STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DE 14-238

2015 PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE RESTRUCTURING AND RATE STABILIZATION AGREEMENT

Legal Memorandum of
Public Service Company of New Hampshire
d/b/a Eversource Energy
Regarding the Establishment of the Proper Avoided Cost Standard
for Mandated Purchases from Qualifying Facilities Under
Section 210 of the Public Utility Regulatory Policies Act of 1978

February 8, 2016

The proper avoided cost standard for mandated purchases of power from QFs by PSNH pursuant to Section 210 of the Public Utility Regulatory Policies Act of 1978 is the one used by every other utility in New Hampshire; the one the Commission chose to use in its Puc 900 rules; the one PSNH has used since the 1999 Settlement; the one approved by the Commission in PSNH's Tariff NHPUC No. 8;[1] the one based upon PSNH's incremental costs at the margin; and, the one that is neutral to customers and fulfills PURPA's "just and reasonable" standard – that is, the ISO-NE real time price.

The 1999 PSNH Settlement Agreement

Since the Commission's approval of the "PSNH 1999 Restructuring Settlement Agreement, the "avoided cost" price that Public Service Co. of New Hampshire ("PSNH") has paid to "Qualifying Facilities" or "QFs"[2] pursuant to Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. § 824a-3) ("PURPA") has been controlled by Section IX, B. 2 of the 1999 Settlement:

> **IX. MARKETING OF ENERGY**
>
> **B. Marketing of PSNH Power**
>
> **2. Purchases from Qualifying Facilities ("IPPs") at Short Term Avoided Cost Rates**
>
> For so long as PSNH is required to purchase the output from IPPs under short term avoided cost rates, it shall be deemed prudent for PSNH to sell or bid IPP power into the pool at the ISO New England market clearing price.

As noted in footnote 1, this 1999 avoided cost standard has been implemented in PSNH's Commission approved Tariff NHPUC No. 8. Per that Tariff, the price paid to QFs for their output under PURPA is equal to "the payments received by the Company for the sale of QF generation to the ISO-NE power exchange." The only ISO-NE market power from Granite State Hydropower Association's ("GSHA") members can be sold into is the real-time market. *See* Exhibit VV.

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[1] "Terms and Conditions for Delivery Service," ¶33. Rates for Purchases from Qualifying Facilities: Rates: Qualifying Facilities selling their output to the Company will be eligible to receive Short Term Avoided Cost Rates equal to the payments received by the Company for the sale of QF generation to the ISO-NE power exchange, adjusted for line losses, wheeling costs and administrative costs incurred by the Company for the transaction.

[2] *See* 18 CFR §292.201, *et seq.*

The 2015 PSNH Settlement Agreement

If the 2015 PSNH Restructuring and Rate Stabilization Agreement is approved by the Commission, per Section XI, C of that Settlement, it is anticipated that the 1999 Agreement will be terminated and superseded by the 2015 Agreement. For that reason, the 1999 Agreement's avoided cost standard was carried-over into the 2015 Agreement.

Section VI, B of the 2015 Agreement reads:

> **VI. MARKETING OF ENERGY**
>
> **B. Purchases from Qualifying Facilities ("QFs"), Independent Power Producers ("IPPs") and Power Purchase Agreements**
>
> Unless otherwise found by the Commission or other appropriate authority, for so long as PSNH purchases the output from QFs, IPPs, or pursuant to the PPAs, PSNH shall sell or bid such purchases into the pool at the ISO-NE market clearing price, with the resulting costs or credits recovered via Part 2 of the SCRC as a Non-Securitized Stranded Cost. Nothing in this Agreement shall be construed as limiting the Commission's authority with respect to determining an electric distribution company's purchase obligation of QF or IPP output.

As GSHA's witness, Mr. Norman, testified on February 3, 2016, the avoided cost standards in both the 1999 and 2015 agreements are substantively identical. And, as PSNH's witness Mr. Shuckerow stated, should the 2015 Settlement Agreement be approved, nothing would change with respect to PSNH's payments to GSHA's members.

The PURPA Avoided Cost Standard in Use Throughout New Hampshire

As discussed in Exhibit J, the direct prefiled testimony of James R. Shuckerow at page 8, lines 1-12, all other PURPA-jurisdictional utilities in New Hampshire[3] utilize the ISO-NE real time energy market price as the avoided cost standard for mandated purchases under PURPA. That is exactly the same standard that PSNH has used since approval of the 1999 Settlement, and the same standard that PSNH expects to use under the identical provision in the 2015 Settlement.

[3] UNITIL, Liberty Utilities, and the New Hampshire Electric Cooperative are all PURPA-jurisdictional utilities.

The ISO-NE real time market price is also the same standard that this Commission has implemented in its Puc 900 net metering rules[4] at Puc 903.02 (i)(2) as being "consistent with the requirements of the Public Utilities Regulatory Policy Act of 1978 (PURPA) (16 USC § 824a-3 and 18 CFR § 292.304)":[5]

> **Puc 903.02 Statutory and Other Requirements.**
>
> (i) Unless an electric distribution utility elects otherwise as provided in paragraph (k) below, and except as may be provided otherwise pursuant to paragraph (p) below, the commission shall annually determine the rates for utility avoided costs for energy and capacity consistent with the requirements of the Public Utilities Regulatory Policy Act of 1978 (PURPA) (16 USC § 824a-3 and 18 CFR § 292.304) and as set forth below:
>
> (2) The rates for avoided energy costs shall be based on the short-term avoided energy costs for the New Hampshire load zone in the wholesale electricity market administered by ISO New England, Inc., consisting of the hourly real time locational marginal price (LMP) of electricity plus generation related ancillary service charges, all adjusted for the average line loss in New Hampshire between the wholesale metering point and the retail metering point;

The use of ISO-NE real time prices to set the avoided cost rate under PURPA for New Hampshire's utilities is clearly well established and creates a universal standard that avoids "gaming" between the state's utilities by QFs "arbitraging" disparate PURPA avoided cost purchase requirements.

PURPA's Requirements

The ISO-NE real time price standard complies with the requirements of PURPA and the implementing FERC regulations found at 18 CFR Part 292, "Regulations Under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 With Regard to Small Power Production and Cogeneration." Under PURPA, state regulatory authorities, such as this Commission, are required to establish avoided cost rates for utilities subject to PURPA. 16 USC § 824a-3 (f).

[4] Recall that Mr. Norman testified that some small hydro generators are net metering hosts subject to the Puc 900 rules.

[5] Under RSA 541-A:22, II, "Rules shall be valid and binding on persons they affect, and shall have the force of law," and, "rules shall be prima facie evidence of the proper interpretation of the matter that they refer to."

PURPA sets forth the criteria required for a proper avoided cost rate:

> **16 U.S. Code § 824a–3 - Cogeneration and small power production**
>
> **(b) Rates for purchases by electric utilities**
>
> The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—
>
> (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
>
> (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.
>
> No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

FERC's regulations echo and implement this statutory requirement at 18 CFR §292.304, "Rates for Purchases." FERC included in this regulation a series of factors that a state regulatory authority may take into account when determining a proper avoided cost standard. 18 CFR §292.304 (e). Included, *inter alia*, in those factors are:

> (2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:
>
> (i) The ability of the utility to dispatch the qualifying facility;

and

> (vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system;

As noted above, in 16 U.S. Code § 824a–3, Congress stated that a proper avoided cost may not "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." FERC's PURPA regulations further define this restriction at the definition in 18 CFR 292.101(b)(6):

> (6) ***Avoided costs*** means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.[6]

[6] "The term full 'avoided costs' used in the regulations is the equivalent of the term 'incremental cost of alternative electric energy' used in § 210(d) of PURPA." *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

By both statute and regulation, it is clear that the proper avoided cost for a utility is limited to its "incremental cost...which, but for the purchase from the qualifying facility...such utility would" otherwise incur; i.e., a proper avoided cost ***cannot exceed*** a utility's incremental cost, but by statute may be less than that cost.[7]

The New Hampshire Supreme Court has discussed the avoided cost issue.

> FERC also determined that incremental costs, not average system costs, should be used to calculate avoided costs because, "(u)nder the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with the highest running cost."

Appeal of Granite State Elec. Co., 121 N.H. 787, 790 (1981).

Congress further limited the price that could be set as the proper avoided cost by saying that the rates established for purchase of QF output by utilities had to be "just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S. Code § 824a–3.

<u>New Hampshire Public Utilities Commission Decisions Implementing PURPA</u>

Pursuant to PURPA's statutory requirement, this Commission has issued a number of decisions to implement the proper avoided cost that utilities must pay QFs.[8] In those proceedings, the NHPUC has, *inter alia,*

- Found that the term avoided cost is another way of expressing the concept of incremental cost. For purposes of uniformity with the FERC rules, the commission said it would use the term "avoided costs" with the understanding that the use of the term equates to the concept of "incremental costs." *Re Small Energy Producers and Cogenerators,* 65 NHPUC 291 (1980).

[7] "The FERC regulations require public utilities to purchase electricity from qualifying facilities at a rate equal to the utilities' avoided cost, ***unless the state regulatory commission (here, the PUC) determines that a lower rate is in the public ' interest***, does not discriminate against qualifying facilities, and is sufficient to encourage the construction of small power producers. 18 C.F.R. § 292.304(b)(2)'." *Greenwood v. New Hampshire Pub. Utilities Comm'n*, No. 06-CV-270 SM, 2007 WL 2108950, at *2 (D.N.H. July 19, 2007) *rev'd on other grounds sub nom. Greenwood ex rel. Estate of Greenwood v. New Hampshire Pub. Utilities Comm'n*, 527 F.3d 8 (1st Cir. 2008) (emphasis added).

[8] At hearing, GSHA took the position that these Commission decisions are inapplicable because they pre-date the creation of ISO-NE's Standard Market Design (*see* Exhibit BB). Although that is a chronologically correct statement, the requirements of PURPA have not changed since these Commission decisions, so the principles decided therein remain applicable.

- Found that calculation of the proper avoided cost rate is dependent upon the identification of the generating units operating on the margin. *Re Industrial Cognerators Group,* 72 NHPUC 8 (1987).
- Held that a proper avoided cost should produce a neutral result – one where there is no subsidy either from the small power producer (if he is paid the wholesale rate) or from the purchasing non-generating utility. Supplemental Order 16,000 issued by in Docket No. DR 81-133. 67 NHPUC 825 (1982).
- Held that "if the avoided cost rates are accurately established, ratepayers are neutral." Second Supplemental Order 18,278 issued in Docket No. DR 86-70. 71 NHPUC 327 (1986).

Thus, this Commission has periodically issued decisions regarding the determination of a proper PURPA avoided cost that mimic the statutes and implement federal regulations of it being a utility's "incremental cost" or the cost at the margin; one that is neutral to customers.

Mr. Shuckerow has testified that "at the margin" PSNH always relies upon the ISO-NE real time market. If PSNH has surpluses or shortages throughout the day, Mr. Shuckerow has said those incremental variances are reconciled in the ISO-NE real time market. GSHA's witness, Mr. Norman, agrees with Mr. Shuckerow – in his supplemental testimony, Exhibit L, at page 3, line 16, Mr. Norman testifies that, "data from the Operating Period shows that PSNH always is in the RT [real-time] market to settle daily variations between predicted and actual system/market conditions." Similarly, at line 20 of the same page of Mr. Norman's testimony, he agreed, "*PSNH is always in the RT market*... ."

<u>FERC Decisions Regarding Establishment of a PURPA Avoided Cost</u>

GSHA's argument against the use of the ISO-NE real time market price as the proper avoided cost standard hinges on FERC's August 28, 2012, decision in *Exelon Wind I,* Exhibit CC. However, GSHA misinterprets FERC's decision in that case. Mr. Norman testified that in *Exelon Wind* 1, FERC rejected the use of LMPs for the establishment of a utility's proper avoided cost, and that FERC decision precludes the use of the ISO-NE real time LMP here.[9] That is not correct.

[9] *See* Exhibit YY adding the following sentence to Mr. Norman's testimony at Exhibit K: "Also, FERC has declared that an energy imbalance service market rate at a QF's node is not the purchasing utility's avoided cost under PURPA. *See* Excelon [sic] Wind 1, LLC et al, 140 FERC ¶61,152 (issued August 28, 2012)."

In *Exelon Wind 1*, FERC specifically ruled (at paragraph 52):

> [T]he Commission finds that it is inconsistent with PURPA for SPS [Southwestern Public Service Co.] to use the avoided cost methodology set forth in its Tariff ***in this situation***. ... The problem with the methodology proposed by SPS and adopted by the Texas Commission is that it is based on the price that a QF would have been paid had it sold its energy directly in the EIS [Energy Imbalance Service] Market, instead of using a methodology of calculating what the costs to the utility would have been for self-supplied, or purchased, energy "but for" the presence of the QF or QFs in the markets, as required by the Commission's regulations.

140 FERC ¶61,152, 61,703 (August 28, 2012) (emphasis added).

FERC ruled that the use of an "EIS Market" price ***for SPS*** did not comply with the PURPA standard for setting an avoided cost ***in this situation***. What was the "situation" that the *Exelon Wind 1* generators faced? FERC described that "situation" in paragraph 20 of its Order:

> Exelon Wind argues there are pervasive transmission constraints on the SPS system that prevent the EIS market from being a functional market for PURPA's purposes, and it bottles up QF output, so that prices in the EIS market are not reflective of the prices that would prevail in a competitive market.

Thus, the "situation" the FERC *Exelon Wind 1* decision addressed was the specific condition where there were "pervasive transmission constraints" on the utility's system that "bottles up QF output."

The Petitioner in the *Exelon Wind 1* case, Exelon Corporation, agrees that FERC's decision in *Exelon Wind 1* was premised on the presence of transmission constraints and was specific to the facts of that case. In its "Comments of Exelon Corporation" dated February 21, 2013[10] filed with FERC in Docket No. EL13-43-000, *Council of the City of New Orleans,* (Exhibit UU in the instant proceeding is FERC's Order in that proceeding), Exelon noted:

> Because the PUCT [Public Utility Commission of Texas] had found that the SPS system continued to be congested, the Commission [FERC] concluded that "SPS' methodology, adopting LIP [Locational Imbalance Price] as avoided costs, unreasonably assume[d] the full access of QFs to third-party buyers in the SPP [Southwest Power Pool, Inc.] EIS Market."

"Comments of Exelon Corporation" at p. 4.

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[10] Available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13187909

Exelon's footnote 12 in its FERC Comments is also highly relevant:

> … The Commission denied SPS's request for PURPA relief in *Xcel I* because, "based on the record" regarding the transmission-constrained nature of SPS's system, the Commission could not "find that QFs located in the SPS control area have nondiscriminatory access as required." *Xcel I* at P 22.[11] *See also id.* at P 30 (concluding that there was "sufficient evidence of operational constraints to rebut the presumption that QFs within SPS have nondiscriminatory access to the market, and [SPS] has not demonstrated to the contrary.").

In the instant case, there is no factual evidence showing that GSHA's members suffer from "pervasive transmission constraints" that "bottle up" those QF generators from accessing the ISO-NE market.[12] Without proof of such similar underlying facts, the "situation" that formed the basis of FERC's *Exelon Wind 1* is different than exists in New Hampshire for PSNH's system and there is no basis for GSHA's reliance upon that decision in this case.

In *Exelon Wind* 1, at paragraph 52, FERC went on to say that the proper avoided cost a utility must pay was determined by the costs such utility would have incurred "but for" the QF power. Mr. Shuckerow testified that the cost PSNH would incur "but for" the energy supplied by GSHA's members is the ISO-NE real-time price. During cross-examination, Mr. Norman repeatedly argued that the power produced by his members' was an "insignificant part" of PSNH's overall generating mix as compared to the total energy needs of PSNH's customers. In his supplemental testimony, Exhibit L at page 2, line 21, he testified, "QF/IPP purchases provided only 2% of the power to meet PSNH's default service load… ." He also testified that PSNH is always in the real-time market for approximately 10% of its energy needs. (Exhibit L, page 3, line 6). These facts support Mr. Shuckerow's assertion that the "but for" cost to customers for PSNH is indeed the ISO-NE real time market.

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[11] *Xcel Energy Servs., Inc.*, 122 FERC ¶ 61,048 ("*Xcel I*"), reh'g denied, 124 FERC ¶ 61,073 (2008) ("*Xcel II*").

[12] GSHA may argue that a starred portion of Exhibit FF, 18 CFR §292.309(d)(1), which is one of FERC's PURPA regulations, states, "For purposes of § 292.309(a)(1), (2), and (3), there is a rebuttable presumption that a qualifying facility with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market." That "rebuttable assumption" by its terms only applies for purposes of determining whether FERC will grant a utility's request to terminate the mandatory purchase requirement of PURPA under authority granted by Congress in its passage of the Energy Policy Act of 2005. This portion of the FERC's PURPA regulation was added by FERC Order No. 688, in a rulemaking initiated per Section 1253(a) of the Energy Policy Act of 2005. The presumption does not apply to the setting of avoided costs for QFs, regardless of their size.

In FERC's *Council of the City of New Orleans* decision (Exhibit UU) decided fourteen months ***after*** *Exelon Wind 1*, FERC mentions its *Exelon Wind 1* decision several times. Being fully aware of its earlier *Exelon Wind 1* decision, in its discussion of "The LMP-Based Avoided Cost Methodology," FERC stated at paragraph 30:

> 30. The Commission cannot determine at this time whether the avoided-cost rate for "as available" sales that is based on LMP in the MISO market and that Entergy has proposed at the state level would comply with PURPA and the Commission's regulations, because to date, neither the Louisiana Commission, nor any other state regulatory authority, has addressed Entergy's avoided-cost filing for "as available" sales.[64] Accordingly, the Commission does not have before it a state regulatory authority decision addressing Entergy's proposed avoided-cost methodology for "as available" sales or a corresponding state regulatory authority justification for such methodology in light of the avoided-cost implementation factors set forth in the Commission's regulations. It is the state's responsibility in the first instance to determine an avoided cost rate consistent with the Commission's regulations.

Exhibit UU at page 7, paragraph 30, two internal footnotes omitted.

Footnote 64, included in the quotation above, states:

> 64. It appears that various states have opted to use LMPs in calculating avoided costs. *See* Entergy February 21, 2013 Answer at 19-20. The record in this proceeding does not contain extensive evidence on the particular methodologies that are being used by these states, and these methodologies have not otherwise been the subject of Commission proceedings.

FERC could not be clearer in its *City of New Orleans* decision – it has ***not*** ruled on the use of an "as available" LMP standard for determining the proper avoided cost rate under PURPA.[13] FERC acknowledged its awareness "that various states have opted to use LMPs in calculating avoided costs."[14] Moreover, in *Southwest Power Pool, Inc.*, 143 FERC ¶ 61,018, 61,041 (Apr. 5, 2013) FERC expressly noted the use of real-time prices to determine avoided cost rates when, discussing curtailment of QF purchases, FERC said, "On the other hand, for avoided-cost rates that are

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[13] Referencing FERC's statement in paragraph 3 of the *City of New Orleans* decision which says, "'as available' QF sales will be shown in the real-time market," Mr. Shuckerow testified that the "as available" market equates to ISO-NE's real-time market.

[14] Indeed, GSHA itself previously put FERC on notice that LMP rates are routinely used in New England to establish the PURPA avoided cost rate. Petition for Rulemaking of GSHA and Vermont Independent Power Producers Association to Implement Regulations Applicable to Small Power Production Facilities Under Section 210(m) of the Energy Policy Act of 2005, FERC Docket EL06-26, December 12, 2005. ("In New England, avoided cost rates are LMP-based rates." at p. 9); ("Today, in RTO/ISO markets, avoided costs rates are determined by using LMP prices." at p. 11).

determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions."

Hence, Mr. Norman's testimony that FERC has ***rejected*** the use of locational marginal pricing, and specifically real-time pricing, for the establishment of a proper avoided cost standard is incorrect, and FERC has acknowledged their use to establish avoided cost rate throughout the country.

The Value to Customers of Generation from GSHA's Members in ISO-NE

As testified to by Mr. Shuckerow, and supported by Exhibit VV, the ISO-NE Generation Asset Checklist, most of New Hampshire's QFs cannot participate in the ISO-NE day-ahead market, and must participate in the marketplace as "settlement-only generators" or "SOGs." Mr. Shuckerow testified that SOGs are only accounted for in the real time market by ISO-NE.

The ISO-NE day-ahead market is generally priced higher than the real time market. Per Mr. Norman's updated direct testimony at Exhibit K, page 12, line 3, during 2015, there was a 4.51% premium for assets bid into the day-ahead market versus the real-time market. According to ISO-NE, "The Day-Ahead Energy Market lets market participants commit to buy or sell wholesale electricity one day before the operating day, to help avoid price volatility."[15] This provides value to the marketplace in general.

GSHA's member QFs cannot bid into the day-ahead market and therefore cannot provide the value intended by participation in that day-ahead market. GSHA has repeatedly expressed its members' inability to participate in ISO-NE activities, including the day-ahead market:

- In GSHA's "Opening Scoping Memorandum" filed in this docket on December 5, 2014, at page 1, GSHA stated that its members often do not have the resources to bid production hourly and bear all the administrative burdens associated with ISO-NE market rules.
- In its "Petition for Rulemaking of GSHA and Vermont Independent Power Producers Association to Implement Regulations Applicable to Small Power Production Facilities Under Section 210(m) of the Energy Policy Act of 2005" that was filed with FERC and docketed as FERC Docket EL06-26, GSHA stated that, "It

[15] http://www.iso-ne.com/markets-operations/markets/da-rt-energy-markets

would be simply impossible for a hydroelectric generator or other renewable project of [GSHA members' size] to participate in an RTO/ISO market."

- In FERC docket, RM05-36, regarding FERC's "Revised Regulations Governing Small Power Production and Cogeneration Facilities", GSHA stated that small developers cannot participate in ISO/RTO markets due to the burdensome requirements of those entities and the high costs.
- In FERC Order No. 688, "Final Rule, New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities," GSHA stated that developers of small hydroelectric plants do not have the software, computer and monitoring equipment to integrate to RTO/ISO operations and, in many regions, would not even be eligible to bid their energy into these markets because they are too small for the applicable minimum block.

Under FERC's avoided cost rules, this lack of value (caused in part by such factors as PSNH's inability to dispatch GSHA's units and the value of such units' energy on the PSNH system) should be taken into consideration by the Commission in the establishment of the proper avoided cost standard.

During his live testimony at hearing in this proceeding on February 3, 2016, Mr. Norman conceded that he has backed away from his original direct testimony in Exhibit K wherein he took the position that the proper avoided cost for a deregulated utility should be based upon the result of that utility's default service competitive RFP process. Mr. Norman said that he changed his mind after considering Mr. Shuckerow's criticism of that position noting that QFs do not provide full-requirements, load following service, including all ancillary services. Mr. Norman testified that a proper avoided cost rate should not include costs of rate components that cannot be provided by QFs.

Just as QFs cannot provide full-requirements, load-following service with all ancillary services, those same QFs cannot provide the value sought by ISO-NE from generators that bid daily into the day-ahead market to reduce price volatility – generators that risk monetary penalties if they fail to live up to the terms of their daily bid.

Paying QFs for a service they do not provide would violate PURPA. Recall that by law, a proper avoided cost rate "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S. Code § 824a–3 (b)(1). Requiring customers to pay for value not received is neither "just and reasonable" nor "in the public interest."

GSHA's Alternative that Avoided Cost Should be PSNH's Self-Generation Rate

During his opening remarks during his live testimony, Mr. Norman provided a correction or update to his Supplemental Testimony, Exhibit L, by adding a sentence at page 5, line 2:

> "PSNH's average generating costs in 2015 were 6.71 cents/kWh, while the average RT NH LMP energy price for the same period was 4.02 cents/kWh."[16]

That change was intended to quantify his testimony which says that a proper avoided cost rate should be based upon PSNH's costs to generate or purchase power.

Mr. Norman testified that the source for his 6.71 cents per kilowatt-hour "PSNH cost to generate" came from Exhibit II, where he averaged the final "Total Self Generating Costs" for Jan-June 2015 of 7.49 cents and July –Dec 2015 of 5.93 cents. However, those figures include costs, such as depreciation, taxes, and return on PSNH rate base, that Mr. Shuckerow testified PSNH cannot avoid by way of purchases from QFs.[17] Using the correct numbers from Exhibit II, those identified by Mr. Shuckerow as the figures on line 1, "Fossil Energy Costs," the number that Mr. Norman should have used in the update to his testimony is (3.24 cents + 2.31 cents) / 2 = 2.775 cents per kilowatt-hour.[18]

Based upon Mr. Norman's testimony, if an avoided cost standard other than the ISO-NE real time price is desired, the 2.775 cents/kilowatt-hour figure could be utilized as a self-generation cost that PSNH would avoid as a result of purchases from QFs.

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[16] *See* Exhibit YY, page 2.

[17] "The FERC rules implementing PURPA § 210 changed the term 'incremental cost' to 'avoided costs,' 18 C.F.R. § 292.101(b)(6) (1980), and defined it to include 'both the fixed and the running costs on an electric utility system ***which can be avoided by obtaining energy or capacity from qualifying facilities***.' 45 Fed.Reg. 12,216 (February 25, 1980)." *Granite State Elec. supra, 121* N.H at 790 (emphasis added).

[18] When asked about this corrected energy cost number by Commissioner Bailey, Mr. Norman changed his mind, saying that the figures he testified to were average numbers over a six-month period, but ISO-NE works on an hourly basis. Commissioner Bailey aptly noted that it was Mr. Norman who chose to use average numbers in his testimony.

A General Policy Decision Cannot be Made in this Proceeding

Stepping back from his alternative self-generation pricing proposal, Mr. Norman resorted to "fairness" and "policy" arguments. Mr. Norman testified that PSNH's hydroelectric generating stations produce electricity via run-of-river generation, the same as most GSHA members. He indicated that as a matter of fairness, GSHA's generators produce the same value to customers as PSNH's, and should receive the same compensation, i.e., day-ahead prices. However, Mr. Norman's fairness argument has no foundation. PSNH's generation ***is*** bid into the day-ahead market daily by Mr. Shuckerow's subordinates; GSHA's members' generation is not. PSNH's generating assets receive the day-ahead price from ISO-NE based upon their bidding into that market; GSHA's members' stations do not. A "fairness" standard would require that GSHA's member only be compensated for the value they provide – no more, no less. Otherwise, one party would be subsidizing another.

Finally, when asked by Commissioner Bailey whether it is a "policy determination" that GSHA sought, Mr. Norman testified, "I believe it is." This adjudicative proceeding is not the proper forum for the Commission to consider or prescribe policies that implement statutes. The proper forum would be a rulemaking proceeding. RSA 541-A:1, XV defines a "Rule," *inter alia*, to be:

> XV. "Rule" means each regulation, standard, form as defined in paragraph VII-a, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies.

What Mr. Norman asks this Commission to do is to interpret and implement a statute administered by this agency (PURPA) and to prescribe a "policy" thereunder. Creating a "policy" that requires PSNH's customers to pay a higher rate for mandated purchases of QF power than the customers of other utilities in this state based upon public policy considerations is not "just and reasonable to the electric consumers of the electric utility" – it is discriminatory. If the Commission desires to make a policy determination as requested by Mr. Norman, it might reconsider its denial of PSNH's rulemaking petition docketed as DRM 15-340 where all of the state's PURPA-jurisdictional utilities would participate.

Conclusion

In conclusion, even though GSHA's members are not ISO-NE market participants, cannot comply with the ISO-NE market rules, do not have the resources to bid production hourly, cannot afford the expenses involved in participation in the day ahead market, do not permit PSNH to avoid any day-ahead obligations, and therefore provide no day-ahead market value – they want customers to pay them for a product they do not and cannot provide. GSHA's position regarding the proper avoided cost under PURPA has been a constantly moving target. First it said that the proper avoided cost for GSHA's members under PURPA should be PSNH's cost for its own generation;[19] then it said it should be the ISO-NE day-ahead price;[20] then it said it ought to be based upon the proportionate amount of energy PSNH buys in the day-ahead and real time markets;[21] then it reverted to the day-ahead price;[22] at hearing, it resurrected PSNH's self-generation cost;[23] only to abandon that and testify that determination of the proper avoided cost could be something different depending upon the Commission's conclusions on undefined policy considerations.[24]

In contrast, PSNH's position on this has not wavered in this proceeding, nor has it for a decade and a half. The proper avoided cost standard the Commission should accept is the one used by every other utility in New Hampshire; the one the Commission chose to use in its Puc 900 rules; the one PSNH has used since the 1999 Settlement as reflected in PSNH's Commission-approved Tariff; the one based upon PSNH's "but for" incremental costs at the margin; and the one that is neutral to customers and fulfills PURPA's "just and reasonable" standard – that is, the ISO-NE real time price.

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[19] Exhibit K, p. 12, line 17; p. 17, line 9.

[20] Exhibit K, p. 17, lines 22.

[21] Exhibit L, p. 4, line 12.

[22] Exhibit L, p. 8, line 11.

[23] Recall Mr. Norman's live testimony referring to Exhibit II.

[24] Recall Mr. Norman's live testimony responding to questions from Commissioner Bailey.

Respectfully submitted this 8th day of February, 2016.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
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CERTIFICATE OF SERVICE

I certify that on this date I caused this Legal Memo to be served to parties on the Commission's service list for this docket.

February 8, 2016

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