STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

In re: 2018 Eversource Energy Service Solicitation
Docket No. DE 18-002

MOTION
FOR DETERMINATION THAT AGREEMENTS CONFORM WITH RSA 362-H
AND TO DIRECT EVERSOURCE TO COMPLY WITH RSA 362-H

Intervenors Springfield Power LLC ("Springfield"), DG Whitefield LLC ("Whitefield"), Bridgewater Power Company, L.P. ("Bridgewater"), Pinetree Power Tamworth LLC ("Pinetree Tamworth") and Pinetree Power LLC ("Pinetree") (collectively, "Intervenors") move the Commission for a determination that their power purchase agreements conform with RSA 362-H and to direct Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") to comply with RSA 362-H.

In support hereof, Intervenors state the following.

I. Introduction.

On September 13, 2018, Senate Bill 365 was enacted by the New Hampshire General Court and codified at RSA 362-H ("SB 365" or "RSA 362-H").[1] In enacting RSA 362-H, the General Court determined that it was in the public interest to promote the continued operation of, and the preservation of employment and environmental benefits associated with certain renewable electric generation facilities, including those of Intervenors, and thereby promote fuel diversity as part of the state's overall energy policy.[2] To implement this policy, RSA 362-H's statutory scheme

[1] SB 365, 2018 N.H. Laws Ch. 379, An Act relative to the use of renewable generation to provide fuel diversity, *codified at* N.H. Rev. Stat. Chapter 362-H.

[2] 2018 N.H. Laws Ch. 379:1 (Findings).

requires certain electric distribution companies to offer to purchase energy from, among others, Intervenors, through the issuance of a solicitation.

On November 6, 2018, Eversource solicited proposals from Intervenors to enter into power purchase agreements under RSA 362-H. The Eversource solicitation contained a draft confirmation with attached governing terms. On November 16, 2018, Intervenors submitted their proposals to Eversource. Intervenors' proposals provided the information sought by Eversource in its solicitation. Intervenors' proposals also included revised drafts of Eversource's confirmations and governing terms to bring them into conformity with RSA 362-H. On December 4, 2018, Eversource filed Intervenors' proposals (with two further revisions made by Eversource) with the New Hampshire Public Utilities Commission ("Commission") as attachments to its *Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as enacted by Senate Bill 365* ("Eversource Petition").

The Eversource Petition informs the Commission that Eversource will not enter into purchase power agreements with Intervenors, notwithstanding the fact that RSA 362-H requires it to do just that. Instead, Eversource seeks to violate the requirements of RSA 362-H by displacing them with its own extra-statutory 'rate order PURPA' scheme and by stating that it will only make the statutorily mandated purchases of Intervenors' energy output if the Commission orders it to do so. Eversource's refusal to enter into agreements required under RSA 362-H, and its inclusion of provisions in its solicitation that are inconsistent with and/or irrelevant to RSA 362-H, are merely an attempt to avoid its obligations under RSA 362-H and to lure the Commission into making unnecessary determinations, the effect of which will support a preemption challenge to RSA 362-

H that is pending in the Federal Energy Regulatory Commission ("FERC") -- a case in which Eversource is an intervenor ("FERC Proceeding").[3]

In this proceeding, the Commission should not undertake to decide Eversource's extra-statutory requests and claims. For instance, the direct testimony of Frederick B. White asks the Commission to set the adjusted energy rate,[4] but RSA 362-H requires no such thing. In fact, RSA 362-H was carefully crafted to avoid having the Commission set any rate. The rate in the statute is determined by a competitive solicitation process used to provide default service, and that rate is subject to FERC's regulatory requirements. RSA 362-H authorizes the Commission only to engage in a sole task: to undertake a review to determine whether Intervenors' power purchase agreements (*i.e.*, their confirmation and governing terms) conform with RSA 362-H. There is no other pre-condition to Eversource's compliance with RSA 362-H. Eversource must comply with New Hampshire law and enter into the power purchase agreements (and not some kind of PURPA-type rate order of Eversource's choosing) because that is what RSA 362-H requires.[5]

II. Intervenors' power purchase agreements conform with RSA 362-H, and thus, Eversource must comply with New Hampshire law by signing them.

A. RSA 362-H is based on settled law, its purpose is in the public interest and its process is straightforward.

Prior to RSA 362-H, New Hampshire law already required electric distribution companies subject to the Commission's jurisdiction: (i) to issue periodic solicitations for the competitive procurement of wholesale default service power supply, from which supply it would serve its

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3 FERC Docket No. EL19-10-000.

4 Eversource Petition, Direct Testimony of Frederick B. White at bates 000362 ("Finally, as part of this proceeding, the Commission must set the 'adjusted energy rate' as defined in RSA 362-H:1, I.").

5 *See* RSA 362-H:2, IV ("agreements shall be subject to review by the commission for conformity with this chapter").

default retail service customers; and (ii) to obtain Commission approval of those competitive procurements and resulting wholesale power contracts with winning bidders.[6]

RSA 362-H is simply based on the results obtained under that pre-existing law. It requires electric distribution companies to solicit proposals from eligible facilities to enter into power purchase agreements and to purchase one-hundred percent of the net energy output from the eligible facilities at an "adjusted energy rate."[7]

Neither Eversource here, nor any party in the FERC Proceeding, challenges the lawfulness of the underlying competitive procurement of wholesale power -- upon which RSA 362-H is based.

1) RSA 362-H is in the public interest.

The New Hampshire General Court was unequivocal: "it is in the public interest to promote the continued operation of, and the preservation of employment and environmental benefits associated with these sources of indigenous-fueled renewables, and thereby promote fuel diversity as part of the state's overall energy policy."[8]

2) RSA 362-H's process for attaining power purchase agreements is straightforward.

"[E]ach electric distribution company that is subject to the commission's approval regarding procurement of default service shall offer to purchase the net energy output of any

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6 RSA 374-F:3(V)(c). *See also, e.g., Pub. Ser. Co. of N.H. d/b/a Eversource Energy*, Order Approving Solicitation Process and Resulting Rates, DE 18-002, Order No. 26,147, 2018 WL 3068167 (N.H.P.U.C. June 15, 2018).

7 RSA 362-H:2 ("To retain and provide for generator fuel diversity, each electric distribution company ... shall offer to purchase the net energy output of any eligible facility located in its service territory....") (underline added); RSA 362-H:1, I (defining the adjusted energy rate as "80 percent of the rate, expressed in dollars per megawatt-hour, resulting from the default energy rate minus, if applicable, the rate component for compliance with the renewable energy portfolio standards law, RSA 362-F, if that rate component is included in the approved default energy rate.") (underline added).

8 2018 N.H. Laws Ch. 379:1 (Findings) (underline added).

eligible facility located in its service territory [in accordance with RSA 365-H:2, I-V]."[9] Eversource is an electric distribution company that is subject to the Commission's approval regarding procurement of default service.[10]

An "eligible facility" is:

> any facility which produces electricity for sale by the use, as a primary energy source, of biomass, or municipal solid waste; provided that: (1) the facility's power production capacity is not greater than 25 megawatts excluding station service needs; (2) the facility is interconnected with an electric distribution or transmission system located in New Hampshire; and (3) the facility began operation prior to January 1, 2006, or if the facility ceased operation and then later returned to service after that date then prior to January 1, 2006 the facility operated for at least 5 years regardless of the current operational status of the facility.[11]

Each of the Intervenors is an "eligible facility" in Eversource's service territory.[12]

Thus, Eversource must offer to purchase Intervenors' net energy output in accordance with the process set forth in RSA 365-H:2, I-V:

First: "[p]rior to each of its next 6 sequential solicitations of its default service supply after [September 13, 2018]," Eversource must solicit proposals from Intervenors to enter into power purchase agreements:

> [The solicitation] shall inform eligible facilities of the opportunity to submit a proposal to enter into a power purchase agreement with [Eversource] under which [Eversource] would purchase an amount of energy from the eligible facility for a period that is coterminous with the time period used in the default service supply solicitation. The solicitation shall provide that [Eversource's] purchases of energy from the eligible facility shall be priced

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9 RSA 362-H:2 (underline added).

10 *See, e.g., Pub. Ser. Co. of N.H. d/b/a Eversource Energy*, Order Approving Solicitation Process and Resulting Rates, DE 18-002, Order No. 26,147, 2018 WL 3068167 (N.H.P.U.C. June 15, 2018). *See also generally* Eversource Petition (acknowledging Eversource is an electric distribution company that is subject to the commission's approval regarding procurement of default energy service).

11 RSA 362-H:1, V(a).

12 There are two exceptions to this definition that are not applicable to Intervenors. *See* RSA 362-H:1, V(b). *See also generally* Eversource Petition (acknowledging that Intervenors are eligible facilities).

> at the adjusted energy rate derived from the default service rates approved by the commission in each applicable default service supply solicitation and resulting rates proceeding. ... [and] shall also inform the eligible facility that: (1) [Eversource's] purchase from the eligible facility shall be at the eligible facility's interconnection point with [Eversource]; (2) the purchase shall be from the eligible facility's net electrical output and not from the output of another unit; and (3) [Eversource's] purchase would be for 100 percent of the eligible facility's net electrical output.[13]

Second: in response to Eversource's solicitation, eligible facilities like Intervenors' may submit proposals to Eversource to sell the power they generate as follows:

> Each eligible facility's proposal in response to such solicitation shall provide a nonbinding proposed schedule of hourly net output amounts during the term stated over a mutually agreeable period, whether daily, monthly, or over the term used in the default service supply solicitation for the applicable default energy rate and such other information as needed for the eligible facility to submit and [Eversource] to evaluate the proposal.[14]

Third: Eversource "shall select all proposals from eligible facilities that conform to the requirements of this section" and then "shall submit all eligible facility agreements to the commission as part of its submission for periodic approval of its residential electric customer default service supply solicitation."[15]

Fourth: "[a]ll such eligible facility agreements shall be subject to review by the commission for conformity with this chapter in the same proceeding in which it undertakes the review of the electric distribution company's periodic default service solicitation and resulting rates."[16]

B. Intervenors complied with the process, and their power purchase agreements conform to the requirements, of RSA 362-H.

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13 RSA 362-H:2, I(a)-(b) (underline added).

14 RSA 362-H:2, II (underline added).

15 RSA 362-H:2, III (underline added).

16 RSA 362-H:2, V (underline added).

For the reasons described below, Intervenors' power purchase agreements conform to the requirements of RSA 362-H.

1) Eversource's Solicitation included the statutorily required terms but also included additional terms that are inconsistent with RSA 362-H.

On December 6, 2018, Eversource solicited proposals from Intervenors to enter into power purchase agreements ("Solicitation").[17] The Solicitation included a cover letter ("Cover Letter")[18] and draft confirmation ("Confirmation")[19] with attached governing terms ("Governing Terms").[20]

The Solicitation included the statutory terms for the process required by RSA 362-H insomuch as Eversource informed Intervenors:

- "of the opportunity to submit a proposal to enter into a power purchase agreement with the electric distribution company under which the electric distribution company would purchase an amount of energy from the eligible facility for a period that is coterminous with the time period used in the default service supply solicitation" and "that the electric distribution company's purchases of energy from the eligible facility shall be priced at the adjusted energy rate derived from the default service rates approved by the commission in each applicable default service supply solicitation and resulting rates proceeding,"[21] and
- "that: (1) the electric distribution company's purchase from the eligible facility shall be at the eligible facility's interconnection point with the electric distribution

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17 Eversource Petition, ¶ 5 (attaching the Solicitation at bates 000020-49).

18 Solicitation, Cover Letter at bates 000020-22.

19 Solicitation, Confirmation at bates 000023-27.

20 Solicitation, Governing Terms as bates 000028-49.

21 *Compare* Solicitation, Cover Letter at bates 000020-21 *with* RSA 362-H:2, I(a).

company; (2) the purchase shall be from the eligible facility's net electrical output and not from the output of another unit; and (3) the electric distribution company's purchase would be for 100 percent of the eligible facility's net electrical output."[22]

The Solicitation further requested that Intervenors include the following additional information in their proposals:

> 1. Confirmation in writing representing that your facility is indeed an 'eligible facility' under RSA Chapter 362-H.
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> 2. Evidence of authority under the Federal Power Act to make the wholesale energy sales contemplated by RSA Chapter 362-H. If such authority stems from certification as a 'qualifying facility' ('QF') under the Public Utility Regulatory Policies Act ('PURPA'), please provide a copy of the facility's QF certification.
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> 3. Evidence of corporate good-standing and authority to do business in the State of New Hampshire.
>
> 4. A non-binding proposed schedule of hourly net output amounts during the February 1, 2019 through July 31, 2019 term of Eversource's next default energy solicitation.
>
> 5. A completed 'Draft Confirmation' to express Seller's preliminary indication of interest and to accept the terms hereof and of the attached Governing Terms. A final, execution version of this Confirmation will be provided subsequent to PSNH selecting winning suppliers in its default energy service solicitation and developing proposed residential default energy service rates needed for PSNH to submit to the NHPUC as part of its submission for periodic approval of its residential electric customer default service supply solicitation as required by RSA Chapter 362-H.[23]

However, Eversource also included certain conditions within its Solicitation that are contrary to RSA 362-H, some of which would create pre-conditions in RSA 362-H that do not

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22 *Compare* Solicitation, Cover Letter at bates 000020-21 *with* RSA 362-H:2, I(b). *See also* Solicitation regarding the "interconnection point" in the Confirmation at bates 000024 and in the Governing Terms at bates 000030; Solicitation regarding Eversource's purchase from Intervenors of "100% of [their] net energy output" in the Cover Letter at bates 000021, "the net energy output" and "100% of the output" in the Confirmation at bates 000023, 25 and "the net energy output" in the Governing Terms at bates 000029.

23 Eversource Petition, ¶ 5; Solicitation, Cover Letter at bates 000021.

exist in the law, or support flawed arguments that the Commission's actions are preempted by the Federal Power Act ("FPA") or the Public Utility Regulatory Policies Act ("PURPA").[24] For instance:

- Eversource attempted to condition its compliance with New Hampshire law by unilaterally declaring that: "should there be any administrative or judicial challenge regarding the legality or enforceability of any part of NH RSA Chapter 362-H, then, during the pendency of any and all such challenges PSNH will pay the rate set forth in its Tariff for Electric Delivery Service – NHPUC No. 9, set forth in Section 33, 'Rates for Purchases from Qualifying Facilities,' for Product until such time as all challenges to NH RSA Chapter 362-H are finally resolved and not subject to further appeal."[25] Of course, RSA 362-H contains no such condition or consequence concerning its implementation.
- Eversource attempted to require that Intervenors must "maintain [their] status as … a 'qualifying facility' pursuant to 18 C.F.R. Part 292 prior to the Term of this Agreement and maintain such status throughout such Term."[26] But RSA 362-H does not require that Intervenors be or maintain "qualifying facility" status, particularly where, as here, each of the eligible facilities has either obtained or are in the process of obtaining Market-Based Rate ("MBR") authority pursuant to Section 205 of the FPA and Exempt Wholesale Generator ("EWG") status pursuant to the Public Utility Holding Company Act of 2005.

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24 As discussed below, such impermissible conditions that are not required by RSA 362-H but were included by Eversource in an apparent attempt to bolster the flawed preemption arguments in the FERC Proceeding.

25 Solicitation, Cover Letter at bates 000021; Solicitation, Confirmation at bates 000024.

26 Solicitation, Confirmation at bates 000025.

- Eversource sought to define "Good Utility Practice" as compliance with, *inter alia*, "all ISO-NE Rules and ISO-NE Practices...."[27] However, RSA 362-H does not require any participation in the ISO-NE markets, and thus Intervenors removed this language.[28]
- Eversource's Confirmation as sent in its Solicitation under the "Energy Price" section sought to have PSNH pay the adjusted energy rate "as established" by the Commission.[29] However, RSA 362-H does not delegate to the Commission the right to determine the rate. Instead, the rate is determined through the default service procurement process.

Intervenors rejected the impermissible conditions that Eversource sought to impose and timely submitted their proposals (with the additional information requested and appropriate revisions)[30] to Eversource in conformance with the statutory requirements of RSA 362-H.

2) Intervenors' proposals were timely submitted to Eversource.

On November 16, 2018, Intervenors timely submitted their proposals to Eversource for its purchase of their net energy output.[31]

Each proposal complies with the requirements of RSA 362-H as each includes "a nonbinding proposed schedule of hourly net output amounts during the term stated over a mutually agreeable period, whether daily, monthly, or over the term used in the default service supply

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27 Solicitation, Governing Terms at bates 000030.

28 *See, e.g.*, Bridgewater's revised Governing Terms at bates 000063 (defining "Good Utility Practices" without relation to ISO-NE).

29 Solicitation, Confirmation at bates 000024.

30 The Eversource Petition provides a comparison of Eversource and Intervenors' revisions to the Confirmation and Governing Terms at bates 000363-391.

31 Eversource Petition, ¶ 6.

solicitation for the applicable default energy rate and such other information as needed for the eligible facility to submit and the electric distribution company to evaluate the proposal."[32]

Additionally, as requested by Eversource, each proposal includes: (1) a confirmation in writing that each Intervenor is an "eligible facility" under RSA 362-H; (2) evidence of authority under the FPA to make the wholesale energy sales contemplated by RSA 362-H; (3) evidence of corporate good-standing and authority to do business in New Hampshire; (4) a non-binding proposed schedule of hourly net output amounts during the term of the next default energy solicitation; and (5) a signed Confirmation with Governing Terms.

In timely submitting their conforming proposals to Eversource, Intervenors each revised certain language within its draft confirmation and governing terms to remove the impermissible conditions that Eversource was attempting to unilaterally impose, which would effectively nullify New Hampshire law and support the preemption challenge in the FERC Proceeding.

3) Eversource selected each of Intervenors' conforming proposals as power purchase agreements, made two changes, and submitted them to the Commission for its review of their conformity with RSA 362-H.

Upon receiving Intervenors' proposals, RSA 362-H requires two steps. First, that Eversource "shall select all proposals from eligible facilities that conform to the requirements of this section" as power purchase agreements.[33] Second, that Eversource "shall submit all eligible facility agreements to the commission as part of its submission for periodic approval of its residential electric customer default service supply solicitation."[34]

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32 RSA 362-H:2, II.

33 RSA 362-H:2, III.

34 RSA 362-H:2, III.

Eversource selected Intervenors' conforming proposals and submitted them to the Commission **with two revisions** that it made.[35] The first revision that Eversource made to Intervenors' proposals was to the "Payment Terms" contained in the Confirmation.[36] Intervenors do not presently object to Eversource's inclusion of and revisions to the Payment Terms but would object if the language therein concerning "100% Asset Owner" is interpreted to give Eversource any access or rights to Intervenors' capacity and/or a pay-for-performance benefit or to suggest that somehow these terms tether the power purchase agreement to the ISO-NE markets. The inclusion of these terms was proposed by PSNH and participation in the ISO-NE markets is not required by RSA 362-H. The second revision that Eversource made to the Governing Terms included as part of Intervenors' proposals concerns the third paragraph to the preamble of the Governing Terms.[37] Intervenors do not object to Eversource's revisions of this language.

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35 Notwithstanding the fact that "[a]ll five responses varied from the terms and conditions contained in Eversource's solicitation," Eversource Petition, ¶ 6, for the reasons described above, the variances were necessary because Eversource's Solicitation did not conform to RSA 362-H. *See also* comparison of Intervenors' revisions to Confirmation at bates 000363-369 and to Governing Terms at bates 000370-391.

36 Intervenors' "**Payment Terms**" state: "Notwithstanding anything in this Confirmation or Governing Terms to the contrary, this Transaction will be effectuated by designating PSNH, ID 50094, the Asset Owner for ISO-NE billing and settlement purposes. Payment will equal Delivered Energy times the Energy Price adjusted for any revenues or expenses readily identifiable in the ISO-NE bill resulting from ownership not included in 'Market Energy Clearing Price,' including any and all resettlements. All other revenue that PSNH receives from ISO-NE shall be credited to Seller by the 21st day of the next month." *See* Eversource Petition at bates 000364 (showing "red lined" revisions to Intervenors' proposals).

Eversource's revisions to Intervenors' "**Payment Terms**" state: "Notwithstanding anything in the Confirmation or Governing Terms to the contrary, each Transaction required under this Order will be effectuated by designating PSNH, ID 50094, as 100% Asset Owner for ISO-NE billing and settlement purposes. Payment will equal Delivered Energy times the Energy Price adjusted for any revenues or expenses readily identifiable in the ISO-NE bill resulting from ownership not included in 'Market Energy Clearing Price,' including any and all resettlements. All other revenue net of costs that PSNH receives from ISO-NE attributable to ownership of the unit shall be credited to Seller consistent with the Section 5 of the Governing Terms." *See* Eversource Petition, ¶ 18 (underline added to show Eversource's revisions to Intervenors' proposed Payment Terms). *See also* each of Intervenors' proposals submitted to the Commission by Eversource as Attachments B, I through V.

37 Intervenors' language states: "PSNH's performance under this Confirmation is expressly subject to and conditioned by the terms herein and in Attachment A and an order from the NHPUC reviewing this Confirmation and its Attachment A and finding that they are in conformity with RSA 362-H." *See* Eversource Petition at bates 000364 (showing "red lined" revisions to Intervenors' proposals).

Eversource's revisions to Intervenors' language states: "PSNH's performance hereunder is expressly subject to and conditioned upon the terms herein and in the Confirmation and an order from the New Hampshire Public

With the inclusion of these two revisions made by Eversource to Intervenors' proposals, Eversource submitted them to the Commission as the "agreements" pursuant to RSA 362-H for the Commissions' review as follows:[38]

- The Pinetree power purchase agreement ("Pinetree Agreement");[39]
- The Bridgewater power purchase agreement ("Bridgewater Agreement");[40]
- The Springfield power purchase agreement ("Springfield Agreement");[41]
- The Pinetree Tamworth power purchase agreement ("Pinetree Tamworth Agreement");[42] and
- The Whitefield power purchase agreement ("Whitefield Agreement")[43] (collectively, "Intervenors' Agreements").

Despite all of the foregoing, in violation of the plain language of RSA 362-H, Eversource states "it did not intend to enter into formal, bilateral power purchase agreements ('PPA') with [Intervenors], but, instead, would make the purchases specified by RSA 362-H if and to the extent

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Utilities Commission ('NHPUC') reviewing the Confirmation and Governing Terms and finding that provisions addressed by RSA 362-H and contained herein are in conformity with RSA 362-H." *See* Intervenors' proposals submitted to the Commission by Eversource, and revised by Eversource, as Attachments B, I through V (underline added to show Eversource's revisions to Intervenors' proposed language).

38 *Compare* Eversource Petition, ¶ 6 ("Copies of the five proposals received by Eversource are attached to this Petition at Attachment B (I through V).") *with* RSA 362-H:2, III.

39 Pinetree Agreement at bates 000052-101 (Cover Letter, executed draft Confirmation with Governing Terms, QF Certificate and Secretary of State Certificate).

40 Bridgewater Agreement at bates 000103-156 (Cover Letter, executed draft Confirmation with Governing Terms, QF Certificate and Secretary of State Certificate).

41 Springfield Agreement at bates 0001158-211 (Cover Letter, executed draft Confirmation with Governing Terms, QF Certificate and Secretary of State Certificate).

42 Pinetree Tamworth Agreement at bates 000213-261 (Cover Letter, executed draft Confirmation with Governing Terms, QF Certificate and Secretary of State Certificate).

43 Whitefield Agreement at bates 000263-316 (Cover Letter, executed draft Confirmation with Governing Terms, QF Certificate and Secretary of State Certificate).

that this Commission orders it to do so," likening this unilaterally imposed process "to the 'rate orders' issued by this Commission in the 1980's, under the Public Utility Regulatory Policies Act ('PURPA')."[44]

Simply put, Eversource has "decided not to enter into any formal PPAs under SB 365 in order to preserve rights under the Federal Power Act ('FPA') and PURPA in the event that the legality of SB 365 was challenged."[45] Eversource's unilateral decision to violate New Hampshire law is further contrary to its acknowledgment that the requirements of RSA 362-H are an exercise of the police power of the State of New Hampshire.[46]

4) The PUC must review Intervenors' Agreements for conformity with RSA 362-H and order Eversource to comply with New Hampshire law.

RSA 362-H establishes the Commission's task with respect to Intervenors' Agreements that have been submitted to it by Eversource: "all such eligible facility agreements shall be subject to review by the commission for conformity with this chapter...."[47]

For the reasons discussed herein, and upon a review of Intervenors' Agreements, the Commission must find that they conform to the requirements of RSA 362-H.[48] Moreover, with regard to the only aspect of discretion that is allowed under RSA 362-H, Eversource determined that Intervenors' Agreements conform to the statutory requirements because it selected them for submission to the Commission for its review.

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44 Eversource Petition, ¶ 7.

45 Eversource Petition, ¶ 8.

46 Solicitation, Cover Letter at bates 000022.

47 RSA 362-H:2, IV.

48 *Compare* RSA 365-H *with* Intervenors' Agreements (conforming to statutory requirements).

But for Eversource's unilateral decision to violate New Hampshire law by not signing Intervenors' Agreements, they are complete and in conformance with RSA 362-H. Yet, Eversource states that it does not intend to enter into Intervenors' Agreements, and that it will only do so if the Commission "mandates" these purchases.[49] But it is New Hampshire law that requires Eversource to enter into the power purchase agreements -- not a Commission requirement, ruling or order. Eversource must comply with RSA 362-H until it is repealed, or a court of competent jurisdiction determines RSA 362-H is unlawful or stays the implementation of RSA 362-H. None of these have occurred.

Thus, Intervenors request that the Commission declare Intervenors' Agreements conform to the requirements of RSA 362-H, and direct that Eversource must comply with RSA 362-H by signing them.

III. The Commission need not act on or agree with Eversource's irrelevant and extra-statutory issues because doing so could nullify RSA 362-H and/or support the arguments being advanced against RSA 362-H in the FERC Proceeding.

The remainder of the Eversource Petition raises a series of red-herring issues that Intervenors will address as a matter of course, but which are not necessary for the Commission's review in this proceeding nor are they relevant to RSA 362-H.[50] The Commission should avoid being drawn into unnecessarily ruling upon issues that could be viewed as being beyond the scope of the Commission's RSA 362-H obligations in an effort to have a court determine that RSA 362-H is preempted by FPA or PURPA, which is simply not true.

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[49] *See, e.g.*, Eversource Petition, ¶ 16 (requesting that "any Commission order mandating purchases…."), ¶ 17, 18 & 19 (describing "any Commission order mandating purchases….") and ¶ 20 (stating that the "Commission determination should mandate such obligations…."). But as Eversource's Solicitation itself makes clear, it is not the Commission that mandates its purchase from Intervenors, but rather RSA 362-H. *See* Solicitation, Cover Letter at bates 000020 ("Re: Solicitation Mandated by New Hampshire RSA Chapter 362-H").

[50] Eversource Petition, ¶¶ 9-22.

A. The FERC Proceeding.

Eversource has unilaterally "decided not to enter into any formal PPAs under SB 365 in order to preserve rights under the Federal Powers Act ('FPA') and PURPA in the event that the legality of SB 365 was challenged."[51] The Eversource Petition then references and attaches a FERC *Petition for Declaratory Order and Request for Expedited Action* filed by the New England Ratepayers Association ("NERA Petition").[52] Eversource also references but does not attach various protests thereto including the Protest of the State of New Hampshire ("NH Protest") and the Protest of the New Hampshire Generator Group ("NHGG Protest").[53]

If in the unlikely event that FERC was to issue a declaratory order, such an order in and of itself would have "no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA" and/or determine whether RSA 362-H is preempted.[54] Such an order from FERC, or a court of competent jurisdiction, is unlikely including for the reasons set forth in the NH Protest and the NHGG Protest.

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51 Eversource Petition, ¶ 8.

52 FERC Docket EL 19-10. *See also* Eversource Petition, ¶ 14 and FN 1.

53 While all filings in FERC Docket EL-19-10 are available from the FERC e-Library, the NH Protest is attached hereto as **Exhibit 1** and the NHGG Protest is attached hereto as **Exhibit 2** for ease of reference for the Commission.

54 Regarding the authority of FERC declaratory orders, "[a]n order that does no more than announce the Commission's interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA." *Xcel Energy Servs. Inc. v. F.E.R.C.*, 407 F.3d 1242, 1244 (D.C. Cir. 2005) (Ginsburg, J.) (quoting *Niagara Mohawk Power Corp. v. F.E.R.C.*, 117 F.3d 1485, 1488 (D.C. Cir. 1997)). Eversource tacitly acknowledges as much in its draft Governing Terms, which sought to impose a dispute resolution process that would replace the need for a court of competent jurisdiction. *See* Solicitation, Governing Terms at bates 000045-46. It similarly acknowledges that the Commission should not rule on any issues that are beyond the scope of RSA 362-H. *See* id. (providing that if the Commission "disclaims jurisdiction because the Dispute is subject to FERC's jurisdiction, then the Parties may seek to resolve such Disputes before FERC.").

B. PURPA is irrelevant and RSA 362-H is not related to QF status.

Eversource makes a variety of PURPA arguments and seeks to have the Commission make avoided cost determinations, relying on *Connecticut Light & Power Co. ("CL&P")*[55] for its argument that "FERC found that a Connecticut statute similar to New Hampshire's SB 365 requiring Eversource's affiliate to purchase the output from a generating facility at a rate based upon CL&Ps [sic] retail energy rate is 'among other things, preempted by section 210 of PURPA and the Commission's regulations promulgated thereunder."[56] However, no such avoided cost determinations are necessary, and Eversource's arguments in this regard are procedurally and substantively incorrect.

Most importantly, RSA 362-H does not require Eversource to purchase any energy from Intervenors based on status as a qualifying facility ("QF") under PURPA.[57] Because RSA 362-H is not a law invoking PURPA and/or QF status, there is no reason for the Commission to engage in an exercise to determine whether RSA 362-H is consistent with avoided costs. Furthermore, the mere fact that Intervenors may, or may not, be QFs is irrelevant to the requirements of RSA 362-H because that law is not directed at purchasing power from QFs. For these reasons, Eversource's attempt to require Intervenors to maintain QF status was among the impermissible conditions in its Solicitation that Intervenors rejected. And even if FERC did determine that

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55 71 FERC ¶ 61,035, 61,150 (Apr. 12, 1995).

56 Eversource Petition, ¶ 11.

57 *See generally,* RSA 362-H.

PURPA was at issue, Intervenors would be prepared to relinquish their QF status to the extent necessary.[58]

Procedurally, the only reason that any of the issues in *CL&P* were before FERC is because the parties stipulated to the scope and nature of a referral from the United States District Court for the District of Connecticut concerning a challenge to the underlying Connecticut law.[59] No such court proceeding is pending with regard to RSA 362-H.

Substantively, the Connecticut law at issue in *CL&P* is different from RSA 362-H because RSA 362-H does not "regulate rates."[60] Rather, it mandates a purchase based upon a competitive procurement process established in an existing and otherwise unchallenged New Hampshire law.

C. The Commission should not make any determinations regarding federal preemption.

RSA 362-H is the law, and the Commission need not, and should not, engage in a detailed review of the interplay between RSA 362-H and FERC's jurisdiction under the FPA, particularly where those issues are already before FERC, and where Eversource is an intervenor in the FERC Proceeding.

Eversource also attempts to bolster its flawed preemption arguments by claiming that RSA 362-H requires it to sell Intervenors' power into the ISO-NE market.[61] Again, however, there is

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58 Eversource also argues that is should not have to purchase from Pinetree Tamworth because it is a QF with a capacity greater than 20 MW. Because Eversource is not required to purchase from QFs with a capacity greater than 20 MW, it need not purchase from Pinetree Tamworth. Eversource Petition, ¶ 13. But for the same reasons as above, RSA 362-H has nothing to do with PURPA or QF status, and thus, the Commission need not make any determinations with respect thereto.

59 *Connecticut Light & Power Co. v. South Eastern Connecticut Regional Resources Recovery Authority*, 822 F.Supp. 888, 892 (D.Conn. 1993).

60 *See Connecticut Light & Power Co.*, 70 FERC ¶61,012, 61,023 (Jan. 11, 1995).

61 Eversource Petition, ¶ 20. *See also* Eversource Petition, Direct Testimony of Frederick B. White, bates 000355-356.

no reason for the Commission to entertain that factual argument because there is simply no requirement in RSA 362-H that mandates any participation in that market. Federal courts and FERC have already spoken to this issue and have determined that there is a difference between laws that mandate market participation and those that leave such market participation to the discretion of the market participants.[62] This is simply another effort to bolster their flawed preemption arguments. The Commission should not be drawn into Eversource's attempt to add such an obligation to RSA 362-H in order to support a potential "tethering" issue under *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016), which does not otherwise exist under RSA 362-H.

D. There is no ambiguity in RSA 362-H as between "energy" and "capacity." RSA 362-H only addresses the purchase of energy.

Eversource argues that it "is uncertain whether SB 365 only applies to the sale of 'energy' and not 'capacity' produced by the eligible facilities."[63] First, RSA 362-H is unambiguous because

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62 The question of whether a reference to a wholesale market price in a state program constitutes an impermissible tie to the wholesale power markets has already been litigated in the Second and Seventh Circuits in the context of the Zero Emission Credit ("ZEC") programs in New York and Illinois, respectively. In both of those cases, the courts upheld the state programs and found that the respective relationships of ZEC prices to wholesale market prices did not constitute impermissible tethering because the programs did not require participation in those wholesale markets. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (upholding the Illinois ZEC program, in part, because "how [a generator] sells that power is up to it. It can sell the power to an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts"); *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (upholding the New York ZEC program, in part, because "Plaintiffs concede that the ZEC program 'does not expressly mandate that the plants receiving ZEC subsidies bid into the NYISO auctions'").

In the Seventh Circuit proceeding, FERC and the Department of Justice submitted an *amicus brief* responding to the same argument that Eversource provides here – that as a practical matter, they have "no alternative to bidding into the auction, 'such that the ZEC subsidy will not occur unless the winning nuclear generators sell their energy into the wholesale markets.'" Brief for the United States and the Federal Energy Regulatory Commission ("FERC/DOJ") as Amici Curiae in Support of Defendants-Respondents and Affirmance at p. 12, *Village of Old Mill Creek, et al. v. Star* (7th Cir., May 29, 2018). FERC/DOJ explained that "[b]usiness realities and market forces cannot be so easily equated with requirements imposed by force of law" and that "a 'business decision' to sell at the auction 'is irrelevant from a preemption perspective' and is not equivalent to a 'state directive.'" *Id.* (*citing Coal. For Competitive Elec. V. Zibelman*, 272 F. Supp. 3d 554, 570 (S.D.N.Y. 2017). FERC/DOJ further explained that "[e]quating private action with state regulation would take preemption doctrine down a path not contemplated by the Supreme Court's 'limited' holding". *Id.* at 13.

63 Eversource Petition, ¶ 16.

it only refers to, and only requires the purchase of, "energy." There is no mention of "capacity." In this regard, the plain language of the law speaks for itself. Second, even Eversource agreed that there was no ambiguity in RSA 362-H -- at least at the time of its Solicitation, which repeatedly acknowledged that its purchase would be only for energy.[64]

E. Eversource's "cost of compliance" changes are not necessary.

Eversource requests that "the Commission also order that the costs of compliance will be recovered as part of [its] started cost recovery...."[65] However, RSA 362-H addresses this issue, and Intervenors' revisions to Eversource's draft Confirmation reflect the statutory text.[66] Thus, Eversource's requests in this regard, including for a Commission order here, are unnecessary because RSA 362-H:2, V sets the requirements for cost recovery.

F. Eversource's final efforts to lure the Commission into making unnecessary and irrelevant orders.

The Eversource Petition concludes with final efforts to lure the Commission into mandating the energy purchases that are required by RSA 362-H.[67] But it is not the Commission's order(s) that mandate(s) Eversource's purchase of Intervenors' energy. Rather, it is New Hampshire law pursuant to RSA 362-H that mandates those purchases.

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64 *See* Solicitation, Confirmation at bates 000023 (defining "Product" and "Energy Price" for purchase of energy, not capacity), Governing Terms at bates 000032 (defining "Products" to "mean Energy only"). Nowhere in the Solicitation is there anything to do with the purchase of capacity.

65 Eversource Petition, ¶ 17.

66 *See, e.g.*, Bridgewater Agreement at bates 000110 (defining "Cost Recovery" to be "[a]s provided in RSA 362-H:2, V, PSNH is eligible to recover the Transaction's difference between its energy purchase costs and the market clearing price through a nonbypassable delivery services charge applicable to all customer's in PSNH's service territory. The charge may include reasonable costs incurred by PSNH, and the charges shall be allocated using the customer class allocation percentages approved in NHPUC docket DE 14-238, order 25,920.").

67 Eversource Petition, ¶¶ 19-20 (arguing repeatedly that the Commission should mandate the purchases that are in fact required by RSA 362-H).

Instead of adopting the language that Eversource requests the Commission to include in any order,[68] the Commission should simply order that Eversource comply with New Hampshire law by signing Intervenors' Agreements, or the final forms thereof, once they have been found to be in conformity with RSA 362-H.

IV. Conclusion.

For the foregoing reasons, Intervenors respectfully request that the Commission:

A. Review Intervenors' Agreements for conformity with RSA 362-H;

B. Determine that Intervenors' Agreements conform with RSA 362-H;

C. Order that Eversource must comply with RSA 362-H by signing Intervenors' Agreements; and

D. Not issue any other orders or rulings regarding matters that are beyond the scope of the review of Intervenors' Agreements for conformity with RSA 326-H.

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[68] Eversource Petition, ¶ 19 ("The Commission's order(s) should require executed Confirmation Forms for each eligible facility signed by Sellers and a final version of the Governing Terms document, both which conform to the Commission's order(s) addressing the various issues herein, be finalized and filed with the Commission prior to the start of deliveries under SB 365. PSNH's performance hereunder is expressly mandated by this Order and such performance is subject to and conditioned upon the terms set forth in the 'Governing Terms for purchase by Public Service Company of New Hampshire d/b/a/ Eversource Energy (Buyer' pursuant to the legal mandate set forth in New Hampshire RSA Chapter 362-H' and in the Confirmation as each is approved by this Order.").

Respectfully submitted,

SPRINGFIELD POWER LLC,
DG WHITEFIELD LLC,
BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER TAMWORTH LLC, and
PINETREE POWER LLC

By Their Attorneys,

SHAHEEN & GORDON, P.A.

Date: December 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused this Motion to be filed in hand and electronically to the Commission and electronically, or by U.S. Mail, First Class, to the persons identified on the Commission's Service List for this docket in accordance with N.H. Admin. R. Puc 203.11.

Date: December 17, 2018

Timothy J. McLaughlin (NH Bar # 19570)

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association	)	Docket No. EL19-10-000

PROTEST OF
THE STATE OF NEW HAMPSHIRE

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.211, and the Notice of Petition for Declaratory Order issued by the Commission on November 2, 2018, the State of New Hampshire, acting through its attorneys, the Office of the Attorney General ("Attorney General"),[1] protests the Petition for Declaratory Order and Request for Expedited Action ("Petition") filed in this Docket on November 2, 2018, by the New England Ratepayers Association ("NERA"). As discussed below, the Petition is premature, and because it is premature, there is no adequate evidentiary record before it. The Commission should follow its precedent and allow the state regulatory agency—here the New Hampshire Public Utilities Commission ("NHPUC")—to implement the statute. The Attorney General requests that the Commission dismiss the Petition for the reasons discussed herein.

I. The Petition Should Be Dismissed Because It Seeks Relief Prematurely.

The Commission should dismiss the Petition as premature. The Petition asks that the Commission issue a declaratory order finding that New Hampshire Senate Bill 365 ("SB 365")[2] is preempted by the Federal Power Act ("FPA"). Petition at 1. SB 365 requires electric

[1] The Attorney General filed an intervention in this proceeding on November 27, 2018.

[2] SB 365, 2018 N.H. Laws Ch. 379, An Act relative to the use of renewable generation to provide fuel diversity, codified at NH RSA 362-H.

distribution companies ("EDCs") that are subject to the NHPUC's supervision to procure default energy service for residential class customers to also solicit proposals from and offer agreements to certain eligible facilities.[3] But while the statute sets an "adjusted energy rate,"[4] the Petition ignores the salient facts that (i) SB 365 does not impose an obligation on the eligible facilities to sell to the EDCs; (ii) SB 365 does not compel the EDCs to "sell that energy into the ISO-NE market" as claimed in the Petition at 10;[5] (iii) to the extent that the eligible facilities do sell to the EDCs, SB 365 does not make any proclamations about FERC jurisdiction over such agreements; and (iv) the NHPUC has not yet had the opportunity to review the eligible facility agreements that the EDC would submit in NHPUC proceedings concerning the EDC's periodic default energy service solicitation and resulting rates. Accordingly, "[a]t this point in the proceeding, we are not presented with a state statute that lies in conflict with the FPA. Thus, there is no controversy or uncertainty for the Commission to resolve at this time." *Idaho Power Co.*, 161 FERC ¶ 61,284, at P 15 (2017).

Participation by eligible facilities is voluntary and there is no way to know at this early stage which eligible facilities will participate in the solicitation and whether they will execute contracts. The statute requires EDCs to offer to purchase the net energy output of eligible facilities (NH RSA 362-H:2) and provides eligible facilities the opportunity to submit proposals to EDCs: the EDC's solicitation "shall inform eligible facilities of the opportunity to submit a proposal to enter into a power purchase agreement…" NH RSA 362-H:2, I(a). As the

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3 "Eligible facility" is defined in the state statute as one that produces electricity for sale by the use, as a primary energy source, of biomass, or municipal solid waste, with certain additional parameters specified. NH RSA 362-H:1, V(a)-(b).

4 "Adjusted energy rate" is eighty percent of the default service energy rate for residential class customers, less the rate component for compliance with the state's renewable energy portfolio standards program. NH RSA 362-H:1, I, IV.

5 The statute contains no such requirement and instead specifically contemplates that the energy purchased from eligible facilities will be used to serve retail customers as part of the EDCs' default service. NH RSA 362-H:2, III.

Commission has previously held in dismissing another petition for declaratory order, "the voluntary nature" of the program makes concerns "speculative at this time." *Southern Maryland Elec. Coop. Inc. v. Choptank Elec. Coop. Inc.*, 157 FERC ¶ 61,118, at P 26 (2016). Granting the Petition at this time would foreclose an opportunity for the NHPUC to address the matter in the first instance. *Id.* at P 27 ("The Commission's issuance now of an order on the merits of the Petition could, in this latter circumstance where there are available state fora, inappropriately interfere with the Maryland Commission's and any state court's efforts to address the Cooperatives' concerns at the state level").

While the Petition complains that "SB 365 makes no provision for filing the PPAs with FERC for review under section 205 of the Federal Power Act, and does not condition the PPAs' effectiveness upon FERC approval" (Petition at 13), there is nothing in SB 365 that precludes such filings or otherwise wrests authority from FERC. Thus, the claim made in the Petition is unripe. *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U. S. 190, 205 (1983) ("The basic rationale of the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'") (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)); *NextEra Energy Res., LLC v. ISO New England Inc.*, 156 FERC ¶ 61,150, at P 15 (2016) (dismissing complaint asserting that state regulators in Massachusetts, New Hampshire, Connecticut and Rhode Island were on the verge of implementing agreements that would allow certain EDCs to buy natural gas pipeline capacity and recover costs from retail ratepayers, even though EDCs cannot use the capacity; finding that the complaint "is not ripe for consideration.

The circumstances giving rise to the Complaint are in a state of flux and the Commission does not have before it the concrete facts necessary to determine whether the tariff will be unjust and unreasonable").

II. The Commission Should Not Make Declarations Interpreting a New Hampshire Statute.

The Petition raises potential federal-state jurisdictional issues that can—and should—be avoided by the Commission until such time as the statute is implemented by the EDCs, the eligible facilities, and the NHPUC and, then only if implementation truly establishes a "controversy" that needs terminating under FERC Rule 207.[6] Further, the Commission should not lightly jump into jurisdictional waters. As recognized by Justice Sotomayor, "the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence. Pre-emption inquiries related to such collaborative programs are particularly delicate." *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J. concurring).

"It is, moreover, axiomatic that, when a state legislature has sounded an uncertain trumpet, a federal court charged with interpreting the statute ought, if possible, choose a reading that will harmonize the statute with constitutional understandings and overriding federal law." *Vote Choice, Inc. v. DiStefano*, 4. F.3d 26, 41-42 (1st Cir. 1993) (citing 1A Norman J. Singer, Sutherland Statutory Construction Sec. 23.21 (4th ed. 1985 & Supp. 1993)). The Supreme Court has held that "[i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal

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[6] The prematurity of the Petition underscores the fact that NERA has not shown imminent harm if the Commission does not act by the Petition's requested deadline. The public interest would be served by the Commission's not acting hastily on an incomplete record.

Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted). *Cf. New York v. FERC*, 535 U.S. 1, 17-18 (2002) (recognizing that "[t]he Court has most often stated a 'presumption against pre-emption' when a controversy concerned not the scope of the [f]ederal [g]overnment's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of [f]ederal [g]overnment authority").

The presumption against preemption is particularly strong when the states are regulating health and safety matters. The Federal Government thus grants states "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic*, 518 U.S. at 475 (citation omitted). In enacting SB 365, the New Hampshire General Court[7] specifically found that eligible facilities are important not only to the state's economy but also "because they provide fuel diversity and environmental benefits, which protect the health and safety of the state's citizens and the physical environment of the state." SB 365, 2018 N.H. Laws Ch. 379:1. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

At the heart of the Petition's complaint seems to be the Petitioner's dissatisfaction with the adjusted energy rate that is tied to the rate for EDCs' competitively procured default energy service for the residential ratepayer class. However, it is beyond dispute that states may—in exercising their traditional authority over electricity generation and retail operations—encourage renewable resources and may do so by requiring utilities subject to their jurisdiction to purchase

[7] The New Hampshire General Court is the bicameral state legislature of State of New Hampshire.

renewable generation. "[S]tates have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or order utilities to purchase renewable generation." *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (citing *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, at 62,080 (1995)). Indeed, a state legislature "can direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses." *Entergy Nuclear Vermont*, 733 F.3d at 417 (quoting *New York v. FERC*, 535 U.S. 1, 8 (2002)) (internal quotation marks omitted). Under the FPA, states retain "authority over . . . administration of integrated resource planning and . . . authority over utility generation and resource portfolios." *New York v. FERC*, 535 U.S. 1 at 24 (citation omitted). Additionally, the adjusted energy rate is tied to the default service energy rate, which is under the purview of the NHPUC. As the Commission has recognized, "issues involving potential recovery of costs from retail customers are within the province of the state." *Exelon Corp. v. PPL Electric Utilities Corp. and PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,176, at P 27 (2006).

"Commission action on petitions for declaratory order is discretionary with the agency." *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984); *see* 5 U.S.C. § 554(e) (Commission may "in its sound discretion . . . issue a declaratory order to terminate a controversy or remove uncertainty"). Here, declining to grant the Petition would be consistent with the Commission's statement that "it is not [FERC's] intent to interfere with state programs that further specific legitimate policy goals." *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 137 (2010), *order on reh'g*, 150 FERC ¶ 61,208 (2015). *See also Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("the structure and limitations of federalism . . . allow the

States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (quoting *Medtronic*, 518 U.S. at 475); *KN Wattenberg Transmission Ltd. Liability Co.*, 93 FERC ¶ 61,041, at 61,090 (2000) (in examining whether a facility might qualify as a non-jurisdictional (NGA-exempt Hinshaw) facility, the Commission "took into account the Colorado PUC's claim"; "we presume that where a state commission declares its intent to assume regulatory duties over in-state distribution lines, such pipelines then qualify for exemption from federal jurisdiction").

Similar to analyses the Commission has undertaken in denying petitions for declaratory order to allow the matter to be decided in a more appropriate venue,[8] the Commission here should allow the state regulatory agency to implement the statute, and if there are objections to its implementation, allow the party that is alleging harm to take the matter up with the appropriate court.

III. The Petition's Request That SB 365 Violates PURPA Is Likewise Premature.

The Petition also requests that the Commission declare that SB 365 violates section 210 of PURPA because the legislature allegedly ignored the requirement under PURPA and under FERC's regulations that rates set by the states for wholesale sales by qualifying facilities ("QFs") may not exceed the purchasing utilities' avoided costs. Petition at 1, 15-16. This question, however, is necessarily subsidiary to a finding of preemption under the FPA, and should not be reached until a decision under the FPA is made. As set out above, a determination of preemption under the FPA is premature at this time on the present record. If the Commission nonetheless

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[8] *See, e.g., Kentucky Utils. Co.*, Order Denying Request for Declaratory Order, 109 FERC ¶ 61,033 (2004) (finding that the contract dispute does not warrant assertion of the Commission's primary jurisdiction under *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,332, *reh'g denied*, 8 FERC ¶ 61,031 (1979)). *See also QST Energy Trading Inc. v. Cent. Illinois Pub. Serv. Co. and Union Elec. Co.*, 85 FERC ¶ 61,166, at 61,666 (1998) (exercising its discretion and declining to exercise jurisdiction and allowing the matter to be decided by the appropriate court because "[a] determination as to whether QST is an eligible utility turns on Illinois statutory construction").

decides to address the request with respect to PURPA, those issues are similarly premature on the present record and without further action at the state level.

Petitioner's PURPA preemption argument lacks evidentiary support. The Petition argues that the rate established by the statute "bears no relationship to the buyers' avoided cost" (*id.* at 4); however, there is no evidence supplied for this conclusion. SB 365, as the Petition recognizes (*id.* at 7), provides that the adjusted energy rate is 80 percent of the default service energy rate applicable to residential customers, less the rate component for compliance with the state's renewable energy portfolio standards ("RPS") law.[9] Although the Petition cites the most recently approved default service solicitations for Public Service Co. of New Hampshire (d/b/a Eversource Energy) ("PSNH") and Unitil Corporation ("Unitil"),[10] and proposes a theory as to why this rate exceeds the avoided cost (Petition at 18-19), there is insufficient information in the record for the Commission to make a determination that the statute's rates will exceed the utilities' avoided cost.

States have exclusive jurisdiction over the designing of their retail programs and default service, and rates for default service. *FERC v. Elec. Power Supply Assoc.*, 136 S. Ct. 760, 762 (2016) ("But [the FPA] places beyond FERC's power, leaving to the States alone, the regulation of 'any other sale'—*i.e.*, any retail sale—of electricity. §824(b)"). While SB 365 introduces a new procurement obligation imposed on EDCs, these EDCs are subject to the NHPUC's jurisdiction and must submit all agreements to the NHPUC as part of their submission for the periodic approval of their residential electric customer default service supply solicitation

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9 NH RSA 362-H:I, IV.

10 The Petition states that pursuant to NHPUC orders, the PSNH default service rate for residential customers is 9.412 cents/kWh, which includes a 0.369 cents/kWh RPS compliance adder, and that the Unitil default service rate for residential customers is 11.689 cents/kWh, which includes an RPS adder of 0.082 cents/kWh. *See* Petition at 8-9.

obligations. Here, although the Petition asserts that the adjusted energy rate will exceed the EDCs' avoided cost rate (Petition at 3, 19), there is no evidence in the record that it will indeed do so.

The avoided cost rate in New Hampshire is currently set for all QF sales as the market clearing price for ISO New England Inc. ("ISO-NE"). However, the determination that the rate in the statute exceeds the utilities' avoided cost is one that needs to be made in the first instance by the NHPUC, not by the Commission in response to the Petition. *See Council of the City of New Orleans*, 145 FERC ¶ 61,057, at P 30 (2013) ("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"). The Petition cites to a NHPUC order approving settlement terms that "avoided cost rates for purchases of IPP power pursuant to PURPA [and another state program] shall be equal to the market price for sales into the ISO-NE power exchange, adjusted for line losses, wheeling costs, and administrative costs." Petition at 18. The Settlement Agreement approved by the NHPUC expressly provides that "[n]othing in this Agreement shall be construed as limiting the [NHPUC's] authority with respect to calculating avoided costs. The Settling Parties agree not to oppose the opening of a generic docket or rulemaking upon petition by any Settling Party to consider the proper calculation of Avoided Costs under PURPA [and the other state program] for all electric distribution companies in New Hampshire." 2015 Public Service Company of New Hampshire

Restructuring and Rate Stabilization Agreement, at 12, NHPUC Docket Nos. DE 11-250 and DE 14-236 (filed June 10, 2015).

Thus, the avoided cost for these EDCs and these eligible facilities in New Hampshire is not set in stone and is a matter for the NHPUC to determine. Accordingly, not only does the Petition not prove that the adjusted energy rate is higher than avoided cost, it cannot. The existence of a provision of the statute that allows EDCs to collect a non-bypassable charge in the event that they fail to collect their full costs (Petition at 3, 19) is not evidence that the adjusted energy rate is higher than avoided cost.[11] As the Petition concedes, "the 20% deduction in the rate . . . is not an actual determination of avoided cost." Petition at 19, n.42. Without interference from the Commission, the NHPUC may go about its business of setting the avoided cost rates and ensuring that the adjusted energy rate does not exceed such rates.

Indeed, the NHPUC may well set an avoided cost that is specific to these types of facilities. As the Commission has explained:

> where a state requires a utility to procure energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. Thus, the guidance provided by the Commission in this proceeding simply reflects the reality that states have the authority to dictate the generation resources from which utilities may procure electric energy. Just as, for example, an avoided cost rate may reflect a state requirement that utilities must 'scrub' pollutants from coal plant emissions, so an avoided cost rate may also reflect a state requirement that utilities purchase their energy needs from, for example, renewable resources.

Calif. Pub. Utilities Comm'n, Order Denying Rehearing, 134 FERC ¶ 61,044, at P 30 (2011).

[11] Moreover, the NHPUC has not yet had the opportunity to consider the EDCs' proposed method for calculating the nonbypassable charge, which may include reasonable costs incurred by the EDCs.

The Petition cites to this very lines of cases as support for its argument that "[b]ecause the New Hampshire statute purports to set the rates for wholesale sales by 'eligible facilities' outside of PUPRA, it is plainly preempted under this Commission's analysis" in these cases. Petition at 15 (citing *Calif. Pub. Utilities Comm'n*, 132 FERC ¶ 61,047 (2010) ("*California PUC*"), *order granting clarification*, 133 FERC ¶ 61,059 (2010), *order denying reh'g*, 134 FERC ¶ 61,044 (2011)). However the Petition misapplies the Commission's precedent in *California PUC*. There, while the Commission found that the California Public Utility Commission's ("CPUC's") decisions constituted impermissible wholesale rate-setting by the CPUC, FERC found that "to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations, subject to certain requirements." *California PUC* at P 65 (emphasis in original). The Commission conditioned this finding on the following requirements: "as long as (1) the CHP generators which the CPUC is requiring the Joint Utilities to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility." *Id.* at P 67. The Commission made this finding notwithstanding the fact that "the CPUC has not argued that its AB 1613 program is an implementation of PURPA." *Id.* at P 64.

Importantly, the Commission found that there was "no record in these proceedings on which FERC may determine whether the CPUC offer price is consistent with the avoided cost rate requirements of PURPA." *Id.* at P 68. Here, too, there is no record upon which FERC may determine that the adjusted energy rate is inconsistent with the rate requirements of PURPA. Thus, to the extent that the Commission makes a finding that SB 365 attempts to set wholesale rates for eligible facilities—notwithstanding the arguments above—the record here is devoid of

any evidence of the actual adjusted energy rate to be applied to a particular PPA and of a state determination of the utilities' avoided costs, and is thus premature. *See Nevada Hydro Co.,* 164 FERC ¶ 61,197, at PP 22-23 (2018) (dismissing as premature "a request to designate [a pumped storage facility] as a transmission facility is premature at this time. [The facility] has not been studied in the CAISO TPP. . . . Absent such information, the Commission cannot make a reasoned decision on whether [the facility] is a transmission project and thus eligible for cost-recovery. . . ."; agreeing with argument "that there is no controversy or uncertainty necessitating a declaratory finding at this time").

IV. CONCLUSION

The Attorney General requests, for the reasons set forth above, that the Commission decline to issue a ruling that SB 365 is preempted by the FPA and violates section 210 of PURPA, and instead dismiss the Petition as premature.

Respectfully submitted,

State of New Hampshire

By its attorneys,

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Dated: December 3, 2018

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon the parties identified on the Commission's official service lists in these proceedings by electronic means.

Dated at Washington, D.C. this 3rd day of December, 2018.

By: */s/ Kimberly B. Frank*

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EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association	)	Docket No. EL19-10-000

MOTION TO INTERVENE AND PROTEST OF
THE NEW HAMPSHIRE GENERATOR GROUP

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure,[1] the New Hampshire Generator Group ("NHGG")[2] respectfully submits this Motion to Intervene and Protest in response to the petition for declaratory order filed by the New England Ratepayers Association ("NERA") on November 2, 2018 in the above-captioned docket (the "Petition"). NERA's Petition requests that the Commission issue an order finding that New Hampshire Senate Bill 365, which is codified in N.H. Rev. Stat. ch. 362-H ("362-H"),[3] is preempted by the Federal Power Act ("FPA") and Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA").[4] For the reasons discussed herein, the Commission should promptly deny NERA's Petition.

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1 18 C.F.R. §§ 385.211, 385.212, 385.214 (2018).

2 The New Hampshire Generator Group is comprised of the following entities: Bridgewater Power Company, L.P., DG Whitefield LLC, Pinetree Power – Tamworth LLC, Pinetree Power, Inc., Springfield Power, LLC, and Wheelabrator Concord Company, L.P. The New Hampshire Generator Group is not an organized entity, but is an *ad hoc* group with similar interests in opposition to the Petition.

3 SB 365, 2018 N.H. Laws ch. 379, An Act relative to the use of renewable generation to provide fuel diversity, *codified at* N.H. Rev. Stat. ch. 362-H.

4 16 U.S.C. § 824a-3 (2012).

I. EXECUTIVE SUMMARY

The Petition misrepresents provisions in 362-H and either mischaracterizes or completely ignores applicable preemption precedent under the FPA and PURPA. The NHGG seeks to correct the Petition's factual misrepresentations and will demonstrate to the Commission that 362-H is not preempted. To the contrary, the State of New Hampshire has properly exercised its rights with respect to utility procurement and resource planning—activities that both the Commission and the courts have consistently found to be reserved to the jurisdiction of the states.

From a factual standpoint, NERA fails to provide the complete text of 362-H in its Petition or to describe this law accurately, relying instead upon misstatements and mischaracterizations. For example, NERA contends, without support, that 362-H: (i) requires that electric distribution companies sell the energy from "eligible facilities" into the ISO New England, Inc. ("ISO-NE") market, (ii) sets a rate for wholesale sales that is not based upon competitive procurement, and (iii) intrudes upon this Commission's review of wholesale sales. But none of these characterizations of 362-H are correct. Under 362-H, no participation in the ISO-NE markets is required, the purchase price is based upon the electric distribution company's competitively procured default service rate, and this Commission retains its full jurisdictional authority over wholesale sales. The NHGG corrects these (and other) misstatements herein and attaches a full and complete copy of 362-H as Exhibit A for support.

With respect to the FPA, NERA makes no conflict preemption arguments, relying instead upon the doctrine of field preemption, which the Supreme Court has held would not apply "[s]o long as a State does not condition payment of funds on capacity clearing the

auction."[5] Here, NERA's field preemption arguments must fail because 362-H is "untethered to a generator's wholesale market participation."[6] 362-H simply implements a mechanism for the State of New Hampshire to exercise its authority over State-regulated electric distribution companies with respect to the State's jurisdiction over utility procurement and resource planning.

Under the FPA, states have always retained the authority to regulate power purchases, resource planning, and even the ability to prefer certain generation resources over others, including through mandated purchases and direct subsidies. None of these are areas over which the Commission has exclusive jurisdiction under the FPA. NERA never argues, and could not argue, that New Hampshire's competitive process for procurement of wholesale power supply by the State's electric distribution companies to serve their default retail service customers, which results in FERC-jurisdictional wholesale power sales agreements between the distribution utilities and wholesale suppliers, is preempted under the FPA. Such competitive wholesale procurement arrangements are commonplace in states with some form of competitive retail access.

Likewise, a procurement arrangement in which eligible suppliers obtain power purchase agreements pursuant to New Hampshire's procurement requirements in 362-H at rates set at a discount off of competitively-determined wholesale rates for default service to be determined in future procurement auctions is not preempted under the FPA. Just as this Commission has not determined that a state's ability to conduct a competitive auction to determine a rate to serve default service customers is field preempted, there should similarly be no reason for this Commission to find that field preemption prevents the State from requiring

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5 *Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288, 1299 (2016) (hereinafter, "*Hughes*").

6 *Id.*

electric distribution companies to purchase from eligible facilities at that same competitively determined rate less 20 percent.

With respect to PURPA, 362-H is not a law directed at purchasing power from qualifying facilities ("QFs") under PURPA and does not require that an eligible supplier's generation facility be or remain a QF. Moreover, 362-H does not set a rate, let alone one above the electric distribution companies' avoided cost for the segment of utility purchases from renewable biomass and waste-to-energy resources. All of the generators that are part of the NHGG have either obtained or will obtain exempt wholesale generator ("EWG") status and authority to make wholesale sales of energy, capacity and ancillary services at market-based rates prior to making any sales under any power purchase agreements entered into as a result of 362-H. Simply because the members of the NHGG also happen to have QF status should not make a difference. Even if the Commission were to determine that preemption under PURPA was somehow at issue (which it should not be for the reasons set forth herein), each member of the NHGG is prepared to relinquish its QF status prior to the effective date of any power purchase agreement entered into pursuant to 362-H, which would make PURPA inapplicable.

II. COMMUNICATIONS

The NHGG requests that all correspondence and communications with respect to this proceeding be addressed to the following individuals and that the following individuals be placed on the official service list for this proceeding:[7]

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[7] To the extent necessary, the NHGG respectfully requests waiver of 18 C.F.R. § 385.203(b)(3) in order to permit designation of such persons for service in this proceeding.

III. MOTION TO INTERVENE

Each of the members of the NHGG hereby moves for leave to intervene in this proceeding. Each member owns and operates one of the biomass or waste-to-energy generating facilities in New Hampshire that is an eligible facility under 362-H. The outcome of this proceeding could have a direct impact on each of the NHGG members. Each of its members has an interest in this proceeding that cannot be adequately represented by another party and their participation in this proceeding is in the public interest. Therefore, each of the members of the NHGG requests to be permitted to intervene as parties in this proceeding.

IV. BACKGROUND

Prior to the enactment of 362-H, New Hampshire law already required each electric distribution company in the state that is subject to the jurisdiction of the New Hampshire Public Utilities Commission ("NHPUC") to: (i) issue periodic solicitations for the competitive procurement of wholesale power supply, from which supply it would serve its default retail service customers, and (ii) obtain NHPUC approval of those competitive solicitations and resulting wholesale power contracts with winning bidders.[8] NERA is not challenging any aspect of that pre-existing law even though it has resulted in contracts between electric distribution companies and winning bidders for the purchase and sale of wholesale power that are subject to the jurisdiction of this Commission.

362-H is based on the results obtained under that pre-existing law and requires electric distribution companies to solicit proposals from suppliers with "eligible facilities" (hereinafter, simply referred to as "eligible facilities") to enter into power purchase agreements

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[8] N.H. Rev. Stat. ch. 374-F:3(V)(c); *see also, e.g., Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order Approving Solicitation Process and Resulting Rates, Order No. 26,147, 2018 WL 3068167 (N.H.P.U.C. June 15, 2018); *Unitil Energy Sys., Inc.*, Order Approving Petition, Order No. 26,180, 2018 WL 4929445 (N.H.P.U.C. Oct. 5, 2018).

whereby the electric distribution companies would purchase 100 percent of the net electrical output from these eligible facilities. A copy of 362-H is attached hereto as Exhibit A. Under 362-H, an "eligible facility" is defined to include any generating facility that: (i) relies on biomass or municipal solid waste as its primary energy source; (ii) has a power production capacity not greater than 25 MW; (iii) is interconnected with an electric distribution or transmission system in New Hampshire; and (iv) began operations prior to January 1, 2006.[9]

362-H requires electric distribution companies to solicit proposals from eligible facilities prior to each of the electric distribution company's next six sequential solicitations for default service supply.[10] Each solicitation for proposals from eligible facilities shall "inform eligible facilities of the opportunity to submit a proposal to enter into a power purchase agreement with the electric distribution company."[11] The solicitation must also inform the eligible facilities that, among other things, the electric distribution company's purchase under the resulting power purchase agreement would be for 100 percent of the eligible facility's net electrical output and the term of the agreement would be coterminous with the period used in the default service supply solicitation.[12] The purchase of energy under such power purchase agreement would then be at the rate resulting from the competitively determined default service

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9 N.H. Rev. Stat. ch. 362-H:1(V). Specifically, "eligible resource" is defined as "any facility which produces electricity for sale by the us e, as a primary energy source, of biomass, or municipal solid waste; provided that: (1) the facility's power production capacity is not greater than 25 megawatts excluding station service needs; (2) the facility is interconnected with an electric distribution or transmission system located in New Hampshire; and (3) the facility began operation prior to January 1, 2006, or if the facility ceased operation and then later returned to service after that date then prior to January 1, 2006 the facility operated for at least 5 years regardless of the current operational status of the facility."

10 N.H. Rev. Stat. ch. 362-H:2(I)(a). Nothing in the statute prevents an eligible facility from participating in an electric distribution company's default service solicitation.

11 N.H. Rev. Stat. ch. 362-H:2(I)(a).

12 N.H. Rev. Stat. ch. 362-H:2(I)(a) and (b).

energy service rate less a 20 percent discount (*i.e.*, the "adjusted energy rate" under 362-H).[13] The default energy service rate is the result of the pre-existing competitive solicitation that New Hampshire law has required electric distribution companies to conduct to serve retail customers that do not choose alternative competitive retail suppliers.[14] Eligible facilities that choose to participate in a solicitation pursuant to 362-H are effectively price-takers that agree to be paid a portion of the price determined by the competitive solicitation for wholesale power supply to serve the electric distribution companies' default retail service customers.

If an eligible facility chooses to submit a proposal in response to an electric distribution company's 362-H solicitation, its response must include a proposed schedule of hourly net output during the term as well as such other information as needed for the electric distribution company to evaluate the proposal.[15] The electric distribution company will then select all proposals from eligible facilities that conform to the requirements set forth in the statute and enter into power purchase agreements with those eligible facilities.[16]

What the statute does not do is also significant. 362-H does not require eligible facilities with power purchase agreements with the electric distribution companies or the electric

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13 N.H. Rev. Stat. ch. 362-H:2(I)(a). The "adjusted energy rate" is defined as "80 percent of the rate, expressed in dollars per megawatt-hour, resulting from the default energy rate minus, if applicable, the rate component for compliance with the renewable energy portfolio standards law, RSA 362-F, if that rate component is included in the approved default energy rate." N.H. Rev. Stat. ch. 362-H:1(I).

14 The "default energy rate" is defined as "the default service energy rate applicable to residential class customers, expressed in dollars per megawatt-hour, as approved by [NHPSC] from time to time, and which is available to retail electric customers who are otherwise without an electricity supplier." N.H. Rev. Stat. ch. 362-H:1(IV).

15 N.H. Rev. Stat. ch. 362-H:2(II).

16 N.H. Rev. Stat. ch. 362-H:2(III). Even if all seven of the facilities identified by NERA in the Petition as eligible facilities provided conforming responses to solicitations and entered into power purchase agreements under 362-H, the total combined capacity of all of the facilities is less than 120 MW.

distribution companies to offer or clear any of the net electrical output procured through the power purchase agreements in any ISO-NE market. 362-H does not remove or supersede this Commission's jurisdiction over the power purchase agreements between eligible facilities and the electric distribution companies that would be entered into pursuant to 362-H. Additionally, 362-H does not require such eligible facilities to be or remain QFs under PURPA.

V. PROTEST

A. The Petition Contains Critical Misrepresentations About 362-H.

NERA misrepresents important facts about 362-H.

First, NERA incorrectly states that 362-H requires electric distribution companies in New Hampshire that purchase energy from eligible facilities to "sell that energy into the ISO-NE market."[17] Tellingly, NERA neither quotes nor references any provision in 362-H that imposes such a requirement because no such provision exists. To the contrary, 362-H was carefully crafted to avoid requiring either the eligible facility or the purchasing electric distribution company to offer or clear energy or capacity in any regional transmission organization ("RTO") or independent system operator ("ISO") markets. It is not surprising that NERA misleadingly claims that there is a tie to the ISO-NE market because the holding in the Supreme Court's recent *Hughes v. Talen Energy Marketing, LLC*[18] decision hinges upon the fact that the state program at issue in that case required the participating generator to offer and clear its capacity in the applicable RTO capacity market.

Second, NERA argues that the New Hampshire law sets a price for wholesale sales and "makes no allowance for . . . competitive solicitation."[19] But 362-H does not set a

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17 Petition at 10.

18 *Hughes* at 1300.

19 Petition at 13.

price or authorize the NHPUC to set a price. Rather, 362-H mandates a purchase (not a sale) if certain requirements are met, and requires that the purchase price be based upon a 20 percent discount off of the default service rate, which, in turn, would be determined through an organized competitive solicitation process. NERA does not challenge that competitive procurement process or the default service price that results from that competitive process, even though the end result of such a process has always been the execution of one or more wholesale power contracts subject to this Commission's jurisdiction. Under 362-H, eligible facilities that obtain power purchase agreements are effectively price takers at a discount off of this competitively determined default service price.

Third, NERA labels the default service rate as a "retail" rate and not a wholesale rate.[20] But again, NERA fails to explain that the competitive default service solicitation results in wholesale power purchase agreements between the default service providers and the electric distribution companies under which the utility purchases power for resale to its customers, and New Hampshire law requires its electric distribution companies to periodically issue solicitations to competitively procure power supply, which in turn results in the default service rate.

Fourth, NERA incorrectly states that 362-H seeks to intrude upon FERC's review of a wholesale sale.[21] That could not be farther from the truth, and NERA provides no evidence to support this assertion. To the contrary, there is no language in 362-H that avoids compliance with any FERC regulatory requirement. Even the Public Service Company of New Hampshire's ("PSNH") (d/b/a Eversource) proposed Governing Terms for the Purchase of Energy Pursuant to the Legal Mandate Contained in New Hampshire RSA Chapter 362-H to the New Hampshire

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20 *Id.* at 12.

21 *Id.* at 2, 12.

Generators ("PSNH Proposed Governing Terms") acknowledge that FERC compliance remains an important part of the New Hampshire program. Section 3.1(h) of the PSNH Proposed Governing Terms specifically requires that "Seller shall be responsible for complying with all applicable requirements of Law, including all applicable rules, procedures, operating policies, criteria, guidelines and requirements imposed by FERC and any other Governmental Entity."[22] FERC oversight over wholesale sales remains unchanged with the enactment of 362-H.

B. The FPA Does Not Field Preempt 362-H.

NERA argues that 362-H is unlawful under the FPA as a result of the doctrine of field preemption under the Supremacy Clause of the United States Constitution.[23] But NERA's analysis is flawed and outdated. NERA misrepresents the current law on field preemption and ignores the framework of cooperative federalism between this Commission and the states under the FPA. Based upon current applicable precedent, NERA's preemption challenge to 362-H must fail.

1. Courts Have Established A Presumption Against Findings of Preemption In Cases Under The FPA And The Natural Gas Act.

The doctrine of preemption is rooted in the Supremacy Clause of the U.S. Constitution, which states that "the Laws of the United States . . . shall be the supreme Law of the Land."[24] Field preemption bars a state's action only if a federal law reflects the intent of Congress "to exclude state regulation."[25] This form of preemption "reflects a congressional

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22 The NHGG members do not accept all provisions in the PSNH Proposed Governing Terms. Some are inappropriate, such as provisions that are inconsistent with the provisions of 362-H, as well as provisions that require eligible facilities to remain QFs. Those concerns have been raised with PSNH, and if not remedied, may also need to be raised with the NHPUC.

23 Petition at 10-15. NERA does not make any conflict preemption arguments in the Petition.

24 U.S. CONST., art. VI, cl. 2.

25 *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 104 n.2 (1992) (internal quotations omitted).

decision to foreclose any state regulation in the area, even if it is parallel to federal standards."[26] A field is occupied only where a federal regulatory scheme is "so pervasive" as to imply "that Congress left no room for the States to supplement it."[27] Put another way, field preemption occurs where the federal statute is "so dominant" that federal law "will be assumed to preclude enforcement of state laws on the same subject."[28] However, where state and federal regimes "exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one."[29]

The Federal Power Act, the courts and this Commission have all recognized the importance of "cooperative federalism" when it comes to the interplay between the Commission and the states when dealing with questions of power purchases and resource planning. The Supreme Court has explained that the federal and state spheres of jurisdiction over the regulation of electricity "are not hermetically sealed from each other."[30] They are instead the product of a "congressionally designed interplay between state and federal regulation"[31] and that "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain."[32] Courts and the Commission have cautioned that this interplay must not be mistaken for "impermissible tension that requires pre-emption

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26 *Arizona v. United States*, 567 U.S. 387, 401 (2012).

27 *English v. General Elec. Co.*, 496 U.S. 72, 74 (1990) (internal quotations omitted).

28 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

29 *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

30 *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016).

31 *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central Pipeline Corp. v. State Corporation, Comm'n of Kan.*, 489 U.S. 493, 518 (1989).

32 *Hughes*, 136 S. Ct. at 1298.

under the Supremacy Clause."[33] Earlier this year, the Second Circuit held that as a result of this interplay, there is "a 'strong presumption against finding that the State's powers are preempted by the FPA,' legislation that was drawn with meticulous regard for the continued exercise of state power."[34] This presumption is only defeated where displacing state authority was the "clear and manifest purpose" of Congress.[35] Recently, the Supreme Court has also held that courts evaluating whether this Commission occupies the field must focus on "the importance of considering the *target* at which the state law *aims* in determining whether that law is preempted."[36]

Courts have long recognized state authority over resource planning and utility "buy-side" issues.[37] The Supreme Court has gone so far as to explain that states have the ability to favor certain generation resources, even through "direct subsidies."[38] Courts have also held that states have "broad powers under state law to direct the planning and resource decisions of

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33 *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring). *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 50 (2d Cir. 2018) (citing *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. 493, 518 (1989))).

34 *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d at 50 (internal quotations and citations omitted).

35 *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

36 *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (hereinafter, "*Oneok*") (emphasis in original).

37 *New York v. FERC*, 535 U.S. 1, 24 (2002) (noting that areas of State authority include: reliability of local service, administration of integrated resource planning and utility buy-side and demand-side decisions, including demand-side management, authority over utility generation and resource portfolios, and authority to impose distribution or retail stranded cost charges); *see also Kentucky West Virginia Gas Co. v. Pennsylvania Public Utilities Comm'n*, 837 F.2d 600, 602 (3d Cir. 1988).

38 *See Hughes*, 136 S. Ct. at 1299.

utilities under their jurisdiction," including to "order utilities to build renewable generators themselves" or to "order utilities to purchase renewable generation."[39]

In Order No. 888, the Commission discussed the scope of states' rights under the FPA and acknowledged that states have "authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including [demand-side management];[and] authority over utility generation and resource portfolios."[40] The Commission has also recognized that the ability of states to require utilities to purchase generation is not limited to QFs under PURPA.[41] In fact, the Commission emphasized in *S. Cal. Edison Co.* that "states have numerous ways outside of PURPA to encourage renewable resources," including "broad powers . . . to direct the planning and resource decisions of utilities" and the ability to "order utilities to purchase renewable generation."[42]

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39 *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal citations omitted). *See also New York v. FERC*, 535 U.S. at 24 (citing Order No. 888 to note these same areas of state authority); *Cal. Pub. Utilities Comm'n*, 132 FERC ¶ 61,047 at P 69 (2010) (noting the ability of state regulators to order utilities "to purchase capacity and energy from certain resources"); *Cal. Pub. Utilities Comm'n*, 134 FERC ¶ 61,044 at P 30 (2011) (acknowledging "the reality that states have the authority to dictate the generation resources from which utilities may procure electric energy.").

40 FERC Stats. & Regs., Regs. Preambles, Jan. 1991–June 1996, ¶ 31,036, p. 31,3782, n.544 (April 24, 1996), 61 Fed. Reg. 21,540, 21,736 (May 10, 1996) ("Order No. 888").

41 *See S. Cal. Edison Co., San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269 (1995).

42 *Id.* at 62,080. *See also Cal. Pub. Utilities Comm'n*, 132 FERC ¶ 61,047 at P 69 (2010) (noting the ability of state regulators to order utilities "to purchase capacity and energy from certain resources"); *Cal. Pub. Utilities Comm'n*, 134 FERC ¶ 61,044 at P 30 (acknowledging "the reality that states have the authority to dictate the generation resources from which utilities may procure electric energy."); *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, 117 FERC ¶ 61,078 at P 6 (2006) (distinguishing Commission regulations under PURPA from "resource portfolio obligations under state law including obligations to purchase renewable energy").

2. *Recent Federal Court Precedent On Preemption Confirms 362-H Is Not Field Preempted.*

NERA relies heavily on a series of decisions which pre-date the extensive and instructive body of precedent that has recently come out of the federal courts regarding field preemption under the FPA. Oversimplifying the field preemption analysis under the FPA, NERA takes numerous short-cuts misstating certain key holdings and ignoring others entirely, and fails to provide a fulsome picture of the current state of the law on field preemption under the FPA.

a. *Hughes*

In *Hughes*, the Supreme Court considered a Maryland program whereby a generator, CPV Maryland, LLC ("CPV"), entered into a contract for differences pursuant to which it would bid into PJM's capacity auction and be paid a guaranteed rate for capacity distinct from the market clearing price if the generator cleared the capacity auction.[43] The Court drew a careful distinction between CPV's contract-for-differences and traditional bilateral contracts such as power purchase agreements that the capacity auction is designed to accommodate.[44] Under the contract-for-differences, CPV did not transfer its capacity to its counterparties as a generator would do in a traditional bilateral agreement, but instead sold its capacity in the PJM auction and then received a price other than it would receive from the auction.[45]

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43 *Hughes*, 136 S. Ct. at 1297 (" . . . Maryland—through the contract for differences—requires CPV to participate in the PJM capacity auction, but guarantees CPV a rate distinct from the clearing price for its interstate sales of capacity to PJM.").

44 *Id.* at 1295.

45 *Id.*

The *Hughes* decision builds upon the Supreme Court's holding in *Oneok* that a field preemption analysis must consider "the *target* at which the state law *aims*."[46] The Supreme Court's decision in *Oneok* emphasized the importance of preserving areas of historical state jurisdiction in cases of potential overlap with FERC authority,[47] and held that a preemption analysis must "proceed cautiously" on a case-by-case basis. A state law is preempted "only where detailed examination convinces [the court] that a matter falls within the pre-empted field" and only if the state law in question "aim[s] directly" at that federal jurisdiction.[48]

In *Hughes*, the Supreme Court held that Maryland's program was preempted by FERC's exclusive ratemaking jurisdiction under the FPA, finding that Maryland's program "guarantees [the winning bidder] a rate distinct from the clearing price for its interstate capacity sales to PJM," which "[b]y adjusting an interstate wholesale rate . . . contravenes the FPA's division of authority between state and federal regulators."[49] The Supreme Court held that states may not "interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable . . . ."[50]

The Supreme Court expressly limited its holding in *Hughes* to the program at issue, however, emphasizing that:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC . . . Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.' . . . ***So long as a State does not***

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46 *Oneok*, 135 S. Ct. at 1599. The Court in Oneok explained that the relevant provisions of the FPA are "analogous" to those in the NGA. *Id.* at n.10.

47 *Id.*

48 *Id.* at 1599-60.

49 *Hughes*, 136 S. Ct. at 1290.

50 *Id.* at 1299.

> ***condition payment of funds on capacity clearing the auction***, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.[51]

The Court also invoked *Oneok* to emphasize that state laws "incidentally affecting" FERC's domain may be lawful,[52] and emphasized that its decision did not address the permissibility of other potential state measures, including even "direct subsidies."[53]

362-H does not "target" an area reserved for federal authority under the FPA, which is the field preemption test in *Oneok* and reiterated by the Court in *Hughes*. 362-H, which is expressly designed to promote fuel diversity through utility purchasing decisions and oversight over utility resource portfolios, is not intended to encroach or aimed at encroaching upon an area of exclusive federal jurisdiction. Rather, 362-H's goal in promoting fuel diversity falls comfortably within the scope of managing utility "buy-side decisions" and "resource planning," which the Commission has expressly recognized as areas reserved to state regulation.[54] Nowhere does 362-H require capacity (or energy) from an eligible facility to be offered into or clear an organized wholesale market, and therefore, the holding in *Hughes* does not lead to the conclusion that 362-H is field preempted by the FPA. And nowhere does 362-H suggest that FERC does not retain jurisdiction over any resulting power purchase agreements.

NERA erroneously asserts that the bilateral sale of energy pursuant to power purchase agreements that may result from 362-H is an "intrusion" on the Commission's jurisdiction that is "more stark" than the circumstances in *Hughes*, because *Hughes* involved a contract for

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51 *Id.* (emphasis supplied).

52 *Id.* at 1298.

53 *Id.* at 1299.

54 *See, e.g.*, Order No. 888 at n.544.

differences.[55] But *Hughes* says the opposite—namely, that the contract for differences in *Hughes* was more problematic than a traditional bilateral agreement because it operated within an RTO's organized wholesale market. The Court acknowledged that PJM's organized, bid-based capacity auction was "designed to accommodate long-term bilateral contracts for capacity"[56] and distinguished such contracts from the contract-for-differences:

> The contract for differences, Maryland and CPV respond, is indistinguishable from traditional bilateral contracts for capacity, which FERC has long accommodated in the auction. But the contract at issue here differs from traditional bilateral contracts in this significant respect: The contract for differences does not transfer ownership of capacity from one party to another outside the auction. Instead, ***the contract for differences operates within the auction***; it mandates that LSEs and CPV exchange money based on the cost of CPV's capacity sales to PJM. Notably, because the contract for differences does not contemplate the sale of capacity outside the auction, Maryland and CPV took the position, until the Fourth Circuit issued its decision, that the rate in the contract for differences is not subject to FERC's reasonableness review.[57]

Here, 362-H does not "operate[] within the auction" as no power is required to be offered into or clear the ISO-NE markets, unlike in *Hughes*. Being "tethered" to the bidding or clearing into the relevant regional transmission organization markets was singled out as the key feature that made the Maryland program impermissible in *Hughes*.[58] 362-H contains no link to participation in the RTO markets, and therefore, NERA is unable to use *Hughes* to claim that the legislation is preempted by the FPA.

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55 Petition at 12.

56 *Hughes*, 136 S. Ct. at 1293.

57 *Id.* at 1299 (internal citations omitted) (emphasis supplied).

58 *Id.*

b. *Allco*

Last year, the U.S. Court of Appeals for the Second Circuit issued an applicable preemption decision in *Allco Fin., Ltd. v. Klee*.[59] *Allco* involved a solicitation of proposals ("RFPs") from providers of renewable energy in Connecticut. Allco Finance Limited ("Allco"), which did not win any of the RFPs, argued that the solicitation process was preempted by the FPA just like in *Hughes*. However, in *Allco*, the court found that the Connecticut program "does not condition capacity transfers on any such [FERC-approved] auction."[60] As a result, the Second Circuit found that the Connecticut program was not preempted because it was not tethered to the wholesale power markets.[61]

NERA distorts *Allco*, incorrectly arguing that *Allco* hinged upon whether utilities were compelled to enter into power purchase agreements. That is not the holding of *Allco*. In fact, the court in *Allco* specifically stated: "we express ***no opinion*** here about whether, if the Connecticut agencies truly had 'compelled' utilities to enter contracts with generators on specified terms, review by FERC of such bilateral contracts would be sufficient to defeat any preemption claim" precisely because no parties argued for such a result.[62] NERA also fails to point out the important references and citations in *Allco* to the Second Circuit's holding in *Entergy Nuclear v. Shumlin* and FERC's own finding in *S. Cal. Edison Co.* that "[s]tates may . . . order utilities to purchase renewable generation," undercutting NERA's suggestion that mandated utility purchases of generation would be preempted.[63]

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59 *Allco Fin., Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017) (hereinafter "*Allco*").

60 *Id.* at 99.

61 *Id.* at 102.

62 *Allco*, 861 F.3d at 100 n.15 (emphasis supplied).

63 *Id.* at 101 (citing *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) and *S. Cal. Edison Co., San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269 at 62,080 (1995)).

In addition, NERA omits any discussion of the actual holdings in *Allco*, presumably because they are unfavorable to NERA's position. The court held in *Allco* that the most important difference between the programs in *Hughes* and *Allco* was that "Maryland sought essentially to override the terms set by the FERC-approved PJM auction, and require transfer of ownership through the FERC-approved auction," while "Connecticut, instead, transfers ownership of electricity from one party to another by contract, independent of the auction."[64] The same fundamental distinction holds true for 362-H, which does not override FERC-approved terms. Furthermore, the court in *Allco* held that "the contracts at issue in the case before us are the kind of traditional bilateral contracts between utilities and generators that are subject to FERC review for justness and reasonableness under *Morgan Stanley* []. They are, in other words, precisely what the *Hughes* court placed outside of its limited holding."[65] Again, the same holds true for 362-H. There is no provision in 362-H that exempts any resulting power purchase agreement from full compliance with FERC requirements.[66] And, as PSNH has acknowledged in its Governing Terms, full compliance with FERC regulatory obligations is required.

c. The Zero Emission Credits Cases

Most recently, the U.S. Courts of Appeals for the Second and Seventh Circuits rejected similar preemption claims under the FPA with respect to two different state Zero

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64 *Allco*, 861 F.3d at 99.

65 *Id.* (internal citations omitted).

66 Moreover, the Commission decided not to act in response to a petition by Allco and Allco Renewable Energy Limited that sought an enforcement action against the Connecticut Department of Energy and Environmental Protection and the Connecticut Public Utilities Regulatory Authority for improperly implementing PURPA. *Allco Renewable Energy Ltd.*, Notice of Intent Not to Act, 154 FERC ¶ 61,007 (2016).

Emission Credit ("ZEC") programs that subsidize certain nuclear generating facilities.[67] In *EPSA*, the Seventh Circuit found that the Illinois nuclear subsidy program was not preempted because it does not require the subsidized generation to participate in the FERC-regulated markets.[68] The Seventh Circuit held that, even though the Illinois state program "can influence the auction price," the Court held that "because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law."[69] In *CCE*, the Second Circuit found that the fact that the New York nuclear subsidy program did "not expressly mandate that the plants receiving ZEC subsidies bid into the NYISO auctions" was an important reason why there was no preemption in that case.[70] Accordingly, the Court held that "Plaintiffs have failed to state a plausible claim" for preemption.[71]

These opinions emphasized the very limited nature of *Hughes*, and held that the Illinois and New York programs lacked the requisite "tethering" to the regional RTO market.[72] The Seventh Circuit held that "[t]his feature—that the subsidy depended on selling power in the interstate auction—is what led the Justices to conclude that Maryland had transgressed a domain reserved to the FERC."[73] The Commission's brief in *EPSA* sought the same result and explained

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67 *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) ("*EPSA*") (upholding the Illinois Zero Emission Credit ("ZEC") program,); *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) ("*CCE*") (upholding the New York ZEC program).

68 *EPSA*, 904 F.3d at 523 (finding that the generator "can sell the power in an interstate auction but need not do so").

69 *Id.* at 524.

70 *CCE*, 906 F.3d at 53.

71 *Id.*

72 *EPSA*, 904 F.3d at 523; *CCE*, 906 F.3d at 46.

73 *EPSA*, 904 F.3d at 523.

the Commission's position that the Illinois program was not preempted and that the program in *Hughes* was preempted precisely "[b]ecause the program conditioned that subsidy on generators' participation in the wholesale auction (bidding and clearing requirement), while promising a rate distinct from the wholesale market price."[74] As noted above, 362-H does not reference, let alone condition, compensation on participation in a wholesale auction.

* * * * *

Unlike the program invalidated in *Hughes*, there is simply no connection between compensation for eligible facilities resulting under 362-H and their participation in wholesale markets. 362-H is in no way "tethered" to wholesale power markets and thus is not preempted by the FPA. 362-H simply encourages fuel diversity by requiring electric distribution companies to offer to purchase generation from eligible facilities with desired biomass or waste-to-energy fuel characteristics. This effort falls squarely within the states' authority over resource portfolios and their ability to regulate the buy-side decisions of utilities. Furthermore, 362-H does not set a price for the sale of wholesale power. Instead, the price (for purchases and not sales) is determined through the pre-existing competitive default energy service solicitation (less 20 percent), and NERA is not challenging the competitive default energy service process or price.

NERA's FPA preemption analysis revolves around a string of decades-old Commission decisions that pre-date *Oneok*, *Hughes*, *Allco* and the ZEC cases discussed above. These federal court cases have significantly refined the FPA preemption landscape since the mid-1990s, a time before the creation of RTOs and ISOs. These cases provide relevant, binding guidance for how the relationship between state law and the FPA must be evaluated. As such,

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74 Brief for the United States and the Federal Energy Regulatory Commission, Case Nos. 17-2433 and 17-2445 at 9 (7th Cir. filed May 29, 2018).

any preemption analysis under the FPA cannot ignore, and must be based upon, this body of federal court precedent.

Furthermore, the facts involved in those older Commission cases on which NERA relies are easily distinguishable from 362-H. For example, the state law in question in *Midwest Power Systems, Inc.*,[75] required the Iowa Utilities Board to establish "just and economically reasonable" rates to be paid in long-term power purchase agreements. Similarly, in *Connecticut Light & Power Co.*,[76] the state law required that the wholesale rate be tied to the utility's retail rate as determined by the Connecticut Department of Public Utility Control. Unlike in those cases, the rate at issue here is determined through a pre-existing competitive default service procurement process that is subject to this Commission's regulatory oversight.

Based upon all of the most recent and applicable FPA preemption cases (and not the limited and misleading field preemption discussion that NERA offers), the Commission should deny NERA's request and instead find that 362-H is not field preempted by the FPA.

C. PURPA Does Not Preempt 362-H.

NERA argues that PURPA preempts 362-H because it "set[s] rates" for the eligible facilities at a value in excess of the avoided cost rate.[77] However, 362-H does not set any rate, let alone one that exceeds avoided costs. As explained above, the rates to be paid pursuant to power purchase agreements entered into pursuant to 362-H are based upon a discount off of the prices determined pursuant to competitive solicitations conducted by the electric distribution companies under New Hampshire law for the procurement of supply for default service as a result of retail competition in New Hampshire. Under 362-H, eligible facilities are

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75 78 FERC ¶ 61,067 (1995).

76 71 FERC ¶ 61,035 (1995).

77 Petition at 3.

effectively price-takers at a value that is a discount from the competitive solicitation. If the Commission were to agree with NERA's Petition that a QF cannot accept a competitively determined default service price, it would effectively be finding that PURPA also preempts all QFs, even those with market-based rates that do not seek to make sales at wholesale pursuant to PURPA, from participating in any state-mandated competitive auction that might result in a price above the purchasing utilities' avoided costs, including the competitive auctions to supply default service. What NERA seeks here would lead to the perverse result that generating facilities would have to abandon their QF status simply in order to respond to the many state-mandated competitive utility solicitations not just in New Hampshire but nationwide.

Moreover, the Commission has given states great latitude in determining avoided costs, including having a "multi-tiered avoided cost rate structure"[78] and the ability to "recognize procurement segmentation by making separate avoided cost calculations."[79] The Commission determined that where, as here, states require a utility to procure energy from generators with particular characteristics, "generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement."[80] Thus, "a natural gas-fired unit, for example, would not be a source 'able to sell' to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs."[81]

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78 *See Cal. Pub. Utilities Comm'n*, 133 FERC ¶ 61,059 at PP 22-26 (2010); *order on reh'g*, 134 FERC ¶ 61,044 at P 28 (2011).

79 *Cal. Pub. Utilities Comm'n*, 133 FERC ¶ 61,059 at n. 53 (2010).

80 *Id.* at PP 29. *See also California Public Utilities Commission*, 134 FERC ¶ 61,044 at P 30 (noting that "an avoided cost rate may… reflect a state requirement that utilities purchase their energy needs from, for example, renewable resources.").

81 *Id.* at P 27.

Here, 362-H requires the purchase of energy from biomass and waste-to-energy renewable resources within the electric distribution companies' service territories, and accordingly, any avoided cost calculation, even if relevant, should be based upon the purchase of power from this segment of renewable resources. While NERA argues that PSNH's avoided cost should be tied to the "price of energy in ISO-NE,"[82] that does not take into consideration 362-H and any impact that law may have on an avoided cost for a new renewable biomass and waste-to-energy purchase segment.

But none of this should matter because 362-H does not require eligible facilities to possess QF status. The mere fact that the biomass and waste-to-energy facilities identified as eligible facilities under 362-H currently happen to be QFs does not mean that they need to remain QFs. 362-H does not prevent any of these eligible facilities from also being EWGs with market-based rate authority under Section 205 of the FPA. In fact, all of the generators that are members of the NHGG either already have or are in the process of obtaining EWG status and market-based rate authority. Simply because the members of the NHGG also happen to have QF status should not make a difference. Where, as here, a state law mandates power purchases from certain categories of generators, but does not require that they be QFs, and where, as here, generators are relying upon market-based rate authority for the right to make sales, the Commission should determine that PURPA is inapplicable and should not penalize the generators simply because they also happen to be QFs. But if the Commission were to determine that PURPA preemption applies and requires generators to relinquish their QF status to participate in 362-H solicitations,[83] each of the generators in the NHGG intend to relinquish its

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82 Petition at 18.

83 Given that an entity can obtain market-based rate authority and both certify itself as an EWG and certify its generating facility as a QF, the Commission should find that an entity that has obtained

QF status effective as of the effective date of any power purchase agreements executed pursuant to 362-H, to ensure that any such PURPA preemption determination would not apply to those generators. Accordingly, the Commission should find that PURPA preemption is inapplicable to eligible facilities that relinquish QF status as of the effective date of the power purchase agreements executed pursuant to 362-H.[84]

VI. CONCLUSION

For the foregoing reasons, the NHGG respectfully requests that the Commission reject the Petition and find that 362-H is not preempted by the FPA or PURPA.

Respectfully submitted,

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Dated: December 3, 2018

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all three of these authorizations and certifications need not relinquish its QF certification to participate in a solicitation under 362-H. Such an entity could participate in the solicitation on the basis of its market-based rate authorization and EWG status without implicating its QF status.

84 Furthermore, the NHGG notes that the arguments set forth herein effectively render NERA's request with respect to PSNH's mandatory purchase price obligation regarding QFs with a net capacity in excess of 20 MW moot.

EXHIBIT A

TEXT OF 362-H

TITLE XXXIV
PUBLIC UTILITIES

CHAPTER 362-H
THE PRESERVATION AND USE OF RENEWABLE GENERATION TO PROVIDE FUEL DIVERSITY

Section 362-H:1

362-H:1 Definitions. –

In this chapter:

I. "Adjusted energy rate" means 80 percent of the rate, expressed in dollars per megawatt-hour, resulting from the default energy rate minus, if applicable, the rate component for compliance with the renewable energy portfolio standards law, RSA 362-F, if that rate component is included in the approved default energy rate.

II. "Biomass" means plant-derived fuel including clean and untreated wood such as brush stumps, lumber ends and trimmings, wood pallets, bark, wood chips or pellets, shavings, sawdust and slash, agricultural crops, biogas, or liquid biofuels, but shall exclude any materials derived in whole or in part from construction and demolition debris.

III. "Commission" means the public utilities commission.

IV. "Default energy rate" means the default service energy rate applicable to residential class customers, expressed in dollars per megawatt-hour, as approved by the commission from time to time, and which is available to retail electric customers who are otherwise without an electricity supplier.

V. (a) "Eligible facility" means any facility which produces electricity for sale by the use, as a primary energy source, of biomass, or municipal solid waste; provided that: (1) the facility's power production capacity is not greater than 25 megawatts excluding station service needs; (2) the facility is interconnected with an electric distribution or transmission system located in New Hampshire; and (3) the facility began operation prior to January 1, 2006, or if the facility ceased operation and then later returned to service after that date then prior to January 1, 2006 the facility operated for at least 5 years regardless of the current operational status of the facility.

(b) "Eligible facility" shall not include: (1) any facility, while selling its electrical output at long-term rates established before January 1, 2007 by orders of the commission under RSA 362-A:4; and, (2) any municipal solid waste facility less than 10 megawatts in size and which was not in operation on January 1, 2018.

VI. "Primary energy source" means a fuel or fuels, or energy resource either singly or in combination, that comprises at least 90 percent of the total energy input into a generating unit. A fuel or energy source other than the primary fuel or energy source may be used only for start-up, maintenance, or other required internal needs of the facility.

Source. 2018, 379:2, eff. Sept. 13, 2018.

Section 362-H:2

362-H:2 Purchased Power Agreements. –

To retain and provide for generator fuel diversity, each electric distribution company that is subject to the commission's approval regarding procurement of default service shall offer to purchase the net energy output of any eligible facility located in its service territory in accordance with the following:

I. (a) Prior to each of its next 6 sequential solicitations of its default service supply after the effective date of this chapter, each such electric distribution company shall solicit proposals, in one solicitation or multiple solicitations, from eligible facilities. The electric distribution company's solicitation to eligible facilities shall inform eligible facilities of the opportunity to submit a proposal to enter into a power purchase agreement with the electric distribution company under which the electric distribution company would purchase an amount of

energy from the eligible facility for a period that is coterminous with the time period used in the default service supply solicitation. The solicitation shall provide that the electric distribution company's purchases of energy from the eligible facility shall be priced at the adjusted energy rate derived from the default service rates approved by the commission in each applicable default service supply solicitation and resulting rates proceeding.

(b) The solicitation shall also inform the eligible facility that: (1) the electric distribution company's purchase from the eligible facility shall be at the eligible facility's interconnection point with the electric distribution company; (2) the purchase shall be from the eligible facility's net electrical output and not from the output of another unit; and (3) the electric distribution company's purchase would be for 100 percent of the eligible facility's net electrical output.

II. Each eligible facility's proposal in response to such solicitation shall provide a nonbinding proposed schedule of hourly net output amounts during the term stated over a mutually agreeable period, whether daily, monthly, or over the term used in the default service supply solicitation for the applicable default energy rate and such other information as needed for the eligible facility to submit and the electric distribution company to evaluate the proposal.

III. With each eligible facility solicitation, the electric distribution company shall select all proposals from eligible facilities that conform to the requirements of this section. The electric distribution company shall submit all eligible facility agreements to the commission as part of its submission for periodic approval of its residential electric customer default service supply solicitation.

IV. All such eligible facility agreements shall be subject to review by the commission for conformity with this chapter in the same proceeding in which it undertakes the review of the electric distribution company's periodic default service solicitation and resulting rates.

V. The electric distribution company shall recover the difference between its energy purchase costs and the market energy clearing price through a nonbypassable delivery services charge applicable to all customers in the utility's service territory. The nonbypassable charge may include recovery of reasonable costs incurred by electric distribution companies pursuant to this section. The recovery of the nonbypassable charge shall be allocated among Eversource's customer classes using the allocation percentages approved by the commission in its docket DE 14-238 order 25,920 approving the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement. In the first filing proceeding at the commission under this chapter applicable to each other electric distribution company, the commission shall determine and apply an allocation based on the foregoing allocations for any other electric distribution company subject to this chapter, but reasonably adjusted to account for differing customer classes if any from those of Eversource.

Source. 2018, 379:2, eff. Sept. 13, 2018.

Certificate of Service

I certify that on this 3rd day of December, 2018, I have caused a copy of the foregoing document to be served electronically on each person listed on the Secretary's official service list for the above-referenced proceeding.

/s/ Christopher M. Randall
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