

**THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION**

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

Petition for Approval of a Power Purchase Agreement with Hydro Renewable Energy Inc.

Docket No. DE 16-693

**INITIAL LEGAL MEMORANDUM OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY**

I. INTRODUCTION

On June 28, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH” or the “Company”) filed a petition with the New Hampshire Public Utilities Commission (“Commission”) for approval of a proposed power purchase agreement (“PPA”) between it and Hydro Renewable Energy Inc. (“HRE”), and for approval of appropriate rate treatment for that PPA. As noted in that petition, HRE and PSNH have entered into a PPA for a term of 20 years under which HRE will sell and PSNH will buy approximately 100 megawatts (MW) of electric energy. The energy purchased pursuant to the PPA would be delivered over the to-be-constructed Northern Pass Transmission line (“NPT Line”)¹, a high voltage electric transmission line proposed to be built to convey hydroelectricity produced by Hydro-Québec, a corporate affiliate of HRE², to New Hampshire and the New England electric markets.

¹ As further described in the petition, the NPT line is proposed to be constructed by Northern Pass Transmission, LLC (“NPT”), a wholly owned subsidiary of Eversource Energy and a corporate affiliate of PSNH. NPT is not a party to this proposed transaction and holds no interest in the PPA. A petition is currently pending before the New Hampshire Site Evaluation Committee for the siting and construction of the NPT Line. The effectiveness of this PPA is conditioned upon the successful completion of that proceeding and other regulatory proceedings and construction of the NPT Line.

² HRE is a wholly-owned direct subsidiary of H.Q. Energy Holdings Inc., and an indirect subsidiary of Hydro-Québec (“HQ”).

By the terms of the PPA, HRE would sell to PSNH approximately 100 MW of firm, on-peak energy to be delivered to PSNH's Deerfield Substation, at prices based on the MA Hub NYMEX forwards adjusted for delivery to the delivery point. Moreover, PSNH shall be entitled to receive, at no additional cost, all of the environmental attributes associated with the HQ renewable resources for the delivered energy over the term of the PPA. HRE shall have the obligation of ensuring that the energy to be supplied is available and that its processes for providing that energy meet the requirements of the regional grid operator, ISO-New England.

On October 25, 2016, the Commission issued an order of notice in which the Commission concluded that it would divide its review of the PPA into two phases. More specifically, the Commission stated:

In the first phase, the Commission will review briefs submitted by Eversource, Staff and other parties regarding whether the Eversource-HRE PPA, and affiliated program elements, is allowed under New Hampshire law. If the Commission were to rule against the legality of the Eversource-HRE PPA, this petition will be dismissed. If the Commission were to rule in the affirmative regarding the question of legality, it will then open a second phase of the proceeding to examine the appropriate economic, engineering, cost recovery, and other factors presented by Eversource's proposal.

October 25, 2016 Order of Notice in Docket No. DE 16-693 at 3. The Commission directed PSNH, and others to file "legal briefs regarding the legality of Eversource's proposal" on or by November 21, 2016. This filing represents PSNH's initial legal brief as directed by the Commission. In submitting this brief, PSNH is guided by the Commission's statements in its order of notice that the docket may consider:

issues related to whether [1]³ Eversource has the corporate authority to enter into the Eversource-HRE PPA under RSA 374:57; notwithstanding any corporate authority, [2] whether Eversource's entering into the Eversource-HRE PPA would [A] violate the Restructuring Principles of RSA Chapter 374-F, or [B] any other New Hampshire law, or [C] any federal law, including the Federal Power Act, [3]

³ The inserted numbering/lettering corresponds to the numbered/lettered paragraphs of this memo, below.

especially in light of the Commission’s recent ruling in Docket No. DE 16-241, Order No. 25,950 (October 6, 2016), relating to an Eversource proposal to acquire gas capacity in which the Commission dismissed the petition as violating the Restructuring Principles of RSA Chapter 374-F; [4] whether the inclusion of Eversource-HRE PPA costs in the SCRC [A] would be permitted under RSA Chapter 374-F, RSA 374:57, RSA Chapter 378, [B] the terms of the 2015 Restructuring Settlement, and [C] Commission precedential standards for ratemaking, as just, reasonable, and in the public interest . . .

October 25, 2016 Order of Notice in Docket No. DE 16-693 at 2.⁴ As is explained in detail below, the PPA is legal, consistent with state policy, consistent with Commission precedent and beneficial to customers in the state. Accordingly, the Commission should open Phase II of this proceeding as described in the order of notice.

II. DISCUSSION

1. PSNH has the Corporate Authority to Enter into the PPA

As noted in the Commission’s order of notice, the Commission intends to explore whether PSNH “has the corporate authority to enter into the Eversource-HRE PPA under RSA 374:57”. Order of Notice at 2. RSA 374:57, however, neither creates nor restricts PSNH’s corporate authority to enter into a PPA. Instead, PSNH’s corporate authority to enter into contracts, including a PPA, is derived from its status as a New Hampshire corporation.

Nothing in New Hampshire’s corporate law in RSA chapter 295, nor in PSNH’s history or organizing documents, places any limitation or restriction on PSNH’s authority to enter into contracts. Rather, PSNH has the authority to “make contracts necessary and proper for the transaction of [its] authorized business” in New Hampshire. RSA 295:6; *see also* RSA 293-A:3.02(7) (stating that a New Hampshire corporation has the power “to make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which

⁴ PSNH acknowledges that the Commission identified still more items that it may believe are covered by PSNH’s filing. At this juncture, PSNH does not address such items as they do not relate to the “legality” of PSNH’s proposal.

may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income.”). The general authority of a public utility in New Hampshire to exercise its authority under the business corporation laws has been affirmed by the New Hampshire Supreme Court. *See American Loan Trust Co. v. General Electric Co.*, 71 N.H. 192, 195 (1901).

As a further general matter, PSNH notes that as an electric distribution company (“EDC”) it has, and will continue to have following the divestiture of its generating assets, the obligation to provide default energy service to its customers. PSNH does so now through its own generation and through purchasing supplemental energy in the marketplace as contemplated in RSA chapter 369-B. In line with the 2015 Settlement Agreement,⁵ when PSNH no longer provides default energy service through its own generation it will do so through a competitive market solicitation that will end with one or more contracts with energy suppliers in the same manner as is handled by other New Hampshire EDCs today. In other words, PSNH now and in the future will need to enter into contracts for electricity. Accordingly, not only is there no limitation on PSNH’s corporate authority to enter into contracts for electricity, the continuation of PSNH’s ability to enter into such contracts is both necessary and expected.

Regardless of the above, there is a class of contracts for energy that do have a special status under RSA 374:57 – contracts lasting more than one year. For those contracts, RSA 374:57 does not prevent PSNH (or any other utility) from entering such contracts. What RSA 374:57 does is set limitations on the means by which the costs of those contracts may be recovered. RSA 374:57 provides, in its entirety:

⁵ References to the “2015 Settlement Agreement” refer to the “2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement” as submitted on June 10, 2015, and amended on January 26, 2016, in Docket No. DE 14-238 and approved in Order No. 25,920 (July 1, 2016) in that same docket.

Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the commission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The commission may disallow, 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.

RSA 374:57. The statute presumes that a utility has the authority to enter into agreements for the purchase of generating capacity, transmission capacity, or energy that last for more than a year and sets requirements for submitting those agreements to the Commission. If electric utilities had no authority to enter into such an agreement, this statute would have no meaning. The statute also provides a mechanism for the Commission to disallow recovery of the costs of such an agreement to the extent it finds that agreement unreasonable and not in the public interest. Notably, what the statute does not do is limit or restrict the ability of the utility to enter into such an agreement in the first place, and it does not confer upon the Commission the authority to invalidate or void such an agreement.⁶ Pursuant to RSA 374:57, the Commission may review the agreement and may disallow the amounts paid under it if it finds the contract not to be reasonable and in the public interest. The fact that there is a specific statutory provision governing the Commission's review of, and approval of the costs relating to, energy contracts with a term over a year, is evidence that utilities have the authority under New Hampshire law to enter into such contracts.

The Commission has previously analyzed and applied RSA 374:57 as a means of determining, in advance, whether certain contracting activities were reasonable and in the public interest for purposes of later cost recovery. In Docket No. DE 11-184, the Commission was

⁶ Contrast that with, for example, RSA 366:4 that states that failing to provide the Commission with certain contracts makes those contracts "unenforceable in any court in this state" unless later approved by the Commission.

called upon to review a series of PPAs between PSNH and small wood-fired electric generators (the “Wood IPPs”) pursuant to RSA 374:57.⁷ In looking at the requirements of RSA 374:57, the Commission noted that the statute “reinforces the general proposition that PSNH may purchase energy under the PPAs, and employs reasonableness and the public interest as the appropriate standards.” *Public Service Company of New Hampshire, et al.*, Order No. 25,305 (December 20, 2011) at 28. The Commission then reviewed a series of statutory requirements that may be considered in determining whether the proposed contract was consistent with the public interest for cost recovery purposes.⁸ *Id.* at 29. It is notable that the agreements with the Wood IPPs were entered in 2011, well after enactment of the restructuring law. In other words, and as discussed further below, the existence of restructuring did not eliminate the ability of PSNH, or any other EDC, to enter into long term contracts for electric energy and the Commission has approved such contracts following restructuring.

While ultimately the Commission may engage in a review to test the merits of the PPA to judge whether it is in the public interest for purposes of cost recovery, the time is not yet ripe for such considerations. Only once the Commission has begun its review of the appropriate economic, engineering, and other factors would such matters become relevant. At this stage, it is sufficient to note that PSNH has the authority to, and there is an expectation in New Hampshire law that it will, enter into long term contracts for energy, such as the PPA here. RSA 374:57 stands only for the proposition that when those contracts are for longer than one year, the Commission may review those contracts for purposes of deciding cost recovery. *Id.*

⁷ The petitioners in that matter also sought the Commission’s approval pursuant to the Public Utility Regulatory Policies Act (“PURPA”), 16 U.S.C. 824a-3. However, the Commission determined that reliance upon PURPA was not required and, accordingly, did not use that as a basis for evaluating the PPAs. *Public Service Company of New Hampshire, et al.*, Order No. 25,305 (December 20, 2011) at 35.

⁸ In the course of that analysis, the Commission noted that putting aside the prudence or reasonableness of the non-price contractual terms, energy purchases at or below market rates would tend to be construed as prudent and reasonable. Order No. 25,305 at 28.

2. The PPA Does Not Violate the Restructuring Principles or Other Laws

The Commission's order of notice also questioned whether, notwithstanding any corporate authority, the PPA would violate the Restructuring Principles of RSA chapter 374-F, or any other State or Federal Law, particularly following the Commission's recent ruling in Docket No. DE 16-241, Order No. 25,950 (October 6, 2016), or whether it would violate the terms of the 2015 Settlement Agreement relating to the divestiture of PSNH's generation assets. The answer is "no," the PPA violates no law, policy, or other requirement.

A. The Restructuring Law

As a starting point, PSNH notes that the operability of the PPA is expressly conditioned upon the successful permitting, construction, and commercial operation of the NPT Line – events that do not depend upon the existence of the PPA, and which can be completed without the PPA.⁹ Accordingly, any analysis of the PPA must begin with the understanding that whatever broader "market effects" might emanate from the existence of the NPT Line, the potential for any such impacts from energy being delivered over the NPT Line will exist in the New Hampshire and New England markets regardless of the existence of the PPA.¹⁰ The PPA merely

⁹ The PPA is for 10 percent of the energy that will be delivered over the NPT Line. As such, it would strain credibility to suggest that approval of an agreement for one-tenth of the energy is essential to securing the construction of the NPT Line. This conclusion is further reinforced by recognizing that the term of the PPA is 20 years, while NPT and HRE anticipate that the NPT Line will have a service life of at least 40 years. See Transmission Service Agreement between Northern Pass Transmission LLC and Hydro Renewable Energy Inc., Section 8.2, filed as Appendix 16, Volume XIV of NPT's October 19, 2015 application with the New Hampshire Site Evaluation Committee and available at: http://www.nhsec.nh.gov/projects/2015-06/application/Volume-XIV/2015-06_2015-10-19_nptllc_psnh_app_16_transmission_service_agreement.pdf. While the PPA would, during its term, provide direct benefits to customers in New Hampshire, whether the NPT Line will be built at all does not rely upon the existence of the PPA.

¹⁰ As the Federal Energy Regulatory Commission ("FERC") has found, the NPT Line is not a "merchant transmission project" but a "cost-based participant funded transmission project that the Petitioners are undertaking at the request of HQUS who has agreed to participant fund the project" 127 FERC ¶ 61,179 at 17, available at Exhibit E, Bates page 34, of the October 19, 2015 petition of NPT to commence business as a public utility in New Hampshire in Docket No. DE 15-459. Moreover, the services available over the line are subject to FERC's jurisdiction and review to ensure that the "cost-based rate is just, reasonable, and not unduly discriminatory or preferential." *Id.* Thus, the funding for the construction of the NPT Line does not depend upon the PPA.

provides a unique opportunity for New Hampshire customers to gain additional direct benefits from the existence of the NPT Line.¹¹

New Hampshire's Restructuring Law, RSA chapter 374-F (the "Restructuring Law"), provides, at its outset, that "**The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers** of electricity by harnessing the power of competitive markets." RSA 374-F:1, I (emphasis added). The New Hampshire Supreme Court supports this interpretation:

The purpose section of the restructuring statute specifically identifies "[t]he most compelling reason to restructure the New Hampshire electric utility industry [as] reduc[ing] costs for all consumers of electricity by harnessing the power of competitive markets." RSA 374-F:1, I (Supp.1998). In the public law encompassing the restructuring statute, the legislature expressly found that New Hampshire has the highest average electric rates in the nation and such rates are unreasonably high. *The general court also finds that electric rates for most citizens may further increase during the remaining years of the Public Service Company of New Hampshire rate agreement and that there is a wide rate disparity in electric rates both within New Hampshire and as compared to the region.* The general court finds that this combination of facts has a particularly adverse impact on New Hampshire citizens.

Laws 1996, 129:1, I (emphasis added).

In re New Hampshire Pub. Utilities Comm'n Statewide Elec. Util. Restructuring Plan, 143 N.H. 233, 241 (1998) (emphasis in original).¹²

To achieve this goal of cost reductions, the statute sets out a series of interdependent policy principles that are to guide the Commission (and other agencies) in regulating a restructured electric market. RSA 374-F:1, III. Among the principles that are to guide the

¹¹ Other benefits of NPT, such as overall lower regional energy costs, tax revenues, jobs, and the Forward New Hampshire Fund, are described by NPT on its website, <http://www.northermpass.us/forward-nh.htm>, and are part of the analysis presently before the New Hampshire Site Evaluation Committee for its consideration.

¹² Competition was clearly a means to an end, not the goal of restructuring; the goal was lower rates. The Legislature expressly stated as a finding, "III. Restructuring of electric utilities to provide greater competition and more efficient regulation is a nationwide phenomenon and New Hampshire must aggressively pursue restructuring and increased customer choice *in order to provide electric service at lower and more competitive rates.*" Laws 1996, 129:1, III (emphasis added).

Commission are those relating to assuring system reliability and universal service, ensuring benefits to all electric consumers, and improving the environment and the use of renewable energy sources. RSA 374-F:3, I, V, VI, VIII, IX. The existence of a PPA that assures that New Hampshire electric customers will distinctively benefit from a reliable source of electricity that is generated from a renewable source without the use of fossil fuel fosters and promotes all of these policies.

The Restructuring Law's policy principles as set forth in RSA 374-F:3 contain few mandates. Most of the fifteen interdependent restructuring policy principles provide guidance; they enumerate matters the Commission "should" consider. Courts have consistently interpreted the word "should" in a statutory context as a recommendation, and not a mandate. "[T]he common meaning of 'should' suggests or recommends a course of action, while the ordinary understanding of 'shall' describes a course of action that is mandatory." *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999); *Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers*, 440 F.3d 1038, 1047 (8th Cir. 2006). *See also United States v. Harris*, 13 F.3d 555, 559 (2d Cir.1994)(opining that because the regulation does not say that the court "must" but rather the court "should," it suggests an approach and does not mandate it.) In the Restructuring Law, the Legislature chose to use the word "shall," designating a mandate, sixty-seven times. It did not use such mandatory words in the interdependent restructuring policy principles, except in three cases. I. "Reliable electricity service must be maintained;" V. "A utility providing distribution services must have an obligation to connect all customers in its service territory;" and XII(c). "Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs." RSA 374-F:3.¹³

¹³ "The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. The general rule of statutory construction is that the word 'may'

Significantly, even if the Commission were to consider the PPA to be a “generation-related” service, nothing in the Restructuring Law prohibits utilities from entering into such a PPA. The interdependent policy principles have no mandate forbidding utilities from either entering into a PPA or from participating in beneficial generation-related projects. To the contrary, the Restructuring Law itself notes that “market forces can now play the *principal* role in organizing electricity supply for all customers instead of monopoly regulation.” 1996, N.H. Laws 129:1, IV (emphasis added).¹⁴ In addition, the Restructuring Law at RSA 374-F:1, I references as a “purpose” the “functional separation of centralized generation services from transmission and distribution services.” Being a purchaser of energy via a PPA is not engaging in a “centralized generation service.”¹⁵

The PPA is intended to implement and comply with a specific mandate contained in the Restructuring Law. As noted above, RSA 374-F:3, XII (c) requires that “Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs.” Under the 2015 Settlement Agreement, PSNH will have on-going stranded costs resulting from over-

makes enforcement of a statute permissive and that the word ‘shall’ requires mandatory enforcement.” *City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006) (internal citations and quotations omitted). “Where the legislature fails to include in a statute a provision for mandatory enforcement that it has incorporated in other, similar contexts, we presume that it did not intend the law to have that effect and will not judicially engraft such a term.” *In re Bazemore*, 153 N.H. 351, 354 (2006), *see also Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 691 (1981). Throughout RSA 374-F:3 the legislature chose to make certain provisions mandatory by use of the terms “shall” or “must” and others discretionary by use of terms such as “should” or “may.” The PPA supports those provisions with mandatory language by helping to maintain reliable universal service and by assisting in the mitigation of stranded costs.

¹⁴ BLACK’S LAW DICTIONARY defines “principal” as chief; leading; primary. Contrast this with BLACK’S definition of “only”, including sole; alone; exclusive.

¹⁵ The Restructuring Law does not define the term “centralized generation service.” FERC considers generation that is centrally dispatched to be “centralized generation.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61074 (Oct. 21, 2011). This Commission has contrasted “centralized generation” to “distributed generation.” *In Re Wyrulec Co. of New Hampshire*, Order No. 23,443 (April 19, 2000) at 270. The Environmental Protection Agency describes “centralized generation” as “large-scale generation of electricity at centralized facilities. These facilities are usually located away from end-users and connected to a network of high-voltage transmission lines. The electricity generated by centralized generation is distributed through the electric power grid to multiple end-users. Centralized generation facilities include fossil-fuel-fired power plants, nuclear power plants, hydroelectric dams, wind farms, and more.” U.S. EPA Website, *Centralized Generation of Electricity and its Impacts on the Environment*, <https://www.epa.gov/energy/centralized-generation-electricity-and-its-impacts-environment> .

market costs of existing PURPA obligations and PPAs. Entering into a contract intended to mitigate these existing stranded costs is entirely consistent with the Restructuring Law's mandate.

There are also other important public policy interests that must be considered. ISO-New England has recently described the existing competitive electricity market at "precarious" and "unsustainable."¹⁶ This Commission has concurred, recognizing that both wholesale and retail electric prices have "escalated sharply"¹⁷ and just last month noting the volatility of current prices for electricity.¹⁸ The Legislature expressly stated that, "The goal of restructuring is to create competitive markets that are expected to produce lower prices for all customers than would have been paid under the current regulatory system." RSA 374-F:3, XI. These recent assessments by ISO-NE and the Commission demonstrate that the existing competitive market is failing to fulfill the primary goal of restructuring. More than 20 years after the effective date of the Restructuring Law, electricity prices continue to have "a particularly adverse impact on New Hampshire citizens." 1996 N.H. Laws, 129:1, I. As noted above, the Restructuring Law contains few mandates binding the Commission in furtherance of the goal of lowering the price of electricity for New Hampshire's citizens and the Commission has a duty to investigate and embrace measures that would lower prices, reduce volatility, and ensure reliable service – including the PPA between PSNH and HRE.

Further, the Commission is well-aware that even after passage of the Restructuring Law, important public policy considerations have led to the need to approve other PPAs. In Docket No. DE 11-184, discussed above, the State urged this Commission to approve agreements

¹⁶ See September 28, 2016 Comments of Gordon Van Welie, President and CEO of ISO-New England to New England Council at the New Hampshire Institute of Politics as reported at: <http://www.unionleader.com/energy/New-Englands-energy-situation-orecarious-ISO-leader-says-092916>.

¹⁷ Order of Notice in Docket No. IR 15-124, April 17, 2015 at 2.

¹⁸ Order No. 25,950 in Docket No. DE 16-241, October 6, 2016 at 15.

between PSNH and five wood-fired IPPs in order to implement important public policy considerations.¹⁹ A finding in the instant docket that the Commission has no authority to consider the PPA would not only eliminate one of the few and most effective tools the State has to address economic development concerns, but would also fly in the face of a number of the restructuring policy principles and public policy concerns.²⁰ Moreover, it would set a precedent that, though such agreements are expressly permitted, they should be discouraged and avoided, regardless of the public benefits that might flow from them.

B. Other New Hampshire Law

Distinct from the Restructuring Law, New Hampshire has an energy policy, established by the Legislature in RSA 378:37, which states:

The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.

RSA 378:37 (emphasis added). Contracting for low cost, reliable, and fuel diverse (non-natural gas dependent) energy supplies is entirely aligned with New Hampshire's energy goals, and the PPA promotes those goals – it is not counter to them or forbidden by them.

¹⁹ The State's urging came from Governor Lynch, the entire Executive Council, the Commissioner of DRED, and myriad state senators, representatives and selectmen based upon public policies including jobs, tax revenues, and environmental benefits.

²⁰ See also *In re Pinetree Power, Inc.*, 152 N.H. 92, 97 (2005):

“RSA chapter 374–F also governs electric utility restructuring. See RSA ch. 374–F (Supp.2004). According to this chapter, customer benefits of restructuring include ‘health and environmental benefits.’ RSA 374–F:3, V(f)(5) (Supp.2004). Further, in addition to being consistent with New Hampshire energy policy as set forth in RSA 378:37 (1995), commitments to renewable energy resources are to ‘be balanced against the impact on generation prices’ and can have ‘significant environmental, economic, and security benefits.’ RSA 374–F:3, IX (Supp.2004). This statutory scheme supports the conclusion that the ‘public interest’ of PSNH's customers encompasses more than simply rates.”

Furthermore, and has been discussed and described in innumerable places, New England has a large, and growing, reliance on natural gas as the preferred fuel for electric generation. As such, the availability of, and resulting cost for natural gas is the primary driver of the cost of electricity in New England and New Hampshire. As the Commission is acutely aware, given the constraints on the deliverability of natural gas into the region, the reliance upon it as the marginal fuel for electric generation has led to the sustained high and volatile electric prices mentioned above.

In fact, the Commission has specifically noted that the reliance upon a single fuel, natural gas, for electric generation has led to electric prices that are causing economic harm to New Hampshire, contrary to both the restructuring principles in RSA chapter 374-F, and the State's Energy Policy in RSA 378:37. Specifically, the Commission has noted:

During recent winters, significant constraints on natural gas resources have emerged in New England, despite abundant natural gas commodity production in the Mid-Atlantic States and elsewhere. These constraints have led to extreme price volatility in gas markets in the winter months in our region, which, in turn have resulted in sharply higher wholesale electricity prices. Correspondingly, rates charged for Default Service to certain EDCs' customers have escalated sharply in New Hampshire for winter period service. *See* Order No. 25,719 (September 29, 2014) and Order No. 25,720 (October 3, 2014). Overall, the average retail price of electricity in New England is the highest in the continental United States, posing a threat to our region's economic competitiveness.

April 17, 2015 Order of Notice in Docket No. IR 15-124 at 2 (footnote omitted). While PSNH's petition and testimony note the general impact that the existence of the NPT Line would have on the region's and the state's energy prices, it is the PPA that ensures that New Hampshire customers will reap a unique direct benefit from electric energy that is not generated by natural gas, and that is not subject to the remarkable swings in price that have been the hallmarks of the

growing reliance on natural gas.²¹ A PPA for a reliable source of non-fossil fuel based electricity that will help to mitigate the price and volatility troubles that have been plaguing New Hampshire electric customers is entirely and completely aligned with the Restructuring Law and its policy principles, as well as with New Hampshire’s Energy Policy.

The PPA implements the State’s policies encouraging fuel diversity found in other law as well, including RSA 4-E:1, I(c) and II; RSA 362-F:1; RSA 374-F:8; RSA 374-G:1; RSA 378:7-a; and RSA 378:37. For example, the State’s Office of Energy and Planning is responsible for developing, and periodically updating, an energy strategy for the State that takes into account numerous factors including the use of renewable energy, RSA 4-E:1, I(c), and it requires analyses of “policy changes and priorities necessary to ensure the reliability, safety, fuel diversity, and affordability of New Hampshire’s energy sources.” RSA 4-E:1, II. In crafting the most recent energy strategy, the Office of Energy and Planning noted the commitment by the six New England Governors through the New England States Committee on Electricity (“NESCOE”),²² to advance a regional energy infrastructure initiative that would diversify New

²¹ Pursuant to RSA 374-F:8 (a provision added to the Restructuring Law in 2007), the Commission has been empowered to represent New Hampshire at the regional and national levels for various purposes including those relating to “**wholesale electric issues, including policy goals relating to fuel diversity, renewable energy,** and energy efficiency, and to assure nondiscriminatory open access to a safe, adequate, and reliable transmission system at just and reasonable prices.” RSA 374-F:8 (emphasis added). The PPA is for renewable energy, and provides a more diverse source of electric supply. The PPA is aligned with and supports New Hampshire’s energy goals.

²² NESCOE has also recently noted its support for the use of more diverse fuel sources for electric generation, and, importantly, for ensuring that state energy policies and regional energy needs align:

The practical reality is that state energy and environmental requirements intersect with regional competitive energy markets. State requirements must be harmonized with regional resource adequacy criteria and market mechanisms. This ensures that consumers receive the full value of their investments in clean and/or local energy resources and that resource needs in the wholesale markets are not overstated.

In 2016 and beyond, NESCOE will continue to work to have regional planning processes and markets account for state energy and environmental laws. These may include, but are not limited to, state renewable energy requirements, implementation of micro-grids and other means to enhance grid reliability, sustained aggressive investment in energy efficiency and small local generation resources, and continued progress to reduce the region’s reliance on higher emissions fuel sources.

Hampshire’s energy supply portfolio and ensure proper allocations of benefits and costs of transmission investments in the region in response to the natural gas supply constraints plaguing the region.²³ As noted repeatedly, the PPA helps to secure for New Hampshire customers the benefits of a renewable, and fuel diverse, supply of energy and is therefore not only aligned with New Hampshire policy as found in law, but also the State’s strategy for implementing that policy.

Each of the “other state laws” listed in this section rely upon the Commission having authority over its regulated utilities for their implementation. A finding that the Commission has no authority to consider the PPA would amount to a finding that the Commission is powerless to consider these other statutes or to fulfill the intents of the Legislature.

C. Federal Law

Not only is the PPA consistent with, and supportive of, state law and the policies encompassed in it, it is likewise consistent with federal law. At the outset, the Commission’s order of notice identifies only the Federal Power Act (“FPA”) as a specific federal law that may bear upon the PPA. Accordingly, PSNH focuses on the FPA, though it reserves the right to comment further as may be appropriate.

As a first matter, the PPA here is not the product of state action or state requirements. It is a private contract negotiated between two commercial entities for the purchase and sale of energy.²⁴ It secures to PSNH a source of energy supply indexed to market rates. Furthermore, as

NESCOE Annual Report to the New England Governors 2015 at 19, available at: http://nescoe.com/wp-content/uploads/2016/03/2015AnnualReport_23Mar2016.pdf.

²³ See New Hampshire 10-Year State Energy Strategy at 15, available at: <https://www.nh.gov/oep/energy/programs/documents/energy-strategy.pdf>.

²⁴ PSNH also notes that this PPA is exclusively between it and HRE. No affiliate of either company is party to, or has an interest in, the PPA. Accordingly, the PPA is not subject to the affiliate restrictions in the Commission’s rules, or those overseen by FERC. See 18 C.F.R §35, *et seq.*, and *Electric Power Supply Association v. AEP Generation Resources, Inc.*, 155 FERC ¶ 61,102 (2016) and *Electric Power Supply Association v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 (2016). In fact, FERC has already concluded that “the possibility of affiliate

noted above, any incidental effect that may befall wholesale rates or the wholesale energy market by virtue of the existence of the NPT Line, or the energy delivered over it, will occur regardless of the PPA. All the PPA does is to ensure the PSNH and its customers will be able to directly benefit from whatever impact may arise.

The PPA at issue here does not directly affect the wholesale rate for HRE, or anyone else. State approval of the PPA would not run counter to, or interfere with, FERC's jurisdiction over matters "affecting" wholesale rates, and HRE would sell the energy it produces for delivery over the NPT Line into the New England market at whatever rates and on whatever terms are acceptable to it under the market-based rate authority it has been granted by FERC under Section 205 of the FPA effective August 3, 2016.²⁵

The Commission's review of the PPA here relates to the retail transaction where the costs and benefits of the PPA are passed on to New Hampshire electric customers as proposed. Nothing about that transaction interferes with or undermines the wholesale rates and markets that are the sole province of the FERC under the FPA.

3. The Commission's recent ruling in Docket No. DE 16-241

The Commission noted in its order of notice that its recent order relating to the purchase of natural gas capacity by PSNH may bear upon the analysis of the issues here. PSNH submits that the Commission's order changes neither the relevant considerations nor the ultimate conclusion regarding the legality of the PPA here.²⁶

abuse does not exist" for the construction of the NPT Line, 127 FERC ¶ 61,179 at 22, available at Exhibit E, Bates page 39, of the October 19, 2015 petition of NPT to commence business as a public utility in New Hampshire in Docket No. DE 15-459. Furthermore, as PSNH noted above, the construction of the NPT Line does not depend upon the PPA. Therefore, there is neither a direct, nor indirect, benefit conferred to NPT or the NPT Line by virtue of the PPA.

²⁵ See *Hydro Renewable Energy Inc.*, FERC Docket No. ER16-1875-000

²⁶ As noted below, the Commission's Order in Docket No. DE 16-241 is, as of the date of this submission, the subject of two outstanding motions for rehearing.

In Docket No. DE 16-241, PSNH sought approval of a contract between it and Algonquin Gas Transmission LLC (“AGT”) whereby PSNH would purchase capacity on the Access Northeast pipeline, a natural gas pipeline project that would be constructed by AGT. As PSNH explained in its petition there, the purpose for proposing to purchase the capacity was to give AGT the financial assurances it needed to construct a pipeline that would bring additional natural gas supplies to New England on a pipeline that would have direct access to a substantial number of gas-fired electric generators. The result would be a more reliable supply of natural gas for various purposes, including electric generation. The availability of that supply would have mitigated price spikes and lowered overall electric costs and would have furthered the chief goal of the Restructuring Law – cost reductions for customers.

On October 6, 2016, the Commission issued Order No. 25,950 in Docket No. DE 16-241 and rejected the proposed contract with AGT. In so doing, the Commission began by finding that “the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity.” Order No. 25,950 at 8. Based upon that conclusion, the Commission further stated:

Based on that finding, we conclude that the proposal brought forward by Eversource is fundamentally inconsistent with the purposes of restructuring. Specifically, we conclude that the Capacity Contract is a component of “generation services” under RSA 374-F:3, III, which requires unbundled, clear price information for the cost components of generation, transmission, and distribution. The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies. Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal.

Id. at 9. Respectfully, PSNH disagrees with the findings reached by the Commission²⁷ and has sought rehearing of that order. November 7, 2016 Motion for Reconsideration in Docket No. DE 16-241. While PSNH does not restate each of its reconsideration arguments here, PSNH does note its argument regarding the Commission’s finding that the “overriding purpose” of restructuring is to foster competition is inconsistent with the language and intent of the Restructuring Law.²⁸ Regardless, however, even if one accepts the Commission’s conclusion as true, the PPA here does not challenge or undermine that purpose.

As the Commission stated in Order No. 25,950:

To achieve that purpose [of introducing competition to electric generation], RSA 374-F:3, III directs the restructuring of the industry, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services. A more efficient structure involves placing investment risk on merchant generators who can manage that risk, and allowing customers to choose suppliers, thus enabling customers to pay market prices and avoid long-term over market costs.

Id. at 9.²⁹ As noted above, the construction and the operation of the NPT Line (and the generating infrastructure relating to it) does not depend upon the PPA. The risks of siting,

²⁷ In fact, NESCOE has also specifically noted that the reliance upon “markets” or “competition” is not the end purpose of restructuring:

Take a moment to consider the purpose of restructuring.

It was never to implement markets or to seek to achieve their benefits at the expense of state energy or environmental policies or to diminish environmental quality.

When generators oppose in- or out-of-market mechanisms to recognize state policies in planning and markets, from use of the DG Forecast, to the Renewable Exemption, to Clean Energy RFPs, it suggests a belief that markets are an end in themselves or paramount to state laws. They are not.

NESCOE Annual Report to the New England Governors 2015 at 18, available at: http://nescoe.com/wp-content/uploads/2016/03/2015AnnualReport_23Mar2016.pdf.

²⁸ The Commission has also stated that in some circumstances where it reviewed the applicability of RSA 374-F:1, it concluded that while the effect on competition from utility actions may be a factor in an analysis, the final determination about whether a particular act is in the public interest depends on more than the potential effect on competition. *See* Order No. 25,111 (June 11, 2010) in Docket No. DE 09-137 at 29-30.

²⁹ Notably, by use of discretionary language RSA 374-F:3, III does not “direct” restructuring as stated in Order No. 25,950, but indicates a general intent of the Legislature: “When customer choice is introduced, services and rates **should** be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services **should** be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution

permitting, constructing, and operating the NPT Line, and of building and operating the electric generating infrastructure that will feed the NPT Line rest with NPT and HQ/HRE, respectively. Nothing about the PPA modifies or diminishes that risk, and nothing about the PPA puts PSNH in the business of generating electricity. If HRE is able to deliver and sell energy over the NPT Line in an efficient manner it will succeed, and if it does not, it will not. The PPA does not lift that risk from HRE.

Instead, what the PPA does do is to offer PSNH, and by extension its customers, the opportunity to secure a unique benefit from the availability of the energy that HRE will provide over the NPT Line. That energy will be produced by a reliable, low cost, renewable source and, if the PPA is approved, will be provided to PSNH on beneficial contract terms. Moreover, as proposed (and discussed further below) the benefits of the PPA would flow through the Stranded Cost Recovery Charge (“SCRC”) which will both meet the statutory mandate to mitigate the costs included in that charge to the benefit of all of PSNH’s customers, and avoid interference with any customer’s selection of power supplier or the offerings of those suppliers.

The value of the PPA could be materially enhanced in the future if PSNH is able to reap the benefits of the environmental attributes of the renewable power. In short, PSNH is buying energy, no different than the energy it presently buys pursuant to bi-lateral contracts and other PPAs authorized by the Commission and nothing about the PPA runs counter to the conclusions of the Commission in Order No. 25,950.

services which **should** remain regulated for the foreseeable future.” RSA 374-F:3, III (emphases added), *see also* discussion of mandatory versus discretionary language at footnote 12, *supra*.

4. Cost Recovery and Commission Precedent

A. RSA chapter 374-F, RSA 374:57, RSA chapter 378

As discussed briefly above, and as raised in the Commission's order of notice, the Commission also seeks information about the propriety of PSNH's proposal to include the costs and benefits of the PPA in the SCRC, particularly in light of RSA chapter 374-F, RSA 374:57, RSA chapter 378. In its petition, PSNH has proposed that the costs and benefits of the PPA be passed through its SCRC so as to be spread to all of PSNH's customers. June 28, 2016 Petition of PSNH in Docket No. DE 16-693 at 5, and Testimony of Eric H. Chung. By working through the SCRC the PPA will be consistent with New Hampshire law and principles in at least two ways. First, and with acknowledgement of the competitive principles cited by the Commission in its recent order in Docket No. DE 16-241, it will not distort the market for energy service and will not intrude upon the offerings of any competitive energy suppliers or on the competitive energy market generally. Second, it will help to mitigate stranded costs consistent with the mandates in RSA 374-F:3 and the 2015 Settlement Agreement and will, in that way, help maintain rates that are just, reasonable, and in the public interest.

The PPA is designed to provide economic benefits to PSNH's customers, by providing below-market pricing that PSNH will monetize and include in rates as a credit to stranded costs. Hence, the PPA should not be considered as a "stranded cost" as that term is defined in RSA 374-F:2, IV.³⁰ Instead, the benefits of the PPA are "mitigation measures" as discussed in RSA 374-F:3, XII(c). And that statute expressly requires that, "Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs." *Id*

³⁰ As the Commission is aware, PSNH is limited in the rate elements applicable to all customers. It has, therefore, previously allowed for the inclusion of certain items (in particular rate credits) in the SCRC based on its conclusion that it was appropriate to include them there. *See* Order No. 25,664 (May 9, 2014) in Docket No. DE 14-048 (including Regional Greenhouse Gas Initiative rebates in the SCRC).

The Order of Notice listed RSA 374:57 as another statute that must be considered concerning cost recovery. Fifteen years after enactment of the Restructuring Law, the Commission held that “RSA 374:57...reinforces the general proposition that PSNH may purchase energy under...PPAs, and employs reasonableness and the public interest as the appropriate standards.” Order No. 25,305 at 28. The Commission continued, “RSA 374:57 contemplates the possibility of the Commission’s disallowance of costs.” *Id.* As discussed previously, nothing in RSA 374:57 provides a legal basis to reject the PPA or prevent the Commission from determining whether that PPA is in the public interest.

Similarly, nothing in RSA chapter 378 precludes the Commission from considering the PPA. To the contrary, RSA 378:37 directs the Commission “that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources... .” The PPA is designed to lower costs while simultaneously providing a new reliable and diverse energy source.

B. The 2015 Restructuring Settlement

One of the primary objectives of the 2015 Settlement Agreement is to minimize stranded costs that must be borne by customers. The 2015 Settlement Agreement expressly notes, “The Settling Parties recognize and understand that their mutual undertakings, as expressed in this Agreement, reflect their efforts to ... resolve various other issues as provided herein in a manner that minimizes stranded costs... .” 2015 Settlement Agreement at 3. Similarly, the 2015 Settlement Agreement notes “The goals of the asset auctions are to maximize the net Total Transaction Value ... realized from the sale(s) in order to minimize Stranded Costs... .” *Id.* at 16 and states as an “important objective” “Mitigating the financial impacts of the stranded cost

recovery charge on large commercial and industrial customers.” *Id.* at 2. In its Order approving the 2015 Settlement Agreement, the Commission noted the benefits of minimizing stranded costs.³¹

Moreover, PSNH has previously stated on the record that any PPA it entered with HQ or its affiliates for delivery of power over the NPT Line would be structured in a manner that avoids any adverse impacts on the overall competitive marketplace or on PSNH’s acquisition and provision of default energy service. Over a year ago, the Commission quoted PSNH’s assurances in a prior Order noting that:

[A]ny PPA “would NOT be used to supply default energy service but would be monetized by selling the entitlement back into the market with the monetary benefits flowing to customers to mitigate stranded costs,” and that “the methodology set forth in the Settlement for obtaining default energy service post-divestiture would NOT be impacted by any PPA with Hydro-Quebec.”

Order No. 25,830 (October 23, 2015) in Docket No. DE 14-238 at 3 (emphases in original).

In pre-filed testimony accompanying its petition in the instant docket, PSNH lived up to those prior assurances. PSNH witness James G. Daly testifies, “PSNH’s entitlements to the energy and environmental attributes will be sold bilaterally or into the wholesale market, with the net proceeds credited to the Stranded Cost Recovery Charge.” June 28, 2016 Testimony of James G. Daly in Docket No. DE 16-693 at 9. In response to the question, “Q. Will PSNH use the energy from the PPA to supply default energy service?” Mr. Daly answered “No.” *Id.* Neither the competitive marketplace in general, nor PSNH’s provision of default energy service, will be impacted by the PPA. Further, Mr. Daly testifies that allowing the proceeds from the PPA to mitigate stranded costs is intended to eliminate “any adverse effect to competitive suppliers that might occur from impacts to the default energy service price... .” *Id.* at 12. The

³¹ See Order No. 25,920 in Docket No. DE 14-238, July 2, 2016 at 69 (Rate Reduction Bonds “will serve to ameliorate the long-term burden of stranded costs); at 70 (foregoing recovery of \$25 million of previously deferred equity related to the Merrimack Station Scrubber “will serve to reduce stranded costs.”

PPA is consistent with the 2015 Settlement Agreement and the assurances PSNH made relative to it.

C. Commission Precedential Standards

As noted, PSNH has proposed to include the costs and benefits of the PPA in its SCRC, a charge applicable to all customers, rather than in the default energy service charge or some other rate element. This treatment of the PPA is consistent with similar treatment of the existing PURPA obligations and PPAs that the Commission authorized in Order No. 25,920 (July 1, 2016) approving the 2015 Settlement Agreement. In the 2015 Settlement Agreement, the costs/benefits of PSNH's presently existing PURPA and PPA obligations will be included as Part 2 (unsecured) stranded costs under the SCRC and the revenues obtained by the sale of those existing arrangements will be used to offset the overall level of stranded costs to be recovered. PSNH submits that this same method is a reasonable, appropriate, and legal means to account for the PPA here.

In general, and as the Commission has recently highlighted, New Hampshire policy generally, but not entirely, favors the use of competition and competitive principles. *See, e.g.*, N.H. CONST., pt. II, art. 83 ("Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it."); RSA 374-F:1; and Order No. 25,950 at 8-9. Accordingly, a key goal of PSNH is to ensure that New Hampshire customers will retain the benefits of the PPA, while the potential benefits that might be had from competition are not diminished. An additional goal is to ensure that any handling of the PPA does not impede the ability of PSNH to procure and provide default service for customers who do not have a competitive supplier. The way to reach each of these goals, while remaining consistent with Commission precedent, is to

ensure that the costs and benefits of the PPA flow to all customers and not merely those who take their energy supply from one source or another. Including the PPA in the SCRC will avoid distorting the market for electric supply offered by competitive suppliers to individual customers or as may be offered through utility default service rates. In that way, it will ensure that customers continue to receive the benefits of a competitive marketplace as well as the benefit of the mitigation of stranded costs.

With respect to the mitigation of stranded costs, as noted earlier RSA 374-F:3 provides, as one of the interdependent policy principles in restructuring, that “Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs.” RSA 374-F:3, XII(c). As noted in Mr. Daly’s testimony, “the PPA results in up to approximately \$100 million in net customer energy savings across the range of scenarios reviewed. Under all but one of the various scenarios reviewed by PSNH, and without including any value for the environmental attributes PSNH will receive under the PPA, customers would receive a net economic benefit from the PPA.” June 28, 2016 Testimony of James G. Daly in Docket No. DE 16-693 at 7.³² In virtually every scenario, and even before accounting for the value of environmental benefits, there is a net economic benefit to the PPA that would be used to lower the overall level of PSNH’s stranded costs. All else being equal, the cost mitigation effect of the PPA will help to ensure that the SCRC rate will be just, reasonable, and in the public interest.

III. CONCLUSION

For the reasons set forth herein, PSNH has the legal authority to enter into the proposed power purchase agreement between PSNH and HRE; the Commission has the legal authority to review and approve that PPA; and the rate treatment proposed for the PPA is fair, reasonable, in

³² Compare this to the PPAs approved in Docket No. DE 11-184, the cost of which were “significantly above-market.” Order No. 25,305, *passim*. It is incongruous that the Commission would have authority to review and approve “significantly above-market” PPAs, but not a PPA that has many millions of dollars in benefits.

the public interest, and consistent with the requirements of law. The Commission should move to Phase II of this proceeding, where it will have the opportunity to consider the merits of the PPA and see that the PPA will “provide real benefits to the people of the Granite State.”³³

Respectfully submitted,

**Public Service Company of New Hampshire d/b/a
Eversource Energy**

November 21, 2016
Date

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³³ *Governor Hassan’s Statement on Northern Pass Announcement*, Press Release of August 18, 2015.

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Legal Memo to be served on each person identified on the commission's service list pursuant to N.H. Code Admin. Rule Puc 203.11.

November 21, 2016
Date



Robert A. Bersak