THE STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DOCKET NO. DE 23-009

SQUAM RIVER HYDRO, LLC

Petition for Reconnection of a Qualifying Facility

Town of Ashland's Initial Brief on Jurisdiction

The Town of Ashland and the Ashland Electric Department (collectively "Ashland"), by and through their attorneys, McLane Middleton, Professional Association, submit this brief pursuant to N.H. Code Admin. Rules Puc 203.32 and the Public Utilities Commission's ("PUC" or "Commission") Procedural Order dated May 10, 2023. As discussed herein, the Commission lacks jurisdiction over Ashland in this matter and therefore does not have the authority to grant the relief sought by Squam River Hydro, LLC ("Petitioner" or "SRH"). Accordingly, Ashland requests that the Petition filed by SRH be dismissed.

INTRODUCTION

SRH asks, among other things, that the Commission order Ashland to: (1) pay SRH going forward at the avoided cost rate for the power generated by SRH's two hydroelectric run-of-the-river dams pursuant to State law, RSA 362-A, and the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"); (2) reimburse SRH retroactive to January 2020 for avoided cost revenues and Renewable Energy Credits; and (3) reimburse SRH for its investment in the dams due to its reliance on state and federal law and/or a prior Power Purchase Agreement ("PPA").

Ashland is a municipal electric utility whose service territory is located entirely within its town boundaries and is, therefore, exempt from the Commission's jurisdiction pursuant to RSA 362:2. Furthermore, Ashland properly terminated its prior voluntary wholesale PPA with SRH

pursuant to the terms of the PPA and thus denies that it has any obligation to reimburse SRH for any past costs. In addition, any question concerning Ashland's obligations as a municipal utility under federal law is within the jurisdiction of the Federal Energy Regulatory Commission (the "FERC"). Finally, SRH's claim that it should be reimbursed for its investment in its hydropower facilities, apparently based on some theory of detrimental reliance, is not a claim that the PUC has the authority to adjudicate because, among other things, Ashland is not a public utility and RSA 365:29 governing reparations applies only to public utilities. For these reasons and as discussed more fully below, the PUC does not have the jurisdiction or authority to grant any of the relief that SRH seeks.

BACKGROUND

SRH's claims come three years after Ashland's lawful termination of its PPA with SRH, which the parties had voluntarily entered into on January 1, 2012, for the purchase and sale of electricity generated by SRH's two run-of-the-river hydroelectric dams, and which Ashland resold at retail to its residential and commercial customers in Ashland. Pursuant to the PPA with SRH, Ashland agreed to purchase electricity generated by SRH's facilities for a negotiated purchase price of $0.085/kWh. Exhibit 1, Parties' PPA, Section 2(a).

The PPA provided for a one-year term subject to automatic renewal for successive one-year terms "unless terminated during any such successive one year terms by either party within ninety (90) days written notice." Ex. 1, at Section 1. The PPA made no mention of any State or federal regulatory authority or obligation on the part of Ashland to purchase SRH's electrical output; rather, the PPA expressed the intent of the parties to contract freely for the purchase and sale of electricity. *See* Ex. 1, Recitals (stating "[s]eller seeks to sell, and Buyer seeks to purchase, electric power on a wholesale basis for use by Buyer in the operation of its municipal

electric utility."). At no time during the term of the PPA, or subsequent to its termination, did SRH indicate or give notice to Ashland that SRH sought to sell its power at the applicable avoided cost rate (which would have been considerably lower than the PPA rate), pursuant to State or federal law.

In 2019, Ashland conducted an audit of its electricity needs and determined that it was purchasing electricity well in excess of what it needed to meet the demands of its customers and that the PPA with SRH was well in excess of market prices. Consequently, the Ashland Board of Selectmen voted to terminate the PPA in accordance with the 90-day notice provision contained in Section 1 of the PPA. On August 28, 2019, Ashland sent SRH a notice letter that Ashland was terminating the PPA and would cease making purchases from SRH 90 days from the date of the notification. On October 7, 2019, SRH confirmed that it had received Ashland's notice of termination and requested an extension of the effective termination date. In its October 7th letter, SRH also expressly stated that it intended to seek alternative buyers for its electricity generation. On October 8, 2019, Ashland agreed to extend the effective termination date of the PPA to January 8, 2020.

On January 2, 2020, SRH emailed the New Hampshire Department of Business and Economic Affairs stating that SRH had listed the two dam properties for sale and requested help to find "an alternative buyer" for SRH's power. *See* Exhibit 2. On other occasions following termination of the PPA, SRH notified Ashland that is was actively seeking alternative purchasers for its power and/or negotiating rates with such prospective purchasers.

On August 25, 2020, SRH notified Ashland that it was working on a potential offer to sell the dam sites and inquired whether Ashland would be able to buy power again from the hydro plants once Ashland's contract with VPPSA expired, noting that it would be helpful to the buyers

if a new agreement could be made. While SRH inquired at one point whether Ashland had an obligation to purchase SRH's power at a price less than the arrangement with VPPSA, SRH never provided notice to Ashland, or otherwise indicated, that it was interested in selling its electricity to Ashland as a QF pursuant to PURPA. Rather, on multiple occasions SRH notified Ashland that it was pursuing alternative buyers for its electricity and was actively negotiating with other parties for its power. One potential buyer contacted Ashland inquiring about net metering and interconnecting to Eversource. *See* Exhibit 3.

ARGUMENT

I. Municipal Corporations are not "public utilities" and are exempt from the jurisdiction of the Commission.

The New Hampshire Supreme Court has made clear over the years in a long line of cases that the Public Utilities Commission has only such powers as the Legislature has delegated to it, and such delegation "does not extend beyond expressed enactment or its fairly implied inferences…power and authority not granted are withheld." *State v. New Hampshire Gas & Electric Co.*, 86 N.H. 29 (1932). The Supreme Court further held: "Having only such authority to regulate as was expressly defined, the commission was not invested with authority beyond regulation. General supervision did not give general jurisdiction…" *Id.* at 32. As explained below, firstly, the Legislature, by definition, expressly withheld from the PUC authority over municipal corporations operating within their corporate limits and, secondly, the PUC's general supervisory authority over public utilities does not confer PUC jurisdiction over municipal corporations such as Ashland.

RSA 362:2, I expressly provides that the term "public utility" does not include municipal corporations operating within their corporate limits. Specifically, the term "public utility" is defined in RSA 362:2, to include:

> "every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, *except municipal corporations and county corporations operating within their corporate limits*, owning, operating or managing any plant or equipment or any part of the same ... for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public..." RSA 362:2, I [emphasis added].

While an entity that owns or operates equipment for the furnishing of electricity to the public is, as a general proposition, a "public utility", the plain language of RSA 362:2, I unequivocally excludes "municipal corporations...operating within their corporate limits" from the definition of a public utility, including Ashland. Because the Legislature has explicitly excepted municipal corporations from the scope of the Commission's regulatory authority over "public utilities", the Commission lacks jurisdiction over Ashland and may therefore not adjudicate the claims made by SRH.

The extent of the Commission's jurisdiction and supervisory authority in New Hampshire, moreover, is expressly set forth in statute. RSA 374:3 provides that that Commission has "general supervision of all *public utilities* and the plants owned, operated or controlled by the same." RSA 374:3 [emphasis added]. As noted above, the PUC only has the authority expressly delegated to it and its general supervision of public utilities cannot be read to fairly infer authority over a municipal corporation operating within its corporate limits.

The New Hampshire Supreme Court has interpreted the above statutes, consistent with their plain meaning, to find that municipal electric utilities are not "public utilities" and, therefore, are not subject to the jurisdiction of the PUC. *See Blair v. Manchester Water Works*, 103 N.H. 505, 506 (1961) (municipal utilities "operating within their corporate limits are exempted from the definition of a public utility."); *see also New Ipswich Elec. Lighting Dept. v. Greenville Elec. Lighting Co.*, 108 N.H. 338 (1967) (Court holding that municipal lighting department is "not subject to the jurisdiction of the Commission as to operations within the

corporate limits of the town."); *see also In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 33 (2010) ("A municipal corporation, however, that operates solely within its corporate limits, is not a 'public utility' subject to the PUC's jurisdiction."). That "municipal corporations" are outside the jurisdiction of the Commission over operations within town limits is settled law. Simply put, because Ashland is not a "public utility" pursuant to RSA 362:2, Ashland is not subject to PUC jurisdiction within its town boundaries.

SRH concedes that, as a municipal electric utility operating within its corporate limits, Ashland is excluded from the definition of "public utility" in RSA 362:2, yet posits generally that Ashland is nevertheless subject "to some degree" to PUC jurisdiction. *See* Petition at ¶3. As apparent authority for the proposition that Ashland is somehow subject to PUC jurisdiction, SRH refers to RSA 362:4-a, I. *See* Petition at ¶3. RSA 362:4-a, I, however, is inapplicable under the circumstances and does not support SRH's allegations. RSA 362:4-a, I provides that a "municipal corporation furnishing electric utility services *outside its municipal boundaries* shall not be considered a public utility under this title for the purpose of accounting, reporting, or auditing functions with respect to said service." RSA 362:4-a, I. Ashland is not operating, and does not provide electrical service, outside of its municipal boundaries – a fact that SRH also concedes. *See* Petition at ¶3.

SRH also makes general mention of RSA 362-F and RSA 125-O in ways suggesting that those statutes either lead to PUC jurisdiction over this matter or impose obligations on Ashland related to this proceeding. RSA Chapter 362-F is titled the Electric Renewable Portfolio Standard and creates obligations for "providers of electricity." Pursuant to RSA 362-F:2, XIV, however, municipal utilities such as Ashland are explicitly excluded from the definition of "providers of electricity." RSA Chapter 125-O is titled the Multiple Pollutant Reduction

Program and includes the Region Greenhouse Gas Initiative ("RGGI"). Pursuant to RSA 125-O:23, II, certain auction proceeds realized by the State are required to be rebated, or passed on, to all electric retail ratepayers in the state, which includes the customers of municipal utilities such as Ashland. This provision, however, does not confer on the PUC any ratemaking authority over Ashland but merely requires Ashland to be the conduit for passing on to its ratepayers the value of certain RGGI auction proceeds obtained by the State.

II. The Limited Electrical Energy Producers Act, RSA 362-A, does not apply to Ashland because it is not a "public utility" subject to the Commission's regulatory and ratemaking authority.

The Town of Ashland is not obligated, and has never been obligated, to purchase power from SRH pursuant to RSA 362-A or under any other State law. For the reasons already stated, Ashland is not a public utility subject to the Commission's jurisdiction and ratemaking authority. SRH's reliance on RSA 362-A:8 (Petition at ¶6) to suggest that Ashland had a "legally enforceable obligation to purchase power from SRH or to compensate SRH based on Ashland's avoided costs" ignores the plain language of the statute. RSA 362-A:8, titled "Payment Obligations; *Public Utilities*", provides that the purpose of the section is to:

> codify existing law on regulatory obligations of *public utilities* for the purchase, pursuant to applicable federal and state law and commission orders, of energy or energy and capacity from qualifying small power producers…" RSA 362-A:8, I [emphasis added].

The language of RSA 362-A:8, and the broader statutory scheme, makes clear that it applies only to "public utilities" and, therefore, as a matter of law, does not apply to municipal utilities operating within their corporate boundaries. *See* RSA 362-A:2-a ("Purchase of Output by *Private* Sector); RSA 362-A:3 (Purchase of Output of Limited Electrical Energy Producers by *Public Utilities*); RSA 362-A:4 (Payment by *Public Utilities* for Purchases of Output). Accordingly, RSA 362-A:8 is inapplicable.

SRH's reliance on Appeal of Public Service Co. of New Hampshire, 130 N.H. 285 (1988) and Appeal of Granite State Electric Co., 121 N.H. 787 (1981) fairs no better. *See* Petition at ¶2, 6. Both of those cases involved challenges by *public utilities* of rates ordered by the Commission for purchases of electric power from small power producers pursuant to RSA 362-A. Because Ashland is not a public utility subject to RSA 362-A or the Commission's ratemaking authority, both cases are inapposite.

SRH's reliance on federal law (PURPA), 16 U.S.C. § 824a-3(f)(1), to suggest that the Commission has authority to implement and/or enforce PURPA requirements against Ashland is equally unavailing. *See* Petition at ¶6. 16 U.S.C. § 824a-3(f)(1) provides that "each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) *for each electric utility for which it has ratemaking authority*." 16 U.S.C. § 824a-3(f)(1) [emphasis added]. Federal law is clear that state public utilities commissions are only authorized to implement the federal PURPA requirements for electric utilities over which the commissions have regulatory authority. Because Ashland is exempt from PUC jurisdiction, the PUC lacks ratemaking authority over it. Consequently, the PUC equally lacks authority to implement or enforce PURPA requirements against Ashland.

Insofar as SRH alleges that Ashland was under any PURPA obligation to purchase SRH's output, which Ashland disputes, that question, and any remaining allegations based on federal authority (*see* Petition at ¶ 4-8), is squarely within the jurisdiction of FERC. Under the PURPA definitional scheme, set forth below, FERC jurisdiction extends to the broader federal definition of "electric utilities", which includes municipal utilities.

PURPA Section 3 contains the following definitions.

> (4) The term "electric utility" means any person, State agency or Federal agency, which sells electric energy.

(9) The term "nonregulated electric utility" means any electric utility other than a State regulated electric utility.
(17) The term "State regulatory authority" means any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility (other than such State agency), and in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority, such term means the Tennessee Valley authority.
(18) The term "State regulated electric utility" means any electric utility with respect to which a State regulatory authority has ratemaking authority.

The critical distinction for the Commission's purposes in terms of jurisdiction here is between a nonregulated electric utility and a State regulated electric utility. Because the PUC does not exercise ratemaking authority over Ashland, Ashland is not a State regulated electric utility. Ashland is instead a nonregulated electric utility in PURPA parlance and is therefore subject to FERC jurisdiction, not the PUC's.

CONCLUSION

The Public Utilities Commission is not a state court of general jurisdiction endowed with broad equitable powers. The Public Utilities Commission is instead a regulatory forum with limited powers and it may only exercise that authority expressly delegated to it by the Legislature. For the reasons stated herein, the Public Utilities Commission lacks jurisdiction over Ashland and, therefore, lacks authority to determine the matters alleged or order the relief requested by SRH in the Petition.

Respectfully submitted,

Town of Ashland, New Hampshire & Ashland Electric Department

By Their Attorneys

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Certificate of Service

I hereby certify that a copy of the foregoing Petition has on this 16th day of June, 2023, been sent by email to the service list in DE 23-009.

Thomas B. Getz