

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

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

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

Docket No. DE 16-693

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

Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH” or the “Company”) files this Reply Brief pursuant to the Commission’s procedural directive set forth in its October 25, 2016, Order of Notice.

INTRODUCTION

In its Order of Notice, the Commission determined that it would divide its review of PSNH’s petition into two phases. In the first phase, the Commission will review briefs submitted by Eversource, Staff and others regarding whether the Eversource-HRE PPA¹ is allowed under New Hampshire law.

The Commission received seven initial briefs.² PSNH will not endeavor to address every one of the myriad theories propounded in the other briefs as to why the PPA is unreasonable, imprudent, inconsistent with public policy, and the like. Those arguments are primarily policy matters related to the substance of the PPA, not matters impacting “the legality of Eversource’s

¹ The same abbreviations used in PSNH’s initial memorandum will be used herein.

² Briefs were filed by PSNH, Staff, OEP, NEPGA, NextEra, CLF, and SPNHF.

proposal” under New Hampshire law.³ In this Reply Brief, PSNH will concentrate on demonstrating that the PPA is not prohibited by New Hampshire law, and that the proceeding should move to phase two where the Commission could consider the merits of the PPA.

LEGAL AUTHORITY OF PSNH TO ENTER INTO THE PPA

Not one of the other briefs contested PSNH’s authority under New Hampshire corporation laws to enter into the contractual PPA obligation. Accordingly, if PSNH desires to waive the condition in the PPA requiring approval of the PPA by the Commission, it has the legal authority to maintain the PPA without including it in rates and allow its shareholder to receive all the benefits of the PPA.⁴ Since no one has challenged PSNH legal authority to enter into the PPA, the only material legal question before the Commission in this phase one is whether the PPA may be included in PSNH’s rates.⁵

INTERDEPENDENT RESTRUCTURING POLICY PRINCIPLES

Other entities filing briefs⁶ center their arguments that the PPA cannot be included in PSNH’s rates on RSA 374-F:3, III by contending that it: “requires the separation of generation activities from transmission and distribution activities” (NEPGA at 5); “overrides any other statutory provision” (Staff at 2); is “the mandatory *sine qua non*” (NextEra at 7); or “violates New Hampshire’s restructuring law” (CLF at 7). As noted in PSNH’s Initial Memorandum,

³ Order of Notice at 4.

⁴ Under RSA 374:57, “The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility’s decision to enter into the transaction was unreasonable and not in the public interest.” Such disallowance refers to inclusion of such costs in a utility’s rates.

⁵ The question is not whether the PPA “should be” included in rates or how it should be included in rates. Those are not legal issues for phase one, but policy determinations for phase two. “If the Commission were to rule in the affirmative regarding the question of legality, it will then open a second phase of the proceeding to examine the appropriate economic, engineering, cost recovery, and other factors presented by Eversource’s proposal.” Order of Notice at 3.

⁶ Except for OEP which took no position on the legality of the PPA or Eversource’s authority to enter into the PPA. (OEP at 7.)

however, RSA 374-F:3, III contains no mandate prohibiting the Commission from considering the PPA.

RSA 374-F:3 contains fifteen interdependent restructuring policy principles.⁷ “[T]hese interdependent principles are intended to guide the New Hampshire general court and the department of environmental services and other state agencies in promoting and regulating a restructured electric utility industry.” RSA 374-F:1, III. Less than a handful of these interdependent restructuring policy principles contain statutory mandates, *i.e.*, subsections I,⁸ V,⁹ and XII.¹⁰ All of the other interdependent policy principles enumerated in RSA 374-F:3 provide guidance – they are not statutory mandates.¹¹ “The following interdependent policy principles are intended *to guide* the New Hampshire public utilities commission in implementing a statewide electric utility industry restructuring plan, in establishing interim stranded cost recovery charges, in approving each utility's compliance filing, in streamlining administrative processes to make regulation more efficient, and in regulating a restructured electric utility industry.” RSA 374-F:1, III (emphasis added).

The Commission has often noted that, “The New Hampshire Supreme Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain

⁷ RSA 374-F:3, subsections I through XV.

⁸ RSA 374-F:3,I: “Reliable electricity service **must** be maintained... .” (emphasis added).

⁹ RSA 374-F:3,V,(a): “A utility providing distribution services **must have an obligation** to connect all customers in its service territory to the distribution system. RSA 374-F:3,V,(f)(2): “A utility **shall** provide to its customers one or more RES options... .”; RSA 374-F:3,V,(f)(9): “The commission **shall** implement subparagraph (f) through utility-specific filings. Approved RES options **shall** be included in individual tariff filings... .”; (emphases added).

¹⁰ RSA 374-F:3,XII,(a): “In making its determinations, the commission **shall** balance the interests of ratepayers and utilities during and after the restructuring process.”; RSA 374-F:3,XII,(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... .”. (emphases added).

¹¹ See *Eddy Plaza Associates v. City of Concord*, 122 N.H. 416, 420 (1982) where the Supreme Court contrasted “a statement of general principles and guidelines” with statutory mandates.

and ordinary meaning,”¹² and “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.”¹³ In its Initial Memorandum, PSNH cited to precedent that discussed the difference between the words “should” and “shall.”¹⁴ “Shall” is a mandate; “should” is not.

In RSA Chapter 374-F, the Restructuring Law as operative today, the Legislature used the word “shall” sixty seven times. It used the word “should” seventy three times. The Legislature chose when to use “shall” and when to use “should” – it chose when to mandate and when to recommend. The Legislature’s choice of words must be given effect – unless the Legislature has mandated a result, the Commission retains discretion to consider a matter with due consideration to public policy and the interdependent policy principles. To conclude otherwise contravenes the clear language of the law, and elevates non-mandatory provisions over other provisions in that law, and, for that matter, over provisions in other laws. Such an approach is wholly inconsistent with New Hampshire law or precedent.¹⁵

As non-mandatory guidance, the majority of interdependent policy principles do not tie the hands of the Commission and do not require any specific outcome. Nor does any one of

¹² See e.g., Order No. 25,950, Docket No. DE 16-241, *Public Service Co. of New Hampshire*, at 7; Order No. 25,426, Docket No. DE 12-139, *New Hampshire Electric Cooperative, Inc.*, at 7. Order No. 25,262, Docket No. DT 09-044, *Re New Hampshire Telephone Association*, at 41.

¹³ See e.g., Order No. 25,950, *Id.* at 7; Order No. 25,182, Docket No. DT 07-027, *Kearsarge Tel. Co., Wilton Tel. Co., Inc., Hollis Tel. Co., Inc. & Merrimack Cty. Tel. Co.*, at 23.

¹⁴ See PSNH Initial Memorandum at 11-12:

Courts have consistently interpreted the word “should” in a statutory context as a recommendation, and not a mandate. “[T]he common meaning of ‘should’ suggests or recommends a course of action, while the ordinary understanding of ‘shall’ describes a course of action that is mandatory.” *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999); *Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers*, 440 F.3d 1038, 1047 (8th Cir. 2006). See also *United States v. Harris*, 13 F.3d 555, 559 (2d Cir.1994)(opining that because the regulation does not say that the court “must” but rather the court “should,” it suggests an approach and does not mandate it.)

¹⁵ “If any reasonable construction of the two statutes taken together can be found, this court will not find that there has been an implied repeal. *State v. Miller*, 115 N.H. 662 (1975); *Public Serv. Co. v. Lovejoy Granite Co.*, 114 N.H. 630 (1974).” *Bd. of Selectmen of Town of Merrimack v. Planning Bd. of Town of Merrimack*, 118 N.H. 150, 153 (1978).

these non-mandatory policy principles have more legal weight than the other principles – as the statute says, they are “interdependent.” Significantly, the Restructuring Law does **not** contain a mandate prohibiting the PPA in question, nor does the Restructuring Law prohibit the ratemaking treatment sought by PSNH. For other parties to argue differently means that they are reading the law differently than the way it is written, or are espousing a policy preference.

Contrary to the arguments of others, one of the very few mandates contained in the interdependent policy principles is that utilities **have an obligation** to seek reasonable measures to mitigate stranded costs, and that such mitigation measures **shall not be limited to** those set forth in the statute.¹⁶ If any single interdependent policy principle is to be afforded greater weight than another, then “the language of the statute itself” must control, and those policy principles with statutory mandates must trump the non-mandatory guidance in other principles.¹⁷

As PSNH pointed out in its Initial Memorandum, the issue of whether the Restructuring Law created a legal prohibition on utilities such as PSNH entering into a power purchase agreement has previously been decided by the Commission. The entirety of Docket No. DE 11-184, “Joint Petition for Approval of Power Purchase and Sale Agreements and Settlement Agreement” dealt with this very issue. In that proceeding, decided 15 years after enactment of the Restructuring Law, the OCA argued against the power purchase agreements that were the subject of that docket, expressly citing to the restructuring policy principles of RSA 374-F.¹⁸ In its “Order Approving Power Purchase Agreements” the Commission held, “We turn next to ***RSA 374:57, which reinforces the general proposition that PSNH may purchase energy under the***

¹⁶ See footnote 10 *supra*.

¹⁷ Hence, contrary to Staff’s position that the functional-separation ***principle*** overrides any other statutory provision governing New Hampshire EDCs (Staff at 2), statutory ***mandates*** are just that – mandates.

¹⁸ See OCA’s Closing Statement of December 5, 2011. See also Order No. 25,305 at 27.

PPAs, and employs reasonableness and the public interest as the appropriate standards.”¹⁹ If the Restructuring Law prohibited PSNH’s entry into power purchase agreements, then Docket DE 11-184 would have had a different result. Furthermore, if the Commission was to now conclude that the PPA is contrary to law it would mean that the Commission is rejecting its conclusions in Docket No. DE 11-184, when there has been no material change in law or policy since the time of those PPAs, and it would mean, as PSNH argued in its initial brief, that the Commission would be without authority to consider future potential PPAs regardless of the benefits they might provide.

The Order of Notice stated that this first phase of this proceeding is dedicated to the “legality of the Eversource-HRE PPA.”²⁰ The Restructuring Law does not prohibit the PPA. Commission precedent holds that even after enactment of the Restructuring Law, utilities may enter into power purchase agreements and that such agreements may be reviewed and approved by the Commission.

Since there is nothing that legally prohibits the PPA, the Commission should “employ[] reasonableness and the public interest as the appropriate standards” as it did in Docket No. DE 11-184 to determine whether or not to allow this PPA to be included in PSNH’s rates. That is a matter beyond the scope of this first phase of this proceeding. The Commission may, and should, move to phase two to consider these public policy issues.

AFFILIATE TRANSACTION ISSUE

A variety of spurious (and irrelevant) arguments were included in other initial briefs. In particular, some parties argued that the Commission’s Puc 2100 “Affiliate Transaction Rules” make the PPA illegal. That is not correct. First and foremost, the PPA is between PSNH and

¹⁹ Order No. 25,305 at 28 (emphasis added).

²⁰ Order of Notice at 3.

HRE. PSNH and HRE are not affiliates.²¹ Under the Commission’s rules, HRE is a “Non-Affiliated Energy Competitor” as defined at Puc 2102.09.²² That alone ends this issue.

SPNHF alleges that NPT has failed to provide access to distribution system information to its non-affiliated competitors.²³ But, SPNHF fails to point to any specific “distribution system information” that NPT has provided or to whom such information was provided. Perhaps that is because NPT – a transmission company – has no “distribution system information” to provide.

Other briefs make similar unsubstantiated claims of affiliate transaction violations, but none are true. For example, others argue that there is some kind of affiliate relationship because HRE will utilize FERC-regulated transmission services provided by Northern Pass Transmission to deliver the PPA’s energy to PSNH. However, the Commission’s rules do not discuss, and therefore do not cover, that relationship.²⁴

Moreover, as the Commission is aware, NPT is today a “public utility” as defined under the Federal Power Act,²⁵ and it is also a “public utility” under New Hampshire law, subject to obtaining approvals for the underlying project.²⁶ NPT is not an unregulated competitive entity that may adjust its prices to meet the vagaries of the marketplace. To the contrary, it is a regulated company that will provide transmission service under a cost-of-service tariffed rate

²¹ Even NextEra concedes at 16 that “HRE is not affiliated with either company [PSNH or NPT].”

²² Note that HRE is *not* a “Non-Affiliated Competitor” as defined in Puc 2102.08 because PSNH has no competitive affiliate that provides the product or services provided by HRE.

²³ SPNHF at 4.

²⁴ The Commission has allowed similar power purchase agreements without any suggestion that affiliate transaction standards were violated. *See e.g., Re Granite State Electric Company*, 74 NH PUC 325 (1989), where the Commission noted GSEC’s purchase of power from Hydro-Quebec to be delivered by the HQ Phase II line – a line owned by New England Electric Transmission Corporation, an affiliate of GSEC. *See also, Re Granite State Electric Company*, 76 NH PUC 189 (1991).

²⁵ Federal Power Act Section 201(e); 16 U.S. Code §824(e).

²⁶ *See* Order No. 25,953 (October 14, 2016) in Docket No. DE 15-459.

approved by FERC under Section 205 of the Federal Power Act.²⁷ As a regulated utility subject to a FERC cost-of-service tariff rate, NPT will not be selling its service on a competitive basis. As noted by NEPGA²⁸ the Commission has stated that its affiliate transaction rules are directed at “unregulated” affiliates: “Under the Commission’s Affiliate Transactions Rules, N.H. Code Admin. Rules, Chapter Puc 2100, there exists a strong policy preference against self-dealing in relations between New Hampshire EDCs and their *unregulated* affiliates.”²⁹ The Commission’s Puc 2100 rules recognize that transactions between *regulated* companies are governed by applicable tariffs.³⁰ There is no affiliate transaction issue surrounding the PSNH-HRE PPA.³¹

COMPETITIVE PROCUREMENT

Others argue that the PPA is illegal because it was not competitively procured. Yet, not one of those other briefs cite to any specific law or rule requiring such a competitive procurement, nor any law that invalidates a contract that is not competitively procured.

Staff begins its memorandum by stating that any PPA “*must* still be subject to a Staff-directed and Staff-conducted Request For Proposals (RFP) competitive bidding process” (at 1, emphasis added) without citing to any authority for that statement. But, later in that same memorandum, Staff says it “would urge the Commission in the strongest terms to order

²⁷ *Northern Pass Transmission LLC*, 134 FERC ¶ 61,095, *reh’g denied*, *Northern Pass Transmission LLC*, 136 FERC ¶ 61,090 (2011). On January 13, 2014, an amendment to the Agreement was accepted by delegated letter order. *Northern Pass Transmission LLC*, Docket No. ER14-597-000 (Jan. 13, 2014) (delegated letter order).

²⁸ NEPGA at 16.

²⁹ Order No. 25,860, Docket No. IR 15-124, “*Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire*” (emphasis added).

³⁰ Puc 2105.09(a)(5).

³¹ NEPGA argues that the PPA might possibly implicate certain federal affiliate issues, but then tacitly notes that those issues are not clear when it states that their further consideration should await Phase II of this proceeding. NEPGA at 19. Also, recall that FERC has already concluded that “the possibility of affiliate abuse does not exist” for the construction of the NPT Line, 127 FERC ¶ 61,179 at 22, available at Exhibit E, Bates page 39, of the October 19, 2015 petition of NPT to commence business as a public utility in New Hampshire in Docket No. DE 15-459.

Eversource to submit to a Staff-directed and Staff-conducted RFP process for acquiring a ‘hedge’ of this type.” (at 3).³²

Either such a competitive process is required, or it is not. Without citations to any law or rule requiring such a process, such a process is not a requirement.. The Commission is directed again to its decision in Docket No. DE 11-184. Five power purchase agreements were approved without any requirement for a competitive procurement process.³³ If the Commission desires to make a policy decision regarding the use of a competitive procurement process, such decision is not a matter affecting the legality of the PPA in phase one of this proceeding.

INCLUSION OF THE PPA IN THE STRANDED COST RATE

Others argue that the proposed use of the PPA to mitigate stranded costs is in some way illegal. That is just not the case. As noted earlier, one of the very few mandates in the Restructuring Law’s interdependent policy principles is that utilities have an obligation to mitigate stranded costs.³⁴ In setting such a requirement, the Restructuring Law does not limit the measures a utility may use to mitigate stranded costs.

Some argue that the PPA is not a reasonable cost mitigation measure because the pricing mechanism does not guarantee that the PPA will always be “in the money.” But, whether or not the PPA is a “reasonable measure to mitigate stranded costs” as called for by RSA 374-

F:3,XII,(c), does not affect the legality of the PPA. The law does not require a guarantee that the

³² Moreover, other than by making general references to affiliate concerns (which, as noted, are not an issue) it is unclear why any RFP for energy that would result in a contract with a utility would need to be Staff-run or Staff-directed, nor why having it conducted by Staff would be better or more desirable than one run by a utility or anyone else. To the extent that the Commission’s statements in Order No. 25,860 (January 19, 2016) in Docket No. IR 15-124 have any bearing on the legal determination in this docket (and PSNH’s position is that it has little if any relevance), it states that the Commission would expect that a contract for gas capacity to serve electric generation would be procured by RFP. It does not, however, anticipate or require that such an RFP be run by or at the direction of the Commission Staff.

³³ Moreover, as PSNH pointed out in its May 12, 2016 reply brief in Docket No. DE 16-241 (at 8), the PPAs at issue in Docket No. DE 11-184 were explicitly above-market and non-competitively procured, but were approved nonetheless.

³⁴ RSA 374-F:3,XII(c).

costs be mitigated, only that reasonable efforts are made to mitigate the costs. Hence, the issue is whether the PPA is a reasonable measure, which goes to the merits of the PPA, and is not an issue to be decided in phase one of this proceeding. In fact, the Commission's Order of Notice (at 3) explicitly points to "cost recovery" as being a matter for the second phase of the proceeding.

OEP notes that, "Mitigation of Stranded Costs Through the SCRC Is Permissible if Appropriately Structured." (at 6). Such an investigation of an appropriate structure for the inclusion of the PPA into rates (whether via the stranded cost charge,³⁵ the default energy charge,³⁶ or some other rate mechanism³⁷) is not a legal matter for phase one of this proceeding.

CONCLUSION

For the reasons set forth both herein and in PSNH's Initial Memorandum, PSNH has the legal authority to enter into the proposed power purchase agreement between PSNH and Hydro Renewable Energy Inc.; the Commission has the legal authority to review and approve that PPA; and inclusion of the PPA in rates is not prohibited by law. The Commission should move to phase two of this proceeding, where it will have the opportunity to consider the merits of the PPA and see that the PPA will "provide real benefits to the people of the Granite State."³⁸

³⁵ Per the 2015 PSNH Settlement Agreement approved in Docket No. DE 14-238, "all over-market or under-market costs related to the PPAs and IPPs" are defined to be "stranded costs" to be fully recovered through the SCRC.

³⁶ All five of the power purchase agreements approved in Docket No. DE 11-184, which were estimated to be approximately \$20 million over market, were included "as part of PSNH's energy (default) service rate payable by its energy service customers." Order No. 25,305 at 9 and 3.

³⁷ The Commission has plenary authority over utility rates. *New Hampshire v New England Teleph. & Teleg. Co.* 103 NH 394, 397 (1961).

³⁸ *Governor Hassan's Statement on Northern Pass Announcement*, Press Release of August 18, 2015.

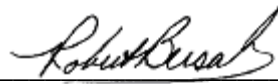
Respectfully submitted,

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

December 5, 2016

Date

By: _____



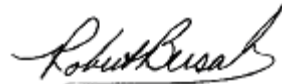
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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

December 5, 2016

Date



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