STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 23-009

SQUAM RIVER HYDRO, LLC

Petition for Reconnection of Qualifying Facility,
Payment of Avoided Costs and Payment of Lost Revenues

MOTION FOR REHEARING OF ORDER NO. 26,937

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07 and RSA 541:3, Squam River Hydro, LLC ("SRH") respectfully requests rehearing of Order No. 26,937 (January 25, 2024) (the "Order") issued by the New Hampshire Public Utilities Commission (the "Commission") in the above-captioned docket.

In support of this Motion, SRH states as follows:

I. BACKGROUND AND PROCEDURAL HISTORY

SRH owns two hydroelectric generating facilities that are qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act ("PURPA"), sections 16 U.S.C. 2601, et seq., and small power production facilities under state law (RSA 362-A:1-a, X), located in the Town Ashland, New Hampshire. The Ashland Electric Department unlawfully disconnected these QFs from the electric grid and refused to purchase power from them. On January 31, 2023, SRH filed a petition with the Commission asking for relief under PURPA and state law. SRH and Ashland submitted briefs and reply briefs in accordance with the Commission's procedural schedule. The Commission held a hearing on November 7, 2023. On January 31, 2024, the Commission issued the Order refusing to take jurisdiction over this matter.

II. SUMMARY OF ARGUMENT

Federal regulations, state Supreme Court cases, federal case law, and prior decisions of the Commission all make it clear that the Commission has an obligation to resolve PURPA

disputes like the one between SRH and Ashland. The Commission has sufficient ratemaking authority over Ashland under state law for it to take jurisdiction over this matter consistent with federal regulations. The Commission should therefore reconsider its decision and take jurisdiction over this matter.

III. LEGAL STANDARD OF REVIEW

Pursuant to RSA 541:3 and 541:4, as well as Admin. Rule Puc 203.07, a party or any person directly affected by a Commission action may move for rehearing of a Commission order within 30 days of the order by specifying every ground upon which it is claimed that the order is unlawful or unreasonable. The Commission may grant rehearing or reconsideration where a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. *See also Rural Tele. Co.*, Order No. 25,291 (Nov. 21, 2011) at 9. "The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision." *Dumais v. State Personnel Comm'n*, 118 N.H. 309, 311 (1978). Good reason may also be shown by identifying new evidence that could not have been presented in the underlying proceeding. *Id.* at 4-5. Within 30 days of the filing of a motion for rehearing, the Commission must grant, deny, or suspend the order or decision complained of pending further consideration, and the suspension may be upon such terms and conditions as the Commission may prescribe. RSA 365:21.

IV. SQUAM RIVER HYDRO REQUEST FOR REHEARING

a. The Commission has an obligation recognized under state law, state Supreme Court cases, federal law, and prior Commission decisions to take jurisdiction over this matter.

The Order ignores precedent established by prior Commission orders and New Hampshire Supreme Court decisions which have recognized the Commission's jurisdiction and authority to resolve PURPA disputes, as conferred by PURPA and state law. The Order also

ignores the direction under federal law, recognized in those same decisions, for state regulatory commissions to implement the rules promulgated by the Federal Energy Regulatory Commission. *See* DE 80-246, Supp. Order No. 14,797 (March 20, 1981); DE 11-250 and 14-238, Order No. 25,920 (July 1, 2016); and DE 78-232 and DE 78-233, Order No. 13,589 (April 18, 1979). *See also, Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 287 (1988); *Appeal of Granite State Elec. Co.*, 121 N.H. 787, 789 (1981). The Order runs contrary to the federal court recognition of "the primary role" states play in overseeing the relationship between QFs and utilities. *Allco Renewable Energy Limited v. Massachusetts Electric Company*, 208 F.Supp.3d 390, 393 (D. Mass. Sept. 23, 2016) (*affirmed*, 875 F.3d 64 (1st Cir. 2017)).

By ignoring these precedents, the Order denies SRH its right to have its PURPA dispute with Ashland resolved in New Hampshire by this Commission. It is therefore denying SRH its due process rights under state and federal law.

As noted supra, Ashland's obligation to connect SRH to the grid and to purchase power from it is "a state approved legally enforceable obligation." *See* RSA 362-A:8, II(a). The Commission is thus also ignoring state statutes. See the discussion in section c. below.

Among other things, Subtitle B of PURPA Title I requires each "State regulatory (with respect to each electric utility for which it has ratemaking authority) and each non-[state] regulated electric utility" to consider and then make a determination on whether to adopt by Congressionally-specified dates certain word-for-word regulatory standards that Congress has listed in the original 1978 PURPA, as well as in additions to PURPA contained in the Energy Policy Acts of 1992 and 2005, and the Energy Independence and Security Act of 2007. This "must-consider" requirement of PURPA Title I, Subtitle B should NOT be confused with the PURPA Title II, Sec. 210 requirement for mandatory purchase by electric utilities of cogeneration and small power production. Ashland is clearly an "electric utility" under PURPA

and the Commission should so find. There is no language in PURPA itself nor any precedent cited by the Order that supports a finding that the Commission lacks jurisdiction to enforce the mandatory purchase obligation of Section 210 against an electric utility such as Ashland. The Commission has recognized its authority to adjudicate disputes arising from the unlawful disconnection of a PURPA qualifying facility from the grid and failure to pay avoided costs, and that authority does not depend on the utility's status as a State-regulated electric utility under PURPA. *See* DE 80-246, Supp. Order No. 14,797, 66 NH PUC 83 (March 20, 1981) ("the state regulatory agency may implement PURPA § 210 by undertaking to resolve disputes between qualifying facilities and utilities arising under that portion of the rules which deals with arrangements such as rates for sale by utilities, rates for sale by QF's, interconnection costs, system emergencies and system operating reliability as well as other utility obligations; e.g. wheeling on demand."); *see* SRH's Reply Brief (June 30, 2023) pp.4-5.

b. The Order relies on a strained and overly narrow interpretation of RSA 38:17.

The Order at p. 10 first admits that RSA 38 gives the Commission authority over municipalities, but then characterizes that authority as "limited." In doing so the Order takes the very broad language of RSA 38:17 and then gives it far less effect than what it states on its face. This violates principles of statutory construction by imposing a strained and overly narrow interpretation on the language of RSA 38:17, which gives the Commission much broader authority to authorize municipal rates than the Order recognizes. The language in RSA 38:17 is more than sufficient to trigger the "ratemaking authority" language in PURPA and the federal regulations, thereby giving this Commission jurisdiction over this matter.

Moreover, the Commission overlooked Ashland's bad faith disconnection of SRH from the grid which implicates the provisions of RSA 38:12 and 38:15, so that Ashland could seek to

expand its own production and supply of hydroelectricity. As explained in SRH's Petition to the Commission (January 31, 2023), Ashland disconnected SRH from the grid without notice *and* tripled the local property tax assessment of the SRH facilities. *See* SRH's Petition, ¶7. Ashland did the same to another local hydroelectric facility, Northwoods Renewables LLC, *see* Exhibit 1 hereto. This appears to be a targeted effort by Ashland to run small local hydroelectric utilities out of business while it seeks to take over hydroelectric operations for itself. *See* Exhibit 2 (letter of January 26, 2023 stating that Ashland has "expressed a strong interest in once again conducting hydroelectric production at the [Squam Lake Dam] site."). These actions by Ashland provide another basis for the Commission to assert jurisdiction over this dispute in recognition of the Commission's authority pursuant to RSA 38 over a municipal utility seeking to expand its operations, in addition to the Commission's existing authority over supply contracts "and such reasonable rates for the use thereof" under RSA 38:17.

c. The Order Defies Principles of Statutory Interpretation and Denies SRH Rights by Ignoring RSA 362-A:8, II(a).

The Order also provides an unnecessarily narrow and limiting interpretation of RSA 362-A:8,II(a). This statute states unequivocally that the rates established "for the purchase of energy or energy and capacity from qualifying small power producers… under applicable federal law exist under the legislative and regulatory authority of the state and shall be deemed a state approved legally enforceable obligation." *See also* RSA 362-A:1-a, VIII and X, as well as the broad language in the purpose clause, RSA 362-A:1. A statute should be interpreted in light of the policy sought to be advanced by the entire statutory scheme. *State v. Mercon*, 174 N.H. 261, 264 (2021). In this case that policy was to "provide for small scale and diversified sources of supplemental electrical power" and "to encourage and support diversified electrical production that uses indigenous and renewable fuels." RSA 326-A:1. That purpose was not limited to providing these

benefits only in those communities served by non-municipal utilities, it was clearly intended to apply to the entire state of New Hampshire, including communities served by municipal utilities. By interpreting this statute the way it has, the Order has abrogated the overall policy sought to be advanced by the statutory scheme of RSA 362-A.

The language in this statute is plain and unambiguous; it stands alone as a commitment of the state to recognize and enforce the federal law, including PURPA. The failure of the Order to recognize the import of this statute violates principles of statutory construction in that its interpretation leads to an unjust result by overlooking the clear language of the statute and failing to give any meaning to this critical language. Under principles of statutory construction, the Legislature is not presumed to waste words - all words of a statute must be given effect. *In re JP.*, 173 N.H. 453, 460 (2020). The Order's interpretation of RSA 362-A:8, II(a) renders the words cited above meaningless and make it a virtual nullity. *State v. Beattie*, 173 N.H. 716, 720, 724-725 (2020). Because the obligation Ashland has to purchase energy and capacity from SRH is a "state approved legally enforceable obligation," the Commission should be providing SRH with a forum to adjudicate that obligation. By ruling that it lacks jurisdiction, the Order thus denies SRH its due process rights.

RSA 362-A:5 also says that "[a]ny dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication." The current dispute between SRH and Ashland arises in part under RSA 362-A, given the language in the purpose clause as well as the legally enforceable obligation language cited above. This in and of itself gives the Commission jurisdiction to resolve this dispute.

The Commission also has authority under RSA 365:19: "[i]n any case in which the commission may hold a hearing, it may, before or after such hearing, make such independent investigation as in its judgment the public good may require." Under RSA 365:20, the

Commission may "transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." To the extent that it has concerns about its ability to exercise jurisdiction, the Commission should consider taking this step.

d. The Commission has sufficient ratemaking authority over Ashland to take jurisdiction in this matter.

The Commission erred by ignoring the federal definition of "ratemaking authority" in favor of a state law definition of "public utility" that clearly does not exempt Ashland from Commission oversight in all respects. The Order's narrow interpretation of the state statutes and the authority they provide to the Commission, in conjunction with the import of the Texas and New Mexico Commission orders cited in the Order, is mistakenly conceived. The Commission should reconsider this portion of its decision. For the reasons cited above, SRH's case is very similar to the cases which both the Texas and New Mexico Commissions addressed. Because the Commission by law, when read in conjunction with prior orders of this Commission and rulings of the New Hampshire Supreme Court, has sufficient ratemaking authority over Ashland as required under federal regulation, the Commission should follow the analysis used by the Texas and New Mexico Commissions and recognize that the ratemaking authority it has under state law is sufficient for it to exercise jurisdiction over this matter in order to enforce the mandates of PURPA.

The Commission also has authority under RSA 374:57 over "[e]ach electric utility" which enters into an agreement for a term of more than one year for the purchase of energy. Ashland has made such a purchase of energy from the Vermont Public Power Supply Authority following termination of the purchase power agreement with SRH. *See* the Town of Ashland's Preliminary Response to Petition, p 2. This statute does not use the term "public utility" which Ashland has argued, and the Commission has ruled, does not include a municipal utility like Ashland. The use

of the term "electric utility" in this statute as opposed to the term "public utility" must be presumed to have been used intentionally by the Legislature. Ashland Electric Department is clearly an electric utility within the meaning of the term in this statute. Because this statute gives the Commission additional ratemaking authority over Ashland, it should be considered by the Commission in the analysis of whether it has "ratemaking authority" over Ashland.

WHEREFORE, for the reasons cited above, as well as the arguments it has made in its brief, reply brief and at the oral argument, SRH requests that the Commission:

A. Grant rehearing of the Order; and

B. Grant any such further relief as may be just and reasonable.

Respectfully submitted,

Squam River Hydro, LLC
By Its Attorneys

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Dated: February 23, 2024

Certificate of Service

I hereby certify that a copy of the foregoing motion has on this 23rd day of February, 2024 been provided electronically to the email addresses specified on the Commission's service list in DE 23-009.

By: _____
Douglas L. Patch

Project No. 5274

NATDAM ID No. NH00059
Squam Lake Dam Project
New Hampshire Department of
Environmental Services

Date: 1/26/2023

Plan and Schedule to Restore Project Operations for the Squam Lake Project

Re: Non-Operating Status, Plan and Schedule to Restore Project Operations

We have been approached by the Town of Ashland, NH, the prior operator and co-exemptee for the project. They have expressed a strong interest in once again conducting hydroelectric production at the site. We are currently proposing to:

- Clarify the site obligations of each party in the event a new agreement is reached;
- Update the legal status between the two parties;
- Upon possible agreement for a new lease of the dam, come up with a plan for the purchase and installation of all required hydroelectric equipment and connections required for production;
- Review the recently completed hydrologic and hydroelectric analysis recently completed by Gannett Fleming and update all related FERC required documentation;
- Update the EAP for the site based on the inundation mapping performed in the Gannett Fleming analysis.

In the event the negotiations do not lead to an agreement between the State of New Hampshire and the Town of Ashland, we plan to investigate the process required for the surrendering the FERC exemption for the site.

Please let me know if you have any questions or need additional information.

Daniel Mattaini, PE
Chief Operation and Maintenance Engineer
NH Department of Environmental Services
29 Hazen Drive, P.O. Box 95
Concord, NH 03302

Signature