DRM 17-153

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Debra Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

RE: Docket No. DRM 17-153
Freedom Logistics, LLC d/b/a Freedom Energy Logistics

Request for Rulemaking - Purchases of Electric Energy and Capacity Produced from Qualifying Facilities

Dear Director Howland:

Please let this letter serve as the response of Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") to the above-referenced request for rulemaking submitted to the Commission on October 6, 2017 by Freedom Logistics d/b/a Freedom Energy Logistics ("FEL"). The FEL request is premised upon its belief that the ruling of a federal court in another jurisdiction "appears to be adverse" to the existing standards for utility purchases in New Hampshire from certain qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), as well as Eversource's existing tariff. Based upon its belief that this decision appears to be adverse, FEL requests that the Commission adopt certain rules. Eversource objects to the rules as proposed by FEL and questions the underlying premise for the specific request FEL makes. Accordingly, Eversource requests that the Commission deny the request per RSA 541-A:4, I and Puc 205.03(h)(2).

As an initial matter, Eversource notes, as does the FEL petition, that in 2015 Eversource submitted a request to the Commission requesting that the Commission adopt rules regarding aspects of utility purchases from QFs. *See* Docket No. DRM 15-340. While that request was denied based upon the facts in existence at that time, the Commission did note that:

> if there remains an interest in revisiting PURPA obligations following the completion of the Asset Proceeding, we will open a generic avoided cost docket. In that docket, interested parties will be permitted to litigate generally applicable requirements and the avoided cost rate methodology or methodologies for utility purchases of QF power pursuant to PURPA. In the meanwhile, each of our utilities, including Eversource, has a tariffed methodology on file for determining PURPA avoided cost rates.

Order No. 25,814 (September 18, 2015) at 4-5. Therefore, the Commission has already described the proceeding it would intend to undertake to review both avoided costs and "generally applicable requirements" under PURPA. In that the Commission has already noted that to further evaluate issues relating to PURPA it would undertake a generic, litigated proceeding, the instant request for rulemaking is inappropriate. Also, the Commission noted that until it undertakes such a proceeding, the presently tariffed methodology of each utility would apply. Such a generic proceeding is the more appropriate method to examine PURPA requirements to ensure that all interested parties, including all utilities in New Hampshire, may have the opportunity to participate and to address the issues that may arise.

Furthermore, the present request appears only to seek confirmation that utilities have an obligation that FEL alleges exists under federal law. In the proposed rules, the proposed "Purchase Requirement" states only that a utility must purchase the output of a QF at avoided cost, or at an agreed upon rate – paraphrasing federal law – and in the proposed definition of "Avoided Cost" it proposes only the language already found in federal regulations. In that the proposed rules appear only to seek to confirm an existing obligation, initiating a proceeding based upon this petition to examine the proposed rules is unnecessary.

Despite the above, should the Commission determine to undertake a rulemaking based upon the FEL request, Eversource provides the comments below for the Commission's consideration. First, the issue of utility, and State utility commission, obligations under PURPA is not a new one, and it has been the subject of some scrutiny in recent years. Eversource encourages the Commission not to undertake a rulemaking that would put New Hampshire at odds with other states in the region on these issues. As noted in Eversource's petition in Docket No. DRM 15-340, having one state, or one utility within a state, out of line with others may lead to discriminatory outcomes and inefficient rent-seeking behaviors, both of which should be avoided.

Moreover, the Commission is reminded that it very recently dealt with the issue of a utility's purchase requirements under PURPA. As part of its review of the 2015 PSNH Settlement Agreement in Docket No. DE 14-238, the Commission received extensive pleadings and testimony regarding this matter. In Order No. 25,920, issued July 1, 2016, the Commission spent nearly 20 pages detailing and deciding issues related to avoided costs and PURPA implementation in New Hampshire.

With respect to what appears to be the primary concern underlying the FEL petition, the rates paid to QFs, as the Commission is keenly aware, the New England energy market was restructured in the late 1990s and since that time there has been a liquid market for wholesale electric generators. And, while it has been delayed, all utilities in New Hampshire, including Eversource, will soon be divested of their generation. This restructuring also brought about retail choice, which means that all retail electric customers are free to choose a competitive retail supplier or to remain with the utility's default service. Generally speaking, restructuring has eliminated utilities' obligations to serve all load, except for obligations relating to contracts for default service, which will be provided in a nearly identical manner by all utilities and which will be met by short-term commitments with energy providers.

Default service load is intended to be served by short-term, market-based products to provide a viable alternative to market-based retail supply. If power from QFs was used to serve load at long-term contract rates, it would result in prices charged to customers diverging from

short-term rates, which could result in customers making decisions based upon prices that are out of line with the prevailing market. This would distort the competitive playing field and undermine the market-based system. FERC has expressed "concern that the mandatory QF purchase obligation under PURPA in conjunction with administratively avoided cost rates may be inconsistent with the operation of an effective competitive market." *Cogen Lyondell, Inc.*, 95 FERC ¶ 61,243, at 61,838 (2001).

Accordingly, once Eversource has divested its generating assets and all New Hampshire utilities are providing power through competitive procurements, they will have no need for any long term energy or capacity, as well as no short term need for additional energy or capacity, from QFs, nor use for such intermittent energy and capacity to serve their loads' full requirements. Moreover, in making avoided cost determinations, some states have determined that requiring an electric utility to purchase capacity that it does not need (e.g., the QF would not displace the utility's capacity purchases) would be contrary to the public interest. *See, e.g., In The Matter of Idaho Power Company's Petition To Modify Terms And Conditions Of PURPA Purchase Agreements*, No. 33419, 2015 WL 6958997, at *15 (Idaho P.U.C.); accord, *Hydrodynamics, Inc., et al.*, 146 FERC ¶ 61,193 at P. 35 (2015) ("[W]hen the demand for capacity is zero, the cost for capacity may also be zero"). This means that any energy and capacity purchased under a legally enforceable obligation ("LEO") from a QF would not reduce the amount of energy and capacity that needs to be purchased to serve default service requirements and would not be used to serve default service load. In other words, there are no costs that are avoided by the purchase of energy or capacity from QFs.

Also, as noted above, there has been recent activity relative to the requirements of PURPA for New England's utilities and utility commissions, specifically in *Allco Renewable Energy Ltd. v. Massachusetts Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. Sept. 23, 2016)[1] and FERC's decision in *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 (Nov. 22, 2016). These decisions addressed whether a QF is entitled to an LEO containing a forecast of avoided cost. In its decision, FERC stated that ". . . state regulatory authorities cannot preclude a QF — even an intermittent QF — from obtaining a legally enforceable obligation with a forecasted avoided cost rate . . . ." *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61134 at P. 6 (Nov. 22, 2016) (emphasis added). FERC also stated that the QF in question:

> has opted to sell its output pursuant to section 292.304(d)(2)(ii) of the Commission's regulations, which it is entitled to do (and at a rate based on avoided costs calculated at the time the legally enforceable obligation is incurred — which it is also entitled to do), and, therefore, the Connecticut Authority must recognize that a legally enforceable obligation exists ***and calculate the appropriate forecasted avoided cost*** rate pursuant to section 292.304(d)(2)(ii) of the Commission's regulations

Id. at 5 (emphasis added). Based upon FERC's direction to the regulatory authority to develop a forecast of avoided cost at the time the LEO is incurred, to the extent the Commission may undertake the same exercise, it should review a number of issues when determining an appropriate methodology for such forecast.

[1] The petition in this case references a decision dated July 1, 2017 by the United States District Court for the District of Massachusetts. Eversource is not aware of any such ruling and understands that the last decision by the District Court in the referenced matter was in September 2016.

Regarding capacity, FERC concluded that Eversource's Connecticut affiliate only has an obligation to purchase capacity "to the extent that Eversource's capacity needs can be satisfied by Windham's QFs rather than through the capacity auction, ..." *Id.* at P. 7. As explained above, any energy and capacity purchased under LEOs from QFs does not reduce the amount of energy and capacity needed to satisfy default service obligations, because it does not offset the energy or capacity the utility would purchase to serve its default service load. Therefore, it is Eversource's position that utilities have no avoided costs associated with such capacity and should not have an obligation to purchase capacity they do not need. Utilities do not have a capacity need because the wholesale forward capacity market is designed to ensure reliability is met, and companies with load obligations are allocated their share of payments to resources providing capacity. Thus, this burden no longer lies with utilities as it did prior to restructuring.

FERC policy supports this position. In implementing section 210 of PURPA, FERC made clear that an avoided cost rate can exclude capacity costs (as distinct from energy costs) where a QF does not "permit the purchasing utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats.& Regs. ¶ 30,128, at 38,865, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part, Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983). Specifically, FERC stated:

> A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying facility, the purchase rate ***should only include payment for energy or capacity which the utility can use to meet its total system load.***

Id. at 38,871(emphasis added).

As recently as 2015, FERC stated that "avoided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero". *Hydrodynamics, Inc., et al.*, 146 FERC ¶ 61,193 at P. 35 (2015). "[A]n avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity. Thus, while utilities may have an obligation under PURPA to purchase from a QF, that obligation does not require a utility to pay for capacity that it does not need". *City of Ketchikan, Alaska, et al.*, 94 FERC ¶ 61,293, *6 (2001).

Accordingly, any avoided cost rate determined by the Commission need not include capacity unless a utility's purchase of capacity from a QF will permit that utility to avoid building or buying future capacity. In that, as discussed, utilities have no need to purchase capacity from a QF, these FERC decisions establish that PURPA does not obligate them to purchase capacity from QFs.

With respect to energy purchases, Eversource would recommend that if the Commission elects to undertake a rulemaking at this time, and if the Commission also determines that despite

the lack of need for additional energy purchases, utilities should be required to purchase energy from QFs (which they should not for the reasons stated above), any rules proposed by the Commission should factor in various considerations, including:

a) The calculation of avoided costs should use a methodology that is simple and straightforward.

b) The utilities should be the entities that use data from the competitive marketplace to determine the avoided costs, subject to the Commission's verification.

- For example, FERC has noted, "It appears that various states have opted to use LMPs in calculating avoided costs." Council of the City of New Orleans, Louisiana Mississippi Pub. Serv. Comm'n, Arkansas Pub. Serv. Comm'n, 145 FERC ¶ 61057, 61424, at fn. 64 (Oct. 17, 2013).

- Similarly, in Order No. 25,920 this Commission noted, "Eversource further referenced a footnote in FERC's decision in Southwest Power Pool, Inc., 143 FERC ¶61,018 at P 19, fn. 16 (2013), in which FERC expressly noted the use of real-time prices to determine avoided cost rates. Eversource Legal Memorandum at 9-10. Eversource asserted that this FERC precedent supports the conclusion that FERC not only has not rejected the use of real-time pricing for the establishment of a proper avoided cost standard, but has acknowledged use of real-time pricing to establish avoided cost rates throughout the country. *Id.* at 10."

c) The avoided cost should only apply to projects that are not yet constructed and have not yet received the financing necessary to construct the project. Existing projects, or those projects that have already received financing, will not be eligible for contracts.

d) The avoided costs should be common for all utilities in New Hampshire and, to the extent possible, the avoided costs should be consistent with those forecasted by other states.

- As noted, if there is a divergence in the calculated avoided energy and capacity costs between the states, then a project will "shop around" for the highest forecasted rates, and a disproportionate number of contracts will be required of the utility or utilities with the highest avoided cost rates, independent of which state it is in.

e) The term of each LEO should be limited to not more than seven years to avoid having contracts that diverge wildly from existing markets.

- A QF project demanding a long-term purchase obligation from a utility will receive the avoided cost pricing forecast that is applicable at the time of its application, and those pricing terms will be fixed for the duration of that obligation.

- If the avoided costs are changed in a later year, then the updated pricing will not affect QF projects that have previously executed seven year LEOs. The updated pricing will only apply to new QF projects that submit an application for a new LEO.

f) To the extent that a QF is also receiving revenues from the sale of its other products

to third parties or under a separate contract with a utility (i.e., if it is receiving revenue from the sale of its RECs) and/or if the QF receives any other subsidies under state or ISO-NE programs for renewable projects, such incremental subsidies should be taken into consideration to help evaluate the total customer funding through QF payments for a project to ensure that excessive project funding is avoided or mitigated.

By including the above in its consideration of any rules, the Commission will help ensure a fair marketplace and treatment of QFs and customers.

As a final item, Eversource notes its concern with "Part 6" of the rules proposed by FEL. In that part, it reads: "A QF selling power to an Electric Utility under the terms of this section shall not be required to sell 100 percent of the available energy from the project to the Electric Utility." Implementation of such a requirement, if ultimately found appropriate, is problematic. Absent an obligation to sell all available energy, Part 6 could be read to allow a QF to deliver power to the utility whenever the contract rate is above the hourly LMP, and sell it to the market directly when the contract rate is below the hourly LMP, or even to allow the QF to make the determination about a sale sometime after the LMP is determined. Making the utility, and ultimately customers, responsible for responding to such actions and their attendant costs should not be permitted by the Commission.

As noted at the outset of this response, it is Eversource's position that the present petition does not set out adequate justification for commencing a rulemaking at this time, nor do the rules as proposed fulfill a purpose that requires Commission action. Accordingly, Eversource believes the present petition should be dismissed. If, however, the Commission elects to undertake a rulemaking based upon the petition, Eversource submits that the enclosed comments provide an initial set of considerations to take into account when determining what regulations may be appropriate. Additional considerations exist and would be raised and discussed by Eversource at an appropriate stage of any rulemaking proceeding, should one be held.

Thank you for the opportunity to provide these comments, and if you have any questions, please do not hesitate to contact me.

Very truly yours,

Matthew J. Fossum
Senior Counsel

CC: Service List