THE STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

Docket No. DE 18-002

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

2018 Energy Service Solicitation and Senate Bill 365

NEW ENGLAND RATEPAYERS ASSOCIATION

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

Intervenor the New England Ratepayers Association objects to the motion made by the biomass generators (Springfield, Whitefield, Bridgewater, Pinetree Tamworth and Pinetree, collectively referred to as the "biomass generators" or the "generators") to move the Commission to approve the existing agreements between Eversource and the generators and requests the Commission take the appropriate actions to protect ratepayers impacted by RSA 362-H.

NERA believes it is necessary for the NH PUC to consider the implications of federal preemption in order to protect ratepayers and customers.

The current docket under consideration would include the current agreements required under SB 365 (RSA 362-H). Given the timing of both the start of the contracts and the potential for tens of millions of dollars of subsidy flowing from ratepayers to biomass generators under this docket, the PUC must ensure prudent measures are taken to protect ratepayers.

The mission statement of the NH PUC states clearly:

> "To ensure that customers of regulated utilities receive safe, adequate and reliable service at just and reasonable rates."

And,

"To provide necessary customer protection."

The PUC is the primary state organization responsible for taking actions directly, and requiring actions of various stakeholders, to ensure ratepayers are protected. While the nature of the role of the PUC has changed as the state has moved from a vertically integrated utility model to one where competition for customers now exists and the utilities have fully divested from generation, the Commission should maintain its role in protecting customers. In fact, that role becomes most pertinent through its decisions in rate setting dockets, which is exactly what is being addressed in these filings. It is in setting the tariffs that the PUC must use its discretion in determining whether the rates being charged are just and reasonable for the benefit of ratepayers, and ensure that customers are protected.

In the specifics of this situation there is recognized risk that the mandated overpayment (payment above avoided cost for a wholesale transaction) for the electricity generated by the biomass facilities may in fact be a violation of the Federal Power Act. While it is impossible to ascertain a probabilistic outcome regarding a decision, there can be no dispute that there is a real possibility that the "adjusted energy rate" imposed under RSA 362-H will be preempted. Given this potential, and recognizing the risk that payments made under RSA 362-H prior to preemption could be difficult or impossible to recover, or require extensive and costly legal action to recoup, the PUC must take actions or require actions on behalf of the parties to protect ratepayers in these circumstances.

In the technical discussion on December 18, 2018, several options were raised by the stakeholders which can address these concerns.

First, it was suggested that the utilities can be required to pay only the avoided cost for the power generated by the biomass facilities until a final determination from FERC. This is the simplest and most straightforward solution to address the potential for federal preemption of RSA 362-H and would not require any additional actions by the parties. The only risk in this scenario is that there is extensive delay in FERC taking action, but that risk can be mitigated by stipulating a specific date at which, regardless of whether FERC has acted or not, the Commission can revisit the issue of how to protect ratepayers from making unnecessary payments under 362-H..

As a second option, Eversource has suggested an escrow facility into which any amounts stipulated by RSA 362-H over the wholesale rate will be deposited. Upon a final determination of the FERC on the Petition before it, those funds can either be released to the generators if the FERC finds in their favor, or

they can be returned to the utility to avoid any of the legislatively required non-bypassable charges under RSA 362-H being placed on ratepayers.

A third option suggested by PUC staff at the December 18, 2018 meeting was to require the generators to post a Letter of Credit to ensure that recovery of the above market portion of the "adjusted energy rate" can take place.

NERA feels that any of these options are entirely adequate and should be required by the Commission, with NERA suggesting that an escrow option is likely the most cost effective while providing protection for ratepayers. It is unlikely that escrow will be required for more than a few months, if even that long, given that the Petition for Declaratory Order requested FERC decide the matter prior to the February 1, 2018 date when the tariffs and the "adjusted energy rate" would come into effect. As stated at the December 18, 2018 meeting, if the Commission finds that stipulating a specific time frame where the escrow funds must be released (regardless of specific FERC actions) in order to prevent extensive legal challenges from impairing the biomass facilities is prudent, NERA would not find that request objectionable.

It is unreasonable for the Commission to NOT take action or require actions on behalf of the parties to protect ratepayers

As stated above, the Mission Statement of the Commission specifically references its role to provide necessary protections for customers. In fact, it is the only organization among the utilities, generators and government entities involved with the tariff which can protect ratepayers. The utilities, while certainly having some level of interest in their customers, are also economically agnostic in these transactions as all overpayments for this power are transferred onto ratepayers. RSA 362-H specifically uses a required payment and tariff scheme to ensure that ratepayers are directly charged for tens of millions of dollars in subsidies to the biomass plants, and that ratepayers cannot avoid payment because of the use of a non-bypassable charge.

In such a situation, where all the costs of the program will be borne by the ratepayers, and ONLY the ratepayers, it is incumbent on the Commission to advocate on ratepayers' behalf and take action to protect them.

The Commission should consider whether the transactions required in RSA 362-H may be wholesale power transactions to determine if additional actions are necessary to protect ratepayers

The biomass generators in their December 17, 2018 filing under Docket # DE18-002 indicated on page 18:

> "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. Again, however, there is 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."

First, and most importantly, this argument is a red herring. 362-H is preempted because it sets the rate for wholesale sales of energy from the biomass generators to the utilities. There is absolutely no requirement, for preemption purposes, that the energy be tethered to the ISO-NE market. The FPA gives FERC exclusive jurisdiction over the rates of all wholesale sales of energy, regardless of whether they are "tethered" to an ISO market. It is worth noting that the FPA was enacted after the Supreme Court ruled that states are prohibited from setting the rates for wholesale power sales in interstate commerce under the Commerce Clause. *PUC v. Attleboro Steam Co,* 273 U.S. 83 (1927).

Second, even if it mattered, the biomass generators are wrong – 362-H does, in fact, directly tether its sales to the ISO-NE market. It is impossible for these transactions to be outside the wholesale market given the legislative requirements under 362-H V which states:

> "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. . . ." (emphasis added)

As was clearly indicated in NERA's Petition before FERC:

> SB 365 provides that "recovery of the nonbypassable charge [to the EDCs' retail customers] 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." Order No.

25,920 adopted the Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement ("Rate Stabilization Agreement") referenced in SB 365. The Rate Stabilization Agreement provides the following: "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." Thus, the cost recovery mechanism set forth in SB 365 adopts, by reference to the Rate Stabilization Agreement, the requirement that the EDCs "shall sell or bid such purchases [from the eligible facilities] into the pool at the ISO-NE market clearing price. . . ."

Such a sale into the ISO-NE market of all energy purchased under SB 365 is also required by the market rules in ISO-NE. Under those rules, all participating generators over 5 MW must be registered with the ISO-NE as "Generator Assets." No Generator Asset may produce net energy or utilize the ISO-NE grid unless dispatched by the ISO-NE. A generating asset can self-commit to minimum load but there is no "self-scheduling" above minimum output in ISO-NE except for certain intermittent resources subject to "do not exceed" dispatch rules. Whether the Generator Asset seeks to be dispatched solely for wholesale energy market revenues or in support of a bilateral transaction, the Market Participant for such Generator Asset must sell the energy into the ISO-NE market and is compensated by ISO-NE at the LMP for the energy produced.

In ISO-NE, bilateral arrangements are tied to a generating unit's dispatch and physical delivery of energy in that the generating unit receives the bilateral sale price while the buyer receives the ISO_NE LMP. Under a bilateral arrangement, the LMP exposure is thereby transferred from the seller to the buyer. With dispatch also comes the right to use the transmission system; ISO-NE automatically arranges transmission service, in accordance with a least-cost security constrained dispatch solution, in the amounts necessary to serve the control area's loads. SB 365 requires the EDCs to purchase the full net energy output if offered by the eligible facilities. Absent a sale through the ISO-NE market, the eligible facilities cannot produce and deliver any net energy to the EDCs.

Thus, while NERA prevails on its preemption claim regardless of whether the energy the EDCs are required to purchase at the State-mandated rate is sold through the ISO-NE market, the

> statute does, in fact, require such a sale. Indeed, SB 365 embeds this requirement into the calculation of the nonbypassable customer charges. It provides that "[t]he electric distribution company shall recover the difference between its energy purchase costs and the market energy clearing price through a nonbypassable delivery services charge." N.H. Rev. Stat. § 362-H:2(V). By fixing the EDCs' cost recovery as equal to the difference between the Adjusted Energy Rate and the ISO-NE price at the time of the eligible facilities' sales to the EDCs, SB 365 necessitates that the EDCs sell the eligible facilities' energy into the ISO-NE market and earn the revenue from that ISO-NE sale. Otherwise, the EDC would not recover from retail ratepayers the total amount paid for the energy.

The very language of the statute anticipates and requires a wholesale transaction so that the EDCs can determine the portion of the charge which will be allocated under the nonbypassable charge. Without any such wholesale transaction it is impossible for the utility to 1) dispose of the power and 2) determine the market value of the power at that point in time and determine the nonbypassable portion of the "adjusted energy rate".

It is unclear to NERA how the utilities can address these two issues without a wholesale transaction taking place and we are curious if the Commission, the utilities, or the generators can provide another alternative transaction that "disposes" of the electricity without utilizing the ISO-NE wholesale power market. While the biomass generators argue that there is no "tethering" to the wholesale market in RSA 362-H, NERA contends that in fact there is explicit language that references the wholesale market and makes it impossible to divorce the nonbypassable charge determination from these markets.

In fact, it is difficult to envision any other transaction which would meet the mandated requirements and non bypassable charge allocations of RSA 362-H except for a wholesale sale of power. For this reason, the Commission must recognize the real risk to ratepayers that exists by moving forward with any payments made to the generators above avoided cost, short of the Commission requiring terms and conditions that protect ratepayers.

Let us be very clear on this point, NERA is not asking the Commission to make any kind of formal determination of the arguments at FERC, but NERA is asking the Commission to consider the nature of the transactions mandated in RSA 362-H as ones that may be a violation of federal law. In such a case, NERA believes the Commission must take steps that recognize this risk and protect ratepayers. As expressed above, an escrow structure or a requirement for Letters of Credit are two readily available

and common terms which can provide the ratepayer protections the Commission has been empowered to enact.

The biomass references to the Zero Emissions Credits are not relevant to the utility transactions in the wholesale market under RSA 362-H

As noted above and stated again here for reference, the biomass generators make the following statement to distract from the wholesale market transactions:

> "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. Again, however, there is 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."

In the specific footnotes to this argument, the generators cite Second and Seventh Circuit decisions in the context of the Zero Emission Credits. The courts in those cases noted that the ZEC programs did not require the generators to sell their power into the wholesale market and therefore the compensation under the ZEC programs did not interfere with those markets, thus not raising FERC jurisdictional issues.

While not intending to relitigate a settled case, NERA notes that this decision hinged on the ability of the generators to take actions besides selling their power into the wholesale market such as selling their power to an independent end user. In fact, the biomass generators impacted by RSA 362-H also have alternatives to sell their power and entirely avoid the wholesale markets, but the EDC's under 362-H do not.

The very language of RSA 362-H requires the utilities to take actions in the wholesale market to comply with the statute. The utilities are purchasing power specifically for resale in the wholesale market so as to determine the non bypassable charge under the law. While the generators in the ZEC cases had options to sell their power, and thus avoid wholesale markets, the utilities under 362-H do not. They are required to make a sale in the wholesale markets to set a price under the law – in effect they are purchasing the power from the biomass generators specifically for resale at the "energy market price" indicated in the law. This is the very definition of a wholesale transaction under federal law and in the

opinion of NERA is the very reason why FERC jurisdiction applies and why 362-H is a violation of the Federal Power Act.

Given the options which the ZEC generators had under their programs, options which the utilities under RSA 362-H do not have, any use of these cases as consideration by the Commission, in terms of its actions or lack of action, should be ignored.

As clearly stated in the NERA Petition before FERC (see Appendix A attached):

> "The Generator Group's reliance on the ZEC cases is unavailing. Generator Group Protest at 20-22. The ZEC cases—which involved a different scenario where the state program "avoids setting wholesale prices and instead regulates the environmental attributes of energy generation," Coalition for Competitive Electricity v. Zibelman, 906 F.3d 41, 52 (2d Cir. 2018)—have no bearing on this case, because New Hampshire has not confined itself to providing subsidies that exist "separately from wholesale sales," id., but rather has chosen to set the rate for a wholesale sale directly. Indeed, in its discussion of prior analogous preemption precedent, the Court made clear that its analysis of whether the state measure was "tethered" to wholesale market participation was relevant precisely because the law at issue "does not formally regulate wholesale prices." See id. at 53, 55. New Hampshire has engaged in far more blatant intrusion on FERC's exclusive jurisdiction by directly setting the rate for a wholesale sale of electricity. The ZEC cases are thus irrelevant, and certainly cannot save SB 365 from preemption."

The Commission should indicate to the parties what actions or demands the Commission will take, or require the parties to take, if RSA 362-H is preempted.

It is generally recognized that there is a potential for RSA 362-H to be preempted by the FERC. Under a scenario where RSA 362-H is preempted, it is likely that the "adjusted energy rate" which is required under 362-H will be found in violation of the Federal Power Act and that any payments not set in accordance with PURPA will be prohibited under federal law.

Given the potential for preemption, NERA recommends that the Commission consider the limited set of potential outcomes of a FERC decision and determine how it expects the parties and the Commission to act in these situations.

NERA believes the following possible outcomes should be considered with respect to FERC preemption of 362-H:

1) FERC rules in favor of NERA prior to the February 1, 2019 implementation of the current tariff docket and the agreements under 362-H
2) FERC rules in favor of NERA after February 1, 2019
3) FERC rules in favor of the biomass generators prior to February 1, 2019
4) FERC rules in favor of the biomass generators after February 1, 2019
5) FERC announces it will not address the issues under the NERA petition

The critical issue to consider under any of these scenarios is how to ensure that the limited number of parties involved, including utilities, generators, and ratepayers, can all have some level of protection in case of preemption. To this extent, the most critical scenarios to address are those that upset the current status quo, which are scenarios #1 and #2.

It is in those two cases where there would be a material change in the laws governing the agreements under consideration by the Commission, and it is in those two cases the Commission should provide some guidance to all the parties as to how it will take action to address the impacts of pre-emption and what actions it will require of the parties to bring the tariffs and the agreements under RSA 362-H into compliance with the law.

A requirement for escrow or a letter of credit does not violate RSA 362-H

A direct reading of RSA 362-H does not specifically indicate any prohibition on use of an escrow to protect ratepayers. More importantly, there is no language in RSA 362-H that dictates payment terms outside of the mandated "adjusted energy rate" which is in question due to the potential actions at FERC. While there are specific terms of the agreements which are required under the statute (including the rate for the wholesale energy sale), many of the necessary terms and conditions of such an agreement are not addressed either directly or indirectly in the statute.

For example, the terms on payment schedule are not addressed in RSA 362-H, but are necessary terms for any contract such as the one proposed and considered by the Commission. Under the generator's arguments at the December 17 hearing, items not expressly indicated in 362-H are not valid for

consideration in the agreement. As an example of this irrationality, under such a reading Eversource cannot be compelled to make payments in 30 days under the contract and the timing of those payments could be 90 days, or 365 days or at a time to be determined by Eversource, given that RSA 362-H is silent on this matter. Clearly, consideration or requirement of additional terms or conditions must be part of any contractual consideration under 362-H, and those that include protecting ratepayers will not violate RSA 362-H, which states that:

> "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."

Under the statute, the Commission must ensure conformity with RSA 362-H and assuming all the provisions of the agreements which are specifically identified in the statute are complied with, it does not preclude the Commission from allowing for other terms and conditions in the agreements. As stated above, any such agreement between a utility and generator would have to include terms and conditions which are not addressed in RSA 362-H. Given the extensive language which must be included in a complex energy purchase/sale transaction beyond the specific terms required by the legislature in SB 365, it is entirely reasonable for the Commission to consider and require terms on the payment schedule which can protect ratepayers.

NERA clarifies the expected outcome and the requirement of additional actions by the parties if FERC rules in favor of NERA and RSA 362-H is preempted

In the technical discussion on December 18, 2018 it was expressed by the biomass generators that a decision in favor of NERA at FERC has no impact on the agreements unless and until a court of jurisdiction rules on the matter. In addition, in their motion before the Commission (12/17/2018) under Docket # DE 18-002 they stated:

> '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 PURPA' and/or determine whether RSA 362-H is preempted."

NERA disagrees with this and believes that a full understanding of the implications of a FERC ruling against the biomass generators and pre-empting RSA 362-H indicates how court action is not necessarily required for the FERC order to impact these proceedings. This does not mean that any of the parties are precluded from taking additional court action if they deem it necessary, but that a decision in favor of NERA is likely to result in a situation where RSA 362-H is rendered irrelevant for all practical purposes.

Assuming that FERC rules in favor of NERA and issues an order declaring RSA 362-H preempted by federal law, then that ruling would declare the rate unlawful and the biomass generators would not have a just and reasonable rate on file with the FERC. This is an absolute requirement of Section 205 of the FPA before the generators can sell wholesale power. Among the consequences of such a ruling is that the biomass generators would be violating federal law, and would risk incurring civil penalties and other potential actions at FERC if they charged the rates set by 362-H. A further consequence of a FERC preemption ruling is that it would be reasonable for Eversource and Unitil to take the position that they are under no legal compulsion to pay the unlawful rates. Thus, the outcome of a FERC preemption finding would be that the biomass generators cannot charge the rates in 362-H, and that the utilities are not required to pay those rates.

In this environment, it is most likely that the utilities will decide to either not enter into any agreement, or to stop abiding by the agreements under consideration in this docket. At that point, any additional legal action required to commence making wholesale sales would have to be taken by the biomass generators to enforce what they believe to be a right to sell wholesale power at the rate established in 362-H. They could either go to court seeking to overturn FERC's ruling and establish the 362-H rates as valid rates under the Federal Power Act, or they could choose to make a Section 205 filing at FERC asking FERC to approve the rates in 362-H as just and reasonable.

Should there be an outcome where the FERC rules in NERA's favor, determines that RSA 362-H is preempted AND the utilities decide to continue to adhere to 362-H despite the generators violation of federal law, it is most likely that NERA would then take subsequent legal action to stop the unlawful sales. NERA believes this scenario where FERC rules in favor of NERA but the utilities choose to allow sales to take place in violation of federal law is highly unlikely. It should be noted that in this circumstance the shareholders of the utilities could be at risk for any imprudent overpayments under 362-H – an additional consideration by the utilities as they decide how to act under a pre-emption order by FERC.

While it is impossible to unequivocally determine the specific course of action by the parties, the Commission can and should consider the likely actions of the parties and how or when specific court actions would be required to effect a "legal moment". The most likely court action would have to come from the biomass generators to roll back the impacts of a FERC order in favor of NERA, not from NERA to request court action to implement the order.

The likely options for the biomass generators under a FERC Order in favor of NERA are limited and are highly unlikely to provide a transaction price for their power above avoided cost

If FERC makes an order in favor of NERA and determines that RSA 362-H is pre-empted, and assuming that the utilities determine to not move forward with the proposed agreements, the options of the biomass generators are fairly limited setting aside any court action.

The biomass generators have consistently indicated throughout their filings at both FERC and before the Commission that PURPA has no application in these agreements, and NERA is not aware of any of the parties not concurring with that statement. NERA, in its filing with FERC, noted that SB 365 and RSA 362-H make no reference to PURPA and do not use PURPA in justifying its "adjusted energy rate".

In the scenario where FERC rules against the generators, the biomass facilities could continue to operate as (or revert back to) Qualifying Facility ("QF") status under PURPA and ensure that Eversource must take their power. This is entirely within their rights, and pre-emption does not prohibit this in any way. However, the implications of operating under PURPA (which as noted they have vociferously avoided under 362-H) require them to accept avoided cost for their power. This in effect is the same status as they currently enjoy without RSA 362-H.

The biomass generators also have the right to appeal FERC's ruling to the appropriate appellate court, seeking to have the court determine that the rates set by RSA 362-H are valid, just and reasonable rates under the Federal Power Act notwithstanding FERC's ruling. To be clear, NERA would oppose any such appeal, and in the highly unlikely event that the generator appeal is successful, NERA would appeal that decision to the next higher appellate court.

The only other alternatives would be for the biomass generators to pursue a legal action as described above or to ask FERC to approve a rate schedule under Section 205 of the Federal Power Act that

includes a rate paid from the utilities to the generators at the "adjusted energy rate" or some other rate above avoided cost. NERA considers it very unlikely that the biomass generators could meet their burden of proving to FERC that the rate set by 362-H meets the requirements of the FPA that all rates be just and reasonable, especially after FERC has determined that 362-H is preempted.

CONCLUSION

For the aforementioned reasons, NERA respectfully requests the Commission reject the generators demands to approve the agreements as filed, and take the appropriate and prudent actions to protect ratepayers through any of the options presented in this objection.

Respectfully Submitted,

THE NEW ENGLAND RATEPAYERS ASSOCIATION

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Marc Brown
72 North Main Street
Concord, NH 03301
(603) 502-3553