DRM 14-234

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March 25, 2015

NHPUC MAR25'15 PM 4:06

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

RE: DRM 14-234
New England Power Generators Association, Inc.
Request for Rulemaking Pursuant to Puc 205.03 – Puc 2100 Affiliate Transactions Rules
Comments of Eversource Energy on Initial Proposal

Dear Director Howland:

Initially, Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") reiterates its comments from prior submissions that there is no cause for the Commission to undertake this rulemaking at this point. In Order No. 25,721 (October 13, 2014) in the instant docket the Commission stated that it was opening 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 [the Commission's] 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. In light of the Commission's desire to determine whether these rules should be modified, Eversource reasserts that the present rules and law are sufficient to address any affiliate matters within the Commission's purview, and that to revise the rules when they were only readopted in 2011, and when little, if anything, has changed since their adoption, is inefficient and unnecessary. As Eversource has previously contended in this docket, whatever concerns the Commission believes must be addressed are already accounted for by existing rules or statutory authority.

Moreover, the premise upon which the Commission based its consideration for modifying the affiliate transaction rules – the evolution of energy markets and the evolving role of the Commission – cuts against amending the rules. 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 and natural gas industries. Further, to the extent that energy markets have evolved in New Hampshire, and at the regional and federal levels, there has been a shift away from cost of service regulation in certain areas and a reliance on market

forces. The direction of the evolving energy marketplace calls for less regulation, not more. The "evolution of energy markets" does not require this rulemaking.

Further, whatever the motivation for seeking these rule changes, the effect of implementing the proposed changes and redefining a competitive energy affiliate to include the entire utility, would be to hobble the activities of a regulated utility providing distribution and transmission service by applying competitive affiliate rules to the provision of regulated services already under the jurisdiction of state or federal agencies. Competitive affiliate rules that prevent a regulated utility from providing an undue advantage to a truly competitive affiliate are appropriate to avoid disadvantaging other competitive entities. Applying the same concept to regulated services provided by regulated utilities, however, is less sensible. If regulated services provided by utilities are treated the same as competitive services – for example, if utilities were prevented from providing additional transmission and/or distribution service to a location because a generator might contend that the increased supply would put them at a disadvantage – customers would not benefit and may end up paying higher prices for their energy. Adopting regulations that apply within a regulated utility would be detrimental to customers, and would set dangerous precedent.

Despite the above, and in furtherance of the Commission's process, Eversource offers comments on specific rules within the Commission's initial proposal of February 4, 2015 below.

Puc 2101.02(b)

This provision appears to be unnecessary. It appears to reserve to the Commission rights that are conferred to it by statute. There is no need for the Commission to reserve such rights.

Puc 2101.03(a)

Insofar as Eversource is aware, no utility offers "transition" service any longer. As such, that reference should be deleted.

Puc 2101.03(b)

For clarity, Eversource believes that the term "emergency conditions" should be defined.

Puc 2101.04(b)

This new provision appears to be encompassed by the following provision, Puc 2101.04(c). Accordingly, it is unnecessary.

Puc 2102.01

Eversource believes that reference to the underlying statute is sufficient without reproducing the text of the existing statutes in regulations. An amendment of the underlying law would make such a regulation inconsistent with the governing statutory authority. Therefore, the new text should be deleted.

Puc 2102.04

It is not clear what is intended to be encompassed by this definition. New Hampshire has deregulated, in large measure, electricity supply services, but it has not deregulated transmission or distribution services. In fact, New Hampshire law explicitly recognizes that such services are regulated. "Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from ***transmission and distribution services which should remain regulated for the foreseeable future***." RSA 374-F:3, III (emphasis added). Similarly, and in furtherance of this goal, New Hampshire law permits the Commission certain authority to require distinctions relative to electric supply (competitive) and electric distribution (regulated): "The commission is authorized to require that distribution and electricity supply services be provided by separate affiliates." RSA 374-F:4, VIII(a). Given these statutes, it is not clear what the Commission intends by including transmission and distribution projects within the rule. The inclusion of transmission and distribution project participants appears to go beyond the authority of the Commission.

Further, and relative to distribution projects for example, as a practical matter there is no purpose for this rule. Should a utility intend to undertake distribution projects it would either use the workforce of the utility itself, or it would appeal to an outside market for needed services. It would be inefficient and impractical to have a utility affiliate bid against others for distribution utility projects.

Lastly, relative to this rule, it is not clear what is intended by the reference to "related products or services." The rule appears to include every entity that sells any product or service that could, even incidentally, touch upon the natural gas or electric markets and, therefore, the universe of "related products or services" would appear to be nearly limitless. An unregulated affiliate of Eversource that exists to sell, for example, equipment that monitors natural gas use in commercial equipment, would appear become a "competitive energy affiliate" of Eversource and subject to the requirements of the rules, despite the facts that Eversource does not participate in the natural gas market in New Hampshire and that there is no meaningful link between the business purposes of the entities.

Puc 2102.09

Similar to the above, it is not clear what is intended in this provision. In light of the fact there would likely be no situation where there is a utility affiliate performing certain services (such as those relating to distribution projects), it would seem unnecessary to make reference to non-affiliated versions of such entities.

Puc 2102.11

It is not clear why the regulation of affiliate contracts is being limited to "natural gas or electric distribution" utilities. The underlying law, RSA chapter 366, applies to "public utilities" and the concerns regarding potential abuse of affiliate transactions likewise apply to **all** public utilities. There is no rational reason for the Commission to ignore the requirements of RSA

chapter 366 for every public utility that is not a natural gas or electric distribution company. Therefore, the words "that provides natural gas or electric distribution services subject to the commission's jurisdiction" should be deleted. In addition, it is not clear why the service territory of an affiliate of a rural electric cooperative is a relevant consideration in determining what entity is covered by the rules. If a cooperative is affiliated with a competitive electric supplier, it should be of no consequence where such supplier operates within the state.

Puc 2103.01, 2103.03(a), and 2103.03(b)

It is not clear what the term "similarly situated" means in these provisions, nor it is clear how it would be determined whether one entity is "similarly situated" to another. This would appear to create an obligation on the utility to render a determination on what entities are, or are not, similarly situated to other entities, and it would expose the utility to liability should it err (or be thought to have erred) in its determination. The utility should not be required to make such determinations.

Puc 2103.06(b)

The term "regulated utility services" as used in this rule should be clarified to exempt the shared services provided by a utility service company.

Puc 2103.07(a) and 2103.07(b)

In the situation referenced in these rules, a utility will have sought authorization from the Commission to offer some type of discount, rebate or waiver, the Commission will have authorized the provision of such discount, rebate, or waiver, the utility will have offered the discount, rebate, or waiver consistent with the authorization provided by the Commission, and the utility will have posted the offer of the authorized discount, rebate, or waiver on its website. In such a situation it is not clear why the amended rule requires that a notice be filed with the Commission. The utility has already received the authority of the Commission through an open and public process to provide the discount, rebate, or waiver, and it has added the information required in Puc 2103.07(c) to its publicly accessible website. An additional filing with the Commission appears to be an unnecessary administrative burden. Moreover, in light of the requirement for prior Commission authorization for a utility to offer a discount, rebate, or waiver of a charge, there is no need for Puc 2103.07 at all; the Commission could make an *ad hoc* determination regarding what actions are necessary under the circumstances of the particular discount, rebate, or waiver when it grants authorization for same.

Puc 2103.10(c)(4)

The term "share with" should be replaced with "provide to" or similar language to avoid the possibility of preventing a utility and an affiliate from having access to reports prepared by a service company. To leave the rule as it stands would appear to mean, for example, that an internal corporate planning document relating to the parent company and prepared by a utility service company could not be "shared" by the utility and an affiliate, though both would need to

have the information in such a report and the availability of such a report would cause no competitive concerns.

Puc 2105.03(a)

The term "supply services" should be clarified to mean energy supply, unless some other meaning is intended, in which case that intent should be made clear.

Puc 2105.04(a)

The scope of this rule is unnecessarily broad. If, for example, a utility and an affiliate, working independently, both determine that hiring a third party recruiter to fill corporate positions would be advisable, under this rule, and 2105.04(e), hiring that entity would not be permitted. The restrictions on third party service providers should be narrowed.

Puc 2105.05(b)

The amendments to the rule have rendered it too broad. Under the rule, if a utility and a competitive affiliate are controlled by a holding company, a corporate officer is permitted to be an officer for the utility or the competitive affiliate, but not both. By deleting the term "energy" in reference to the competitive affiliate, this means that an officer of the utility cannot be an officer of a competitive affiliate, regardless of whether that affiliate's line of business is substantially similar to the business of the public utility. The term should be narrowed by reinserting the word "energy" into "competitive [energy] affiliates".

Puc 2105.07(b)(2)

The prohibition on "joint activity" in this rule is too broad. Read in conjunction with Puc 2105.07(d), the rule prohibits, for example, the use of a website that references both the utility and the competitive affiliate (regardless of the information actually provided) because, it appears, such website would amount to "communications" with "existing or potential" customers. This rule must be narrowed.

Puc 2105.07(3)

The United States Supreme Court has recognized that privately owned public utility companies, like other private entities, have a right to engage in free speech on issues of public concern. *See Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 8 (1986). Similarly, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978), the Court stated:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in

> government to channel the expression of views is unacceptable under the First Amendment.

(citations omitted); *see also Citizens United v. Federal Election Commission*, 558 U.S. 310, 313 (2010) ("*Bellotti* reaffirmed the First Amendment principle that the Government lacks the power to restrict political speech based on the speaker's corporate identity."). While avoiding confusion may be an admirable goal, the restrictions in the rule on those who may speak at public gatherings or to public officials on matters of public interest, and the manner in which such speech must be delivered, cannot stand. The concern relating to restrictions on speech to public officials is further highlighted by the rule's requirement that utility and affiliate speech be "otherwise consistent" with the rules, without defining what it means to be "otherwise consistent." As Eversource had indicated previously in this docket, the proposed amendments to this rule violate the First Amendment to the United States Constitution and cannot be implemented.

Puc 2105.07(e)

The rule references the utility's "provision of transportation service to the customer." In light of the fact that the proposed definition of "utility" covers natural gas and electric distribution companies, and that Eversource has noted that the definition of "utility" should be broadened consistent with RSA chapter 366, it is not clear what is included in the reference to "transportation service."

Puc 2105.09(a)

Pursuant to RSA 374:30 a utility may transfer or lease its franchise, works or system if the Commission determines it is in the "public good." Similarly, RSA 366:5 provides authority to the Commission to investigate certain purchases and sales, and, as part of such investigation, the utility and affiliate must show that the purchase or sale is "reasonable." By establishing strict pricing criteria around all sales, leases and transfers between utilities and affiliates, it appears that the rules may not abide by the flexible statutory requirements that such transactions be "reasonable" or in the "public good." It may be that under certain circumstances a sale, transfer, or lease at something other than the pricing criteria set out in the rule is the best course for the disposition of a particular asset or service and is, therefore, "reasonable" or in the "public good." Yet, the flexibility provided in the statutes is denied by operation of the rule. In such a case, the rule must yield.

Puc 2106.01(a) and (d)

The stated purpose of Puc 2106.01 is that a utility is to provide a plan that demonstrates "that there are adequate procedures and policies in place for complying with these rules." Puc 2106.01(a). Eversource does not object to such purpose. The contents of the plan as described in Puc 2106.01(d), however, go beyond that purpose. Puc 2106.01(d) requires, for example, descriptions of the business purpose of and business conducted by affiliated entities, employee tracking information, and two different, but substantially similar officer certifications. Such

information is not required to determine whether the utility has "adequate procedures and policies" for complying with the rules. The plan requirements should be narrowed to those items necessary to confirm the existence of sufficient procedures and policies.

Additionally, it is not clear how the provisions in Puc 2106.01(d) (3) and (4) differ. Consider eliminating at least one.

Puc 2106.04

Puc 2106.04(a) is not clear as written and creates substantial compliance issues. By its terms, the rule appears to require that if a utility acquires a competitive energy affiliate, the utility must notify the Commission within 10 days of that affiliate's commencement of business in New Hampshire. It is likely that if a utility is acquiring another business, that business would have commenced its activities more than 10 days prior. In that case, it would be impossible to comply with this provision. Similarly, a utility is to notify the Commission of the creation of a competitive energy affiliate within 10 days of that affiliate beginning business activities in New Hampshire. It is not clear, however, what qualifies as the commencement of business activities. If, for example, the entity is a competitive electric power supplier that would operate under the Commission's Puc 2000 rules, prior to selling electricity it must, at a minimum: be registered with the secretary of state; be able to procure power in the New England market; have completed EDI testing; have posted appropriate financial security; and have received its registration from the Commission following submission of a complete application. Presumably, any point along this timeline, or some other point altogether, could be deemed to be the date upon which business activities commenced and the date from which the 10-day requirement runs. This provision must be amended to provide additional flexibility.

Additionally, and with respect to Puc 2106.04(b), the 10 day requirement requires the filing of an updated plan. Such a filing may not meet the timing requirement for the reasons set out above. Further, for the reasons discussed relating to Puc 2106.01, there appears to be no need for a new compliance plan. The utility would continue to have its procedures and policies in place, and the creation or acquisition of a new entity would not change those procedures or policies.

Puc 2106.05

As written, this section is overbroad as it would require the Commission to perform a review, investigation, inquiry, or audit for every complaint that may be filed, regardless of the nature of the complaint or the allegations within it. The provision found in RSA 365:4, concerning "Complaints to, and proceeding before, the Commission" should be included in this section, so that the rule would read, "On the commission's own motion or a complaint, in order to verify that the utility is in compliance with these rules, ***and if it shall appear to the commission that there are reasonable grounds therefor***, the commission ***may***:"

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Very Truly Yours,

Matthew J. Fossum
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