

**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 Reply 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 reply brief in support of Ashland’s initial brief on jurisdiction dated June 16, 2023 (“Ashland Initial Brief”). The narrow legal question before the New Hampshire Public Utilities Commission (“PUC” or “Commission”) concerns whether the Commission has jurisdiction over Ashland, a municipal utility, in this matter. As demonstrated below and in Ashland’s Initial Brief, New Hampshire law is settled that the Commission lacks such authority. Inasmuch as Squam River Hydro, LLC (“Petitioner” or “SRH”) has failed to establish the Commission’s jurisdiction, Ashland requests that SRH’s Petition be dismissed.

1. In its June 16, 2023 brief (“SRH’s Brief”), SRH describes at great length the regulatory framework of the Public Utilities Regulatory Policies Act (“PURPA”) and the New Hampshire Limited Electrical Energy Producers Act (“LEEPA”), as well as the Commission’s authority under those statutes as they relate to the regulation of *public utilities*. However, the lengthy description is a distraction from the fact that Ashland is not a public utility, and SRH fails to identify any express authority in statute, case law, or otherwise, conferring jurisdiction on the Commission over Ashland in this matter.

2. SRH makes the over-inclusive, and hence fundamentally flawed, argument that because Ashland is an “electric utility” subject to PURPA as a matter of federal law, it is also subject to PUC jurisdiction; but one does not automatically follow from the other. SRH’s argument ignores PURPA’s definitional scheme as set forth in Ashland’s Initial Brief at pp. 8-9. Specifically, there are two types of electric utilities under PURPA, a “State regulated electric utility” and a “nonregulated electric utility.” With respect to the former, under PURPA the PUC has authority over rate-regulated public utilities. As for the latter, because the PUC does not have ratemaking authority over Ashland, Ashland is a “nonregulated electric utility” under PURPA, and thus any jurisdiction over this matter resides with the Federal Energy Regulatory Commission (“FERC”), not the PUC.

3. SRH’s generalized jurisdictional discourse would be relevant if Ashland were a public utility subject to the PUC’s ratemaking authority; however, RSA 362:2 could not be more clear in excluding municipal corporations operating within their corporate limits from PUC regulatory authority. In asking the PUC to assert authority over Ashland, SRH asks this Commission to ignore the well-established legal doctrine in New Hampshire limiting the PUC to “only such authority to regulate as was expressly defined” by the Legislature. *See State v. New Hampshire GAS & Electric Co.*, 86 N.H. 29 (1932). Given that RSA 362:2 unambiguously exempts Ashland from the Commission’s ratemaking authority, SRH is asking the Commission to overstep its expressly defined authority. *See also* RSA 374:3 (limiting the PUC’s authority to the “general supervision of all public utilities”).

4. SRH’s Brief contains three topic headings.

- I. PURPA and LEEPA confer jurisdiction on the Commission over the subject matter of this dispute.
- II. SRH is a qualifying facility under PURPA and LEEPA.

III. The Commission has jurisdiction over the Town of Ashland Electric Department because it is subject to PURPA.

SRH's part III conclusion, however, does not follow from, nor is it supported by, the arguments put forth in parts I, II and III. As explained above, SRH builds in part I on the flawed premise that the PUC has jurisdiction because Ashland is an electric utility under PURPA, ignoring the reality that PURPA makes separate and clearly delineated provisions for entities subject to State ratemaking authority (i.e., public utilities) and entities not subject to State ratemaking authority (i.e., municipal corporations operating within their corporate limits).

5. To support its argument, SRH relies in part I on New Hampshire cases involving the Commission's authority to implement and/or enforce PURPA and/or LEEPA against *public utilities*, namely Public Service Company of New Hampshire and Granite State Electric Company.¹ See SRH Brief at 2 (citing *Appeal of Public Service Co. of New Hampshire* 130 N.H. 285 (1988) and *Appeal of Granite State Elec. Co.*, 121 N.H. 787 (1981)). Missing are citations to a case in which the Commission has exercised regulatory authority over a municipal utility operating within its corporate limits in a matter concerning PURPA or LEEPA. SRH's reliance on the New Hampshire Supreme Court's interpretations of LEEPA and PURPA in the context of the PUC's regulation of public utilities is simply irrelevant to the question before the Commission here. See Ashland's Initial Brief at 4-6.

6. The Commission's authority to regulate public utilities is not in dispute in this proceeding. Rather, the narrow question before the Commission is whether it has jurisdiction to enforce the provisions of PURPA and LEEPA against Ashland, a municipal utility. SRH glides

¹ Ironically, in *Granite State Electric Company* the New Hampshire Supreme Court reversed and remanded a decision of the PUC, observing that: "The PUC, as an administrative agency, must act within the scope of its delegated powers." *Appeal of Granite State Electric Company*, 121 N.H. 787, 792 (1981) Yet SRH cites the same case here as a basis for the Commission to take action beyond its delegated powers.

over this crucial point, summarily contending that the Commission's authority over public utilities extends to municipal utilities. Citing *Appeal of Granite State*, which concerned the PUC's setting of PURPA rates applicable to public utilities, SRH quotes the New Hampshire Supreme Court's holding discussing RSA 362-A:3, titled "Purchase of Output of Limited Electrical Energy Producers by Public Utilities" thus:

That statute 'requires an electric utility, in certain circumstances, to purchase the entire output of electric power produced by a limited electrical energy producer, RSA 362-A:3, at a rate set by the PUC.' SRH Brief at 2 (quoting *Appeal of Granite State Elec. Co.*, 121 N.H. at 789.

SRH appears to use this case citation to suggest that municipal utilities are subject to the purchase obligation of RSA 362-A. But this reading ignores the plain language and full text of RSA 362-A:3, I, which provides:

The entire output of electric energy of such limited electrical energy producers, **if offered for sale to the electric utility**, shall be purchased by the **electric public utility** which serves the franchise area in which the installations of such producers are located. RSA 362-A:3, I [emphasis added].

What SRH omits, but the full text makes clear, is that the purchase obligations under LEEPA only apply to public utilities, not municipal utilities operating within their corporate limits.

7. SRH similarly over reaches by citing to PUC Docket No. DE 80-246, Order No. 14,797, 66 NH PUC 83 (March 20, 1981) to postulate that "the Commission has recognized its authority under PURPA to adjudicate disputes on a case-by-case basis." SRH Brief, p. 5. In Docket No. DE 80-246, the Commission set forth five matters for investigation.

1. Rates for sale of power by *public utilities* to small power producers and cogenerators.
2. Engineering and financial policies governing interconnection of small power producers and cogenerators to *public utilities*.
3. Operating and safety standards for small power producers and cogenerators.
4. Certain unresolved issues relating to the commission's work under DE 79-208 9[1979] 64 NH PUC 361), setting rates for purchases by *public utilities* from small power producers and cogenerators...

5. Examination of how progress by *public utilities* shall implement commission policy on small power producers and cogenerators. [Emphasis supplied.]

Once again, SRH relies on a discussion of the Commission's authority over public utilities to also mean authority over municipal corporations operating within their corporate limits. There is, however, simply no basis for interpreting Order No. 14,797 as a decision by the Commission that it has the authority to adjudicate disputes between QFs and nonregulated electric utilities, i.e., utilities over which it lacks ratemaking authority.

8. In part II, SRH explains why it merits treatment as a QF under PURPA and cites to the seminal U.S. Supreme Court case, *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), which upheld the constitutionality of Section 210 of Title II of PURPA. SRH does make note in passing of the distinction between state regulatory authorities, like the PUC, and nonregulated utilities, like Ashland, but it urges the wrong inference upon the Commission. Clearly, state commissions may comply with the requirements of PURPA by resolving disputes involving public utilities on a case-by-case basis, but that does not establish the PUC's authority to resolve a dispute involving a nonregulated utility over which it has no ratemaking authority.

9. SRH's reliance in part III on *Appeal of Ashland Elec. Dept.* to assert that the Commission has jurisdiction over Ashland in this case is also misplaced. The issue before the Court in *Appeal of Ashland* was whether, and to what extent, a municipality must comply with the notice and hearing requirements in RSA 38:10 ("Municipal Electric, Gas, or Water Systems") "when an existing municipal utility wants to construct parallel lines and distribution facilities within its corporate limits that will operate *in addition to* the existing poles and wires owned by a public utility." *Appeal of Ashland Elec. Dept.*, 141 N.H. 336, 338 (1996). That case did not involve LEEPA or PURPA.

10. SRH says that the Court in *Appeal of Ashland Elec. Dept.* “determined that Ashland was subject to NH PUC jurisdiction for purposes of RSA Chapter 38” and Ashland does not take issue with that characterization. SRH Brief at p. 9. SRH then goes on to say, however: “*Similarly*, Ashland is subject to NH PUC jurisdiction for purposes of PURPA, because it is an electric utility as defined in PURPA and PURPA directs state regulatory authorities to implement FERC’s rules promulgated under PURPA.” [Emphasis supplied.] *Id.* There is no “similarly” about it. RSA Chapter 38 comprises an express delegation of authority by the Legislature to the PUC over activities by municipal utilities when establishing, expanding, taking, purchasing, leasing, or otherwise acquiring plant for the manufacture and distribution of electricity, gas or water. There is, however, no such delegation to the PUC of authority to implement PURPA with respect to Ashland. Again, SRH’s pronouncements go too far. *Appeal of Ashland* is inapposite here. As for other arguments that SRH makes in part III regarding RSA Chapters 362-A, 362-F and 125-O, Ashland addressed their shortcomings in its Initial Brief at p. 6

11. As noted numerous times, SRH is wrong throughout its brief in the various ways it claims that the Commission derives jurisdiction over Ashland from the directive that the Commission implement PURPA regulations. *See* SRH Brief at 9. Contrary to SRH’s position, 16 U.S.C. § 824a-3(f)(1) directs commissions to implement PURPA regulations only “for each electric utility for which it has ratemaking authority.” The Commission lacks ratemaking authority over Ashland; therefore, it does not have authority under PURPA to regulate Ashland. *See* Ashland’s Initial Brief at 8.

12. Ultimately, both the New Hampshire Legislature and the New Hampshire Supreme Court have unequivocally determined that the Commission does not have jurisdiction over municipal utilities like Ashland. *See* Ashland’s Initial Brief on Jurisdiction at 8; *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."); RSA 362:2 (Exempting municipal corporations operating within town boundaries from the definition of public utility.). Despite repeated efforts to get around this bedrock precedent, SRH has failed to identify any authority that could reasonably be interpreted to confer jurisdiction on the PUC over this matter.

13. SRH closes part III with arguments touching on the state energy mix, legally enforceable obligations, cessation of purchases under PURPA, the termination of the power purchase agreement between Ashland and SRH, nondiscriminatory access to wholesale markets, and the PUC's authority to award damages. The consistent thread running through such arguments is, again, the mistaken notion that the PUC's jurisdiction is congruent with the broad PURPA definition of electric utilities. It is not. There is in fact a bright line between State regulated electric utilities and nonregulated electric utilities under PURPA, and the PUC's jurisdiction is limited to those electric utilities for which it has ratemaking authority. Accordingly, recourse for any claim SRH may have lies with FERC, not the PUC.

14. Finally, to the extent SRH asserts that it deserves recovery of so-called lost revenues pursuant to PURPA without ever having (1) notified Ashland that it sought to operate as a QF and (2) requested that Ashland purchase its output at the avoided cost rate, such a result would be manifestly unjust and would violate Ashland's due process rights. In any case, to the extent the allegations raised in SRH's petition fall within the scope of PURPA, such matters are properly within the jurisdiction of FERC, not the PUC. *See* Ashland's Initial Brief at 8-9.

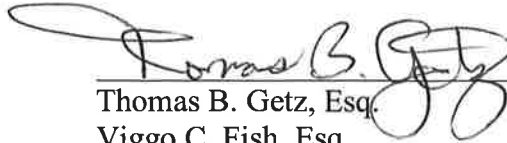
15. For all these reasons, the PUC lacks jurisdiction over Ashland in this matter and Ashland requests that the Commission dismiss the petition.

Respectfully submitted,

Town of Ashland, New Hampshire & Ashland
Electric Department

By Their Attorneys

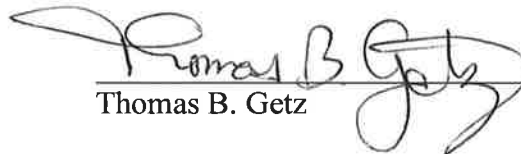
Date: June 30, 2023

A handwritten signature in black ink, appearing to read "Thomas B. Getz", written over a horizontal line.

Thomas B. Getz, Esq.
Viggo C. Fish, Esq.
McLane Middleton, PA
11 South Main Street, Suite 500
Concord, NH 03301
(603) 230-4403
thomas.getz@mclane.com
viggo.fish@mclane.com

Certificate of Service

I hereby certify that a copy of the foregoing Reply Brief has on this 30th day of June, 2023,
been sent by email to the service list in DE 23-009.

A handwritten signature in black ink, appearing to read "Thomas B. Getz", written over a horizontal line.

Thomas B. Getz