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.

REPLY 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 Reply Brief in this matter.

I. Introduction

The Commission's Order of Notice in this docket requested briefs and reply briefs on the legality of the proposed 20-year Purchase Power Agreement ("PPA") between Public Service of New Hampshire d/b/a Eversource Energy ("Eversource" or "PSNH") and Hydro Renewable Energy Inc. ("HRE") for which Eversource is seeking approval.

On November 21, 2016, Eversource, the Staff of the Commission, the Conservation Law Foundation ("CLF"), the New England Power Generators Association, Inc., ("NEPGA"), the Office of Energy and Planning ("OEP"), the Society for the Protection of New Hampshire Forests ("the Forest Society") and NEER filed Initial Briefs. NEER's Reply Brief addresses the positions set forth by Eversource, showing the company's positions to be legally incorrect. For the reasons set forth herein and in NEER's Initial Brief, the Commission should dismiss Eversource's Petition as impermissible under New Hampshire law.

II. Eversource's analysis regarding its corporate authority to enter into the HRE PPA is flawed

Eversource contends it possesses the corporate authority to enter into the HRE PPA because: (1) RSA 295:6 authorizes Eversource to enter into contracts necessary to carry out its "authorized business;"[1] (2) Eversource has the authority to enter into PPAs to purchase supplemental energy and to serve default service customers, which is, in part, evidenced by the Commission's approval of post restructuring PPAs in Docket No. DE 11-184; (3) Eversource's purchase of energy under the HRE PPA, is "no different than the energy it presently buys pursuant to bi-lateral contracts and other PPAs authorized by the Commission . . ."; (4) RSA 374:57 "presumes that a utility has the authority to enter into agreements for the purchase of generating capacity . . . or energy . . . "; and (5) there is no statutory limit on the ability of Eversource to enter into an agreement, nor any authority for the Commission to invalidate or void such an agreement.[2]

Everource's arguments erroneously rely on law and policy that authorize or support Eversource's ability, under limited circumstances, to enter into PPAs to "purchase" energy. Eversource, however, concedes that the purpose of the HRE PPA is for it to resell the energy, not to use the energy purchased under the PPA for default or transition service.[3] Instead of addressing the unique aspects of the HRE PPA in light of the law, Eversource sidesteps a proper legal analysis by simply rationalizing that the HRE PPA is within its "authorized business" (RSA 295:6) since PPAs were approved in Docket No. DE 11-184. This reference is not on point.

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[1] Eversource also points to RSA 293-A:3.02(7); however, this statute simply states the company has the authority to enter into contracts which may be converted into or include the option to purchase securities. There is no language in that statute that remotely addresses the subject matter in this proceeding.

[2] Eversource's Initial Legal Memorandum at 3-7, 11-12, 19.

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

One, the PPAs approved in Docket No. DE 11-184 were for the purchase of energy under supplemental power purchases allowed for default and transition services under RSA 369-B:3, IV (b)(1)(A), which is not applicable to the HRE PPA given Eversource's admission, noted above, that the energy will not be used for those services.[4] Two, the Commission strictly qualified the approval of the PPAs in that docket, concluding that ". . . this case is *sui generis*. Our findings and rulings in this case are not to be taken as any kind of precedent or general policy statement . . . ."[5] Eversource simply ignores the Commission's qualified approval in that docket.

Similarly, Eversource sidesteps a meaningful legal analysis by simply emphasizing the lack of limiting language in RSA 374:57, and issuing an ultimatum that if Eversource does not have the authority to enter into the HRE PPA to purchase energy it will render the statute meaningless.[6] Eversource's statements, however, cannot be squared with the law. Eversource itself correctly concedes that "RSA 374:57 . . . neither creates nor restricts PSNH's corporate authority to enter into a PPA."[7] Moreover, RSA 374:57 will not be rendered meaningless; Eversource will still be required to seek Commission approval of PPAs for the purchase of energy related to supplemental purchases for transition and default services. Hence, RSA 374:57 does not provide Eversource corporate authority to enter to the HRE PPA and is not rendered meaningless.

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[4] *Id.*

[5] *Public Service Company of New Hampshire, Bridgewater Power Company et al., Joint Petition for Approval of Power Purchase Agreements and Settlement Agreement*, Docket No. DE 11-184, Order No. 25,305 Approving Power Purchase Agreements at 43-44 (December 20, 2011).

[6] Eversource Initial Legal Memorandum at 4-5.

[7] *Id.* at 3.

The primary basis which Eversource cites for its corporate authority to enter into a contract is derived from New Hampshire corporate law. Eversource asserts that "[n]othing in New Hampshire's corporate law in RSA chapter 295, nor in PSNH's history or organizing documents places any limitation or restriction on PSNH's authority to enter into contracts."[8] This conclusion misreads the plain and ordinary language of RSA 295:6 and completely ignores the fact that it is a regulated public utility subject to the regulatory compact. RSA 295:6 limits and qualifies a corporation's contracting authority to ". . . make contracts necessary and proper for the transaction of authorized business, and no other." Eversource's "authorized business" (including whether it can enter into the HRE PPA) is governed by the applicable regulatory statutes administered by the Commission. This fundamental legal principle seems lost on Eversource.

Only if Eversource were not regulated by the Commission or some other authority would the company's actions be wholly determined by its corporate authority.[9] In contrast, when an entity's contracting actions are regulated, a contract inconsistent with the regulatory scheme is *ultra vires* and void *ab initio*.[10] Eversource's corporate authority to contract under its "authorized business," is, therefore, not limited to a review of the general provisions of corporate law, but, also, must be legal under the statutes that regulate it as a public utility. Hence, the HRE

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[8] *Id.*

[9] *Petition of White Mountain Power Co.*, 96 N.H. 144, 148 (1950) ("By the provisions of R. L., *c.* 273, *s.* 56, the cooperative is 'exempt from the jurisdiction of the public service commission.' The certified question accordingly depends wholly upon the corporate authority granted the cooperative by the chapter of the Revised Laws cited in the question.")

[10] *See, e.g., Professional Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 21, 23 (2012) (". . . we hold that the portion of RSA 31:3 which grants municipalities the right to recognize unions and enter into collective bargaining agreements was superseded by the enactment of the PELRA, and, therefore, that the Town had no authority to recognize the non-PELRB-certified Union. Accordingly, the agreement, as well as the subsequent agreements, are *ultra vires* contracts and wholly void.").

PPA must be legal under the Restructuring Statute for Eversource to possess the corporate authority to enter into the contract. As demonstrated in NEER's Initial Brief and below, the HRE PPA violates the Restructuring Statute. Thus, Eversource lacks the corporate authority to enter into the HRE PPA, and, accordingly, the Commission should declare the PPA void *ab initio*.

III. Contrary to Eversource's arguments, the HRE PPA violates the Restructuring Statute

A. The HRE PPA is not legal under RSA 374-F:1, I

In a continuation of its disagreement with the Commission's decision in Docket No. DE 16-241, Eversource argues that the goal of the Restructuring Statute is the reduction of customer costs[11] and the interdependent policy principles set forth in RSA 374-F:3 are merely "guides" to achieve "this goal of cost reductions."[12] It also maintains that competition is a "means to the end" of lower rates.[13] In support of these contentions, Eversource primarily points to one phrase in the first sentence of RSA 374-F:1, I.[14] However, Eversource's position is fundamentally

[11] Eversource Initial Legal Memorandum at 8, note 12, 16-18.

[12] *Id.* at 8. It also asserts that ". . . the Commission has a duty to investigate and embrace measures that would lower prices, reduce volatility, and ensure reliable service – including the PPA between PSNH and HRE." *Id.* at 11.

[13] *Id.*, note 12. Eversource further believes the HRE PPA is consistent with the provisions of the Restructuring Statute that promote reliable, fuel diverse and renewable sources of energy. *Id.* at 9, 14-15, 19. However, the company fails to show how promoting these policies overcomes the failure of its proposal to satisfy the separation requirements in the Restructuring Statute.

[14] *Id.* at 8. "**The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers** of electricity by harnessing the power of competitive markets." (emphasis added by Eversource).

flawed, as it is directly contrary to long-standing cannons of statutory construction and the analysis that the Commission laid out very clearly in Order 25,950.[15]

The start of any inquiry into statutory construction and interpretation is the plain and ordinary meaning of the statute "as written."[16] Further, the interpretation of a statute does not involve an examination of isolated words or phrases,[17] but rather a reading of the statute as a whole.[18] Application of these straightforward rules of statutory construction demonstrates that Eversource's selective reading of RSA 374-F:1, I is without merit.

The whole of RSA 374-F:1, I reads:

> The most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets. The overall public policy goal of restructuring is to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment. Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that will require unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services.

The plain and ordinary meaning of this statute is clear and logical. The three sentences of the statute set forth three premises for restructuring. The first premise, the "reason" to restructure, is to reduce customer costs through competitive markets. The second is the "public policy goal" to restructure, which is to achieve a more efficient industry structure and regulatory

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[15] *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).

[16] *See, e.g., Petition of Malisos*, 166 N.H. 726, 729 (2014); *Pennelli v. Town of Pelham*, 148 N.H. 365, 368 (2002). These cases also hold that a principle of statutory interpretation is that legislative history is only consulted when the language of the statute is ambiguous. Eversource does not complain that the statutes are unclear, and, therefore, its selective citation to legislative history is not instructive, nor should it be considered.

[17] *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010); *Pennelli v. Town of Pelham*, 148 N.H. at 366.

[18] *Id.*

framework that reduces customer costs while maintaining reliable electric service and with minimum adverse environmental impact. The third premise is the "key elements" of restructuring, which include customer choice and development of competitive markets. The statute is clear that achievement of these key elements "will require" action: the "unbundling of prices and services and at least functional separation of centralized generation services from transmission and distribution services." This action also explains how the first premise, the "compelling reason" to restructure through "harnessing the power of competitive markets" is to be accomplished. Indeed, the directive nature of the action required in RSA 374-F:1, I was recognized by the Supreme Court of New Hampshire:[19]

> In 1996, the legislature enacted RSA chapter 374-F (the restructuring statute). *See* RSA 374-F:1, I (Supp. 2000). The restructuring statute **directed** the PUC to design a restructuring plan 'in which electric generation services and rates would be extracted from the traditional regulatory scheme, unbundled, and subjected to market competition.' (emphasis added).

Thus, read as a whole, the wording and structure of this statute is clear and profound. Eversource's attempt to isolate and focus exclusively on one phrase of the first sentence and ignore the remainder of the statute is not only misguided, it is contrary to cannons of statutory construction, and, therefore, must be rejected. When this misguided approach is rejected, it is equally clear that Eversource's proposal to recover the costs of the HRE PPA (a generation service) through distribution rates is not legally permissible.

[19] *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 673 (2001), *quoting In re N.H.P.U.C.*, 143 N.H. at 236, 722 A.2d at 485.

B. A reading of RSA 374-F:1, I and RSA 374-F:3, III together and in the context of the entire Restructuring Statute requires the rejection of the HRE PPA

Eversource attempts to relegate RSA 374-F:3, III to a statute that merely provides guidance or discretionary options for the Commission's consideration.[20] It maintains the use of the term "should" instead of "shall" in this statute is supportive of its position.[21] It further contends that even if the HRE PPA is considered a generation service, it is lawful under the Restructuring Statute.[22] Eversource is incorrect on all points.

As explained above, any inquiry into statutory construction begins with a review of the plain and ordinary meaning of the words of the statute. When the inquiry involves, as it does here, two or more statutes, those statutes are to be read: (1) together and in harmony (when possible)[23] – and this is particularly required when the statutes were enacted during the same legislative session;[24] and (2) in the context of the overall statutory scheme and in a manner to effectuate the statute's underlying policies.[25] Applying these rules to RSA 374-F:1, I and RSA 374-F:3, III (which were enacted in the same legislative session) demonstrates that the separation requirements are clear and consistent with each other.

As already established, the plain language of RSA 374-F:1, I sets forth a separation requirement:

> Increased customer choice and the development of competitive markets for wholesale and retail electricity services are key elements in a restructured industry that **will require** unbundling of prices and services

[20] Eversource Initial Legal Memorandum at 9-10, note 13, 18, note 29.

[21] *Id.* at 9-10, note 13.

[22] *Id.* at 10.

[23] *Supra*, note 16.

[24] *Public Service Company of New Hampshire v. Lovejoy Granite*, 114 N.H. 630, 632-633 (1974)

[25] *Supra*, note 16.

> and at least functional separation of centralized generation services from transmission and distribution services. (emphasis added).

Also, as explained, the directive nature of RSA 374-F:1, I was recognized by the Supreme Court of New Hampshire.[26] As one of the "interdependent policy principles... intended to guide the New Hampshire public utilities commission in implementing a statewide electric utility industry restructuring plan... and in regulating a restructured electric utility industry,"[27] RSA 374-F:3, III carries forth this directive and parallels it, declaring:

> . . . services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. 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.

The only qualification on the separation requirements in RSA 374-F:3, III is that ". . . distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs." Thus, with this one exception which is not applicable to the HRE PPA, the separation requirements set forth in RSA 374-F:1, I are mirrored in, and are to be read in harmony with, RSA 374-F:3, III.

A reading of the separation requirements in the context of the entire Restructuring Statute further demonstrates the fallacy of Eversource's interpretative approach. One, the interdependent policy principles are directives to the Commission on how to accomplish "restructuring" and those directives are qualified by RSA 374-F:1, I, which requires the imposition of the separation requirements. Two, all of the interdependent policy principles can be satisfied with the imposition of the separation requirements – indeed, it is clear that it is the

[26] *Supra,* note 19.

[27] RSA 374-F:1, III.

imposition of the separation requirements that either advances the achievement of the other interdependent policy principles,[28] or results in the need for the consideration and achievement of certain other principles.[29] Third, inapposite to Eversource's strained reading that the statute's sole focus is on reducing rates and costs, the plain and ordinary language of the Restructuring Statute is replete with instructions on how to carry out "restructuring." Simply put, without a separation of generation prices, rates, and services from distribution/transmission prices, rates, and services there is no electric industry restructuring. Consequently, to follow Eversource's hodgepodge of arguments that fail to acknowledge the legal import of the separation requirements would violate yet another cannon of statutory construction: a presumption against the Legislature passing an act that would lead to the absurd result of nullifying the purpose of the statute.[30]

Arguing against the weight of a straightforward application of the cannons of statutory construction, Eversource attempts to explain away the separation requirements in RSA 374-F:3, III by pointing to the word "should." According to Eversource, the three cases it cites stand for the proposition that "Courts have consistently interpreted the word 'should" in a statutory context as a recommendation, and not a mandate."[31] Eversource's argument should be rejected.

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[28] Customer choice, open access, full and fair competition, and near-term rate relief.

[29] Universal service, benefits for all customers, environmental improvement, renewable energy resources, energy efficiency, recovery of stranded costs, regionalism, administrative processes and timetable.

[30] *Appeal of Ashland Electric Department*, 141 N.H. 336, 340 (1996), *quoting State v. Kay*, 115 N.H. 696, 698 (1975). (Court affirmed Commission's denial of a request for a declaratory ruling that the Town of Ashland may expand its distribution facilities without the PUC's authorization, concluding:

> Because 'it is not to be presumed that the legislature would pass an act leading to an absurd result and nullifying to an appreciable extent the purpose of the statute,' *State v. Kay, 115 N.H. 696, 698, 350 A.2d 336, 338 (1975)*, Ashland's interpretation cannot stand.

[31] Eversource Initial Legal Memorandum at 9, *citing Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers*, 440 F.3d 1038, 1047 (8th Cir. 2006); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999); and *United States v. Harris,* 13 F.3d 555, 559 (2d Cir.1994).

First, Eversource's cite to the *Ripplin* case is to the dissent, and, therefore, has no precedential weight. Second, the other two cases cited by Eversource involve consideration of Federal Sentencing Guidelines, not statutory provisions; and, hence, neither case is instructive on how to interpret the Restructuring Statute. Third, there are cases on the other side of the issue.[32] Fourth, the application of the cannons of statutory construction establish that in the context of the Restructuring Statute, RSA 374-F:3, III is a mandate.

The analysis herein demonstrates, through, among other things, the parallel construction of the two separation requirement statutes and a reading of the Restructuring Statute as a whole, that the separation requirements are mandatory. Additional support for the mandatory nature of the use of the word "should" in RSA 374-F:3, III is demonstrated by the application of the rule of statutory construction that ". . . all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words."[33] To relegate RSA 374-F:3, III to a recommendation, as proposed by Eversource, makes it superfluous in light of the entire statute and inconsistent with the common understanding of the word "should" which is "used . . . to express duty, obligation, propriety, or expediency." *Webster's Third International Dictionary* 2104 (2002). In RSA 374-F:3, III the word "should", when considered as a whole and in light of RSA 374-F:1, I, is a duty and obligation to impose the separation requirements.

Consider further that in *City of Rochester*, [34] the New Hampshire Supreme Court found the term "shall" was not mandatory because it was qualified by the phrase "be subject to." Applying this analysis, the term "should" in RSA 374-F:3, III is indeed mandatory because its

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[32] *See, e.g., People of the State of Colorado v. Raymond,* 240 P.3d 311, 317 (2009) (Court found that jury instructions using the term "should" connoted "an obligatory command and not a permissive request").

[33] *Pennelli v. Town of Pelham*, 148 N.H. at 367-368, *quoting Appeal of Reid*, 143 N.H. 246, 252 (1998).

[34] *City of Rochester v. Corpening*, 153 N.H. 571, 575 (2006).

construction must be considered together and in harmony with mandatory language in RSA 374-F:1, I, as well as its own language that includes the phrase "and at least," which requires the functional (as opposed to corporate) separation of market generation services from regulated distribution and transmission services. To interpret "should" as relegating the separation requirement to a recommendation or discretionary option, as advanced by Eversource, takes the word out of context as it relates to the other words within the statute, as well as the Restructuring Statute as a whole, and therefore, must be rejected.

Similarly, Eversource attempts to explain away the separation requirements by asserting: (1) the HRE PPA is not a generation service; and (2) even if the HRE PPA is considered a generation service, there is no prohibition in the Restructuring Stature.[35] On the latter argument, Eversource's position that "a purchaser of energy via a PPA is not engaging in a 'centralized generation service'" is flawed. The purchasing of energy is not the issue in this proceeding; rather, what is at issue is Eversource's plans to *resell* the energy it acquires under the HRE PPA either bi-laterally or in the competitive generation market and to pass the PPA's costs on to retail electric distribution customers. As already demonstrated, this bundling of generation services and costs with distribution rates violates the Restructuring Act. On the former argument, even accepting the EPA definition offered by Eversource,[36] the HRE PPA satisfies that definition in that Eversource is stepping into the shoes of HRE and selling its centralized hydro generation.

[35] Eversource Initial Legal Memorandum at 10.

[36] *Id.* at note 15. "The Environmental Protection Agency describes 'centralized generation' as 'large-scale generation of electricity at centralized facilities. These facilities are usually located away from end-users and connected to a network of high-voltage transmission lines. The electricity generated by centralized generation is distributed through the electric power grid to multiple end users. Centralized generation facilities include fossil-fuel-fired power plants, nuclear power plants, hydroelectric dams, wind farms, and more.' U.S. EPA Website, *Centralized Generation of Electricity and its Impacts on the Environment*, https://www.epa.gov/energy/centralized-generation-electricity-and-its-impacts-environment." Also, notably, none of the sources provided by Eversource use the term "centralized generation services."

Accordingly, Eversource's arguments and attempts to explain away the separation requirements in the Restructuring Statute are without merit, and, therefore, should be rejected.

C. Contrary to Eversource, the HRE PPA is not an appropriate mitigation measure under RSA 374-F:3, XII (c)

Eversource apparently assumes that there is no question that the HRE PPA is legal under RSA 374-F:3, XII (c), as it simply concludes that "the benefits of the PPA are 'mitigation measures'" and it is consistent with the Restructuring Statute to enter into "a contract intended to mitigate existing stranded costs."[37] Eversource, however, provides little or no support, rationale, case law, or the application of rules of statutory construction to RSA 374-F:3, XII (c).[38] In contrast, as shown in NEER's Initial Brief, the HRE PPA is more than "a contract," and, further, the HRE PPA does not square with the plain language of what constitutes a "reasonable" stranded cost mitigation measure under RSA 374-F:3, XII (c).[39] Thus, the HRE PPA is not consistent with RSA 374-F:3, XII (c).

D. 2015 Restructuring Settlement

Again, Eversource sweepingly assumes the 2015 Restructuring Settlement supports the HRE PPA, given that "[o]ne of the primary objectives" of the Settlement "is to minimize stranded costs."[40] In making this argument Eversource cited the Commission's Order approving

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[37] *Id.* at 10-11, 19-21, 24.

[38] Eversource alludes to Order No. 25,664, but that Order did not address the issue of what constitutes a reasonable mitigation measures under RSA 374-F:3, XII (c). Therefore, the Order is not instructive on the import of RSA 374-3, XII (c) in the context of a financial hedging instrument, such as the HRE PPA.

[39] NEER Initial Legal Brief at 8-11.

[40] Eversource Initial Legal Memorandum at 21-22.

the Settlement Agreement, Order No. 25,920 in DE 14-238.[41] What Eversource fails to acknowledge, however, is that the Commission in that order noted that it was incorporating into its standard for reviewing the Settlement Agreement the restructuring principles from RSA 374-F which indicate "the Legislature's policy direction in favor of the divestiture of Eversource's generation assets over the last 20 years."[42] It is, thus, clear that the Commission carefully examined the restructuring policy principles when it reviewed the Settlement Agreement and its approval was in fact about much more than minimizing stranded costs. The Commission's approval was directed at implementing the restructuring policy principles cited above and finally accomplishing the separation of generation services from transmission and distribution.

In addition, the Commission has concluded that above-market costs of new PPAs can be analogous to stranded costs.[43] Eversource's request for the recovery of the net financial impacts of the HRE PPA from distribution customers provides an opportunity for it to incur additional costs that would be treated as stranded costs and recovered through the Stranded Cost Recovery Charge.[44] There is nothing in the 2015 Settlement Agreement, however, that directly or even indirectly supports the legality of the HRE PPA, particularly given the statutory provisions that it would violate, as established herein. Therefore, the 2015 Restructuring Settlement does not provide legal support for the HRE PPA.

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[41] *Investigation of Scrubber Costs and Cost Recovery And Determination Regarding Eversource's Generation Assets*, Order 25,920 Approving Agreement (July 1, 2016).

[42] *Id.* at 65.

[43] *Public Service Company of New Hampshire, Bridgewater Power Company et al., Joint Petition for Approval of Power Purchase Agreements and Settlement Agreement*, Docket No. DE 11-184, Order No. 25,305 Approving Power Purchase Agreements at 40.

[44] Testimony of Chung at 2 lines 19-21.

E. Competitive Solicitation Requirements

The Order of Notice raised a legal question as to "whether Eversource's 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." Eversource's Initial Legal Memorandum fails to address the issue, whereas the Initial Briefs of NEER, the Staff of the Commission, CLF, NEPGA, OEP and the Forest Society all address this issue. The arguments presented by Staff, NEER, and the other parties on this issue should therefore be adopted. As Eversource is the Applicant in this proceeding, it is puzzling that it chose not to address this legal issue in its Initial Legal Memorandum as requested by the Commission.

In light of Eversource's failure to address this issue in the initial round, if Eversource addresses the issue in its Reply Brief, NEER may seek leave to respond to any legal arguments raised in Eversource's Reply Brief for the first time.

F. Factual Arguments

In contrast to its legal arguments, Eversource in its Initial Legal Memorandum addresses issues and questions of fact that are not properly before the Commission in Phase I.[45] NEER's decision not to reply and rebut herein these issues and questions of fact (many of which are flatly

[45] Eversource Initial Legal Memorandum at 7-8, notes 9, 10, 13-14, 18 (discussion of Northern Pass Transmission Line); 11 (discussion of alleged findings of ISO-New England); 13 (discussion of natural gas supply); 13 (discussion of the alleged attributes of the HRE PPA to "not be subject to remarked swings in price"); 19 (discussion on speculative value of HRE PPA if RECs are adopted for hydro power); 20, 22-24 (discussion on alleged lack of: (i) distorting the market for energy service; (ii) "adverse" impact of HRE PPA on the overall competitive marketplace; and (iii) diminishing competition); 22-23 (discussion on whether PSNH pre-filed testimony "lived up to" prior assurances) 23-24 (discussion on the alleged appropriateness of flowing costs and benefits to all customers versus just default service customers) and 24 (discussion on projected benefits of HRE PPA as set forth in Mr. Daly's testimony).

incorrect) should not be taken as NEER agreeing with Eversource's contentions, but, rather, respecting the Commission's decision to limit Phase I to questions of law.

IV. Conclusion

Eversource's Initial Legal Memorandum provides no discernable insight on the legal questions posed by the Commission. Instead, its arguments are contrary to basic cannons of statutory construction. When these cannons of statutory construction are applied to the Restructuring Statute, these rules demonstrate Eversource's arguments are without merit, and, must be rejected. Thus, for the reasons set forth herein, and in NEER's Initial Legal Brief, Eversource's Petition should be dismissed as impermissible under New Hampshire law.

Respectfully submitted,

NextEra Energy Resources, LLC
By Their Attorneys

Douglas L. Patch
Orr & Reno, P.A.
45 S. Main St.
P.O. Box 3550
Concord, N.H. 03302-3550
(603) 223-9161
dpatch@orr-reno.com

Brian J. Murphy
Senior Attorney
NextEra Energy Resources, LLC
700 Universe Blvd. (LAW/JB)
Juno Beach, FL 33408
(561) 694-3814
brian.j.murphy@nee.com

Dated: December 5, 2016

Certificate of Service

I hereby certify that a copy of the foregoing Petition has on this 5th day of December 2016 been sent by email to the service list in DE 16-693.

By: _____
Douglas L. Patch