STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 18-002

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

2018 Energy Service Solicitation

Order on Motion for Clarification and, in the Alternative, Rehearing

O R D E R N O. 26,224

March 6, 2019

In this order, the Commission denies the Wood Plants' request for clarification and rehearing of Order No. 26,208 regarding the implementation of RSA 362-H. The Wood Plants have provided no new argument or evidence that changes our previous analysis and conclusions, and our authority remains constrained by the express provisions of RSA 362-H and other statutes limiting what can be included in rates.

I. PROCEDURAL HISTORY

On January 11, 2019, the Commission issued Order No. 26,208 (Order), in which it denied in part a petition filed by Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) for review under RSA Chapter 362-H (RSA 362-H) of the responses Eversource received to its default service supply solicitation from five wood-fired electric generation plants located in its service territory. The five wood-fired generating plants are Springfield Power LLC, DG Whitefield LLC, Bridgewater Power Company, L.P., Pinetree Power Tamworth LLC, and Pinetree Power LLC (collectively, the Wood Plants). The Wood Plants intervened jointly in this docket and filed a motion asking the Commission to determine that their responses to Eversource's solicitation complied with RSA 362-H and to order that

Eversource sign their proposed agreements. The Order also denied in part the Wood Plants' motion.

The Commission stated in the Order that as requested by the parties, it would not address the constitutional issues raised in the pending proceeding before the Federal Energy Regulatory Commission (FERC), in which the New England Ratepayers Association (NERA) has argued that federal law preempts RSA 362-H. Order at 17. The Commission further noted that, although RSA 362-H authorized it to review "eligible facility agreements," it was unable to do so because there were no such agreements to review. Eversource and the Wood Plants had been unable to agree on the terms necessary for the formation of valid agreements. *Id.* at 18, 21.

The Commission did, however, resolve a number of other issues regarding the interpretation of statutory language contained in RSA 362-H. *Id.* at 19-25. The Commission also addressed the recovery from ratepayers of over-market payments made by Eversource under RSA 362-H and the Commission's authority to approve such recovery before the constitutional challenge is resolved. *Id.* at 22-24. The Commission recognized that, even though RSA 362-H contains a provision authorizing an electric distribution company (EDC) such as Eversource to recover over-market payments from customers through a nonbypassable charge, that provision could be invalidated if RSA 362-H were found unconstitutional. *Id.* at 23-24. Eversource estimated that over-market payments during the first six-month procurement period would total $11 million and had requested that the Commission provide assurances that over-market payments would be recoverable as stranded costs. The Commission stated that,

> [u]ntil the constitutionality of the statute 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.

Id. at 24. The Commission rejected Eversource's proposals to protect its customers and shareholders from over-market payments either by requiring escrow of the over-market portion that would otherwise be paid to the Wood Plants until the constitutional challenge had been resolved, or by requiring the Wood Plants to provide letters of credit to secure any required repayment, finding both options inconsistent with RSA 362-H. *Id.* at 24-25. Instead, the Commission "encourage[d] 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." *Id.* at 25.

On February 8, 2019, the Wood Plants filed a Motion for Clarification and, in the Alternative, Rehearing (Motion). NERA and the Office of Consumer Advocate (OCA), filed timely objections to the Motion and Eversource filed a timely partial objection to the Motion. On March 5, 2019, the Commission received a letter from a group of state legislators urging the timely implementation of RSA 362-H. The Motion and Objections, along with all other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at http://www.puc.nh.gov/Regulatory/Docketbk/2018/18-002.html.

II. POSITIONS OF THE PARTIES

A. Wood Plants

The Wood Plants described a number of communications exchanged with Eversource, and proposals made to and by Eversource, following the issuance of the Order. The Motion contained extensive documentation of those communications and proposals, and included discussion regarding Eversource's ability to recover the over-market cost of energy purchased from the Wood Plants. In a letter dated January 14, 2019, Eversource characterized the Commission's statement in the Order that it could not order rate recovery of any such over-

market costs until the constitutionality of RSA 362-H was determined as a "roadblock" to the timely implementation of RSA 362-H. *See* Motion Exhibit (Exh.) 1. Eversource then asked the Wood Plants if they were willing to include a customer protection provision in any agreement pursuant to RSA 362-H. *Id.*

The Wood Plants responded in a letter in which they took issue with Eversource's use of the term "roadblock," but stated they were willing to work with Eversource to include a 60-day, voluntary customer protection provision whereby eligible facilities could choose an accepted form of security or escrow. *See* Exh. 2. At the same time, each of the Wood Plants submitted to Eversource a form of confirmation and governing terms, revised with the intention of conforming to the requirements of RSA 362-H as determined in the Order. *See* Exhs. 3-7.

Eversource and the Wood Plants subsequently communicated about additional revisions to the forms of confirmation and governing terms. *See* Exhs. 8-11. On January 31, 2019, the Wood Plants submitted proposals to Eversource, stating in the accompanying cover letters that they expected Eversource to select those proposals because they conformed to RSA 362-H, and to submit them to the Commission for its review. *See* Exhs. 12-16.

In a letter to the Wood Plants dated February 6, 2019, Eversource stated "[t]he security mechanism set forth in Section 5.5 of the Governing Terms in [the Wood Plants'] January 31 responses is unacceptable to Eversource in both form and duration." *See* Exh. 18. Eversource reiterated in that letter that "[u]nless and until the roadblock[1] is completely addressed, there can be no 'agreements' for Eversource to select or submit to the NHPUC for review." *Id.* In order to

[1] In Exhibit 18, Eversource stated that the Commission had confirmed this "roadblock" in Order No. 26,215 (January 28, 2019) issued in Docket No. DE 18-182, which excluded projected over-market costs incurred pursuant to RSA 362-H from Eversource's nonbypassable Stranded Cost Recovery Charge.

proceed under RSA 362-H, Eversource stated that the Wood Plants would be required to agree to the escrow security provision proposed by Eversource. *Id.*

The Wood Plants argued that the Commission should clarify the Order by finding that the proposed agreements they submitted to Eversource on January 31 conform to the requirements of RSA 362-H. Motion at 17. They contended that the Commission should clarify the Order by finding that Eversource is required under RSA 362-H to select their proposals and submit those proposals to the Commission for approval, as Eversource had failed to identify any provisions of the proposals that did not conform to the statute. *Id.* at 19-21. According to the Wood Plants, "[g]iven Eversource's refusal to identify any non-conforming statutory provisions in the proposal, and its refusal to submit proposals that conform to the statute to the Commission," the Commission should "clarify its Order to state that Eversource is required to select an eligible facility proposal." *Id.* at 20.

The Wood Plants also asked the Commission to clarify the Order by finding that, regardless of whether the proposed agreements have been executed, Eversource must implement them because they conform to RSA 362-H and the failure to do so "leaves Eversource in violation of RSA 362-H." *Id.* at 22.

The Wood Plants further requested that the Commission clarify that no "roadblock" to implementing the proposals exists, because RSA 362-H, a validly-enacted law that is currently in effect, specifically provides a mechanism for recovery of over-market payments, so that no separate recovery order from the Commission is required. *Id.* at 23-24. Relying on *Xcel Energy Servs. Inc. v. F.E.R.C.*, 407 F.3d 1242 (D.C. Cir. 2005), the Wood Plants maintained that any ruling by FERC that federal law preempts RSA 362-H would be of no effect unless and until a federal district court adopted that interpretation. Motion at 24. The Wood Plants asserted that

Eversource cannot refuse to implement the law "simply because the Commission might not separately order rate recovery." *Id.* at 23-24.

Finally, the Wood Plants asked the Commission to clarify that Eversource is in violation of RSA 362-H if it does not submit the Wood Plants' proposed agreements to the Commission for approval. If Eversource continues to fail to select a conforming proposal for Commission review, then the Wood Plants asked the Commission to request that the New Hampshire Attorney General immediately begin an action to force Eversource to follow the law, under RSA 374:41. *Id.* at 22, 24.

In the alternative, the Wood Plants requested that the Commission order rehearing in this matter pursuant to RSA 541:3 and N.H. Code Admin. Rules Puc 203.33, maintaining that the Commission overlooked or misapprehended matters in the Order and that rehearing is warranted by the new evidence presented in their Motion and attached exhibits. Motion at 25-26. According to the Wood Plants, the Commission overlooked the request contained in their earlier motion for the Commission to review the proposals they originally submitted to Eversource under RSA 362-H, and to determine whether those proposals conformed with the statutory requirements. *Id.* at 26-27.

The Wood Plants asserted that, based on the language in RSA 362-H:2, III, the Commission erred by failing to order Eversource to select their proposals and submit them for review by the Commission. *Id.* at 27-28. They argued that, on rehearing, the Commission is authorized under RSA 362-H to order Eversource to select their January 31 proposals and submit them to the Commission for approval, regardless of whether they are signed, because the Wood Plants and Eversource negotiated the terms of those proposals and agreed to all provisions except

for the financial security mechanism, which the Order expressly found to be contrary to RSA 362-H. *Id.* at 29-30 (citing Order at 24).

The Wood Plants also claimed that the Commission erred when it stated it was unable to order rate recovery of over-market costs incurred in compliance with RSA 362-H until the constitutionality of the statute was determined. *Id.* at 30-31 (citing Order at 24). They maintained that, not only is FERC not required to rule on NERA's petition, but any FERC ruling that RSA 362-H is preempted by federal law would not preclude implementation of the statute, which would remain in effect notwithstanding that administrative agency ruling. *Id.*

B. Eversource

Eversource objected to the Wood Plants' requests for clarification regarding the proposed agreements they submitted on a number of grounds. Eversource maintained there are no valid agreements between it and the Wood Plants because the parties were unable to agree on an essential term, namely, a customer protection mechanism for potential over-market costs incurred under RSA 362-H in the event the statute is found unconstitutional. Eversource Partial Objection at 4-5. Eversource contended that there was no "meeting of the minds on all essential terms" and, as such, "there is still no final form of agreement for the Commission to review." *Id.* According to Eversource, without an agreement and without assurance of recoverability of all above-market costs from customers through a nonbypassable charge, it cannot be required to implement the Wood Plants' proposal. *Id.* at 5. Eversource stated that any Commission order "must also include assurance that the mandated recovery provisions of the law at RSA 362-H:2, V will be complied with allowing Eversource to include the law's over-market costs in a nonbypassable charge." *Id.* at 6.

Eversource argued there is a "roadblock" to implementation of the Wood Plants' proposals because a separate Commission order is required to ensure its recovery of over-market costs under RSA 362-H, notwithstanding the mandatory language contained in the statute. *Id.* at 5-6. Eversource referenced the Merrimack Station "scrubber docket," noting that, even though RSA 125-O:11, *et seq.*, contained mandatory language requiring Eversource to install certain pollution control technology at that generating station, the Commission issued two decisions stating that Eversource nonetheless had a duty to its ratepayers to determine an appropriate response to that statutory mandate;[2] otherwise, Eversource could be subject to a prudency investigation for failing to protect its customers. *Id.* at 5-6. Eversource stated that, in view of the scrubber precedent, it must adopt appropriate protective measures to avoid a future prudency challenge to its implementation of RSA 362-H, given the pending constitutional challenge to that statute. *Id.*

Eversource objected to the Wood Plants' suggestion that the Commission refer this matter to the Attorney General, and also to their implication that it is attempting to "thwart" the implementation of RSA 362-H. *Id.* at 7. Eversource stated it is unnecessary to send this matter to the Attorney General because it believes the Commission has the means to put the law into effect. *Id.* In addition, Eversource opined that if the Wood Plants deem a judicial intervention to be necessary, they can seek such a remedy. *Id.*

According to Eversource, it has also attempted to work with the Wood Plants to implement RSA 362-H in a manner that protects ratepayers if the statute is found unconstitutional by developing a way to recover over-market costs. Nonetheless, the parties have been unable to agree upon an adequate customer protection mechanism. *Id.* at 7-10.

[2] In Eversource Partial Objection at 5, Eversource cited *Public Service Co. of N.H.*, Order No. 25,565 at 7 (August 27, 2013); and *Public Service Co. of N.H.*, Order No. 25,714 at 6 (September 8, 2014).

Eversource distinguished the *Xcel Energy* decision cited by the Wood Plants as support for the contention that a FERC ruling regarding federal preemption would have no effect unless adopted by a federal district court. *Id.* at 10-11. Eversource argued that case and similar cases apply only to Section 210 of the Public Utility Regulatory Policies Act (PURPA), and therefore are not applicable to implementation of RSA 362-H, which is not based on PURPA. *Id.* at 10-11. Eversource maintained the Wood Plants have conceded that PURPA does not apply to the issues related to implementation of RSA 362-H. *Id.* at 12-13.

Eversource did not object to the Wood Plants' request for rehearing to the extent consistent with Eversource's own requests for the Commission to resolve certain issues in this proceeding. *Id.* at 14. Eversource stated it had asked the Commission to determine the nature and extent of its obligations under RSA 362-H, including the terms, conditions, and pricing of those obligations. *Id.* Eversource also noted it had requested that, in any order requiring it to purchase power from eligible facilities, the Commission order that its compliance costs be recoverable as part of its Stranded Cost Recovery Charge and determine how to protect customers from excessive over-market charges if RSA 362-H is found unconstitutional. *Id.*

C. OCA

The OCA objected to the Wood Plants' Motion, asserting that their arguments lack merit and that they lack standing to seek rehearing of the Order regarding recovery of over-market costs. OCA Objection at 7-8, 12. According to the OCA, RSA 362-H only grants the Commission authority to review eligible facility agreements executed by the utility. *Id.* at 9.

The OCA asserted that, contrary to the Wood Plants' requests in their Motion, the statute does not authorize the Commission to order Eversource to select proposals or to sign them, to impose contract terms on Eversource, or to review unexecuted draft agreements and issue what

would amount to advisory opinions. *Id.* at 8-10. The OCA noted that the RSA 362-H "directive to the Commission is specific and unambiguous … and confers no authority on the Commission to order Eversource to select proposals, or to issue what would amount to advisory opinions on draft agreements." *Id.* at 9. The OCA asserted that the legislature "could have but did not confer on the Commission the authority … to order Eversource to sign agreements or authority to impose contract terms on Eversource." *Id.* at 10. The OCA suggested that the legislature made the deliberate choice to provide Eversource with the ability to reject power purchase agreements that are illegal and "the Legislature did not intend to have the Commission force upon Eversource contracts that it reasonably believes to be voidable on constitutional grounds." *Id.* at 10-11.

The OCA contended that Eversource was justified in not accepting the Wood Plants' proposals and that the Commission was equally justified in not permitting Eversource to recover over-market costs incurred under RSA 362-H during the pendency of the constitutional challenge before FERC. *Id.* at 3, 11-12. The OCA disputed the Wood Plants' claim that a decision by FERC, the agency with authority to regulate wholesale electric rates, regarding the constitutionality of RSA 362-H would be nothing more than advisory. *Id.* at 13-14. The OCA maintained, moreover, that Eversource has a duty to act prudently and to take all reasonable measures to mitigate stranded costs. *Id.* at 14-15.

The OCA stated that "the Commission did not err and should not change its mind about withholding rate recovery." *Id.* at 14. In the OCA's view, the Commission made a "sound and reasonable" decision to "withhold rate recovery while there is serious reason to believe that such a charge would not be 'allowed by law.'" *Id.* The OCA opined further that "the Commission has appropriately refused to expose Eversource and its shareholders," to agreements that may not

"pass constitutional muster." *Id.* at 15-16. The OCA concluded that the Order was lawful and reasonable, and therefore should remain unchanged. *Id.* at 16.

D. NERA

NERA objected to the Wood Plants' request for clarification, stating that Eversource has presented no agreement with an eligible facility for Commission review. NERA Objection at 4. NERA asserted that the Wood Plants are not permitted to submit their own proposed agreement for Commission approval and suggested that the only agreements the Commission can consider are those submitted by Eversource. *Id.* NERA noted that the Commission found in the Order that it had no express authority under RSA 362-H to order Eversource to execute agreements with eligible facilities or to order it to purchase power from eligible facilities when no agreement exists. *Id.* NERA also objected to the Wood Plants' request for rehearing, arguing that they had presented no new arguments or new evidence to warrant rehearing and "did nothing more than restate arguments" that had "already been made in prior filings with the Commission." *Id.*

III. COMMISSION ANALYSIS

Under RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n* 117 N.H. 999, 1004 (1977), or by identifying specific matters that were "overlooked or mistakenly conceived" by the Commission, *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful Motion for Rehearing does not merely reassert prior arguments and request a different outcome. *Public Service Company of New Hampshire*, Order No. 25,239 at 8 (June 23, 2011).

We note at the outset that the Wood Plants' Motion contains factual representations regarding negotiations, communications, and document exchanges that occurred after the date of

the Order. Those representations of events subsequent to the Order are beyond the scope of a motion for rehearing or reconsideration of a Commission order, and would more properly be the subject of a separate request for relief. The Wood Plants have provided no new argument or evidence that predates the Order to change our analysis and conclusions as set forth in the Order, and we therefore deny the Motion.

Moreover, were we to consider the new factual representations set forth in the Motion, that consideration would not change the factual or legal foundation for our earlier decision. We still have not been presented with a final power purchase agreement for review, which is the Commission's narrowly-defined role under RSA 362-H:2. We still lack express authority under that statute to order Eversource to enter into any such agreement. There is still a federal pre-emption challenge to RSA 362-H pending before the FERC, and no party has asked us to decide that constitutional issue at this time. Indeed, the parties here have expressly asked us to defer constitutional issues to the FERC proceeding. Further, our ability to approve stranded cost rate recovery for potential above-market payments made to the Wood Plants remains constrained by the statutory prohibition on public utility charges in excess of those allowed by law. We address each of those fundamental points in more detail below.

Under RSA 362-H:2, IV, our role is limited to reviewing "eligible facility agreements" submitted by an EDC such as Eversource for "conformity with this chapter." No such agreement has been submitted for our review by Eversource, nor are we aware that a final form of any such agreement exists. As we found in the Order, there is "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." Order at 18. Accordingly, even were we to compel Eversource to "select" and "submit" an

eligible facility proposal, as urged by the Wood Plants, unless Eversource agreed to the proposal we still would not have an "eligible facility agreement" to review. Without an "agreement" between an EDC and an eligible facility or additional statutory authority, the Commission can take no further action under the statute.

With respect to Eversource's recovery of the above-market portion of payments to the Wood Plants under any power purchase agreement found to conform with RSA 362-H, our authority to approve such recovery is expressly limited by RSA 374:2. That section states that any charge made or demanded by a public utility for any service rendered by it "in excess of that allowed by law … is prohibited." *See* RSA 374:2. In addition, any recovery of stranded costs by an EDC such as Eversource must be "lawful" and "constitutional" under the electric restructuring statute, RSA 374-F:3, XII(d).[3] *See Public Service Company of New Hampshire d/b/a Eversource Energy,* Order No. 26,215 at 7 (January 28, 2019).

As noted above, the constitutional challenge to RSA 362-H remains unresolved at this time. As we observed in the Order, if the statute were found unconstitutional after over-market payments have been made to any eligible facilities, the "very authority for a Commission order authorizing recovery of those charges from customers would be invalidated." Order at 24. We therefore concluded that, "[u]ntil the constitutionality of the statue is determined … the Commission cannot order rate recovery of over-market costs associated with compliance with the statute." *Id.* The legal and factual bases for the Order have not changed, and we see no reason to reconsider our conclusion.

[3] "Any recovery of stranded costs should be through a nonbypassable, nondiscriminatory, appropriately structured charge that is fair to all customer classes, lawful, constitutional, limited in duration, consistent with the promotion of fully competitive markets and consistent with these principles." RSA 374-F:3, XII(d).

The statutory limitations and constraints on our authority discussed above have been characterized as a "roadblock" to implementation of power purchases from the Wood Plants as contemplated under RSA 362-H. To the extent that characterization may be apt, the "roadblock" arises from the statutory language itself, and therefore can be removed only by action of the legislature. The Commission is a "creature of statute" and must act only within the scope of its authority under the relevant statutes. *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. 1062, 1066 (1982) (the Commission "is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute").

In the absence of an "eligible facility agreement" submitted by Eversource for Commission review, or additional statutory authority, we find no basis to reconsider or clarify our earlier decision.

Based upon the foregoing, it is hereby

ORDERED, that the Wood Plants' Motion for Clarification and, in the Alternative, Rehearing of Order No. 26,208 is DENIED.

By order of the Public Utilities Commission of New Hampshire this sixth day of March, 2019.

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

Attested by:

Margaret L. Raymond
Assistant Secretary

an official NH Government website

View Service Lists

Service List - Docket Related

Docket# : 18-002 Printed: 3/6/2019

Email Addresses

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

Without Email Addresses

All

ExecutiveDirector@puc.nh.gov