

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-068

FREEDOM LOGISTICS, LLC, d/b/a FREEDOM ENERGY LOGISTICS

**Petition for Authorization Pursuant to RSA 362-A:2-a, II for a
Purchase of LEEPA Output by the Private Sector**

Order Denying Motion to Dismiss

ORDER NO. 25,801

July 29, 2015

In this order, we deny Eversource's motion to dismiss. Considering the allegations in the petition and drawing all reasonable inferences in FEL's favor, we find that the petition alleges sufficient facts to proceed with discovery.

I. PROCEDURAL HISTORY

Freedom Logistics, LLC, d/b/a Freedom Energy Logistics (FEL), owns an office building in Amherst. Fiske Hydro, Inc., operates a hydroelectric generation facility in Hinsdale. FEL filed a petition pursuant to RSA 362-A:2-a seeking Commission approval of a contract for FEL's retail purchase of electricity directly from Fiske Hydro. The statute authorizes Fiske Hydro, a "limited producer of electrical energy," to sell its energy "to not more than 3 purchasers other than the franchise electric utility," and requires the utility to "transmit electrical energy from the producer's facility to the purchaser's facility." RSA 362-A:2-a, I and II. FEL filed a copy of the contract, supporting testimony, and other exhibits. Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) filed a motion to dismiss the petition and to stay the procedural schedule while the Commission considered the motion. FEL timely objected.

II. POSITIONS OF THE PARTIES AND STAFF

A. Eversource

Eversource makes six arguments in support of its motion to dismiss. First, Eversource notes that Fiske Hydro is not a party to the petition or to this docket. Motion at 3. Eversource then argues that Fiske Hydro is a necessary party and “questions whether the Commission may provide any relief” given Fiske Hydro’s non-party status.

Second, Eversource argues the proposed contract violates the “within a limited geographic area” language of the statute. Motion at 3. RSA 362-A:2-a, I provides, in part, that the commission “may authorize a limited producer ... to sell electricity at retail ... within a limited geographic area.” Eversource alleges that 80 miles separate Fiske Hydro’s facility in Hinsdale and FEL’s office building in Amherst. Motion at 3-4. Eversource argues that this distance renders FEL and Fiske Hydro not “within a limited geographic area,” and that approval of the proposed contract “would effectively read the phrase ... out of the statute.” Motion at 4.

Third, according to Eversource, although both Fiske Hydro and FEL are within Eversource’s service area, delivering energy between them requires use of Eversource’s “federally regulated 115 kV transmission system.” Motion at 4. Eversource complains that the petition “offers no information about how the use of that system should be accounted for as part of any transaction,” and argues the petition is thus “inadequate to justify any relief.” *Id.*

Fourth, Eversource argues that FEL’s filing is deficient for not including a second contract with Eversource for the wheeling and delivery of power. Motion at 5. Eversource argues the filing also fails to provide information necessary for the Commission to make the findings required by RSA 362-A:2-a, III. Eversource concludes

that FEL's petition "remains little more than the hypothetical situation that was previously dismissed" in Order No. 25,744 (Dec. 29, 2014). Motion at 5.

Fifth, Eversource points to several legal issues raised in the petition but not addressed by FEL. RSA 362-A:3, I, states that 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." Eversource argues that if Fiske Hydro sells some of its power to FEL under the proposed contract, it will no longer be offering its "entire output" to Eversource. "It is not clear how this transaction would affect Eversource's obligations ... to purchase power produced by Fiske when some portion of that power is no longer offered to Eversource." Motion at 5-6. Eversource next questions whether Fiske Hydro, an ISO-NE registered generator, is allowed to make sales outside of the ISO markets. *Id.* at 6. Eversource also questions the continued vitality of RSA 362-A:2-a in light of the subsequent development of group net metering. "Group net metering is, in essence, little different than what FEL is requesting here, though group net metering has a robust, existing and implemented legal and regulatory system, while FEL's proposal does not." *Id.* Eversource argues that the legal uncertainties "demonstrate that the information provided by FEL is inadequate to support any relief." *Id.*

Finally, Eversource argues FEL's request for an order that Eversource transmit power at no cost is inconsistent with the existing tariff. Eversource says its Commission-approved tariff sets the rate to deliver power from Fiske Hydro to FEL. Motion at 6. Therefore, Eversource argues, FEL's petition is a request to approve a special contract without the information required by RSA 378:18 and RSA 378:18-a. *Id.* at 7.

B. FEL

FEL disagrees with Eversource on each issue. Regarding the absence of Fiske Hydro as a party, FEL relies on a discussion during the prehearing conference during which FEL represented that Fiske Hydro would be a witness and subject to discovery through FEL. Transcript of May 6, 2015, prehearing conference at 8. During that conference, Fiske Hydro's representative, Cameron MacLeod, explained that Fiske Hydro did not have the resources to hire counsel nor the expertise to appear as a *pro se* party. Tr. at 23-24. FEL nonetheless offered that "if the Commission determines that a useful purpose would be served by making Fiske a party to this proceeding, Fiske will be happy to comply." Objection at 4.

Second, in response to Eversource's argument that the proposed contract violates the "limited geographic area" language, FEL states that Eversource "misreads the intent and purpose" of the statute. Objection at 5. FEL argues that "limited geographic area" only qualifies the requirement that the utility transport the energy at no cost and is not a condition for approval of the contract. According to FEL, "selling in a limited area could well mean that there are no transmission facilities used for [the] transaction and the law simply recognizes this possibility." *Id.*

Third, regarding Eversource's argument that the proposal requires use of Eversource's "federally regulated 115 kV transmission system," and that the petition "offers no information about how the use of that system should be accounted for as part of any transaction," FEL points to the testimony of its witness, August Fromuth. Mr. Fromuth's testimony states that FEL will "pay Eversource for any costs determined by the Commission, net of locational value resulting from avoided transmission and distribution costs and avoided line losses, incurred in wheeling and delivering" Fiske's

energy to FEL. Fromuth testimony at 4. Mr. Fromuth also asserts that Fiske currently does not pay any wheeling or transmission costs presumably because Fiske “is not compensated for ... transmission or distribution costs avoided by Eversource as a result of Fiske’s injection of electricity at the tail-end of Eversource’s distribution system.” *Id.* Mr. Fromuth concludes that there are “no incremental costs imposed on PSNH” and that Eversource enjoys “avoided costs.” *Id.* FEL argues that these facts support their request for an order that Eversource “transmit and deliver the Fiske Hydro electrical output to FEL’s meter at no cost to FEL or Fiske Hydro.” *Id.* at 5.

FEL’s response to Eversource’s argument regarding the absence of a wheeling contract is that “there are no net costs imposed upon PSNH by wheeling Fiske’s output to FEL,” and that it is “highly unlikely” Eversource would agree to such a contract “under any reasonable terms.” Objection at 6. FEL asks the Commission to invoke its authority to order what would otherwise be included in a wheeling contract: “The public utilities commission ... retains the right to order such wheeling and to set such terms for a wheeling agreement including price that it deems necessary.” RSA 362-A:2-a, II.

Fifth, FEL argues that none of Eversource’s “legal issues” is a barrier to the relief sought. According to FEL, the possibility that the proposed contract may jeopardize Fiske’s right to sell its “entire output” to Eversource under RSA 362-A:3, I, is a “scare tactic.” Objection at 7. FEL is “unaware of any fact or law that would preclude Fiske from selling a small amount of its output to FEL, and the remainder to Eversource.” *Id.* In response to Eversource’s question “whether an ISO-NE registered generator, such as Fiske, is permitted to make such sales outside of the ISO administered energy and capacity markets,” FEL notes that even Eversource does not know how these issues impact FEL’s proposal. Objection at 7 (quoting Motion at 6) (“It is not

clear how this transaction would affect Eversource's obligations under state or federal law.'"). FEL's response to the argument that newer statutes provide Fiske Hydro better options to sell its output to FEL, particularly group net metering, is that those options are not relevant to its petition under RSA 362-A:2-a. Objection at 7.

Finally, FEL claims the tariff is "inapplicable" because it is "predicated on the flow of electricity from ISO-NE load assets ... through Regional Transmission Service and Local Transmission Service ... to the Eversource distribution system [which] system is designed for a one-way flow of electricity from central stations to dispersed end users." Objection at 8. FEL argues its proposal, by contrast, is an "inward flow of electricity to end users [which] will off-set a portion of the out-flow thereby reducing the need for transmission and distribution investment." *Id.*

C. Staff and Intervenors

Neither Staff nor any of the intervenors took a position on Eversource's motion to dismiss.

III. COMMISSION ANALYSIS

We review motions to dismiss by asking whether the facts alleged in the petition and all reasonable inferences could support the relief sought.

The standard for ruling on such motions requires assuming all assertions made by the moving party are true and determining whether the requested relief may be granted. Decisions on motions to dismiss are made before a full factual record is developed.

Public Serv. Co. of N.H., Order No. 25,213 at 71 (Apr. 18, 2011). Here, understanding that the "full factual record is [not yet] developed," we review FEL's petition to see if it alleges sufficient facts to support approval of its contract with Fiske under

RSA 362-A:2-a, which grants a “limited producer of electrical energy” authority to “sell its produced electrical energy to not more than 3 purchases.”

First, we find that Fiske Hydro should be a party to this docket. Fiske Hydro is the “limited producer of electrical energy” that is the subject of RSA 362-A:2-a. It is Fiske Hydro that we “may authorize ... to sell electricity at retail,” and it is Fiske Hydro who under RSA 362-A:2-a has the authority to request that a “franchised electric public utility ... transmit electrical energy” to FEL. We do not find that Fiske Hydro’s absence as a party warrants dismissal, however. FEL represented that Fiske Hydro would appear as a party if so directed. We thus order that Fiske Hydro file an appearance within 10 days of this order. Second, Eversource’s argument that the proposed contract violates the “limited geographic area” phrase in the statute is without merit. Reduced to its operative language as applied to this case, RSA 362-A:2-a, I, reads as follows: “The commission may authorize [Fiske Hydro] to sell electricity at retail ... within a limited geographic area where [FEL] shall not be charged a transmission tariff or rate for such sales if transmission facilities or capacity under federal jurisdiction are not used or needed for the transaction.” The clear intent of this sentence is to say that FEL “shall not be charged a transmission tariff” if the sale is “within a limited geographic area” such that “transmission facilities or capacity under federal jurisdiction are not used.” The statute does not require the parties to be within that limited area.

Third, Eversource argues that delivering energy between Fiske Hydro and FEL requires use of Eversource’s “federally regulated 115 kV transmission system,” and that FEL “offers no information about how the use of that system should be accounted for as part of any transaction.” We disagree. FEL explained through Mr. Fromuth’s testimony their best understanding of how the power would be delivered to FEL. Eversource is

ultimately the best source for that information, however, and after the record is developed on this point, it may be that Eversource has a basis to charge FEL or Fiske Hydro for that delivery. FEL has agreed to pay any such charges. In any event, this is not a basis to dismiss the petition.

Fourth, we reject Eversource's argument that the absence of a wheeling contract between Fiske Hydro and Eversource is fatal because a wheeling agreement is not a condition of our approval under RSA 362-A:2-a. The statute says that the "commission must approve all such agreements for the wheeling of power and retains the right to order such wheeling and to set such terms for a wheeling agreement including price that it deems necessary." RSA 362-A:2-a, II. The reasonable interpretation of this sentence is that the Commission must *either* approve "all such [wheeling] agreements" *or* the Commission has "the right to order such wheeling." The clause granting the Commission "the right to order such wheeling" would be superfluous if a contract were a necessary condition to approval. *See State v. Bakunczyk*, 164 N.H. 77, 79 (2012) ("the legislature is presumed not to use words that are superfluous").

Fifth, the legal issues Eversource identified are not grounds for dismissal. The possibility that the proposed contract jeopardizes Fiske's right to sell its "entire output" to Eversource under RSA 362-A:3, I, or risks its registration with ISO-NE by making sales outside the ISO-administered markets, are collateral issues for Fiske Hydro to consider. They are not necessary to our decision in this docket. Similarly, Eversource's argument that group net metering may be a better way for Fiske Hydro and FEL to achieve their goals is irrelevant. We have been asked to review a contract under RSA 362-A:2-a, not to review a group net metering arrangement.

Eversource's last argument is that the proposed contract is inconsistent with its tariff and, in effect, is a special contract governed by RSA 378:18 and :18-a. The general requirement to file tariffs arises from RSA 378:1. "Every public utility shall file with the public utilities commission ... schedules showing the rates, fares, charges and prices for any service rendered or to be rendered." RSA 378:18 governs special contracts, an exception to tariffs, but it is an exception that may apply in many circumstances: "Nothing herein shall prevent a public utility from making a contract for service at rates other than those fixed by its schedules of general application, if special circumstances exist which render such departure from the general schedules just and consistent with the public interest" RSA 362-A:2-a, by contrast, is a specific statute that authorizes the particular type of contract proposed in this docket. "To the extent two statutes conflict, the more specific statute controls over the general statute." *State v. Cheney*, 165 N.H. 677, 683 (2013). Here, the specific language authorizing a contract between Fiske Hydro and FEL is the exception to the general requirements requiring tariffs or approval of a special contract. Nonetheless, the fact that RSA 362-A:2-a may conflict with the other laws is not a basis for dismissal.

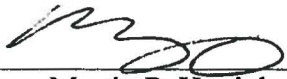
We therefore deny Eversource's motion to dismiss. We also deny Eversource's motion to stay as moot because we granted FEL's separate motion to suspend the procedural schedule by secretarial letter dated July 14, 2015.

Based upon the foregoing, it is hereby


ORDERED, that Eversource's motion to dismiss and to stay is denied; and it is

FURTHER ORDERED, that Fiske Hydro shall file an appearance within 10 days.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of
July, 2015.

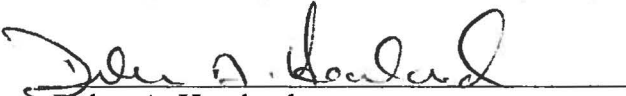


Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director

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