STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: November 21, 2016
AT (OFFICE): NHPUC

FROM: Alexander F. Speidel, Staff Attorney

SUBJECT: Legal Authorities, in re: Eversource PPA Proposal (DE 16-693)

TO: Commissioners
Executive Director Debra Howland
Thomas Frantz, Director, Electric Division
George McCluskey, Assistant Director (Wholesale), Electric Division
Interested Persons, Docket No. DE 16-693

Pursuant to the terms of the Order of Notice issued by the Commission in this above-captioned docket on October 25, 2016, I provide, as Commission Staff (Staff), this legal brief regarding the legality of the proposal by Public Service Company of New Hampshire d/b/a Eversource (Eversource) for approval of a proposed 20-year Power Purchase Agreement (PPA) contract between Eversource and Hydro Renewable Energy Inc. (HRE), an indirect wholly-owned subsidiary of Hydro-Quebec.

On the basis of current Commission precedent and New Hampshire statutory authorities, I have concluded that the Eversource proposal being reviewed in this instant proceeding does not qualify for approval under the authorities cited. Furthermore, if Eversource were to seek approval under an alternative basis for legal authority, it must still be subject to a Staff-directed and Staff-conducted Request For Proposals (RFP) competitive bidding process to ensure least-cost procurement of the product being sought by Eversource in connection with this proposal, and to prevent self-dealing by the utility in seeking contracts of this type.

No New Hampshire Legal Authority for Distribution Rates in Connection with PPA

As mentioned in the Order of Notice, the Commission recently issued an important Order examining the interplay of the New Hampshire Electric Utility Restructuring Statute, RSA Chapter 374-F, and certain other New Hampshire legal authorities dealing with the powers of Electric Distribution Utilities (EDCs). *See* Order No. 25,950 (Oct. 6, 2016) (*reh'g requested*). In the context of Eversource's proposal to acquire a 20-year contract for natural gas capacity from Algonquin Gas Transmission, LLC (Algonquin), as part of the Access Northeast proposal being developed by Algonquin and Eversource's corporate parent, the Commission ruled that RSA Chapter 374-F prohibited the acquisition of such a product by a New Hampshire EDC, as it would violate the core principles of the Restructuring Statute. On this basis, the Commission dismissed Eversource's petition.

In its analysis, the Commission concluded that that the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity. Order No. 25,950 at 8. The Commission noted that, to achieve this purpose of competition, 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." Order No. 25,950 at 9.

In so doing, the Commission ruled that none of the ancillary statutes relied upon by Eversource in bolstering its arguments for approval of the Access Northeast proposal overrode the prime directives of the Restructuring Statute, including RSA 374:1 and 374:2 (safe and reliable service at just and reasonable rates); RSA 378:37 and 378:38 (least cost planning statutes); and RSA Chapter 374-A, among others. The Commission underscored that "[t]he change in the industry through the Restructuring Statute, first passed in 1996, effectively ended a restructured EDC's ability to participate in the generation side of the electric industry," and that "RSA 374-A no longer applies to an EDC like Eversource." Order No. 25,950 at 14.

The key to this analysis, RSA 374-F:3, III, states clearly: "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 services which should remain regulated for the foreseeable future." RSA 374-F:3, III. The implications of the Order No. 25,950 analysis for this PPA proposal are also clear. This functional-separation principle, if violated, overrides any other statutory provision governing New Hampshire EDCs like Eversource, and acts as a general functional prohibition against distribution rates being used for generation or transmission purposes, unless specifically authorized by the terms of the Restructuring Statute. This is designed, as the Legislature intended, to shift the risks of generation (and transmission) investments away from customers of regulated EDCs towards private investors in the competitive market.

This makes Eversource's reliance on the so-called "Capacity" provisions of RSA 374:57, in the context of this PPA proposal, inadequate to overcome a violation of the functional-separation principles of the Restructuring Statute. To distill this proposal to its legal essentials, leaving aside the complex financialization mechanics presented by Eversource, the PPA would involve the use of Eversource distribution rates as a financial backstop for what amounts to a 100 megawatt (MW) energy hedge. If the PPA is financially favorable in light of prevailing ISO-NE energy market conditions, a financial benefit would flow to Eversource (distribution) customers. However, if the PPA were not financially favorable in light of prevailing market conditions, this downside risk would likewise flow to Eversource customers, and be assessed to those customers in the form of higher distribution rates (contained within the Stranded Cost Recovery Charge).

This is a clear example of intermingling of distribution rates with a mixed generation-transmission product, with concomitant risk-shifting prohibited by the functional-separation principles of RSA 374-F:3, III. The mere fact that Eversource is not applying the 100 MW generated in Quebec, and carried over the proposed Northern Pass Transmission line, to meeting its (Default Service) load-service obligations under the terms of this proposal does not immunize Eversource from a violation of the functional-separation principle. Indeed, all commercial economic activities are ultimately monetized, and in this instance, Eversource proposes to use distribution-rate monies as a backstop for a mixed generation (energy) and transmission hedging product, in violation of the functional-separation principle and the prohibitions against risk-shifting for merchant-type activities within the Restructuring Statute. The ancillary statutes cited by Eversource in support of its petition, as was the case in the Access Northeast proceeding, do not override this legal infirmity, and the instant petition should therefore likewise be dismissed by the Commission.

Need for Staff-Directed RFP Process if Alternative Legal Authority Relied On

It is entirely possible that Eversource may seek approval of a restructured version of this proposal in the future, in an attempt to conform with the requirements of New Hampshire law. If so, and if the restructured proposal were to meet all legal requirements (as ruled by the Commission in a future proceeding), Staff would urge the Commission in the strongest terms to order Eversource to submit to a Staff-directed and Staff-conducted RFP process for acquiring a "hedge" of this type. The Commission has traditionally looked favorably on the use of RFP processes to ensure least-cost procurement on fair market terms for EDC requirements, and in this instance, the corporate relationships among Eversource, its parent company, Hydro-Quebec, HRE, and the Northern Pass Transmission venture militate in favor of a Staff-directed process to ensure the avoidance of self-dealing and to secure the best possible terms for Eversource customers.