DRM 14-234

**Public Service of New Hampshire**

A Northeast Utilities Company

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January 5, 2015



Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 S. Fruit St., Suite 10
Concord NH 03301

Re: DRM 14-234, NEPGA Request for Rulemaking
PSNH Comments on Staff Request for Advance Comment

Dear Director Howland:

On December 16, 2014, the Commission Staff issued a Request for Advance Comment on a Subject of Possible Rulemaking with respect to the Commission's Puc 2100 rules on affiliate relations. In that notice it stated that "The Commission is considering whether to incorporate into the affiliate transactions rules a new type of affiliate that may be called an 'energy project development affiliate,' and the Commission is considering the rules that may apply to such an affiliate." Request for Advance Comment at 1.

Public Service Company of New Hampshire ("PSNH") hereby provides its comments pursuant to the Staff request and reasserts its arguments from its October 1, 2014 filing in this docket that the rulemaking at issue is unnecessary, and that the existing rules and law are adequate. Moreover, PSNH notes that to attempt to bring certain entities under its regulation when such entities should not be so regulated may run afoul of state and federal law and could have the effect of stifling investment in New Hampshire.[1] This rulemaking should be closed.

Aside from the general issues identified in PSNH's prior filing, the amendments proposed by NEPGA in the instant docket lead to rules that are overbroad, vague, contrary to law, beyond the authority of the Commission, unnecessary, or otherwise improper. PSNH highlights just some of those matters below. This is not intended to be an exhaustive discussion,

[1] Recently, NEPGA, the entity initially requesting this rulemaking, argued to the Maine Public Utilities Commission that finding affiliate relationships that adhere to FERC and state standards, and industry practices, to be illegal should be avoided because such findings would hamper investments and place Maine at a disadvantage. *See* October 9, 2014 Order of the Maine Public Utilities Commission in Docket No. 2011-0170 at 9. In that the rulemaking request in the instant docket is premised upon relationships that have been found to comply with the relevant standards, a finding by this Commission that there is some matter to address through rules would appear contrary even to NEPGA's position.

but to point out that there are substantial and material flaws in the NEPGA proposal, and that its proposed rules cannot be adopted.

In its suggested amendment to Puc 2101.04, NEPGA proposes to add language prohibiting a distribution company for doing certain acts that would "circumvent these rules or *any other law or rule*." (emphasis added). In the first place, this amendment is unnecessary because it merely prohibits a company from circumventing applicable law – a matter that requires no special rule. Further, this proposal would appear to make the Commission the enforcement agent for compliance with any and every law or rule at the local, state and federal levels. As the Commission is well aware, its jurisdiction is limited to that conferred by law, *see, e.g., Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982) ("The PUC 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."), and it cannot arrogate unto itself authority it does not have. *See Public Service Company of New Hampshire*, Order No. 24,979 (June 19, 2009) at 17. Accordingly, this proposed rule cannot stand.

In Puc 2102.09, NEPGA proposes a new definition for an "energy project development affiliate" that is vague, overbroad, and beyond the jurisdiction of the Commission. The proposed definition includes any affiliate of a distribution company engaged in the "development" of "any energy generation, energy transmission, or energy distribution project" as well as "any services or equipment provided by the affiliate" to any project. The proposed rule does not, however, define the terms: "development," "energy generation" project, "energy transmission" project, or "energy distribution" project. In that it includes "any" such project, and that it includes "any" services or equipment relating to "any" project it is essential to know and understand what projects could possibly be included in this vague rule. For example, on its face, it would appear that an affiliated company offering mutual aid services to a New Hampshire distribution company would become an energy project development affiliate.

Moreover, so far as PSNH is aware, every distribution company in New Hampshire receives services from an affiliated service company in line with state and federal laws and rules. Some of those services necessarily relate to the development of energy generation, energy transmission, or energy distribution projects. This proposed rule appears to reclassify all service companies as energy project development affiliates. The proposed rule is vague and overbroad.

PSNH also notes that entities that actually engage in the generation, transmission or sale of electricity ultimately sold to the public, or that own or operate any pipeline, including pumping stations, storage depots and other facilities, for the transportation, distribution or sale of natural gas are public utilities, as that term is defined in RSA 362:2, I. Therefore, to the extent that a project developing entity would ever engage in such services it would become a public utility in New Hampshire, and subject to the Commission's jurisdiction over such entities. There is no justification for attempting to regulate such an entity directly, prior to it becoming a public utility. Such regulation could also have the effect of curtailing investment in New Hampshire.

Similarly, NEPGA's proposed amendments require certain actions relative to "non-affiliated energy project developers." Not only has NEPGA not provided a workable, or legal, definition of an energy project development affiliate, it does not even attempt to define the

universe of non-affiliated developers – a group that would appear to be virtually limitless. Other proposed amendments likewise rely upon vague or undefined terms.

Next, in Puc 2103.10, NEPGA proposes a rule that would prevent a distribution company from attending any meeting with "customers, potential customers, or state or local officials" at the same time as the undefined energy project development affiliate, except as permitted on a case by case basis by the Commission. Putting aside the First Amendment concerns about a distribution company's right to provide legal, factual information to public officials or members of the public, the proposed rule highlights the flaws in the NEPGA proposal. Administrative rules are, by definition, rules of general applicability. *See* RSA 541-A:1, XV. To have a rule that expressly provides for "case by case" adjudication, application, and enforcement is not a rule. This proposed rule is merely an attempt to limit, unfairly and improperly, the ability of distribution companies to provide information. NEPGA's proposals cannot be adopted.

In Puc 2105.04(f), NEPGA inserts a proposed rule that requires a distribution company to file an annual, public report quantifying an "estimate of the benefits" of shared support services, such as those provided by an affiliated service company, prior to engaging in those services. Initially, it is not clear how such an estimate could ever be made, nor is it clear why it is necessary to estimate the benefits of the services of a service company when those services are offered to a distribution company and an affiliate. This proposed rule serves no purpose. To the extent there is concern about the costs and value of shared services that are to be borne by utility customers, there are already means and mechanisms to investigate such concerns and this rule appears to be, at best, unnecessary.

Next, in Puc 2105.08, and similar to the issues NEPGA's proposal creates under Puc 2103.10, NEPGA proposes a rule stating that an energy project development affiliate, however that may be defined, cannot identify itself as an affiliate of a distribution company, except in specific governmental filings. This proposal: infringes on an unregulated affiliate's rights to free speech; makes an unregulated entity subject to restrictions not applicable to other, similar entities, simply because of its affiliate status; and is directly contrary to an existing regulation that permits a distribution company to allow competitive affiliates to identify themselves as affiliates of the distribution company. There is no reason for this proposed regulation other than to put unregulated, affiliated entities at a disadvantage by limiting the truthful, factual information they or a distribution company can provide to the public.

Lastly, for purposes of this submission, NEPGA proposes unnecessary amendments to Puc 2105.09 to cover "interests in real estate" as NEPGA defines them. PSNH pointed out in its October 1, 2014 submission that the disposition of distribution company real estate is already covered by statute in RSA 378:30. What more is intended by this proposal is not clear. The proposal is made vaguer by amendments that refer to the "fully loaded" cost of an interest in real estate, and that would require a distribution company to retain records sufficient to demonstrate such "fully loaded" costs, without describing what that term entails. It is not at all clear what the fully loaded costs of real estate are, or what they could be, nor is it clear how a distribution company would record such costs. This is a vague, and unnecessary, rule.

There are other shortcomings in the proposed rules, and PSNH points out, as it did previously, that the proposal is beset with substantial issues that make adopting it impossible. Further, the need for additional rules is unnecessary and would likely have undesired consequences. PSNH reasserts that the present rules and law are sufficient to address the Commission's concerns, and that to revise the rules when they were only readopted in 2011, and when little, if anything, has changed since their adoption, is an inefficient use of resources by all potentially involved parties.

Through Order No. 25,721 (October 13, 2014) the Commission opened this rulemaking proceeding to consider whether the affiliate transaction rules "should be modified in light of the continued evolution of energy markets in New Hampshire and New England, as well as our evolving role in public utility regulation" and stated that as part of the docket it would consider "whether Puc 2100 should be modified." Order No. 25,721 at 3-4. The premise upon which the Commission would consider modifying the affiliate transaction rules, *i.e.*, the evolution of energy markets and the evolving role of the Commission, is best examined by reviewing the role of the Commission as provided in its authorizing statutes. At its core, the Commission's role with respect to balancing the interests of public utility customers and shareholders is unchanged in the context of wholesale and retail restructuring in the electric industry over the past several decades. As demonstrated by Commission Staff's investigation of the relationship between PSNH and NPT underlying this proceeding, that core responsibility has been appropriately administered by the Commission under existing statutes and rules. *See, e.g.*, RSA 374:2 (requiring that all public utility charges shall be just and reasonable), and RSA 366:5 (authorizing the Commission to investigate affiliate arrangements). Based on such authority, Commission Staff has, for example, investigated the relationship underlying this request. In that investigation, the Staff concluded in its November 5, 2013 report that, while additional clarity of their roles was advisable, PSNH and NPT were "following appropriate procedures to ensure proper recording of costs associated with the Northern Pass project—resulting in PSNH customers not subsidizing the project." *See* November 5, 2013 Staff Report in Docket No. IR 14-196 at 14. The Commission's existing authority is adequate.

Further, it is also useful to look closely at the import of the Commission's reference to the evolution of energy markets and its evolving role in that regard. Energy markets have evolved in that both at the federal level, and in New Hampshire, there has been a shift away from cost of service regulation in certain areas and a reliance on market forces, which has variously been described as deregulation or restructuring. Along those lines, the Commission's role has also evolved. The direction of the evolving energy marketplace calls for less regulation, not more, to level the playing field for all participants. NEPGA, to the contrary, would have the Commission create obstacles to new entrants that tilt the playing field towards the status quo that NEPGA represents. Such regulation would be inconsistent with the Commission's charge under restructuring and beyond the scope of its traditional authority to assure safe and adequate service at just and reasonable rates.

In light of the substantial shortcomings of the proposal before the Commission, and the lack of a compelling purpose to amend the rules, PSNH contends that the Commission should conclude that there is not cause to modify the rules at this time and that the docket should be closed.

Respectfully submitted this 5th day of January, 2015.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

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