

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 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 moves the New Hampshire Public Utilities Commission (“Commission”) to clarify that the scope of this proceeding is limited to issues directly relevant to whether the Company should be permitted to exceed the 40-foot height limitation imposed on “buildings or structures” under the Town of Bethlehem Zoning Ordinance, Art. II, Part D, for which the Company sought a waiver under RSA 674:30, I that was denied by the Bethlehem Planning Board.

In particular, Eversource requests that the Commission confirm that the scope of this proceeding does not include a review of the need for the two transmission line upgrade projects or the prudence of the estimated costs to complete those projects. Rather, the proper scope of inquiry in this zoning appeal docket is limited to the question of whether the proposed situation of the public utility structures at issue “is reasonably necessary for the convenience or welfare of the public,” thus warranting an exemption from the height restriction under the Town of Bethlehem Zoning Ordinance. The focus of that inquiry must be on the height of the proposed replacement transmission structures in a single Town instead of the overall need for upgrade of two entire linear transmission projects passing through multiple municipalities.

The basis for the two projects and any prudence determination regarding their associated costs are matters for consideration through the federally-jurisdictional processes implemented by the New England Participating Transmission Owners (“PTOs”) and/or ISO

New England Inc. (“ISO-NE”) under the regulatory authority of the Federal Energy Regulatory Commission (“FERC).” The Commission has recently acknowledged its lack of jurisdiction in these areas in Order No. 26,946 (February 12, 2024) issued on rehearing in Docket No. DE 23-056. The applicable jurisdictional boundaries are no different in this case, notwithstanding the Company’s petition to seek exemption from the Town’s zoning height restriction from the Commission. Accordingly, the jurisdictional constraints on expansion of the limited scope of this zoning appeal proceeding are substantively the same and those constraints should be recognized and clarified by the Commission. If any party believes that the federally-jurisdictional process lacks sufficient rigor or thoroughness, then that party should seek reform of the process by ISO-NE and/or FERC. The Commission cannot serve as the default forum for an expanded project review merely because some may perceive the process in the proper forum to be inadequate.

The question of scope addressed in this Motion is a threshold issue in this proceeding and will affect the extent of discovery, the procedural steps involved, and the time required for hearing. Accordingly, the Company seeks Commission clarification of the limited scope of this zoning appeal proceeding on an expedited basis, and respectfully requests that the Commission issue an order confirming that limited scope by November 15, 2024, if possible.

In support of this Motion, Eversource states as follows:

I. BACKGROUND

In this proceeding, Eversource is asking the Commission for an exemption under RSA 674:30, III from operation of the Town of Bethlehem (“Town”) Zoning Ordinance, Art. II, Part D, which imposes a 40-foot height limitation on all buildings and structures within the Town, in connection with the Company’s asset condition maintenance projects on the 115 kV X178 and U199 transmission lines occupying existing rights-of-way within the Town. The Company sought but was denied a waiver from the Town Planning Board under RSA 674:30,

following a public hearing held in May 2024. The Planning Board provided no meaningful discussion or justification for why a waiver was not warranted following the close of the public portion of the May hearing and prior to voting to deny the waiver as reflected in the Town’s meeting minutes, nor is any justification for the denial noted in the town’s Notice of Decision dated May 22, 2024. Eversource then filed a petition with the Commission on June 21, 2024 pursuant to RSA 674:30, III.

The Town has sought intervention and the Office of the Consumer Advocate (“OCA”) has indicated it will participate in the proceeding, while the Department of Energy (“DOE”) is automatically a party in the docket under RSA 12-P:3, III. At the prehearing conference (“PHC”) held on September 16, 2024, the OCA expressed interest in exploring through intensive discovery the basis for the two transmission line projects, in particular the X178 project, and the OCA specifically referenced the reported cost estimate of \$384.6 million (which the OCA consistently mischaracterizes as “\$400 million”) for that project and OCA’s obligation to protect the interests of residential ratepayers in municipalities other than the Town from excessive utility costs. During the PHC and following discussions, the DOE similarly indicated an intention to conduct extensive discovery regarding the two transmission projects, including three rounds of data requests with the involvement of an outside consultant. The Town did not express a definitive position on the scope of discovery required in the proceeding. Eversource argued that the proper scope for what amounts to a zoning appeal was far more limited than asserted or implied by the OCA and the DOE, and that it might be necessary to seek a scoping determination from the Commission at the appropriate time.

Subsequent discussions among the parties confirmed that there is fundamental disagreement regarding the proper scope of this proceeding. As stated in the update letter filed on September 30, 2024, the parties agreed it would be beneficial to have the fundamental scope issues resolved prior to moving forward with the discovery process, with the expectation

that a determination of scope would be provided within the relatively near term. Accordingly, the parties agreed that Eversource would file this Motion by October 4, 2024, and the other parties may file an objection or other response to that motion on or before October 22, 2024. Following clarification of the scope of the proceeding, the parties can reconvene and develop a procedural schedule based on that scope for submission to the Commission.

II. ZONING EXEMPTION APPEALS UNDER RSA 674:30, III

Under RSA 674:30, III, the Commission is authorized to grant exemptions from municipal land use denials for public utility property where it is found that “the present or proposed situation of the structure in question is reasonably necessary for the convenience or welfare of the public . . .” The Commission has not addressed the RSA 674:30, III exemption statute for some time, but prior Commission orders relied on the New Hampshire Supreme Court decision in *Appeal of Milford Water Works*, 126 N.H. 127 (1985), in which the Court recognized that “the exemption provision is to ensure that a variety of conflicting local interests will not impede services provided by public utilities to consumers, particularly in other municipalities, to the detriment of the best interests of the public as a whole.” *Id.* at 131. And the Commission has characterized the RSA 674:30, III exemption standard as “a less stringent standard” than that articulated in RSA 674:30, I applicable to Planning Board consideration of a utility’s waiver request.¹ *Hampstead Area Water Company*, 86 N.H. P.U.C. 548, 551-552 (2001) (analysis following the tests under *Appeal of Milford Water Works*).

The *Milford Water Works* Court further referenced seven factors as relevant to the Commission’s determination of whether an exemption is justified: (1) locus suitability; (2)

¹ RSA 674:30, I provides that: “Notwithstanding the provisions of any such local ordinance, code, or regulation, a planning board, or its designee pursuant to paragraph II, upon application by a utility, may waive any requirement contained in an ordinance, code, or regulation for any unoccupied structure which is less than 200 square feet in area, which is necessary for the furnishing of utility service for the public health, safety, or general welfare, and for which the utility’s siting options are limited by virtue of said structure being a physically integrated component of the utility’s transmission or distribution apparatus. Any such waiver shall terminate, without further action by the planning board, if said structure ceases to be used for provisions of utility services.”

physical character of the uses in the neighborhood; (3) proximity of the site to residential development; (4) effect on abutters; (5) relative advantages and disadvantages to the public convenience; (6) whether other, equally serviceable sites are reasonably available; and (7) whether injury to abutters can be minimized by physical requirements. *Milford Water Works* at 131.² Nevertheless, 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. *Hampstead Area Water Company*, 86 N.H. P.U.C. 899, 902 (2001). The seven factors referenced by the Court and the Commission's prior decisions under RSA 674:30, III clearly focus on local impacts of the proposed public utility structure within the relevant municipality, and do not implicate issues of need, cost, route, or siting over the entirety of a linear project such as a high voltage electric transmission line that runs through existing rights-of-way in a number of municipalities.

As noted in the Company's petition, the Commission has on numerous occasions and in different contexts granted exemptions from local land use restrictions based on RSA 674:30, III, or a predecessor statute, having found that the public utility structures in question serve the best interests of the public as a whole. *See, e.g., Hampstead Area Water Company, Inc.*, 86 N.H. P.U.C. 548 (2001); *Hampstead Area Water Company, Inc.*, 86 N.H. P.U.C. 899 (2001); *Pennichuck Water Works, Inc.*, 86 N.H. P.U.C. 20 (2001); *Bridgewater Steam Power Company*, 70 N.H. P.U.C. 1013 (1985); and *Bridgewater Steam Power Company*, 71 N.H. P.U.C. 20 (1986). In those cases, the Commission considered proposed public utility structures, such as a water supply well or a renewable energy power plant, located in a single location in a particular municipality. None of those situations involved a linear project such as a transmission line running through multiple municipalities. And in many such situations, the proposed structures

² The Company's pre-filed testimony supporting its petition filed in this proceeding addresses each of the seven factors with reference to the factual context of the X178 and U199 projects, and those factual representations will not be repeated here.

were to be new construction rather than upgrades or rebuilds of existing infrastructure; potential alternative site locations within the specific municipality therefore may have been relevant in those cases where they are not here.

Moreover, even in cases where the Commission did consider the need for and potential cost of a proposed new public utility structure in the context of a zoning exemption proceeding, the focus was on the impacts in the affected municipality and not on a regional or statewide basis. For example, in *New England Telephone and Telegraph Company, Inc.*, 72 N.H. P.U.C. 351 (1987), the Commission considered the justification for exemption from municipal zoning restrictions of a proposed new telephone utility “equipment hut” to be located in a residential area in the Town of Bedford. The scope of inquiry focused in part on projected growth in service needs in that area of Bedford, and the relative cost of potential alternative means of meeting those growth needs through new infrastructure construction, and the Commission granted the utility’s request for exemption.³ Neither in that case, nor in any other such case, however, did the Commission conduct an extensive review of the need for or costs of a project outside of the municipality where the subject structures are proposed to be located.

Based on this judicial and administrative precedent, and the language of the statute itself, there is no basis for expansion of the scope of this zoning appeal proceeding to include an investigation of the need for or cost of the associated transmission line rebuild projects in their entirety or in any respect outside the Town of Bethlehem. Rather the scope of review and inquiry must be limited to determining whether exceeding the Town of Bethlehem’s 40-foot height limitation “is reasonably necessary for the convenience or welfare of the public,” with reference to the seven factors listed in the Milford Water Works decision and addressed in detail in the Company’s pre-filed testimony and taking into consideration that the existing structures to

³ Cf. *Bridgewater Steam Power Company*, 70 N.H. P.U.C. 1013 (1985) (in the context of a zoning exemption proceeding, Commission found that siting a new wood-burning renewable generation facility in central New Hampshire “is reasonably necessary for the public welfare,” consistent with both federal and state policies as expressed in the federal Public Utilities Regulatory Policies Act and the state Limited Electrical Energy Producers Act).

be replaced themselves all exceed 40 feet in height.

That limited scope focuses on impacts in the Town, consistent with prior case law and Commission decisions, as opposed to any potential impacts on a regional or statewide basis, and in no way involves a review of estimated costs, the prudence of related expenditures, or the effects on customer rates in the state or elsewhere. This zoning appeal proceeding is not the proper context for any such expanded inquiry, nor is the Commission the proper forum for any such extensive review and determination.

III. COMMISSION LACKS JURISDICTION TO REVIEW THE NEED FOR TRANSMISSION LINE UPGRADES OR PRUDENCY OF ESTIMATED COSTS

The Commission has expressly recognized its lack of authority to review and approve interstate transmission projects and related rates in its order on rehearing, Order No. 26,946 (February 12, 2024), issued in Docket No. DE 23-056. In that order the Commission stated that

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.*

(emphasis added). The petitioner in that earlier docket had sought extensive Commission review of the X178 project and other asset condition transmission upgrade projects located in New Hampshire. The Company submitted filings in that docket addressing the Commission's lack of authority to review the need for and estimated costs of transmission projects subject to regional review and federal rate jurisdiction.⁴ Those constraints are equally binding here, notwithstanding the different context of a utility zoning appeal initiated under RSA 674:30, III.

As a fundamental threshold matter, it must be understood that *all* transmission facilities are subject to FERC regulatory jurisdiction and come within the purview of ISO-NE transmission planning processes and the PTOs' rate design parameters. Under the Federal Power Act, FERC has jurisdiction over the transmission of electric energy in interstate commerce and "over all facilities

⁴ The Department of Energy effectively supported those conclusions in its Brief on Jurisdiction filed on August 8, 2023 in Docket No. DE 23-056.

for such transmission . . . of electric energy . . .” See 16 U.S.C. §824(b)(1). The federal courts have long upheld this exclusive FERC jurisdiction over electric transmission facilities. See, e.g., *California ex rel. Bill Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 851 (9th Cir. 2004) (“[O]ur cases specifying the nature and scope of exclusive FERC jurisdiction make clear that the interstate ‘transmission’ . . . of wholesale energy pursuant to a federal tariff – not merely ‘rates’ – falls within FERC’s exclusive jurisdiction.”); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006) (citation omitted) (“The Federal Power Act (‘FPA’) gives FERC exclusive jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce.”); see also *South Carolina Public Service Authority v. FERC*, 762 F.3d 41, 62-64 (D.C. Cir. 2014) (FERC order requiring electricity transmission providers to participate in regional planning process did not interfere with state regulation because planning mandate related wholly to electricity transmission, involved subject matter over which FERC has broad authority, and was directed at ensuring proper functioning of interconnected grid spanning state lines). Furthermore, the Commission has recognized this jurisdictional distinction in the context of utility Least Cost Integrated Resource Plans, stating that it views “assessment of transmission requirements, to be within the purview of ISO-New England . . .” See Order No. 25,459 (January 29, 2013) at 19-20; see also Order No. 26,946 (February 12, 2024), cited above.

Asset condition transmission projects such as the X178 and U199 lines are reviewed and approved through processes implemented by the PTOs, including Eversource, with involvement of ISO-NE and NEPOOL committees and review by ISO-NE and stakeholders. The specific process followed depends on the size of the proposed project and its location and use on the regional or local electric transmission system. In general, for asset condition transmission projects located on regional Pool Transmission Facilities (“PTF”) with an estimated cost of \$5 million or more, the relevant PTO makes an informational presentation regarding the project to the regional Planning Advisory Committee (“PAC”), following which a Transmission Cost Allocation (“TCA”)

application (and associated proposed plan application, if required) is submitted for review by the NEPOOL Reliability Committee (“RC”) and ISO-NE.⁵ The costs of the PTF-related asset condition projects are included in the Regional Network Service (“RNS”) rate, which is charged to all regional transmission Network Customers in New England based on their relative shares of peak regional network load at specified times of coincident system peak demand. Those transmission Network Customers, most of which are Electric Distribution Companies (“EDCs”) like the Company, then seek recovery of the RNS transmission charges they are assessed from their retail customers through rate mechanisms such as the Company’s Transmission Cost Adjustment Mechanism (“TCAM”).⁶ And while the TCAM rate is subject to annual Commission review and approval, that does not put the costs of the transmission projects themselves within the Commission’s jurisdiction, as review of those costs remains exclusively subject to FERC jurisdiction, as discussed more fully below.

Electric transmission facility planning, construction, installation, replacement, and maintenance in New England therefore are subject to review and approval through processes developed by or in coordination with ISO-NE under FERC’s regulatory jurisdiction, and states either individually or collectively are able to participate in those processes as prescribed by the ISO-NE Open Access Transmission Tariff (“OATT”) and ISO-NE’s planning procedures. Neither the Commission nor any other state utility regulatory authority, however, has the jurisdiction to review or regulate asset condition transmission projects proposed by the Company or by any other PTO in the region, except with respect to siting or permitting issues within the scope of its statutory authority.

⁵ This process is described in more detail in ISO-NE Planning Procedure 4 (“PP4”) Procedure For Pool-Supported PTF Cost Review, and in particular in Attachment G, Guidance for Submission of TCA Applications for Asset Condition Projects. ISO-NE PP4 may be viewed through this weblink: https://www.iso-ne.com/static-assets/documents/2020/02/pp_4_rev9.pdf.

⁶ See, e.g., Docket No. DE 24-090, Eversource Energy 2024 Transmission Cost Adjustment Mechanism.

The Consumer Advocates of New England (“CANE”), an informal group of state consumer advocates in the region that includes the OCA, submitted a memorandum to the PAC advocating for reform of the PAC review process for asset condition transmission projects.⁷ In that letter, CANE expressed support for prior submissions by the New England States Committee on Electricity (“NESCOE”) to ISO-NE and the PAC on July 14, 2023 and February 8, 2023.⁸ The focus of the recommendations set forth in those letters is on enhancing the FERC-approved ISO-NE process and providing more opportunity for information-sharing with and input from states and other interested stakeholders. NESCOE in particular asked the PTOs to engage in a more robust and transparent review and evaluation process for asset condition transmission projects through the PAC or other ISO-NE sponsored forums. Consistent with the jurisdictional delineation described above, NESCOE does not assert that the level of review it advocates for should occur through individual state-level regulatory dockets in any context. Instead, it seeks reform at the regional level subject to FERC jurisdiction under the Federal Power Act. Similarly, in a letter recently sent to Eversource regarding the X178 project, CANE expresses its “hope to see . . . amendments to the X-178 project that might forestall the need for challenges to the prudence of these expenditures before the [FERC].”⁹

If the OCA, DOE, or any other party believes that the federally-jurisdictional process for review of asset condition transmission projects, as summarized above, lacks sufficient rigor or thoroughness, then that party should seek reform of the process by ISO-NE and/or FERC, as NESCOE and CANE have done already. The Commission cannot serve as the default forum for an

⁷ New England Consumer Advocates’ Memorandum to PAC dated September 14, 2023, which may be viewed through this weblink: https://www.iso-ne.com/static-assets/documents/100003/pac_cane_letter_asset_condition_projects.pdf.

⁸ NESCOE’s Memorandum addressed to ISO-NE and PAC dated February 8, 2023, which may be viewed through this weblink: <https://nescoe.com/resource-center/memo-asset-condition-projects-feb8-2023>; NESCOE sent a follow-up memorandum to the PTOs dated July 14, 2023, which may be viewed through this weblink: <https://nescoe.com/resource-center/asset-condition-process-improvements-next-steps/>.

⁹ See CANE letter to Eversource dated August 16, 2024, which may be viewed through this link: https://www.iso-ne.com/static-assets/documents/100014/20240816_cane_letter_to_eversource_x178.pdf.

expanded asset condition transmission project review merely because some parties may perceive the process in the proper forum to be inadequate. That conclusion was correct in the context presented in Docket No. DE 23-056, and it is no less compelling in the context of this limited zoning appeal petition brought under RSA 674:30, III.

IV. CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing, the Company respectfully moves the Commission to clarify the limited scope of this proceeding, as described herein, to direct the parties to restrict discovery to matters within that limited scope, and to grant such other and further relief as may be just and equitable under the circumstances.

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

Dated: October 4, 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 4, 2024

/s/ David K. Wiesner
David K. Wiesner