

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 15-372**

**STEEL'S POND HYDRO, INC.**

**Complaint by Steel's Pond Hydro, Inc. against Eversource Energy**

**Order Denying Motion for Rehearing**

**ORDER NO. 25,849**

**December 10, 2015**

In this order, we deny the motion for rehearing filed by Steel's Pond Hydro, Inc. (SPH), of our prior order dismissing its complaint against Public Service Company of New Hampshire, d/b/a Eversource Energy (Eversource). The complaint concerned Eversource's retention of Forward Capacity Market (FCM) auction payments received from ISO New England, Inc., attributable to the capacity value of the hydroelectric power plant operated by SPH.

**I. PROCEDURAL HISTORY**

On September 9, 2015, SPH filed a complaint against Eversource, alleging that, beginning in May 2015, Eversource ceased passing through FCM auction payments received from ISO New England, Inc. (ISO-NE) to SPH. SPH is the owner and operator of the electric generation equipment installed at Steel's Pond Hydro Project (Facility), a hydroelectric power plant located in Antrim, New Hampshire, that is interconnected to the Eversource distribution system. SPH is a net metering customer-generator pursuant to RSA 362-A:9, and a group host pursuant to RSA 362-A:9, XIV(a), and N.H. Code Admin. Rules Puc 909. Eversource serves as SPH's "lead participant" with respect to the regional wholesale power markets administered by ISO-NE. SPH requested that the Commission either order Eversource to pass through to SPH the FCM auction payments, or permit SPH to enter into an agreement with a different lead

participant that would pass the FCM auction payments through to SPH. At the Commission's direction, Eversource filed a response to the complaint on September 18, 2015. SPH replied to Eversource's response on September 25, 2015.

On October 12, 2015, the Commission issued a secretarial letter (Letter Order) determining there was no basis for SPH's dispute with Eversource, and therefore declining to conduct an independent investigation or commence an adjudicative proceeding regarding the dispute. As stated in the Letter Order, the Commission found it was unnecessary to address a jurisdictional issue raised by Eversource, in view of its determination regarding the substantive issue raised in SPH's complaint. The Commission concluded that,

under RSA 362-A:9 and the Puc 900 rules, a group net metering host customer-generator receiving credits and/or payments at the interconnecting utility's default service rate, which includes charges based on both electric energy and capacity, may not also accept FCM auction revenue payments based on the capacity value of its generation facility. Acceptance of such payments effectively would result in double-counting of capacity and over-compensation to the customer-generator.

On November 10, 2015, SPH filed a motion for rehearing pursuant to RSA 541:3 (Motion), claiming that the Commission's ruling was "contrary to both State and Federal law." Eversource filed a timely objection to the Motion (Objection), and SPH filed a brief reply to the Objection in a letter filed on November 19, 2015 (SPH Reply).

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. SPH's Motion**

In its Motion, SPH asserted as a basis for rehearing that the "Commission's ruling is unlawful because (1) it has overstepped its limited authority granted by the Legislature, and (2) [it has] improperly invaded [the Federal Energy Regulatory Commission's (FERC's)] exclusive jurisdiction over the [FCM]." Motion at 3. SPH argued that the Commission's ruling was unlawful because there is nothing in applicable state net metering law that would empower

the Commission to require SPH to “not accept” FCM auction revenue payments. Motion at 4. SPH conceded that, as a group net metering host, it is entitled to compensation “only” at the default service rate pursuant to state law. *Id.* SPH maintained, however, that this restriction under state law does not prevent it from accepting FCM payments from ISO-NE under federal law. *Id.*

SPH asserted it is “well-settled” under federal law that any generator may act as its own lead market participant at ISO-NE. Motion at 3. SPH argued that the Commission’s ruling would have a “serious unintended consequence,” and would be contrary to federal law, in that it would “render SPH, as Group Net Metering host, unable to accept any FCM payment from ISO-NE, even if it were to act as its own Lead Market Participant.” *Id.* According to SPH, the Commission is not empowered to require SPH to “not accept” FCM auction revenue payments because the Commission only has the authority provided by the legislature. Motion at 3-4. SPH argued that the FERC has exclusive authority and jurisdiction over the FCM, citing a recent federal court decision upholding several FCM-related FERC orders. Motion at 4. SPH asserted that the Commission “may not interfere with this separation of regulatory authority.” *Id.*

SPH hypothesized that, if it became its own lead market participant, or appointed a third party to act in that capacity instead of Eversource, then Eversource would be “unable to divert FCM funds,” which would then “clearly become the property” of SPH. *Id.*

#### **B. Eversource’s Objection**

Eversource’s Objection stated that the Motion should be denied because neither SPH’s argument that the Commission overstepped its authority, nor its argument that the Commission improperly invaded FERC’s jurisdiction over the FCM, is correct. Objection at 1. Eversource asserted that SPH had “turn[ed] the Commission’s ruling around,” because its conclusion that a host “may not accept” certain payments is not a limitation on the host, but instead “sets a

restriction on what payments may be provided to the host by the utility, an issue over which the Commission has extensive authority.” Objection at 2.

Eversource noted the longstanding precedent regarding the Commission’s plenary authority over the establishment of just and reasonable rates for utilities. Objection at 2-3. Eversource challenged SPH’s assertion that the Commission’s authority to set the proper rate to be received by a group net metering host for its output is preempted under federal law, contending that state law leaves no doubt the Commission has the authority to determine such rates. Objection at 3. Eversource further argued that the Commission’s authority to set just and reasonable rates for payments by New Hampshire utilities to qualifying facilities (QFs) is granted under the federal Public Utility Regulatory Policies Act of 1978 (PURPA). *Id.* According to Eversource, under PURPA and consistent with state laws regarding utility rates, a rate for purchase of the output from a QF must be “just and reasonable to the electric consumers of the electric utility and in the public interest.” *Id.* Eversource maintained that PURPA places the obligation for determining such just and reasonable rates on state regulatory authorities. *Id.* Therefore, Eversource argued, the Commission is not preempted by federal law but instead has express authority under PURPA to set the rates for payments by utilities to QFs. *Id.*

Eversource asserted that a group net metering host must be a QF to have its energy sales exempted from FERC regulation under the applicable requirements of Sections 205 and 206 of Federal Power Act, 16 U.S.C. §§791, *et seq.* Objection at 3. In addition, according to Eversource, a sale of energy or capacity by a QF must be made pursuant to a state regulatory authority’s implementation of PURPA Section 210 for the Federal Power Act exemptions to be applicable. Objection at 3-4. Citing Puc 903.02(i), Eversource asserted that the Commission has established regulations governing the implementation of net metering pursuant to PURPA Section 210. Objection at 4. Eversource contended that the Commission has determined,

pursuant to its PURPA authority and through the Puc 900 rules, the rates payable to QFs and the compensation for a group net metering host. *Id.* Eversource therefore concluded that the Commission's decision as set forth in the Letter Order was correct under the Puc 900 standards. *Id.*

Eversource agreed with SPH that, if it becomes its own lead market participant or appoints a third party to act in that capacity, and as a result no longer utilizes Eversource as its lead participant, then Eversource would indeed be bypassed and would be unable to "divert the FCM funds." *Id.* Eversource asserted, however, that if SPH chose to sell its output outside of the Commission's implementation of PURPA Section 210 as contained in the Puc 900 rules, then SPH would lose its PURPA exemptions and would be a wholesale generator subject to FERC rate-setting requirements under the Federal Power Act. *Id.* Eversource stated that SPH is free to sell its energy and/or capacity in a manner inconsistent with the Puc 900 rules, thereby subjecting itself to FERC's wholesale rate jurisdiction. *Id.* Eversource maintained, however, that SPH cannot simultaneously be a wholesale generator subject to FERC rate jurisdiction, "as well as a group net metering host that receives payments for its energy or capacity output based upon state jurisdictional PURPA rates." *Id.* Eversource concluded that the Commission's determination in the Letter Order is correct according to law, and that the Motion should be denied.

Objection at 5.

### **C. SPH's Reply to Objection**

In the SPH Reply, SPH asserted that Eversource had misinterpreted the Commission's conclusion that a host "may not accept" certain payments as a limitation "on what payments may be provided to the host by the utility," rather than a limitation on the host itself. SPH Reply at 1. SPH claimed this "novel reinterpretation" of the Letter Order is contrary to the plain words used

by the Commission, and represented “an apparent concession by Eversource that the Commission’s jurisdiction does not include the authority to restrict SPH’s right to receive [FCM] payments from ISO-NE.” *Id.*

SPH agreed that the Commission’s authority over the establishment of just and reasonable rates for utilities is plenary. *Id.* According to SPH, however, the FCM payments to SPH are not a rate or charge levied by Eversource pursuant to a tariff approved by the Commission; rather, those payments are made by ISO-NE pursuant to the ISO-NE tariff on file with FERC, and the Commission may not interfere in that payment process. *Id.*

SPH asserted that Eversource was incorrect in arguing that the Commission’s Puc 900 rules represent its implementation of utility purchase requirements under PURPA. SPH Reply at 2. According to SPH, Eversource’s claim that the Chapter Puc 900 rules establish rules for net metering pursuant to PURPA Section 210 is “palpably erroneous.” *Id.* SPH further asserted that the Puc 900 rules “do not confer any other authority on FERC with respect to implementation of net metering.” *Id.*

SPH concluded by acknowledging the Commission’s concern about “double-counting of capacity and over-compensation to the customer-generator” if Eversource must pass-through the FCM payments belonging to SPH. *Id.* SPH again noted, however, that it is not required to use Eversource as its Lead Market Participant and is prepared to exercise its right under the ISO-NE Market Rules to become its own Lead Market Participant in order to obtain FCM payments. *Id.*

### **III. COMMISSION ANALYSIS**

Pursuant to RSA 541:3 and RSA 541:4, the Commission may grant rehearing when a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. *See Rural Telephone Companies*, Order No. 25,291 (Nov. 21, 2011) at 9. Good reason may be shown by identifying specific matters that were “overlooked or mistakenly

conceived” by the deciding tribunal, *see Dumais v. State*, 118 N.H. 309, 311 (1978), or 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); *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Telephone Co., and Wilton Telephone Co.*, Order No. 25,088 (Apr. 2, 2010) at 14. A motion for rehearing that does not meet these standards will be denied. *See, e.g., Freedom Logistics, LLC, d/b/a Freedom Energy Logistics*, Order No. 25,788 (June 5, 2015) at 4.

We note at the outset that both SPH and Eversource raise jurisdictional issues under federal law. SPH asserts that the Commission through its Letter Order decision has “improperly invaded FERC’s exclusive jurisdiction over the [FCM].” Motion at 3. Paradoxically, however, SPH’s prayer for relief in its initial complaint requested that the Commission order Eversource to pass through to SPH certain FCM auction payments received by Eversource as SPH’s designated lead market participant in the ISO-NE regional wholesale power market. None of SPH’s filings in this docket has explained or justified this apparent internal contradiction in its position regarding the Commission’s jurisdiction to take action affecting wholesale power market participants. Eversource, for its part, urges us to recognize a source of federal law jurisdiction over state net metering programs under PURPA.

In order to resolve the relevant issues in this proceeding, it is not necessary to determine our jurisdiction, if any, under the Federal Power Act, or to analyze our jurisdiction under PURPA. The state net metering statute, RSA 362-A:9, and our group net metering rules, N.H. Code Admin. Rules Puc 909, authorize us to administer the group net metering program. We are given broad rulemaking authority to implement the statutory net metering provisions, including those related to group net metering, and we have done so through adoption of the Puc 900 rules, including Puc 909. *See* RSA 362-A:9, X.

It is this statute and these rules that provide for group net metering hosts (in this case a large customer-generator) to be compensated for excess electrical output, including both energy and capacity, at either the full retail rate (if 100 kW or less) or at the utility default service rate (if greater than 100 kW up to 1 MW). *See* RSA 362-A:9, IV and XIV; Puc 903.02(f) and (g); Puc 909.08(b) and (c). The default service rate includes charges based on both energy and capacity costs. *See* EverSource NHPUC Tariff No. 8, 1<sup>st</sup> Revised Page 7. As noted above, SPH has recognized and conceded that, as a group net metering host, it is entitled to compensation “only” at the default service rate under state law. *See* Puc 903.02(g)(5)a; Puc 909.08(d). Regardless of the size of its renewable energy facility, a group host is compensated for capacity as well as energy through net metering, and it would be inconsistent with both the letter and the spirit of the state statute and rules for the host to receive additional compensation based on the capacity value of its facility from another source.

We are also given substantial enforcement authority over group hosts under the net metering statute. RSA 362-A:9, XIV(e) provides that the Commission is authorized to “assess fines against, revoke the registration of, and prohibit from doing business in the state, any group host which violates the requirements of” the group net metering statutory provisions and the rules adopted pursuant to those provisions. The Commission has adopted rules governing the process for suspending a group host’s registration for a period of up to two years, after notice and an opportunity to be heard, for any material violation of applicable law and rules. *See* N.H. Code Admin. Rules Puc 909.11. We believe that the receipt by a group host of double compensation for capacity through FCM payments in addition to net metering credits or payments might represent such a material violation warranting suspension under the statute and rules.

As a result of this analysis, we continue to believe that Eversource was not required under state law to pass through to SPH the FCM auction revenue payments it received from ISO-NE




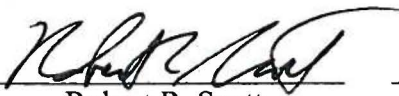
based on the capacity value of the Facility. Because SPH's Motion failed to demonstrate that the Letter Order was unlawful or unreasonable, we deny the Motion and restate our finding that a group net metering host may not, consistent with RSA 362-A:9 and the Puc 900 rules, receive double compensation for its capacity through net metering credits or payments and also through FCM payments received, directly or indirectly, from ISO-NE.

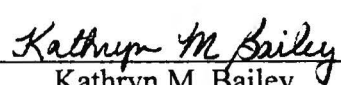
**Based upon the foregoing, it is hereby**

**ORDERED**, that the Motion for Rehearing filed by Steel's Pond Hydro, Inc. is DENIED.

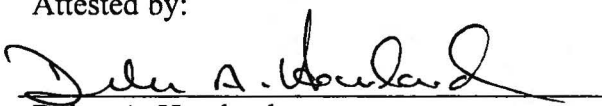
By order of the Public Utilities Commission of New Hampshire this tenth day of December, 2015.

  
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Martin P. Honigberg  
Chairman

  
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Robert R. Scott  
Commissioner

  
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Kathryn M. Bailey  
Commissioner

Attested by:

  
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Debra A. Howland  
Executive Director