THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 18-002

2019 ENERGY SERVICE SOLICITATION

IMPLEMENTATION OF SENATE BILL 365

OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY TO THE MOTION OF THE WOOD IPPs FOR DETERMINATION THAT AGREEMENTS CONFORM WITH RSA 362-H AND TO DIRECT EVERSOURCE TO COMPLY WITH RSA 362-H

AND

EVERSOURCE'S RESPONSE TO THE ISSUES SET OUT IN THE SUPPLEMENTAL ORDER OF NOTICE

On December 17, 2018, 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, the "Wood IPPs")[1] moved the Commission "for a determination that their power purchase agreements

[1] A sixth "eligible facility" under SB 365, Indeck Energy – Alexandria, chose not to respond to Eversource's November 2018 solicitation. However, the Alexandria plant has informed Eversource that it has tentative plans to

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" (the "Motion"). The Motion concerns issues regarding the implementation of Senate Bill 365 ("SB 365") that created RSA Chapter 362-H. Pursuant to Puc 203.07, Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or "the Company") hereby objects to the Wood IPPs' Motion.

Preliminarily, Eversource notes that it has neither ignored the requirements of SB 365 nor refused to comply with the requirements of SB 365. The path Eversource has embarked upon is one that best implements the intent of the law while protecting its New Hampshire customers if SB 365 is found to violate the Supremacy Clause of the U.S. Constitution. As required by SB 365, Eversource solicited proposals from the six wood-fired generating plants that met the statutory definition of "eligible facility" under RSA 362-H:1. The five Wood IPPs responded to Eversource's solicitation by rejecting the solicitation and substituting certain terms and conditions to their liking. Hence, in its December 4, 2018 filing Eversource submitted both the Company's original solicitation and the Wood IPPs' responses to this Commission for a determination of the proper course to take.

Any purchases made by Eversource under SB 365 would be immediately sold into the ISO-NE market and monetized with all net costs passed on to its New Hampshire retail customers.[2] Such purchases would not be used by Eversource or its customers as part of the supply of default energy service.[3] This is necessary for a number of legal and practical reasons, including the following:[4]

---

restart its mothballed generator in time for the next solicitation (Aug 2019) and that it would intend to participate in the solicitation at that time.

[2] RSA 362-H:2, V.

[3] As such, the costs of SB 365 are in essence a tax on Eversource's customers to support public policies well beyond their energy needs, including such policies identified by the Legislature that "(i) are important to the state's economy and jobs, and, in particular, the 6 biomass-fired generators are vital to the state's sawmill and other forest products industries and employment in those industries, and (ii) these indigenous-fueled renewable generating plants are also important to state policies because they provide generating fuel diversity and environmental benefits, which protect the health and safety of the state's citizens and the physical environment of the state." RSA 362-H:1.

[4] *See also* Prefiled Testimony of Frederick B. White dated December 4, 2018 at page 3; "Request for Leave to Answer and Answer of New England Ratepayers Association," December 20, 2018, pp. 12-15, filed in FERC Docket EL 19-10, available at: https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15125357 .

- The "2015 PSNH Settlement" approved in Docket No. DE 14-238 requires that "Unless otherwise found by the Commission or other appropriate authority, for so long as PSNH purchases the output from QFs, IPPs, or pursuant to the PPAs, ***PSNH shall sell or bid such purchases into the pool at the ISO-NE market clearing price***, with the resulting costs or credits recovered via Part 2 of the SCRC as a Non-Securitized Stranded Cost." 2015 Settlement, Section VI, B at lines 685-688 (emphasis added).
- Eversource's retail "Tariff for Electric Delivery Service – NHPUC No. 9," provides: "Selling Options: QFs may sell to the Company or wheel through the Company. ***All generation sold to the Company shall be resold at the ISO-NE market clearing price*** and subject to appropriate charges as if the power was wheeled through the Company and sold directly to ISO-NE." Tariff, Section 33, "Rates for Purchases from Qualifying Facilities," 2nd Revised Page 24 (emphasis added).
- Commission Order No. 26,203 dated December 20, 2018 in the instant docket. That Order approved Eversource's solicitation for power supply for customers that have not elected to take energy service from a competitive supplier for the six-month period beginning February 1, 2019. Order 26,203 notes, "Eversource's solicitation and bid evaluation procedures conform to the process approved by the Commission in Order No. 26,092." (Slip op. at 6). ***The referenced solicitation and the process in Order No. 26,092 require the purchase by Eversource of full-requirements load-following service to supply default energy service.*** Use of any purchases under SB 365 as part of Eversource's default service energy provider obligations would breach both the process approved in Order No. 26,092 and the contracts Eversource has with wholesale default energy suppliers that were approved just a week ago by this Commission.
- SB 365 requires at RSA 362-H:2, V that "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." *See also* the Prefiled Testimony of Frederick B. White filed in this docket on December 4, 2018, at pages 3-4, "As

> 'the market energy clearing price' changes every five minutes, and the output from multiple eligible facilities will each be continuously variable, the only practical way of establishing 'the difference between its energy purchase costs and the market energy clearing price' is to monetize the purchases from the eligible facilities by instantaneously selling that output into the ISO-NE marketplace. Had the legislation contemplated using the energy purchased under SB 365 to be used to serve default service load the legislation would have logically required the costs of the purchases to be recovered from default service customers."

As set forth below, the law itself is both vague and ambiguous regarding material issues that must be part of any transaction: What is being bought/sold? What is the price? Without knowing whether the law requires the purchase/sale of an eligible facility's energy and capacity output, or just energy output, there cannot be any enforceable obligation. Similarly, without knowing what is included or excluded from the determination of the law's "adjusted energy rate," there also cannot be any enforceable obligation.[5]

Hence, Eversource has turned to this Commission for a timely determination of what the law requires, how it will be implemented, and what customer protections should be put in place to recover above-market payments to the Wood IPPs if SB 365 is found to be unconstitutional.

In addition, as agreed to by the Parties during the Technical Session that followed the December 18, 2019 prehearing conference, Eversource responds to the issues set out in the Commission's December 11, 2018, Supplemental Order of Notice.[6]

[5] "A valid, enforceable contract requires offer, acceptance, and a meeting of the minds on all essential terms. *Durgin v. Pillsbury Lake Water Dist.,* 153 N.H. 818, 821, 903 A.2d 1003 (2006). A meeting of the minds is present when the evidence, viewed objectively, indicates that the parties have assented to the same terms. *Syncom Indus. v. Wood,* 155 N.H. 73, 82, 920 A.2d 1178 (2007). 'The question of whether a "meeting of the minds" occurred is a factual question to be determined by the trier of fact,' *Fleet Bank–NH v. Christy's Table,* 141 N.H. 285, 288, 681 A.2d 646 (1996), as is the issue of whether a valid contract was created, *Gulf Ins. Co. v. AMSCO,* 153 N.H. 28, 43, 889 A.2d 1040 (2005)." *Glick v. Chocorua Forestlands Ltd. P'ship,* 157 N.H. 240, 252 (2008), *as modified on denial of reh'g* (June 25, 2008).

[6] *See* "Staff Proposed Procedural Schedule," December 19, 2018.

In support of this Objection, Eversource says the following:

1. On December 4, 2018, Eversource filed a "Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365" (the "Petition"). The Commission determined that the Petition would be considered as part of this docket. Supplemental Order of Notice, December 11, 2018.

2. A prehearing conference and technical session were held regarding this matter on the morning of December 18, 2018.

3. The Wood IPPs filed their Motion during the afternoon of December 17, 2018. In their Motion, the Wood IPPs requested that the Commission:

> A. Review the Wood IPPs' "Agreements" for conformity with RSA 362-H;
>
> B. Determine that Wood IPPs' "Agreements" conform with RSA 362-H;
>
> C. Order that Eversource must comply with RSA 362-H by signing the Wood IPPs' "Agreements"; and
>
> D. Not issue any other orders or rulings regarding matters that are beyond the scope of the review of the Wood IPPs' "Agreements" for conformity with RSA 326-H.

4. First and perhaps foremost, there are no "Agreements" in this matter. As clearly demonstrated by the Motion itself and Attachment 1 to the pre-filed testimony of Eversource witness Frederick B. White dated December 4, 2018, there are only "disagreements." The Motion and the referenced attachment to Mr. White's testimony explicitly identify myriad points of disagreement that exist. A cursory review of Attachment 1 to Mr. White's testimony demonstrates that no "agreements" have been reached. As the New Hampshire Supreme Court has repeatedly made clear "there must be a meeting of the minds in order to form a valid contract." *Chisholm v. Ultima Nashua Indus. Corp.*, 150 N.H. 141, 145 (2003). "A meeting of the minds is present when the parties assent to the same terms." *Id., see also, Tsiatsios v. Tsiatsios*, 140 N.H. 173, 178 (1995) ("In addition to offer, acceptance, and consideration, a valid contract requires that the parties assent to the same terms; that is, that they have a meeting of the minds."). Attachment 1 to Mr. White's testimony details the changes that the Wood IPPs made

to Eversource's solicitation. There was no meeting of the minds and no agreement of the parties.[7]

There needs to be an arbiter with authority to determine the terms and conditions that govern transactions under SB 365. RSA 362-H:2, IV provides this Commission with authority to review these transactions "for conformity with this chapter." It is well settled law that a specialized agency such as the Public Utilities Commission has the authority to settle questions regarding the operation of statutes that fall under its area of expertise, such as SB 365:

> The doctrine of primary jurisdiction "provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." *Wisniewski v. Gemmill*, 123 N.H. 701, 706, 465 A.2d 875 (1983).

Frost v. Comm'r, New Hampshire Banking Dep't, 163 N.H. 365, 371 (2012).

5. In the Motion at pages 8-10, the Wood IPPs allege that "Eversource . . . included certain conditions within its Solicitation that are contrary to RSA 362-H." The Motion then sets out several purported examples of such conditions. And, the Motion states, "Intervenors rejected the impermissible conditions that Eversource sought to impose…." How the Wood IPP's admitted "rejection" of Eversource's solicitation resulted in "agreements" is incomprehensible. *See*, *Tsiatsios*, *supra*. at 178. There are no "agreements." [8]

6. An example cited by the Wood IPPs is Eversource's requirement that the Wood IPPs utilize "good utility practice" including "compliance with all applicable laws, codes and regulations, all ISO-NE Rules and ISO-NE Practices…." The Wood IPPs rejected the "compliance with all applicable laws, codes and regulations, all ISO-NE Rules and ISO-NE Practices…." requirement saying that "RSA 362-H does not require any participation in ISO-NE markets." Whether RSA 362-H requires ISO-NE participation by the Wood IPPs is not relevant

[7] Eversource also notes that even if there were agreements here, it is not clear that they would be enforceable. According to the Wood IPPs, "New Hampshire law that requires Eversource to enter into the power purchase agreements." Motion at 15. However, "In this jurisdiction, the payment of money or the making of a contract might be under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover the money paid or excuse him from performing the contract." *Cheshire Oil Co., Inc. v. Springfield Realty Corp.,* 118 N.H. 232, 236 (1978).

[8] In fact, the Motion itself continues negotiations on substantive terms of a potential agreement. At page 12 of the Motion, the Wood IPPs note that they do not "presently" object to one term, but "would object" to that term if interpreted in a particular way. It is abundantly clear that there is no meeting of the minds, and no agreement.

to this issue. The Eversource solicitation includes "compliance with ISO-NE Rules and ISO-NE Practices" as matters within the definition of "good utility practice." The rejection of this requirement demonstrates that there is no "agreement." Whether this provision is one that is reasonable for governing the relationship between the Wood IPP sellers and the utility purchaser is a matter of fact, not law. Without a factual hearing to produce a record, under RSA Chapter 541-A the Commission cannot make a decision on this matter.

7. Another example cited by the Wood IPPs is that Eversource said it would "pay the adjusted energy rate 'as established' by the Commission." The Wood IPPs claim that the law gives no authority to the Commission to determine the rate, and that the rate "is determined through the default service procurement process." Motion at 10. Under RSA 362-H:1, I, the:

> "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.

According to a December 13, 2018 filing made at the Federal Energy Regulatory Commission ("FERC') by ten New Hampshire legislators in FERC Docket EL19-10 (the New England Ratepayers Association's ("NERA") declaratory ruling proceeding) the adjusted energy rate is 80% of only the "competitively procured rate":

> Chapter 362-H simply uses New Hampshire's existing default service competitive procurement process law to require electric distribution utilities to purchase energy from the approximately 100 MW of eligible biomass and waste-to-energy generation facilities in the State of New Hampshire at a 20% discount from the competitively procured rate.

See "Comments of the New Hampshire Legislators" filed with FERC included as an Attachment to this pleading.[9]

Similarly, in the Motion, the Wood IPPs say "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***." Motion at 3 (emphasis added). At FERC, the Wood IPPs (and the Wheelabrator Concord trash-to-energy plant) state, "[A] procurement arrangement in

[9] Also available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15120518 . Note that more than half of the Legislators that submitted these Comments to FERC were sponsors of SB 365.

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." (Emphasis added.) "Motion to Intervene and Protest of the New Hampshire Generator Group," FERC Docket EL19-10, December 3, 2018 at p. 3.[10] In a later FERC filing, the New Hampshire Generator Group again notes that the adjusted energy rate under SB 365 is based off "the competitively procured default service rate". "Supplemental Comments of the New Hampshire Generators Group," FERC Docket EL 19-10, December 18, 2018 at p. 2.[11]

The calculation described in this statutory definition is not just the rate contained in the wholesale bids received in the default energy solicitation process. Rather, Eversource's "default energy rate" referenced in the statutory definition of "adjusted energy rate" also includes state-jurisdictional items including "the cost of RPS compliance, prior period reconciliation, [and] cost of administrative and general expense associated with the ES offering." Prefiled Testimony of Christopher J Goulding in this docket dated December 13, 2018 at p. 3. Eversource's "administrative and general expense associated with the ES offering" include costs of Internal company administration; Bad Debt Expense; Company Usage; PUC Assessment; and Other. Prefiled Testimony of Christopher J Goulding in this docket dated December 13, 2018, Attachment CJG-1 at p. 3. Under the statutory definition of "adjusted energy rate" only the RPS compliance costs are excluded from the calculation of the "adjusted energy rate." That would mean that Eversource's state-jurisdictional administrative and general costs and prior period reconciliation costs as determined by this Commission are included in the adjusted energy rate calculation.

Clearly, the "adjusted energy rate" is <u>not</u> solely based off of a competitively procured wholesale rate. The only portion of the default energy service rate that is determined by a competitive solicitation process and arguably subject to FERC jurisdiction is the bid prices from

[10] The "New Hampshire Generator Group" includes the five Wood IPPs and Wheelabrator Concord Company, L.P. (an eligible facility located within the service territory of Unitil). The referenced filing is available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15109121 .

[11] The referenced filing is available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15120506 .

the selected suppliers. Eversource's administrative and general expenses, prior period reconciliations, and RPS costs included in the default energy service rate are clearly retail costs outside the jurisdiction of FERC.[12]

Based upon the definition of "adjusted energy rate" contained in RSA 362-H:1, I, it appears that such rate is simply the retail default energy service rate approved by the Commission in Order No. 26,203 (December 20, 2018) minus the RPS portion of that approved rate. *See* prefiled testimony of Christopher J. Goulding filed in this docket on December 13, 2018, at page 6.[13] If so, the adjusted energy rate is based upon a rate that includes both FERC and State jurisdictional components.

A determination must be made regarding what the proper "adjusted energy rate" is under SB 365 – is it 80% of the competitively procured wholesale rates, as alleged by the Wood IPPs and certain Legislators at FERC or is it 80% of the retail default energy service price for residential customers established by this Commission minus RPS compliance costs. The Commission has the authority to make this determination, and Eversource requests that it do so.

Without clarification of the pricing provision of the transaction, there cannot be any "agreements" for this Commission to approve, nor any "agreements" that the Commission can order Eversource to comply with.

8. Not only is there a question regarding the determination of the "adjusted energy rate," but there is also a question of what products utilities are buying when they pay that rate. Are utilities buying all the energy and capacity generated by the Wood IPPs, or just the energy?

The "adjusted energy rate" is based, in whole or in part, on the bid price received from the selected wholesale energy service provider. As noted earlier, that bid price is an all-in, load-following, energy and capacity price. As such, since the "adjusted energy rate" is based upon a

[12] *See also,* "Protest of the State of New Hampshire" dated December 3, 2018, page 6, filed in FERC Docket EL 19-10, available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15109621, where the State, apparently agreeing with Eversource's view of the law, notes that "the adjusted energy rate is tied to the default service energy rate, which is under the purview of the NHPUC." As this Commission is aware, the default service energy rate for Eversource is not just the competitively procured wholesale rate.

[13] Based upon the calculations contained in Mr. Goulding's referenced testimony the adjusted energy rate for purchases under SB 365 for the six-month period beginning February 1, 2019 would be $0.07768 per kWh if that rate is the approved ES rate minus RPS costs.

rate that includes both energy and capacity, excluding capacity from the products being sold by the Wood IPPs would create an asymmetry.

RSA 362-H:2 begins by stating that utilities will "purchase the **net energy output** of any eligible facility located in its service territory." (Emphasis added.) In RSA 362-H:2, I,(b),(3), the law says, "the electric distribution company's purchase would be for **100 percent of the eligible facility's net electrical output**." (Emphasis added.) Similarly, RSA 362-H:2, I,(b),(2) says, "the purchase shall be from the eligible facility's **net electrical output**." (Emphasis added.)

Compare these provisions to that found in RSA 362-A:3, I: "The **entire output of electric energy** of such limited electrical energy producers, if offered for sale to the electric utility, shall be purchased by the electric public utility which serves the franchise area in which the installations of such producers are located." This provision of Chapter RSA 362-A, the "Limited Electrical Energy Producers Act," has been interpreted by this Commission to encompass both energy *and* capacity. *Briar Hydro Associates*, 92 NHPUC 446 (2007), *rehearing denied* 94 NHPUC 175 (2009).[14]

Where the legislature uses different language in related statutes, the New Hampshire Supreme Court will assume that the legislature intended something different. *In re Guardianship of Williams*, 159 N.H. 318, 323 (2009); *State Employees Assoc. of N.H. v. N.H. Div. of Personnel*, 158 N.H. 338, 345 (2009). The language used in RSA 362-A and RSA 362-H is substantially the same. Hence, the same interpretation should be given to both.

9. Without clarification of the products that are being purchased and sold, there cannot be any "agreements" for this Commission to approve, nor any "agreements" that the Commission can order Eversource to comply with. A determination must be made regarding what the proper products are under SB 365. The Commission has the authority to make that determination, and Eversource requests that it do so.[15]

[14] "[O]nce PSNH has purchased Briar Hydro's entire output, Briar Hydro retains no ability to generate power for any other purpose." *Briar Hydro Assocs.*, 94 NHPUC 175 (Apr. 22, 2009), fn. 3.

[15] The Wood IPPs contend that because Eversource's solicitation only referred to energy, there is no ambiguity regarding the products covered by the law. Motion at 19-20. This argument is irrelevant to the issue before the Commission. As noted, the Wood IPPs have rejected Eversource's solicitation and therefore its contents are of no moment. Moreover, the issue before the Commission is what the law requires, not what Eversource's solicitation

10. In the Motion, the Wood IPPs state (at page 13), that "Eversource submitted [the Wood IPPs' proposals] to the Commission as the 'agreements' pursuant to RSA 362-H for the Commissions' review…." Note that by placing the word "agreements" in quotations in their Motion, even the Wood IPPs apparently concede that their submitted proposals are not really agreements at all.

11. The Wood IPPs Motion at page 15 states, "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." As noted during the prehearing conference by counsel for Eversource, compliance with the requirements of a state law does NOT protect a utility from the possibility of a protracted and expensive prudence review by this Commission.

Recall Docket DE 11-250, "Investigation of Scrubber Costs and Cost Recovery." The law mandating the construction of scrubber technology at Merrimack Station by Eversource could not be clearer:

> **125-O:11 Statement of Purpose and Findings. –**
>
> The general court finds that:
>
> I. It is in the public interest to achieve significant reductions in mercury emissions at the coal-burning electric power plants in the state as soon as possible
>
> . . .
>
> VI. The installation of such technology is in the public interest of the citizens of New Hampshire and the customers of the affected sources.
>
> **125-O:13 Compliance. –**
>
> I. The owner shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013.

Notwithstanding the clear and unambiguous statutory public interest findings and the statutory mandate that Eversource (the owner) shall install and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013,

stated. If the Commission determines that the law requires the inclusion of capacity, then that would be the controlling determination regardless of what was in Eversource's solicitation.

the resulting prudence hearing continued for years.[16] Despite the clear and unambiguous public interest findings in the scrubber law and the Legislature's express mandate that the scrubber "shall" be installed,[17] the Commission ruled, "No utility may proceed blindly with the management of its assets or act irrationally with ratepayer funds; PSNH had a duty to its ratepayers to consider the appropriate response, possibly even including a decision to no longer own and operate Merrimack Station, when facing changing circumstances." *Public Service Company of New Hampshire*, Order No. 25,565 (August 27, 2013) at 7; *see also Public Service Company of New Hampshire*, Order No. 25,714 (September 8, 2014) at 6. Ultimately as part of the "2015 PSNH Settlement" approved in Docket No. DE 14-238, Eversource gave up $25 million of deferred return to settle the issue of whether complying with a mandate in a state law was prudent.

In light of the Commission's prior decisions, Eversource cannot "blindly" go forward with SB 365 and commit ratepayer (customer) funds to pay the SB 365 eligible facilities above-market prices. Instead, Eversource considers its present course of action to be the appropriate response - - especially considering the on-going FERC challenges to the constitutionality of the law.

12. In the instant case, the filing at FERC of the "Petition for Declaratory Order" by NERA on November 2, 2018 (prior to the issuance of solicitations to the eligible facilities by Eversource) put Eversource on notice that the state law might be unconstitutional under the Supremacy Clause of the U.S. Constitution. Given the scrubber precedent, rote compliance with SB 365 would put both the customers and the shareholders of Eversource at risk. If Eversource ignored the federal challenge to the law, and that law was ultimately found to be constitutionally infirm, Eversource may again face a prudency investigation for not protecting customers. If the law is set aside as unconstitutional, it is unlikely that the Wood IPPs would willingly refund to

[16] Prudence inquiries regarding the building of the scrubber began in 2008 in Docket No. DE 08-103 and were not concluded until the issuance of Order No. 25,920 in 2016 in Docket Nos. DE 11-250 and DE 14-238. That prudence process included a pair of appeals to the N.H. Supreme Court: *Appeal of Stonyfield Farm*, Case No. 2008-0897 and *Appeal of PSNH*, Case No. 2014-0624. The Commission's "virtual docket book" for Docket DE 08-103 includes 66 tabbed documents and for Docket DE 11-250 includes 232 tabbed documents and 53 marked exhibits. The eight-year prudence review process took roughly 4 times longer than the construction of the scrubber itself.

[17] "[T[he word "shall" establishes a mandatory duty. *Appeal of Algonquin Gas Transmission, LLC*, 170 N.H. 763 (2018).

customers the above-market amounts of payments they had received while the law was under challenge. In their responses to Eversource's solicitation the Wood IPPs rejected the inclusion of any security mechanism to protect customers in the event that SB 365 is set aside. This Commission must decide how to move forward given the law and surrounding circumstances in a manner that it deems reasonable and proper as it is "the arbiter between the interests of the customer and the interests of the regulated utilities." RSA 363:17-a.

13. The Wood IPPs also contest Eversource's hesitancy to enter into formal written contracts to effectuate the transactions contemplated by SB 365. Nothing in the law requires the purchasing utilities to enter into formal written contracts. The law does contemplate that there would be "purchased power agreements" that govern the commercial aspects of the transactions. But, the law is silent on the form those "purchased power agreements" must take. In its Petition, Eversource noted its willingness to comply with a Commission order that directs the purchases under SB 365 and which sets forth the governing commercial terms of the transactions. As noted in the Petition, this Commission has used that very technique to put into effect mandated purchases by utilities under another law – the Public Utility Regulatory Policies Act or PURPA. Whether or not the transactions under SB 365 are subject to PURPA is not the issue before this Commission; that is a matter before FERC. But the point is that there is a methodology to implement SB 365 in a manner that would allow the transactions to go forward while protecting the interests of Eversource's retail customers. Eversource's entering into a formal written contract is unnecessary and may imperil the interests of customers under PURPA regulations or FERC's market based rate regimen.

14. For the reasons set forth above, Eversource objects to the Motion of the Wood IPPs.

15. During the prehearing conference/technical session in this proceeding, the parties were also asked to address the six issues contained in the Commission's December 11 Supplemental Order of Notice. The prior comments have addressed all but two of those six issues: issue number 4 and issue number 6.

16. Issue number 4 in the Supplemental Order of Notice asks, "whether it is necessary for the Commission to decide issues of federal preemption of SB 365 in this proceeding, and, if so, whether SB 365 is subject to federal preemption under the Federal Power Act ("FPA") and PURPA." In determining how best to protect the interests of customers from a finding that SB

365 is unconstitutional, the Commission should consider the FPA and PURPA issues set forth in the Petition, and the arguments for and against SB 365 filed with FERC in its Docket EL19-10. For immediate purposes, however, it is Eversource's opinion that the decision on such federal preemption issues is properly before FERC.

17. Issue number 6 in the Supplemental Order of Notice asks, "whether the Commission should order in this proceeding that Eversource's costs of compliance with SB 365 be recovered as part of its stranded cost recovery as additional "Part 2" non-securitized stranded costs." In its Petition, Eversource made this very request. RSA 362-H:2, V requires:

> 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.

While Eversource's SCRC rate would be a convenient and appropriate place to recover the costs of these purchases, the law does not require that the costs of compliance must be recovered as part of Eversource's existing SCRC rate. The Commission may implement a ratemaking mechanism that would be a "twin" of the SCRC: a nonbypassable charge allocated among Eversource's customers using the existing SCRC rate design. Inclusion of the SB 365 costs within the existing SCRC rate, however, would comply with the requirement of SB 365 without adding the new regulatory and billing complications that another nonbypassable charge, bill entry, and reconciliation/ratesetting proceeding would require. Moreover, inclusion of the costs of SB 365 in Eversource's SCRC is what is called for in the "2015 PSNH Settlement" (*see supra* at 3).

18. NERA has requested that FERC rule upon its Request for Declaratory Order by February 1, 2019. Eversource requests that the Commission consider how best to protect interests of retail customers in the event that SB 365 is determined to be unconstitutional.

In the December 4 pre-filed testimony of Mr. White, the Company proposed:

> In light of the pending challenge to the legality of SB 365, the Commission should determine how to protect customers from excessive charges in the event that the law is ultimately set aside. Eversource has proposed that it pay only the avoided cost rate for energy until the legality of SB 365 has been finally adjudicated, at which time payments will be reconciled as necessary. As an alternative, the Commission could consider requiring each eligible facility to provide a letter of credit in an amount equal to the estimated above market costs of their sales under SB 365 to ensure that funds are available to make customers whole should the law be set aside. Or, the Commission could require Eversource to escrow any amounts above the avoided cost value of the purchases until the law's legality is determined, again at which time payments will be reconciled as necessary.

The estimated above market costs of implementing SB 365 for the six-month period from February 1, 2019 through July 31, 2019 are set forth in this table included in Mr. White's testimony:

FACILITY	NET GENERATING CAPACITY (MW)	ESTIMATED ABOVE-MARKET COST ($ millions)
Springfield Power LLC	17.5	2.2
Pinetree Power Tamworth LLC	20.5	2.6
Pinetree Power LLC	15.5	2.0
DG Whitefield, LLC	17.0	2.2
Bridgewater Power Company, L.P.	15.7	2.0
Total:	86.2	11.0

Eversource urges the Commission to consider the proposals for protecting the interests of customers set forth in Mr. White's testimony.

19. In conclusion, as stated in its Petition, Eversource "would make the purchases specified by SB 365 if and to the extent that this Commission orders it to do so." Petition, para. 7. Eversource stands by that commitment.

WHEREFORE, Eversource respectfully requests that the Commission:

A. Deny the Motion of the Wood IPPs;
B. Determine what the "adjusted energy rate" is under SB 365 for the default energy period beginning February 1, 2019;

C. Determine whether the SB 365 requires the purchase/sale of energy and capacity or only energy;
D. Establish in its Order the commercial terms and conditions that would govern any transactions under SB 365;
E. Include in such terms and conditions protections for retail customers should SB 365 be found to violate the Supremacy Clause of the U.S. Constitution;
F. Fashion its Order in the manner of a Rate Order that creates a legally enforceable obligation requiring the performance deemed reasonable and proper by the Commission of Eversource under SB 365; and,
G. Rule that the costs of compliance with SB 365 be recovered as part of Eversource's existing stranded cost recovery as additional "Part 2" non-securitized stranded costs;

Respectfully submitted this 27th day of December, 2018.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

By:_____

Robert A. Bersak, Esq.
Chief Regulatory Counsel
Public Service Company of New Hampshire
d/b/a Eversource Energy
780 N. Commercial Street
Manchester, NH 03101

603-634-3355
Robert.Bersak@Eversource.com

CERTIFICATE OF SERVICE

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

December 27, 2018

Robert A. Bersak

ATTACHMENT

"Comments of the New Hampshire Legislators"

Submitted to FERC in its Docket EL19-10

State of New Hampshire

GENERAL COURT

CONCORD

RE: New England Ratepayers Association, FERC Docket EL 19-10

As supporters of New Hampshire Senate Bill 365, which was passed by the New Hampshire Legislature and became N.H. Rev. Stat. Chapter 362-H earlier this year, we are writing to ask you to deny the recent Petition for Declaratory Order filed with the Federal Energy Regulatory Commission (FERC) by the New England Ratepayers Association. Chapter 362-H simply uses New Hampshire's existing default service competitive procurement process law to require electric distribution utilities to purchase energy from the approximately 100 MW of eligible biomass and waste-to-energy generation facilities in the State of New Hampshire at a 20% discount from the competitively procured rate.

The focus of Chapter 362-H is on utility purchases from these renewable resources and resource planning decisions of the electric distribution utilities that are subject to the State's competitive procurement process.

We passed this legislation because, as stated in the "findings section" of the Chapter law (2108 Laws, 379:1), the Legislature found it to be in the public interest to promote the fuel diversity represented by these renewables as part of the State's overall energy policy.

As also noted in the "findings section," fuel diversity in the generation mix is important to New Hampshire because our electricity supply (and that of New England) is heavily dependent upon natural gas-fired generation. The "findings section" notes that ISO-NE has expressed the need for fuel diversity, given the amount of natural gas-fired generation, and that renewables can help lessen generation fuel security risks.

This legislation does not seek to interfere with FERC's authority. To the contrary, FERC retains the authority to exercise regulatory oversight over all wholesale sales of electricity, including any power purchase contracts executed under Chapter 362-H.

Additionally, this legislation does not require any level of participation in the ISO-NE markets.

We urge you to deny the Petition for Declaratory Order as soon as possible so that there will be no delay with the implementation of Chapter 362-H.

Thank you for your prompt consideration of this matter.

Sincerely signed and dated December 5, 2018,

Senator Jeb Bradley (R)
Senate Majority Leader (2018)

Representative Gene Chandler (R)
House Speaker (2018)

Senator Dan Feltes (D)
Senate Majority Leader (2019)

Representative Steve Shurtleff (D)
House Speaker (2019)

Senator Martha Fuller Clark (D)
Senate Energy Committee

Representative Robert Backus (D)
House Science & Technology Committee

Senator Robert Giuda (R)
Senate Finance Committee

Representative Erin Hennessey (R)
House Finance Committee

Senator Ruth Ward (R)
Senate Public & Municipal Affairs (representing district served by SB 365 facility)

Representative Howard M Moffett (D)
House Science & Technology Committee. (representing town served by a SB 365 facility)