STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 18-002

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

2019 ENERGY SERVICE SOLICITATON

Order Concerning Implementation of RSA Chapter 362-H
The Preservation and Use of Renewable Generation to Provide Fuel Diversity

O R D E R N O. 26,208

January 11, 2019

APPEARANCES: Robert A. Bersak, Esq., on behalf of Eversource Energy; Timothy J. McLaughlin, Esq., of Shaheen & Gordon, P.A., on behalf of Springfield Power LLC, DB Whitefield LLC, Bridgewater Power Company LP, Pinetree Power Tamworth, LLC, and Pinetree Power; Marc Brown, on behalf of New England Ratepayers Association; D. Maurice Kreis, Esq., of the Office of Consumer Advocate on behalf of residential ratepayers; and Suzanne G. Amidon, Esq., for Commission Staff.

In this order, the Commission provides interpretations of certain statutory terms and determines whether proposed terms of purchase conform to RSA Chapter 362-H, which requires electric distribution companies to purchase the net energy output of any eligible biomass or municipal waste facility located in its service territory. As requested by the parties in this docket, the Commission is not at this time resolving constitutional issues that are pending in another forum.

I. BACKGROUND

The issues before the Commission arise out of the enactment of Senate Bill 365 (SB365) during the 2018 session of the General Court. SB 365 became Chapter 379 of the Laws of 2018 when the Senate and the House of Representatives overrode the Governor's veto. Section 1 of the new law contained the General Court's findings:

> New Hampshire's and New England's electricity supply is heavily dependent upon natural gas-fired generation, which is subject to pricing volatility and risks of fuel availability. In its 2018 Operational Fuel-Security Analysis, the independent system operator of New England (ISO-NE) expressed concerns regarding the need for fuel diversity in the regional generation mix, given the amount of natural gas-fired generation in the mix, and noted that renewables can help lessen the fuel-security risk. The effect of natural gas pricing volatility on energy prices can be the closure of New Hampshire renewable generators and the loss of jobs and other statewide economic benefits, as well as the loss of fuel diversity derived from using indigenous renewable fuels. The general court finds that the continued operation of the state's 6 independent biomass-fired electric generating plants and the state's single renewable waste-to-energy generating plant are at-risk due to energy pricing volatility. These plants (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. The general court finds that 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.

Section 2 of SB 365 created a new chapter of the RSAs, Chapter 362-H. The new chapter contains definitions of certain terms. Two of the defined terms are at issue here. "'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." RSA 362-H:1, IV. "'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." RSA 362-H:1, I.

RSA 362-H:2 then directs each of the electric distribution companies (EDCs) like Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource), which are subject to the approval of the Commission regarding procurement of energy, to provide to its default

service customers (*i.e.*, the customers that choose not to purchase energy from a competitive supplier), to "offer to purchase the *net energy output* of any eligible facility in its service territory." RSA 362-H:2, introductory paragraph (emphasis added). There are six such facilities in Eversource's service territory, five of which have intervened in this matter.

The law specifies the procedures for electric distribution companies and the eligible facilities to deal with each other, including timing and content; and directs each electric distribution company to file with the Commission the agreements it enters into with the eligible facilities. RSA 362-H:2, I-III. It then tells the Commission to "review" the agreements "for conformity with this chapter." RSA 362-H:2, IV. The last paragraph describes how each electric distribution company is to recover the difference between what they pay to the eligible facilities and "the market energy clearing price," through charges imposed on all of the electric distribution company's customers. RSA 362-H:2, V. For ease of reference, all of RSA 362-H:2, I-V, is reproduced below:

> 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.

II. PROCEDURAL HISTORY

On December 4, 2018, Eversource filed a petition seeking Commission review of the responses it had received from five wood-fired generation plants to the Eversource solicitation made pursuant to RSA Chapter 362-H. Eversource's solicitation provided that it would not enter into formal bilateral purchase agreements with the respondents, and instead would make purchases required by statute only if ordered to do so by the Commission. In addition,

Eversource stated that if the legality of RSA 362-H were challenged before any judicial or administrative body, during the pendency of such challenge, the purchase price would be Eversource's avoided cost rate.

In its petition, Eversource noted that the New England Ratepayers Association (NERA) had filed a petition for declaratory relief under Section 207 of the Federal Power Act (FPA) with the Federal Energy Regulatory Commission (FERC) challenging the legality of RSA 362-H (FERC Challenge).[1]

On December 11, 2018, the Commission issued a supplemental order of notice setting a prehearing conference on December 18, 2018. The following parties intervened: Springfield Power LLC, DB Whitefield LLC, Bridgewater Power Company LP, Pinetree Power Tamworth, LLC, and Pinetree Power (collectively the Wood Plants); and NERA. The Office of Consumer Advocate (OCA) was already participating in this docket.

On December 17, 2018, the Wood Plants filed a motion asking the Commission to determine that the changes to the Eversource power purchase agreements made by the Wood Plants conform to RSA 362-H, and to order Eversource enter into agreements in the form proposed by the Wood Plants. At the prehearing conference held on December 18, 2018, the Commission directed the parties to respond to the Wood Plants' motion by December 27, 2018. On December 27, 2018, Eversource, NERA, and the OCA each objected to the Wood Plants' motion, and the Wood Plants filed supplemental comments.

The petition and subsequent docket filings, other than any information for

which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at http://www.puc.nh.gov/Regulatory/Docketbk/2018/18-002.html.

[1] On November 2, 2018, NERA filed a Petition for Declaratory Order and Request for Expedited Action. The matter was designated FERC Docket No. EL 19-10.

III. POSITIONS OF THE PARTIES AND STAFF

A. Eversource

1. Petition

In its petition, Eversource indicated that it solicited proposals from the six eligible facilities in its service territory for the facilities' net output of power produced, for the six-month period beginning February 1, 2019. Eversource asserted that its solicitation was consistent with the requirements of RSA 362-H. In the solicitation, Eversource notified the eligible facilities that it would not enter into a voluntary, bilateral power purchase agreement (PPA) with any of the respondents, to preserve its rights under the Federal Power Act and the Public Utility Regulatory Policies Act of 1978 (PURPA); Eversource noted that NERA had filed at FERC a request for a declaratory judgment under Section 207 of the FPA, challenging the legality of RSA 362-H as preempted by federal law.

Instead of entering into PPAs, Eversource said it would make purchases required by the statute only if ordered to do so by the Commission. In addition, Eversource stated that while any legal challenge to SB 362-H was pending, it intended to pay the eligible facilities Eversource's avoided costs, or the market price of power. Eversource said that the payment of avoided costs, instead of 80 percent of the retail default energy service rate, is appropriate because the Wood Plants are qualifying facilities (QFs) under PURPA and the only rates they are entitled to under PURPA are Eversource's avoided cost of power. Alternatively, Eversource argued that it could enter into voluntary bilateral purchase agreements at rates other than avoided costs, if the Wood Plants obtained market based authority under Section 205 of the FPA.

Eversource argued that the State of New Hampshire has no authority to set wholesale rates outside of PURPA, which restricts wholesale rate setting authority by states to avoided costs or rates established through voluntary bilateral contracts. Further, Eversource noted that it is no longer required under PURPA to purchase output from QFs with capacity exceeding 20 megawatts (MW).

Eversource's solicitation required the following from each of the Wood Plants: (1) confirmation that the facility is an "eligible facility" within the meaning of 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 the State of New Hampshire; (4) a non-binding proposed schedule of hourly net output amounts during the six-month period beginning February 1, 2019; and (5) confirmation of the eligible facility's intent to accept the terms of the solicitation.

Eversource questioned several provisions of RSA 362-H. Eversource claimed that the statute is ambiguous concerning whether the obligation to purchase "100 percent of the eligible facility's net electrical output" includes both energy and capacity, or just energy. Eversource asked the Commission to clarify this ambiguity in its order implementing the new law.

Eversource further noted that the statute allows it to recover the costs associated with any purchases from eligible facilities, and requested that the Commission approve its recovery of those costs as well as administrative expenses as part 2 non-securitized stranded costs. *See* 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement (2015 Settlement), approved in Order No. 25,920 (July 1, 2016).

Eversource stated that five of the six eligible Wood Plants in its service territory responded to its solicitation. Indeck Alexandria did not respond and indicated that it does not

intend to participate in the solicitation. The Wood Plants replied individually to the solicitation, each claiming that Eversource's solicitation contains requirements, terms and conditions that are extraneous and/or contrary to the purpose and intention of RSA 362-H.

2. Objection to Wood Plants' Motion

The Wood Plants' Motion asked the Commission to find that its version of Eversource's proposed agreement met the requirements of RSA 362-H, and to order Eversource to enter into agreements with the Wood Plants' on their terms. Eversource disagreed with the Wood Plants' claim that Eversource failed to comply. Eversource argued that it has taken reasonable actions to protect ratepayers in the event that the statute is found to violate the Supremacy Clause of the United States Constitution. Eversource stated that all purchases from eligible facilities pursuant to RSA 362-H would be immediately sold into the ISO-NE market with over-market and administrative costs passed on to Eversource's New Hampshire retail customers. Eversource claimed that those power purchases cannot be used to supply default service customers based on regulatory constraints and other practical concerns.

Eversource asserted that no agreements exist with the Wood Plants due to numerous disagreements over material purchase terms as reflected in the Wood Plants' responses to Eversource's solicitation. Arguing that the Commission has primary jurisdiction over regulated utilities in New Hampshire, Eversource requested that the Commission serve as arbiter of contested purchase terms pursuant to the statute. Whether terms like imposing compliance with ISO-NE rules and practices should be included are, in Eversource's view, factual questions requiring a hearing before the Commission.

Eversource argued the Wood Plants' claim that the adjusted energy rate is based *solely* on competitively procured wholesale costs is mistaken. Eversource pointed out that the "adjusted

energy rate" is based on 80 percent of the residential default energy service rate minus any rate components associated with RSA Chapter 362-F (the renewable portfolio standards statute). According to Eversource, its default energy service rate includes wholesale costs (which include energy and capacity costs), prior period reconciliations, and the costs of administrative and general expenses associated with default energy service. Eversource asked the Commission to clarify whether the adjusted energy rate under RSA 362-H:1, I, is based on 80 percent of its wholesale bids obtained in its default service solicitation, or its residential default energy service rate.

Eversource also argued that RSA 362-H is ambiguous regarding whether both energy and capacity are being purchased from the Wood Plants. Eversource pointed out that the term "net energy output" as used in RSA 362-H:2, I (b)(2) is similar to the term "entire output of electric energy" used in RSA 362-A:3, I. Eversource observed that the Commission has interpreted "entire output of electric energy" in RSA 362-A:3, I, to include both energy and capacity. *See Briar Hydro Associates*, 92 NHPUC 446 (2007), *rehearing denied* 94 NHPUC 175 (2009). Eversource urged the Commission to likewise interpret "net energy output" under RSA Chapter 362-H to include both energy and capacity.

Eversource claimed that it cannot comply with RSA 362-H because as a regulated public utility, it is bound to act prudently. Given the FERC Challenge, Eversource said it would be imprudent to commit ratepayer funds to pay the SB 365 eligible facilities an amount that could be determined to be unconstitutional. Eversource suggested that rather than paying the Wood Plants the adjusted energy price, it pay them the real time market price and escrow the balance, or alternatively require that the Wood Plants provide security in the form of a letter of credit for over-market payments received under RSA 362-H. Eversource estimated a potential over-

market cost of $11 million during the first six-month period, February 1, 2019, through July 31, 2019.

Eversource urged the Commission to consider the federal preemption arguments under the FPA and PURPA, but suggested that the decision on federal preemption is properly before FERC. *See* FERC Docket EL 19-10. Eversource said it would only enter into a written contract if the Commission ordered it to do so, creating a legally enforceable obligation that assured Eversource recovery of over-market payments in the event the law was subsequently determined to be unconstitutional.

B. NERA

NERA filed an objection to the Wood Plants' motion urging the Commission to deny the request to approve the agreements submitted by the Wood Plants. NERA argued that RSA 362-H is preempted by the Federal Power Act and reiterated arguments made in its pleadings submitted in the FERC Challenge. According to NERA, none of the Wood Plants' arguments changes the fact that RSA 362-H explicitly sets the rate for wholesale sales of electricity from the eligible facilities to EDCs. NERA argued that the Wood Plants miscast *Hughes v. Talen Energy Marketing LLC*, 136 S. Ct. 1288 (2016), and subsequent decisions of the courts of appeals, as narrowing FERC's exclusive jurisdiction over the rates for wholesale electricity. Nonetheless, NERA stated that it is not asking the Commission to make a ruling on the constitutional preemption issues pending before FERC.

In light of its position that RSA 362-H is preempted by the FPA, NERA argued that the Commission should protect ratepayers from incurring over-market costs based on an unconstitutional statute. NERA supported the customer protection options raised by Eversource, arguing that RSA 362-H does not specifically prohibit the Commission from imposing them.

NERA further argued that due to the likelihood that the statute is unconstitutional, it would be unreasonable for the Commission not to require action by the parties to protect ratepayers from making unconstitutional over-market payments. NERA requested that the Commission provide guidance on what actions or demands the Commission would take if RSA 362-H is preempted by federal law.

C. OCA

The OCA argued it is likely that RSA 362-H will be found to be preempted by the FPA and PURPA and that a federal forum is the appropriate place to resolve the issue. Based on Eversource's estimate of over-market costs, the OCA estimated that residential ratepayers would be allocated approximately $10 million dollars annually of those costs, which it believes are unconstitutional. It also pointed out that extra money paid by customers will be difficult to recover after the fact.

The OCA posited that under the Commission's role as arbiter of the interests of utility shareholders and customers, RSA 363:17-a requires it to stay implementation of SB 365 until the constitutional issues are resolved. Alternatively, the OCA would support moving forward with implementation employing either of the two protections suggested by Eversource; a letter of credit for, or an escrow of the over-market revenues until the constitutional issues are decided. The OCA argued that RSA 362-H does not preclude an escrow or a letter of credit, and further observed that the winter months typically provide higher wholesale market prices for power in the region. Thus, the Wood Plants should not suffer severe economic harm during the delay for FERC to rule on preemption issues.

In response to the Wood Plants motion, the OCA stated that FERC regulations implementing Section 210 of PURPA limit mandatory purchases from QFs to avoided costs.

Alternatively, utilities are permitted to make voluntary purchases from QFs at higher than avoided costs, if the generator/seller has acquired "market-based" rate authority from FERC. Thus, according to the OCA, the Wood Plants are attempting to make the purchases under RSA 362-H look voluntary, or preferably like market-based transactions under Section 205 of the FPA. The OCA argued that these purchases are neither voluntary nor market-based. In addition, the OCA disagreed with the Wood Plants' claims that RSA 362-H does not require resale of the purchased power into the ISO-NE markets.

The OCA also took the position that pursuant to RSA 362-H, the only agreements the Commission may review for conformity to the statute are those submitted by Eversource. In the OCA's view the Commission may not review proposed agreements submitted by the Wood Plants and has no authority to require Eversource to sign such agreements.

The OCA urged the Commission not to make any orders on matters beyond a review of purchase agreements for conformity with RSA 362-H. According to the OCA, matters beyond that include constitutional questions, which the parties agree should be decided in a federal forum.

The question of whether net energy output under RSA 362-H includes both energy and capacity of eligible facilities appears to the OCA, to be a matter within the scope of Commission review. The OCA argued that net energy output should include everything of value that is produced by an eligible facility and sold at wholesale under FERC jurisdiction. Given the overall statutory scheme, and the fact that the default service rates, which form the basis of the adjusted energy rate, include both energy and capacity, the OCA concluded that Eversource should purchase both energy and capacity from eligible facilities under RSA 362-H.

D. Wood Plants

The Wood Plants submitted proposals that they claimed conform to the statute. The Wood Plants' proposals changed the price and payment terms, the requirement that they maintain QF status, the requirement that they remain the designated Lead Market Participant in accordance with rules and procedures of ISO-NE, and other provisions.

The Wood Plants' motion requested that the Commission: (1) review the proposed terms of purchase for conformity with RSA 362-H; (2) determine that the Wood Plants proposals conform to RSA 362-H; (3) order Eversource to comply with RSA 362-H by signing the conforming agreements; and (4) not issue orders on any other matters beyond the scope of RSA 362-H. In their motion, the Wood Plants described the November 6, 2018, Eversource solicitation, and included suggested revisions to the terms of the Eversource solicitation. According to the Wood Plants, Eversource's refusal to enter into power purchase agreements, and its inclusion of terms in its solicitation that are inconsistent with RSA 362-H, are "merely attempts to avoid its statutory obligations and to lure the Commission into making findings which will support a preemption challenge to RSA 362-H." Wood Plants' Motion at 5. The Wood Plants argued the Commission is limited to determining whether their revisions to the power purchase agreements conform to the requirements of RSA 362-H.

The Wood Plants observed that the statute is based on a settled process for procuring default service through periodic solicitations of wholesale default service supply used to serve EDC retail customers. Following each procurement, the EDCs must obtain Commission approval of those competitive procurements and the resulting wholesale power contracts with winning bidders. The Wood Plants argued that RSA 362-H is based on that process. The Wood

Plants also stated that no party in this docket challenged the lawfulness of the underlying competitive procurement of the wholesale power upon which RSA 362-H is based.

The Wood Plants pointed to the public interest findings in RSA 362-H and described the process envisioned as a straightforward one: each EDC must offer to purchase the net energy output of any eligible facility located in its service territory as part of its default service procurement process. Purchases are priced at the adjusted energy rate, which is derived from the default service rates approved by the Commission. Eligible facility responses to the Eversource solicitation shall include a non-binding proposed schedule of hourly net output amounts during the term used in the default service supply solicitation. Eversource shall select all proposals from eligible facilities that conform to the statutory requirements, and shall submit all eligible facility agreements to the Commission for review for compliance with RSA 362-H.

The Wood Plants argued that their power purchase agreements, submitted in their mark-up to the Eversource governing terms, conform to the requirements of RSA 362-H. The Wood Plants claimed that Eversource's solicitation contained terms that are inconsistent with the statute. First, they claimed that Eversource's proposed language that requires the Wood Plants get paid the real time energy clearing price in the ISO-NE market, so long as any pending challenges in administrative agencies or courts remain unresolved, is contrary to the express language of RSA 362-H. Second, the Wood Plants claimed that Eversource's requirement that they each maintain their status as a QF pursuant to 18 C.F.R. Part 292, prior to and during the term of the purchase, is contrary to RSA 362-H. The Wood Plants indicated that they have either obtained, or are in the process of obtaining, market-based rate authority and exempt wholesale generator status. Third, Eversource required compliance with ISO-NE rules and practices, which the Wood Plants argued is not required by RSA 362-H. Finally, the Wood Plants claimed that

Eversource's language in its confirmation that the adjusted energy rate to be paid is "as established" by the Commission is contrary to the terms of RSA 362-H which established the rate.

The Wood Plants also took issue with language proposed by Eversource that implied Eversource would be the 100 percent asset owner, to the extent that meant Eversource had rights to the Wood Plants' capacity, or pay-for-performance benefits, or if it would be used to tether the purchases to the ISO-NE markets. With regard to Eversource's position that it did not intend to enter into formal bilateral agreements unless the Commission ordered it to do so, the Wood Plants claimed that Eversource, was in derogation of its statutory obligations. The Wood Plants argued that the Commission must proceed with its review of the agreements to determine whether the terms conform with the statute, until a court of competent jurisdiction declares the statute unlawful or unconstitutional or stays its implementation.

Regarding the pending FERC Challenge, the Wood Plants argued that in the unlikely event FERC declares that the statute is preempted, its ruling would have no legal effect unless a federal district court subsequently ruled on PURPA or FPA preemption issues. The Wood Plants suggested such a ruling by FERC or a federal district court was unlikely due to the arguments they made at FERC as well as the arguments made by the New Hampshire Attorney General.

The Wood Plants took the position that PURPA is not relevant because RSA 362-H does not require Eversource to purchase energy from QFs as defined by PURPA and therefore does not require that rates be set at avoided costs. The Wood Plants indicated that they would be willing to relinquish their QF status if necessary to clarify the lack of relevance of PURPA to implementation of RSA 362-H.

The Wood Plants asked that the Commission not engage in a detailed review of the interplay between RSA 362-H and FERC's jurisdiction under the FPA. According to the Wood Plants, RSA 362-H does not expressly require Eversource to sell the power it purchases from the Wood Plants into the ISO-NE market. Instead, under RSA 362-H, Eversource may, but is not required to, participate in the market. The Wood Plants asserted that Eversource makes that claim to bolster its federal preemption arguments that its purchases are tethered to the regional wholesale markets.

The Wood Plants disagreed with Eversource's assertion that RSA 362-H is not clear regarding whether purchases are for energy only or for energy and capacity. They noted the statute only refers to energy and never mentions capacity. Further, Eversource's solicitation to the Wood Plants pursuant to RSA 362-H included only energy. The Wood Plants stated that Eversource's request that its administrative costs be included in stranded costs is unnecessary because the statute already expressly provides for that recovery. Rather than ordering Eversource to purchase energy as suggested by Eversource, the Wood Plants asked the Commission to order Eversource to comply with the statute by entering into the Wood Plants' version of the contract.

IV. COMMISSION ANALYSIS

In this case the Commission is faced with a newly enacted statute while a constitutional challenge to that statute is pending before FERC. Some parties have asked the Commission to implement the statute, arguing that the statute is in effect until declared unconstitutional by a court of competent jurisdiction. Other parties have requested that the Commission take no action to implement the statute while any constitutional challenge is pending. Notwithstanding the pending challenge to RSA 362-H, the statute reflects the legislature's finding that "it is in the

public interest to promote the continued operation of, and the preservation of employment and environmental benefits associated with [eligible facilities as] sources of indigenous-fueled renewables, and thereby promote fuel diversity as part of the state's overall energy policy," Laws 2018, 379:1, and that EDC customers should pay the associated costs. RSA 362-H:2, V. We cannot substitute our judgment for that of the legislature expressed in a duly-enacted statute. Therefore, we provide our analysis of the issues presented by the parties to facilitate implementation of the statute to the extent of our authority on the current record. As discussed below, we will clarify several of the ambiguities and disagreements that have been raised by the parties concerning the conformity of certain proposed terms of potential agreements with RSA 362-H.

A. Abstention from Reviewing Federal Constitutional Questions

All the parties in this docket have requested that the Commission abstain from deciding the constitutional arguments made by NERA in its pleadings in this docket and by the parties in the FERC Challenge. Eversource, NERA, and the OCA argue that FERC, the federal agency with jurisdiction over wholesale rates as delegated by the FPA, is the best forum for deciding whether RSA 362-H is preempted under either the FPA or PURPA. The Wood Plants take the position that questions of federal preemption must be decided in a court of competent jurisdiction. In the absence of a request to rule on the preemption issue, the Commission will abstain from reaching constitutional issues while the issues are pending before the FERC. If we are presented with a question that requires resolution of the preemption issue, and if preemption has not already been decided by FERC or a court of competent jurisdiction, we will consider certifying the issues to the New Hampshire Supreme Court pursuant to RSA 365:20.

B. Lack of Agreements to Purchase Eligible Facility Output

Under the statute, 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." RSA 362-H:2, III. Eversource in its petition presented its original solicitation and proposed governing power purchase terms as well as the Wood Plants' mark-up of those proposed terms. The two forms of proposed agreement do not match, and therefore we do not have a final form of agreement, whether signed or unsigned, submitted for our review.

Under the terms of the statute, the Commission is authorized to review "eligible facility agreements" that have been submitted by the EDC. RSA 362-H:2, IV. Accordingly, we are not authorized to act until Eversource selects proposals from eligible facilities that conform to the statute and submits agreements to the Commission for review. RSA 362-H: 2, III and IV.

We find no express authority in RSA 362-H for the Commission to order Eversource to sign agreements with eligible facilities, or to order Eversource to purchase power from the eligible facilities in the absence of any agreement. As a result, we deny the Wood Plants' request that we order Eversource to sign the Wood Plants' proposed power purchase agreements.

We also reject Eversource's proposal that we issue "rate orders" requiring it to purchase power from the eligible facilities. There is nothing in RSA 362-H referring to PURPA or avoided costs, and nothing tasking the Commission with ordering alternative methods of implementing the statute. The statute imposes obligations on Eversource, the eligible facilities, and on the Commission, but the extent of the Commission's role is to "review" agreements "for conformity with this chapter."

We will, however, resolve questions concerning whether certain proposed terms are consistent with RSA 362-H, as discussed in the following analysis.

C. Statutory Interpretation

1. "Net Energy Output" and Inclusion of Capacity

To determine what products are included in the purchases required by RSA 362-H we begin with the statutory language. *See Formula Development Corporation v. Town of Chester,* 156 N.H. 177, 178-179 (2007) (in construing statutory language, if the language used is clear and unambiguous, there is no need to look beyond that language to discern the legislative intent of the statute); *In the Matter of Nancy Baker and Robert Winkler*, 154 N.H. 186, 187 (2006) (statutory language should be interpreted ascribing plain and ordinary meanings to the words used). Although the statute describes both "net energy output" and "net electrical output," it does not refer to capacity, which is treated as a separate product in the ISO-NE regional wholesale markets. *See* RSA 362-H:2 (net energy output); RSA 362-H:2, I(b)(2) (net electrical output); RSA 362-H:2, I(b)(3) (net electrical output). RSA 362-H:2, I(a) describes the required transaction as one in "which the electric distribution company would purchase an amount of energy from the eligible facility." Further, in describing the nonbypassable charge required by RSA 362-H:2, V for EDCs to recover the over-market portion of the cost of purchasing the "net energy output" of eligible facilities, the statute uses the ISO-NE "market energy clearing price," which is an energy-only market price and does not include capacity, to calculate the charge to customers. *See* RSA 362-H:2, V. If the energy purchased from eligible facilities were intended to include capacity, an over-market calculation would likewise have included ISO-NE capacity prices. The statute does not use capacity prices as an offset and that omission is consistent with the interpretation that the mandated EDC purchases are only for energy and not for capacity.

Eversource argues that the Commission has traditionally interpreted "the entire output of electric energy" under RSA Chapter 362-A (the Limited Electrical Energy Producers Act) to include both energy and capacity. Based on that interpretation of RSA 362-A, Eversource insists that the Commission should likewise interpret "net electrical output" in RSA 362-H to include both energy and capacity. *See* RSA 362-A:3, I and *Briar Hydro Associates*, 92 NHPUC 446 (2007). This argument fails because RSA 362-A is a separate statute serving a different legislative purpose. Under RSA 362-A, the Commission determines the EDC's avoided costs, as a basis for setting rates for long-term rate orders or other QF purchase obligations consistent with PURPA. RSA 362-H does not require any determination of avoided costs, long-term rate orders, or QF purchase obligations. Moreover, as noted above and below, RSA 362-H does not require eligible facilities to be QFs and does not purport to rely on PURPA. Therefore, Commission decisions under RSA Chapter 362-A are not relevant to the interpretation of RSA Chapter 362-H.

Based on the foregoing, and contrary to Eversource's assertion that the statute is ambiguous, we find that the plain meaning of RSA 362-H requires EDCs to offer to purchase energy only, and not capacity, from eligible facilities located in their service territories. Had the legislature wanted to include capacity in EDC purchases from eligible facilities, it would have expressly included that requirement.

2. "Adjusted Energy Rate"

The price term in the statute is discussed by many of the parties and Eversource asks us to confirm the meaning of that term. The statute sets the price as "80 percent of the rate, 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." RSA 362-H:1, I. The "default energy service rate," in turn, is "the default 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 all retail electric customers who are otherwise without an electricity supplier." RSA 362-H:1, IV.

The statute is clear and unambiguous. The default energy rate applicable to residential class customers is the retail rate for electric customers who are otherwise without an electricity supplier; therefore, by the plain language of the statute, the adjusted energy rate under RSA 362-H is based on the retail rate approved by the Commission. We find nothing in the statute to support an argument that the adjusted energy rate should be based on anything else.

D. Conformity of Proposed Terms with RSA 362-H

Pursuant to the statute, all "eligible facility agreements shall be subject to review by the Commission for conformity with [RSA 362-H]." RSA 362-H:2, IV. While we currently do not have any "eligible facility agreements" before us, as explained above, Eversource has submitted two forms of potential agreements to the Commission. In order to facilitate implementation of the statute we provide the following findings regarding whether certain proposed terms would conform with the statute if presented to us by an EDC as part of an "eligible facility agreement," pursuant to RSA 362-H:2, III.

1. Requirement of Qualified Facility Status

Eversource's solicitation requires that eligible facilities maintain their status as QFs under PURPA during the term of the purchase agreements under RSA 362-H. The statute does not define eligible facilities as QFs, does not require such facilities to obtain QF status, and does not reference PURPA. Further, RSA 362-H does not purport to set the adjusted energy rate at the

EDC's avoided costs, nor does it require the Commission to determine avoided costs in implementing RSA 362-H.[2] As a result, Eversource's requirement that the eligible facilities maintain QF status during the purchase agreement term is inconsistent with RSA 362-H.

2. Compliance with ISO-NE Rules and Practices

Eversource's solicitation requires that the eligible facilities designate Eversource as the 100 percent "asset owner" for purposes of ISO-NE market settlement and also requires that the eligible facilities comply with ISO-NE rules and practices. RSA 362-H does not expressly require the eligible facilities to participate in regional wholesale energy markets. Nonetheless, we encourage the parties to adopt commercially reasonable terms that effectuate the purpose of the statute, including compliance with any applicable ISO-NE rule or procedure that may be necessary to implement the transactions contemplated by RSA 362-H as we interpret them in this order. We note that both Eversource and the Wood Plants are sophisticated market participants that should have a thorough understanding of the relevant ISO-NE market rules and practices. Compliance with ISO-NE rules and practices should not be an impediment to effectuating the statute.

3. Real-Time Energy Market Prices vs. Adjusted Energy Rates

In its solicitation, Eversource changed the price to be paid to eligible facilities to the real-time energy market price, rather than the adjusted energy rate, until such time as the constitutionality of RSA 362-H has been confirmed. The real-time energy price is Eversource's current avoided cost rate under PURPA, is based on the ISO-NE market clearing price, and is generally much lower than the adjusted energy rate established by RSA 362-H.

[2] The current Commission determination of avoided costs for Eversource under PURPA is the real-time market price for electricity in the ISO-NE regional wholesale market. *See* Order No. 25,920 at 90 (July 1, 2016).

In the current default service solicitation, the residential energy service rate was calculated to be 9.985 cents per kilowatt hour (kWh) for the six-month period beginning February 1, 2019, or approximately $99.85 per megawatt hour. Adjusted for removal of the renewable portfolio standard adder, and multiplied by 80 percent as required by RSA 362-H, the adjusted energy rate would be 7.768 cents per kWh, or $77.68 per megawatt hour. [3] In 2018, the average locational marginal price for New Hampshire was approximately $43 per megawatt hour.

Eversource proposes the lower payment rate based on the pending FERC Challenge, arguing that if RSA 362-H is ultimately found to be unconstitutional, ratepayers will have paid approximately $11 million in above-market costs over the first six-month procurement period. Eversource estimated that amount based on the difference between estimated average real-time power prices and the adjusted energy rate paid to the eligible facilities. Nonetheless, RSA 362-H specifically anticipates such over-market costs and provides for recovery from customers through a nonbypassable charge. RSA 362-H:2, V. As a result, we must find that the payment term requested by Eversource does not conform with the express language in RSA 362-H. We discuss below the need for customer protections under the unique circumstance of a potential finding that RSA 362-H is unconstitutional.

E. Commission Order on Recovery of Over-Market Payments

Eversource asks us to include assurances in an order that the over-market payments made by Eversource in compliance with RSA 362-H will be recoverable as part of its stranded cost recovery. RSA 362-H:2, V expressly allows EDCs to recover any above-market costs of purchases from eligible facilities as part of a nonbypassable charge to all electric delivery

[3] *See* Docket No. DE 18-002, December 13, 2018, testimony of Christopher J. Goulding, at Bates 146.

customers. While a federal preemption challenge to the legality of RSA 362-H remains unresolved, however, we are not willing to separately order recovery of stranded costs from Eversource customers for the reasons explained below.

Pursuant to RSA 374:2, charges by an EDC may not exceed what is allowed by law or by order of the Commission. The basis for EDC recovery from customers of over-market costs from eligible facility purchases is RSA 362-H:2, V, and any order by the Commission approving such rate recovery would necessarily rest on the authority set out in that statutory provision. Thus, in the circumstance that the statute is found unconstitutional after Eversource has made over-market payments to eligible facilities, the very authority for a Commission order authorizing recovery of those charges from customers would be invalidated. Until the constitutionality of the statue is determined, and the authority for recovery of over-market charges from customers is upheld, the Commission cannot order rate recovery of over-market costs associated with compliance with the statute. Therefore, we are unable to provide the assurance requested by Eversource regarding stranded cost recovery until the constitutionality of RSA 362-H is fully resolved.

F. Customer Protections

In order to protect its customers and shareholders, Eversource proposes to either: (1) escrow the over-market portion of the adjusted energy rate so that it is not paid to the Wood Plants, unless and until RSA 362-H is no longer being challenged on the basis of federal preemption, or (2) require the Wood Plants to provide letters of credit as security to pay customers back for the over-market payments received during the period of time the statute is challenged, if it is ultimately found to be unconstitutional. We have already determined that the first option is contrary to the terms of RSA 362-H. The second option would likely impose

significant additional expense and uncertainty upon the very eligible facilities the statute is designed to benefit, and therefore is also inconsistent with RSA 362-H.

While we recognize that the pendency of a constitutional challenge to RSA 362-H raises potential customer protection concerns in the event that a constitutional challenge invalidates the statute after it has been implemented, we are not authorized by the statute to impose customer protection terms in any eligible facility agreement. Nonetheless, we encourage the parties to consider voluntary inclusion of appropriate customer protections against the possibility of constitutional invalidation of the statute in any eligible facility agreement that is submitted to the Commission for review.

Based upon the foregoing, it is hereby

ORDERED, that the Wood Plants' motion is Denied in part as explained in this order; and it is

FURTHER ORDERED, that Eversource's petition is Denied in part as explained in this order.

By order of the Public Utilities Commission of New Hampshire this eleventh day of January, 2019.

Martin P. Honigberg	Kathryn M. Bailey	Michael S. Giaimo
Chairman	Commissioner	Commissioner

Attested by:

Margaret L. Raymond
Assistant Secretary

SERVICE LIST - EMAIL ADDRESSES- DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov
acampbell@shaheengordon.com
amanda.noonan@puc.nh.gov
christopher.goulding@eversource.com
donald.kreis@oca.nh.gov
dpatch@orr-reno.com
james.brennan@oca.nh.gov
karen.moran@puc.nh.gov
leszek.stachow@puc.nh.gov
marc@neratepayers.org
matthew.fossum@eversource.com
mcs@sununuenterprises.com
ocalitigation@oca.nh.gov
richard.chagnon@puc.nh.gov
rick.white@eversource.com
robert.bersak@eversource.com
sgordon@shaheengordon.com
suzanne.amidon@puc.nh.gov
tmclaughlin@shaheengordon.com
tom.frantz@puc.nh.gov

Docket #: 18-002-1 Printed: January 11, 2019

FILING INSTRUCTIONS:

a) **Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:** DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429

b) **Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**

c) **Serve a written copy on each person on the service list not able to receive electronic mail.**