STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DE 16-693

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY

Petition for Approval of a Power Purchase Agreement
with Hydro Renewable Energy Inc.

INITIAL BRIEF OF NEXTERA ENERGY RESOURCES, LLC

Pursuant to N.H. Code Admin. Rule Puc 203.32 and the New Hampshire Public Utilities Commission's ("Commission") October 25, 2016 Order of Notice, NextEra Energy Resources, LLC ("NEER") hereby submits its Initial Brief in this matter.

I. Introduction

The Commission's Order of Notice requested briefs on the legality of the Public Service of New Hampshire d/b/a Eversource Energy ("Eversource" or "PSNH") proposal for approval of the following:

> . . . a proposed 20-year Purchase Power Agreement (PPA) contract between Eversource and Hydro Renewable Energy Inc. (HRE), an indirect wholly-owned subsidiary of Hydro-Quebec. The power that is the subject of the PPA is to be delivered to Eversource by HRE over the proposed Northern Pass Transmission (NPT) line. Eversource proposes that for ratemaking purposes, the PPA would be accounted for through Eversource's Stranded Cost Recovery Charge (SCRC) established by the 2015 Restructuring Settlement Agreement and approved by the Commission by Order No. 25,920 (July 1, 2016) in Docket Nos. DE 11-250 and DE 14-238.

For among other reasons, the Order of Notice specifically raised questions about the legality of the HRE PPA in light of the Commission's recent decision to dismiss Eversource's February 18, 2016 Petition for the approval of a proposed 20-year contract with Algonquin Gas

Transmission, LLC, for natural gas capacity on Algonquin's Access Northeast Pipeline Project ("ANE Contract").[1] As established below, the application of the Commission's well-reasoned decision-making in Order No. 25,950 requires that Eversource's Petition for the approval of HRE PPA be similarly dismissed as impermissible under New Hampshire law. Thereafter, NEER also submits that Eversource's failure to use a competitive solicitation process should be deemed to be imprudent and in violation of Commission rules and precedent. Thus, for these reasons, Eversource's Petition should be dismissed, and any future permissible consideration of a PPA should be conducted pursuant to a competitive solicitation.

II. The Commission's legal framework in Order No. 25,950 requires the dismissal of Eversource's Petition

In Order No. 25,950, the Commission's analysis reviewed the purpose of the Electric Utility Restructuring statute, RSA Chapter 374-F ("Restructuring Statute"). The Commission found that the overriding purpose of the Restructuring Statute was to introduce competition into the generation of electricity.[2] As a result, the statute intentionally shifts the risks associated with generation investments away from customers and toward private investors in the competitive market.[3] To effectuate this purpose, RSA 374-F:3, III requires the separation of generation services from transmission/distribution activities and services, and the unbundling of rates

[1] *Petition for Approval of Gas Capacity Contract with Algonquin Gas Transmission, LLC, Gas Capacity Program Details, and Distribution Rate Tariff for Cost Recovery*, DE 16-241, Order Dismissing Petition, Order No. 25,950 (October 6, 2016) ("Order No. 25,950").

[2] *Id.* at 8.

[3] *Id.* at 8-9.

among these services.[4] The Commission further explained that:[5]

> This purpose is underscored by the Legislature's recent strong encouragement, through the passage of HB 1602 and SB 221, to approve the 2015 Settlement Agreement that will accomplish the functional separation of Eversource's generation activities from its distribution activities.

With the above discernment on the purpose and directives of the Restructuring Statute, the Commission determined that the ANE Contract was "fundamentally inconsistent" with the statute, as it was a generation service under RSA 374-F:3, III seeking recovery of its net costs from electric distribution customers. Specifically, the Commission concluded that:[6]

> . . . the Capacity Contract is a component of 'generation services' under RSA 374-F:3, III, which *requires unbundled, clear price information for the cost components of generation, transmission, and distribution.* The acquisition of the gas capacity is clearly related to an effort to serve New England gas-fired electric generators with less expensive, more reliable fuel supplies. *Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal.* (emphasis added).

With the determination that the "basic premise" of Eversource's ANE Contract proposal "runs afoul of the Restructuring Statute's functional separation requirement," the Commission could have concluded its analysis and dismissed the Petition, as it would have been inconsistent with New Hampshire law to approve the ANE Contract. Nonetheless, the Commission further analyzed whether there was another statute that standing alone would support the Eversource proposal, and, if so, how the statute(s) would be affected by the subsequent enactment of the Restructuring Statute, or otherwise not applicable or supportive of the proposal.[7] The

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[4] *Id.* at 9.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 9-10.

Commission's additional legal analysis found that no New Hampshire law supported the ANE Contract, and, therefore, the Eversource Petition was dismissed. The application of the Order No. 25,950 legal framework to Eversource's Petition for the approval of the HRE PPA demonstrates that it must similarly be dismissed.

III. The HRE PPA violates the Restructuring Statute

Eversource's Petition and pre-filed testimony acknowledge that the HRE PPA is a generation service and the associated costs from that service are to be recovered from retail electric distribution customers. Eversource's testimony states that the HRE PPA, if approved, would ". . . NOT be used to supply default energy service, but would be monetized by selling the entitlement bilaterally or into the market . . . ."[8] Thus, Eversource concedes that the HRE PPA is a contractual instrument designed for Eversource to first purchase and then "sell" energy bilaterally, presumably to another load serving entity, or into the wholesale competitive generation marketplace, presumably into ISO-NE. By stating that the HRE PPA would not be used to supply default service, Eversource also concedes the PPA will not be used to "procure" energy for delivery to retail electric distribution customers. Eversource further testifies that "net financial impact" (*i.e.,* "benefits" and "costs") associated with selling the HRE PPA energy and Renewable Energy Credits ("RECs"), if any,[9] would be flowed through or recovered through the distribution customers' SCRC.[10] Simply put, Eversource seeks approval to step into the shoes of

[8] Testimony of Chung at 5 lines 2-4. See, also, Testimony of Daly at 9, lines 18-20.

[9] In his prefiled testimony Mr. Daly admits that the power being provided under the HRE PPA would not qualify for RECs under current laws or rules: "New Hampshire, other states, the federal government, or regional grid operators [would have to] implement laws, regulations or rules for environmental attributes for large hydro that correspond with the Hydro-Quebec renewable energy" in order for Eversource to "be able to monetize those attributes for the benefit of PSNH's customers." Testimony of Daly at 8-9.

[10] Testimony of Chung at 2, lines 20-21 ("net financial impacts"); Testimony of Daly at 12, line 1 ("benefits" and "costs").

HRE and sell HRE generated energy with New Hampshire retail electric distribution customers bearing the risk associated with Eversource's selling of the energy.[11] Thus, it is self-evident from Eversource's testimony that it seeks to engage in a generation service and pass the net costs on to distribution customers in violation of RSA 374-F:3, III. Indeed, it is unlikely Eversource will materially deny the characterization of its Petition, as it appears the company construes the law as permitting it to engage in generation services.[12] Therefore, a straightforward application of the legal determinations in Order No. 25,950 to the HRE PPA shows axiomatic parallels that require the Eversource Petition be dismissed.

The purpose of the ANE Contract was to sell fuel to wholesale gas-fired electric generators, [13] and the intent of the HRE PPA is to create a vehicle for Eversource to sell energy through bilateral transactions or into the wholesale competitive generation market. Both generation service proposals include recovery of the net benefits and costs from Eversource's retail electric distribution customers – thus, bundling generation and distribution.[14] In rejecting the ANE Contract due to this mismatch between providing a generation service and recovering it from distribution customers, the Commission in Order No. 25,950 concluded:[15]

> The proposal before us would have Eversource purchase long-term gas pipeline capacity to be used by gas-fired electric generators, and include the net costs of its purchases and sales in its electric distribution rates. That proposal, however, goes against the overriding principle of restructuring, which is to harness the power of competitive markets to

[11] Also, consider that to sell the HRE PPA energy at market rates requires market-based rate authority from the Federal Energy Regulatory Commission ("FERC"). Eversource has not addressed what actions it must take to ensure it passes FERC's test for being able to sell the HRE PPA energy in the market.

[12] *See* Eversource's Motion for Reconsideration, Docket No. DE 16-241 (November 7, 2015). The company argues it has a right to participate in generation services. As shown below, Eversource's argument, however, is fatally flawed.

[13] Order No. 25,950 at 15.

[14] *Id.*

[15] *Id.*

> reduce costs to consumers by separating unregulated generation from fully regulated distribution. It would allow Eversource to reenter the generation market for an extended period, placing the risk of that decision on its customers. We cannot approve such an arrangement under existing laws. Accordingly, we dismiss Eversource's petition.

The same fundamental legal defects found in the ANE Contract proposal are found in the HRE PPA proposal – that is, to engage in generation services and have the costs recovered from distribution customers. This legally impermissible mismatch led the Commission in Order No. 25,950 to conclude the ANE Contract violated the Restructuring Statute, and this same mismatch requires the same ruling that the HRE PPA violates the separation requirements in the Restructuring Statute.

Further, in a likely preview of the arguments to be presented by Eversource in this proceeding, it recently filed a Motion for Reconsideration in Docket No. DE 16-241 (ANE Contract proceeding). While there is no intention here to address the many arguments presented by Eversource in DE 16-421, since the company's primary disagreement with the Commission in that docket is sufficiently flawed and applicable to this proceeding, it is useful to analyze it in the context of the HRE PPA. In essence, Eversource's primary disagreement turns on its view that RSA 374-A:2 and RSA 374-A:1, II and RSA 374-A:1, IV provide it with the statutory authority to engage in generation-related services, such as the ANE Contract and the HRE PPA.[16] These statutes do nothing of the sort.[17] Instead, Eversource's position in Docket No. DE 16-241 shows its elemental misunderstanding of the Commission's ruling in Order No. 25,950, and the application of the rules of statutory construction, which are equally relevant in this proceeding.

[16] Eversource's Motion for Reconsideration, Docket No. DE 16-241 at 4-12.

[17] RSA 374-A:1 simply states: "A Domestic electric utility is "an electric utility resident in, or organized under the laws of this state." Thus, the analysis focuses on RSA 374-A:2 and RSA 374-A:1, IV.

Enacted in 1975, RSA 374-A:1, IV sets forth a definition of what constitutes an electric utility, while RSA 374-A:2 adds that a domestic electric utility can "participate in electric power facilities." However, these general provisions do not provide specificity on how the electric utility will be regulated in a restructured environment – instead, the particulars of how an electric utility is regulated in a restructured environment, post 1996, is in the Restructuring Statue, and, specifically the separation requirements of RSA 374-F, III. That statute sets forth the specific regulatory conditions that services and rates be unbundled, and generation be functionally separate from transmission and distribution. These separation requirements are the quintessential elements of the Restructuring Statute such that without the Commission enforcing them there would be no restructuring. Further, the tenets of statutory construction mandate that the later statute controls, particularly when the earlier statute addresses the subject in a general manner, and the later statute in a specific manner.[18] Thus, RSA 374-F:3, III controls; which, in turn, requires that, over Eversource's objections, the mandatory *sine qua non* of RSA 374-F:3, III must be enforced: no Eversource generation service can be bundled with distribution and no generation service cost can be passed through Eversource's distribution customer rates. Accordingly, even Eversource's latest arguments are misplaced, and, thus, the Commission should dismiss the HRE PPA Petition.

IV. No other statute supports Eversource's Petition

In Order 25,950, after the Commission stated the threshold conclusion that Eversource's ANE Contract Petition violated the Restructuring Statute, it also considered whether any statute

[18] *In the Matter of Kathaleen A. Dufton and Terry L. Shepard, Jr.*, 158 N.H. 784, 789 (2009), *quoting Bel Air Assocs. v. N.H. Dep't of Health & Human Services*, 154 N.H. 228, 233 (2006) (The Court ruled the later grandmother visitation statute controlled over the earlier enacted general adoption law); *Petition of Public Service New Hampshire*, 130 N.H. 265, 281-284 (1988) (The Court ruled that the later in time prohibitions in the anti-CWIP statute controlled over the earlier in time general ratemaking statute).

on a stand-alone basis supported Eversource's Petition, and, if so, how the statute(s) would be affected by the subsequent enactment of the Restructuring Statute or otherwise not applicable/supportive. NEER's position is that the legal analysis properly ends with the finding that the HRE PPA violates the Restructuring Statute, as the Commission cannot approve a contract that violates one statute merely because another statute may not be violated or is supportive. Nonetheless, out of an abundance of caution, and to provide additional useful information and analysis to the Commission, the following shows no other statute supports Eversource's request for approval of the HRE PPA.[19]

a. The HRE PPA and the recovery of associated costs under the SCRC is not supported or justified by RSA 374-F:3, XII (c) and would not be in the public interest

Eversource contends that the HRE PPA is consistent with RSA 374-F:3, XII (c), which reads as follows:[20]

> (c) Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs. Mitigation measures may include, but shall not be limited to:
>
> (1) Reduction of expenses.

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[19] The Commission followed a number of well-established rules of statutory construction in Order No. 25,950, which were articulated on page 7 as follows:

> The New Hampshire Supreme Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. The Court interprets statutes in the context of the overall regulatory scheme and not in isolation. The goal is to determine the Legislature's intent. Further, the Court construes statutes, where reasonably possible, so that they lead to reasonable results and do not contradict each other. When interpreting a statute, the Court gives effect to all words in the statute and presumes that the legislature did not enact superfluous or redundant words. *See Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501 (2014); *State v. Collyns*, 166 N.H. 514 (2014).

The application of these and other rules of statutory construction are equally dispositive of the HRE PPA.

[20] Eversource Petition at 3; Testimony of Chung at 4, lines 17-19; 5, lines 13-14.

(2) Renegotiation of existing contracts.

(3) Refinancing of existing debt.

(4) A reasonable amount of retirement, sale, or write-off of uneconomic or surplus assets, including regulatory assets not directly related to the provision of electricity service.

According to Eversource, reducing stranded costs through the "expected benefits" of selling energy from the HRE PPA is consistent with the statement in RSA 374-F:3, XII (c) to "take all reasonable measures to mitigate stranded costs."[21] In contrast to Eversource's positon, the plain language of RSA 374-F:3, XII (c) cannot be read to support approval of the HRE PPA as a reasonable mitigation measure to reduce stranded costs through the SCRC.

First, the plain language of RSA 374-F:3, XII (c) cannot be read (as Eversource seemingly infers) as providing an exemption from the requirements in RSA 374-F:3, III to separate and unbundle generation services from transmission and distribution services and costs, since there is no explicit exemption set forth. Indeed, reading such an exemption into the "but shall not be limited to" language violates a fundamental rule of statutory construction against the inference of a statutory exemption to reconcile the reading of two statutes.[22] Instead, statutory construction requires that, when possible, RSA 374-F:3, III and RSA 374-F:3, XII (c) be read harmoniously[23] and in the context of the statute as a whole.[24] Here, such a reading is not only

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[21] Testimony of Chung at 4, lines 17-19.

[22] *Bel Air Assocs. v. N.H. Dep't of Health & Human Servs.*, 154 N.H. 228, 234 (2006) (Court rejected a request to infer an exemption into New Hampshire Administrative Procedures Act based on the principle of reading two statutes as consistent with each other).

[23] *Id; see, also Appeal of Pennichuck Water Works, Inc. & a*, 160 N.H. 18, 27-28, (2010) (Court agreed with PUC's plain language reading of statutes as in harmony with each other).

[24] *Dennis S. Roberts v. General Motors Corporation*, 138 N.H. 532, 536 (1994) (The Court's reading of the statutory scheme as a whole required that the use of term "any person" be qualified and limited to a specific subject matter). According, the "but shall not be limited to" language in RSA 374-F:3, XII (c) cannot be read as a basis for Eversource to propose a mitigation measure that conflicts with a reading of the Restructuring Statute as a whole.

possible, but highly logical. Specifically, the requirement in RSA 374-F:3, III to separate generation services and costs from transmission/distribution services and costs limits and qualifies the types of mitigation measures permissible under RSA 374-F:3, XII (c). In other words, generation-related services are not permissible as stranded cost mitigation measures because the net costs will be flowed through a distribution charge, here the SCRC. Such a reading does not nullify RSA 374-F:3, XII (c) as there are other legally permissible mitigation measures; however, not applying the separation requirements would nullify the customer protections intended by the unbundling of generation services/costs from distribution services/costs in RSA 374-F:3, III, in violation of another rule of statutory construction against the nullification of such protections.[25] Accordingly, Eversource's proposal violates basic rules of statutory interpretation and construction, and nullifies statutory protections, which require a finding that the Petition is not in the public interest.

Second, although the ordinary meaning of the word "mitigate" is to "make less severe or intense; to make less harmful, unpleasant, or seriously bad",[26] Eversource's proposal requests that the net financial impacts (*i.e.,* net costs) be recovered through its electric distribution customers. Thus, while Eversource contends that its scenarios of future events show that customers will benefit (*i.e.,* the revenues Eversource receives from engaging in the bilateral or wholesale generation market will be higher than the costs Eversource pays HRE under the PPA),[27] Eversource cannot, and does not, guarantee customers that selling energy from the HRE

[25] *Richard Holt& a. v. Gary Keer & a.*, 167 N.H. 232, 242-243 (2015) (Court would not create an exception in one statute that nullified the protections in another statute). Here, Eversource requests that the Commission create an exception in RSA 374-F:3, XII (c) where none exists, and an exception that nullifies the consumer protections carefully crafted in RSA 374-F:3, III.

[26] Black's Law Dictionary (10th ed. 2014).

[27] Testimony of Daly at 10, lines 2-9.

PPA will always, or for the 20-year term of the PPA, reduce costs. Thus, Eversource's HRE PPA proposal may exacerbate, rather than mitigate stranded costs.[28] Such a result would be the antithesis of RSA 374-F:3, XII (c), as its sole purpose is to reduce stranded costs.

This flaw is further illuminated by the plain language reading of what the statute identifies as "reasonable" stranded cost mitigation measures. Specifically, the listed mitigation measures in RSA 374-F:3, XII (c) (shown above) are confined to implementing measures that directly reduce the company's existing expenses, costs and uneconomic or surplus over-market assets. These mitigation measures are straight line-of-sight techniques that reduce stranded costs. The HRE PPA is not within this family of mitigation measures. It is an indirect mitigation measure that may or may not reduce stranded cost charges, because, in essence, the PPA is a hedging instrument that Eversource predicts, but does not guarantee, over the balance of the next twenty years will allow it to buy low from HRE and sell high to others. This direct versus indirect mitigation measure mismatch is a result of Eversource's fundamental misalliance – combining what cannot statutorily be combined: generation and distribution. Consequently, Eversource's HRE PPA proposal cannot be squared with the plain language of RSA 374-F:3, XII (c), and, thus, is not in the public interest.

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[28] It is telling that in a Connecticut Department of Public Utility Control proceeding, Connecticut Light and Power, an Eversource electric distribution company, was cited as expressing concerns about the possibility of a PPA increasing stranded costs and the lack of a need in a restructured framework for engaging in such PPAs:

> CL&P testified that such an agreement is inconsistent with the goal of the Act that CL&P become a pure distribution company. Morris Testimony, p. 13. If such a PPA were priced above the market, as is typically the case (Exhibit RTM-5), it would create additional stranded costs to be recovered from CL&P's customers. Because CL&P no longer has generation customers in the traditional sense, it would have no use for the output other than to resell it into the market, presumably at a loss. Morris Testimony, p. 13.

Connecticut Light and Power Company, Docket No. 99-09-12 at 30 (April 19, 2000).

b. RSA 374:57 (the standard of review for a PPA) does not support Eversource's Petition

The statutory prohibition against a PPA that bundles generation and distribution services controls over the general standard of review language in RSA 374:57. As already discussed, the rule of statutory construction requires that the later statute controls when two statutes conflict, particularly when the later statute addresses a subject matter in a specific manner versus the earlier statute addressing it in a general manner.[29] A number of years before electric restructuring, in 1989, RSA 374:57 was enacted to require the filing of a contract, such as a PPA, and to provide the Commission with the authority to determine whether the contract is reasonable and in the public interest. Clearly, RSA 374:57 is a statute setting forth the general overview authority of the Commission for a PPA. In contrast, the Restructuring Statute, enacted almost a decade later, prohibits a PPA that bundles generation services (*i.e.,* selling of the PPA's energy) with distribution costs.[30] Hence, to proceed with a review on the merits of the HRE PPA under the pretext that it is required or authorized by RSA 374:57 would directly conflict with the Restructuring Statute, and, of consequence, would contradict the above cited rule of statutory construction. Accordingly, since the HRE PPA is not legally permissible under the later-in-time and more specific Restructuring Statute, RSA 374:57 provides no legal justification for the HRE PPA.

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[29] *In the Matter of Kathaleen A. Dufton and Terry L. Shepard, Jr.*, 158 N.H. 784, 789 (2009), *quoting Bel Air Assocs. v. N.H. Dep't of Health & Human Services*, 154 N.H. 228, 233 (2006).

[30] The Restructuring Statute only provides for Eversource to enter a PPA for the procurement of energy for default service pursuant to RSA 374-F:3, V(c).

c. Other statutory provisions do not support Eversource's Petition

Eversource contends that the HRE PPA is consistent with the following statutory provisions: (1) RSA 374-F:3, V (ensuring the availability of universal electric service); (2) RSA 374-F:3, VIII (encouragement of environmental improvement); (3) RSA 374-F:3, XI (ensuring that New Hampshire's electric rates are competitive with other regional rates); (4) RSA 374-F:3, XIII (encouraging regional solutions to issues relating to electric restructuring); [31] (5) RSA 4-E:1, I (c) (State's 10-Year Energy Strategy); (6) RSA 362-A:1 (diverse sources of electric power); and (7) RSA 362-F:1 (use of renewable energy technologies and fuels).[32] The application of the Commission's test set forth in Order No. 25,950, however, shows that none of these provisions and statutes provide a legal basis to support the HRE PPA. Among the group of statutes cited by Eversource, not one statute on a stand-alone basis can provide a legal foundation upon which to support the HRE PPA. None of these statutes speak to Eversource having the authority to enter into a PPA designed so it can sell the energy and RECs, if any, into the market or through bilateral transactions. Instead, these provisions set forth broad and general policy pronouncements and the elements for the Office of Energy Planning to conduct a strategic plan. Consequently, there is no language that either authorizes or supports Eversource entering into the HRE PPA, and there is no language in any of these statutes that overrides or contradicts the specificity of RSA 374-F:3, III. As explained above, rules of statutory construction require that these provisions be read in harmony and not in conflict with RSA 374-F:3, III. A harmonious reading dictates that the separation of generation services from distribution services/costs requirements and resulting customer protections in RSA 374-F:3, III are not nullified by the

[31] In Order No. 25,950, the Commission rejected RSA 374-F:3, XIII as supportive of the ANE Contract.

[32] Eversource Petition at 3-4.

general policy pronouncements or study of energy strategies contained in these other provisions. As well, the achievement of and attention to these policy statements are not impacted by the enforcement of RSA 374-F:3, III, as there are other means to achieve the goals in these provisions. For example, Eversource could conduct a competitive solicitation for a long-term PPA to bring low cost energy to its default service customers. Accordingly, RSA 374-F:3, V; RSA 374-F:3, VIII; RSA 374-F:3, XI; RSA 374- F:3, XIII; RSA 4-E:1, I (c); RSA 362-A:1 and RSA 362-F:1 do not make legally permissible that which is legally impermissible under RSA 374-F:3, III, *i.e.,* the HRE PPA.

d. RSA 378:37 and 38 (planning statutes) are not supportive of Eversource's Petition

In Order No. 25,950, the Commission rejected RSA 378:37 and 38 as supportive of Eversource's Petition for approval of the ANE Contract. Specifically, the Commission concluded:[33]

> Reading the planning statutes together with RSA Ch. 374-F, however, *we do not find that the statutes permit the re-joining of distribution and generation functions* in the manner provided by the Capacity Contract. The planning statutes must be read in concert with RSA Ch. 374-F and in light of the industries to which they apply. RSA 378:38 applies to both electric and natural gas utilities, and those industries now differ in a fundamental way. While natural gas utilities continue to arrange natural gas supplies for their residential and small commercial customers, *following electric restructuring, electric utilities do not arrange electric supply for their customers. Instead, pursuant to RSA 374-F:3, V(c), electric utilities provide electric supply through default service, which is offered only to those customers who have not opted to purchase their electricity from a competitive supplier.* Default service is designed to be a safety net for customers who do not choose an independent competitive supplier. Further, default service must be competitively procured. *Id.* As a result of the Restructuring Statute, *electric distribution utilities are no longer required to conduct long-term planning for electric supply.* Accordingly, we find that in a restructured electric industry, the planning

[33] Order No. 25,950 at 11-12.

> requirements for an EDC are limited to procurements of electric supply for the EDC's default service customers. That obligation is not broad enough to justify approval of a proposal like Eversource's. (emphasis added).

Application of this ruling to Eversource's HRE PPA shows that the PPA is similarly not authorized or supported by the provisions of RSA 378:37 and 38. Eversource does not have a planning requirement for entering into PPAs for purposes of reselling the energy bilaterally or into the market, if it ever had one. Further, as the Commission explained, under the Restructuring Statute Eversource's procurement obligation is to default service customers, which the company has been clear the HRE PPA is not intended to serve. Also, as explained above, rules of statutory construction dictate that the specific separation mandates of the later-in-time RSA 374-F:3, III control over the earlier-in-time general planning requirements. Accordingly, RSA 378:37 and 38 do not in any way support the legality of the HRE PPA.[34]

e. Eversource's failure to use a competitive solicitation process violates Commission precedent (for example, Order No. 25,860), standards of prudency, and law (Admin. Rule 2100 – affiliate transaction rules)

In the Order of Notice in this docket, the Commission stated that Eversource's filing raises issues related to whether its "decision to forego a competitive solicitation process to identify and select the least cost supplier of products and services reflected in the HRE PPA comports with the requirements of N.H. Code Admin. Rules Puc 2100, and the standards of prudency applied by the Commission for such contracting."[35] NEER submits that the absence of a competitive solicitation process means that the HRE PPA does not comport with Commission rules, nor does

[34] Eversource citation (Testimony of Chung at 5, lines 15-20) to Order No. 25,830 as supportive of the Commission recognizing the HRE PPA is misplaced. In that Order, the Commission merely noted that no PPA had been finalized at that point in time.

[35] Order of Notice at 2-3.

it comport with Commission prudency standards, and for these additional independent reasons the Commission should dismiss the Petition in this docket.

The energy that Eversource is proposing to purchase pursuant to the HRE PPA would be delivered over a transmission line that would be constructed by Northern Pass Transmission, LLC ("NPT"), a wholly owned subsidiary of Eversource Energy and a corporate affiliate of PSNH.[36] HRE and NPT have a long-term bilateral transmission services agreement that has been approved by FERC.[37] Under the terms of that agreement NPT, PSNH's affiliate, will develop, site, finance, construct, own and maintain the electric transmission line and sell firm transmission service to HRE over a 40-year term.[38] HRE will be responsible for providing approximately $1.1 billion in initial construction costs and a return on such costs, necessary additional capital expenditures and return, and other expenses associated with the line over the 40-year operating term of the TSA.[39] HRE will recover these costs through sales of wholesale power, either through agreements like the PPA at issue here or directly into the New England market. As noted above, Eversource seeks approval to step into the shoes of HRE and sell HRE-generated energy into the market. Thus, there exists a tight, direct connection between HRE, PSNH and NPT even though HRE is not affiliated with either company.

Admin. Rule Puc 2103.02(a) states that a utility "shall provide its products and services, including but not limited to terms and conditions, pricing, and timing, to competitive affiliates, and to non-affiliated competitors in a non-discriminatory manner." Admin. Rule Puc 2101.04 also states that a utility shall not "[t]ake any other actions either directly or indirectly through an

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[36] Eversource Petition at 1.

[37] *Northern Pass Transmission LLC, Order Accepting Transmission Service Agreement* (Issued February 11, 2011) Docket No. ER11-2377-000 ("FERC Order").

[38] *Northern Pass Transmission LLC, Petition to Commence Business as a Public Utility*, DE 15-459 at 2-3.

[39] FERC Order at 4.

affiliate to circumvent these rules or RSA 366." In Order No. 25,860 in Docket No. IR 15-124, the precursor docket to DE 16-241, the Commission noted that under the affiliate transactions rules "there exists a strong policy preference against self-dealing in relations between New Hampshire EDCs and their unregulated affiliates."[40]

In Order No. 25,860 the Commission went on to note that these rules "tend to militate against the use of a sole-source acquisition approach by a New Hampshire EDC seeking to only acquire a gas capacity product from its competitive, unregulated affiliate." While in this docket the PPA is between two unaffiliated companies, HRE and Eversource, the PPA will ultimately benefit NPT, an Eversource affiliate, and for that reason it is an indirect benefit that would arguably be contrary to the rules and contrary to the interests of ratepayers. Order No. 25,860 further noted:[41]

> Also, there is a recognition in private industry and regulatory bodies throughout the United States that competitive bidding acquisition processes provide powerful benefits for ensuring prudency in utility expenditure and, by extension, cost savings for utility customers, through the introduction of cost discipline, open participation by competitors, and choices in product acquisition.

The Commission then said that it expected any acquisition of gas capacity by an EDC for the ultimate benefit of electric customers to be undertaken through an open, transparent, and competitive bidding type of process. Clearly such a process was lacking here. Assuming for the purposes of argument that it would otherwise be legal for Eversource to enter into this generation services agreement, in order to ensure that it would provide the greatest benefit to ratepayers at the least cost, the Commission would have to be assured that a competitive bidding process had been used to obtain the power. That is clearly not the case here. Because there is no evidence of

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[40] *Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire,* Docket No. IR 15-124, Order No. 25,860 at 4 (January 19, 2016).

[41] *Id.* at 4-5.

a competitive solicitation, it is clear that the agreement does not meet basic legal standards established by the Commission.

In many orders, the Commission has noted that when it comes to prudency utilities are held to a high standard. For example, the Commission has concluded:[42]

> Reasonableness of utility managers is not the same as the 'reasonable person' standard because utility managers are experts. It is our 'responsibility and obligation under the law to determine whether PSNH... conducted [itself] with the level of care expected of highly trained and compensated specialists.' *Public Serv. Co. of N.H.*, 81 NH PUC 531, 541 (1996).

If Eversource's purchasing of the energy through the PPA and then selling it into the market as a means of offsetting stranded costs were legal, contrary to the arguments noted above, highly trained utility specialists acting rationally with ratepayer funds would conduct a competitive solicitation process to ensure that the PPA obtained the best price for ratepayers. Such utility officials would be held to a standard that required that they do all that they could to provide the greatest margin between the PPA price and what Eversource could get by selling the energy on the wholesale market, a margin that would be increased by getting the lowest possible PPA price through a competitive solicitation. Because the transaction that led to the HRE PPA was clearly designed to benefit an Eversource affiliate, NPT, and because there was no competitive solicitation process, the Commission should dismiss the Petition.

V. Conclusion

Eversource's Petition violates the Restructuring Statutes and must be rejected as impermissible under New Hampshire law. Further Eversource's Petition is flawed, as it failed to

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[42] *Investigation of Scrubber Costs and Cost Recovery And Determination Regarding Eversource's Generation Assets,* Docket Nos. DE 11-250 and DE 14-238 Order No. 25,920 at 17 (July 16, 2016); *see also Investigation of Scrubber Costs and Cost Recovery,* Docket No. DE 11-250 Order Denying Third Motion for Rehearing, Order No. 25,565 at 7 (Aug. 27, 2013) ("... no utility may proceed blindly with the management of its assets or to act irrationally with ratepayer funds").

use a competitive solicitation process. According for the forgoing reasons, the Commission should dismiss Eversource's Petition.

Respectfully submitted,

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Dated: November 21, 2016

Certificate of Service

I hereby certify that a copy of the foregoing Petition has on this 21st day of November 2016 been sent by email to the service list in DE 16-693.

By: _____
Douglas L. Patch

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