APPENDIX A

REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE NEW ENGLAND RATEPAYERS

FERC DOCKET No. EL19-10-000

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association) Docket No. EL19-10-000

REQUEST FOR LEAVE TO ANSWER AND ANSWER OF THE NEW ENGLAND RATEPAYERS ASSOCIATION

The New England Ratepayers Association (NERA) respectfully requests authorization, pursuant to Rule 213[1] of the Federal Energy Regulatory Commission's ("FERC" or the "Commission"), to submit this Answer to certain Protests submitted on December 3, 2018 and December 17, 2018 in this docket by various parties,[2] and to the December 17, 2018 Comments signed by 10 out of 424 members of the New Hampshire legislature,[3] in response to NERA's Petition for Declaratory Order and Request for Expedited Action (hereinafter the "Petition").

[1] 18 C.F.R. § 385.213(a)(2) (2018). Rule 213(a)(2) provides for answers to protests where authorized by the decisional authority. The Commission customarily accepts answers to a protest or answer where it provides information that assists the Commission's decision-making process, *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252 at P 19 (2010); *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,242 at P 27 (2010), and to "insure a complete and accurate record," *Delmarva Power & Light Co.*, 93 FERC ¶ 61,098 at 61,259 (2000).

[2] Specifically, NERA proposes this Answer to address the Motion to Intervene and Protest of the New Hampshire Generator Group (hereinafter, the "Generator Group" or Generator Group Protest"), the Supplemental Comments of the New Hampshire Generator Group (hereinafter, Generator Group Supplemental Comments"), and the Protest of the New Hampshire Attorney General (hereinafter, the "NH-AG" or "NH-AG Protest").

[3] Hereinafter the "Comments of the 10 New Hampshire Legislators."

I. INTRODUCTION AND EXECUTIVE SUMMARY

None of the arguments advanced in the Protests change the simple and dispositive fact that SB 365[4] explicitly sets the rate for wholesale sales of electricity from the eligible facilities to certain electric distribution companies ("EDCs") that are required to purchase the electricity. The Protestors instead seek to throw up a smokescreen of irrelevant and inaccurate arguments that side-step that central issue.

The Generator Group wrongly accuses NERA of misrepresenting the requirements of the statute, and NERA addresses these false contentions in detail below. But more fundamentally, the Generator Group attempts to miscast the Supreme Court's decision in *Hughes v. Talen Energy Marketing LLC*, 136 S. Ct. 1288 (2016), and subsequent decisions of the Courts of Appeals as markedly narrowing FERC's exclusive jurisdiction over the rates for wholesale sales of electricity, and creating a new requirement that a state's attempt to regulate wholesale electricity rates must be "tethered" to a generator's participation in an RTO in order to raise preemption concerns. The Generator Group's miscasting of *Hughes'* discussion of "tethering" stems from the Group's failure to recognize the distinction between the state action at issue in *Hughes* versus the instant case. In *Hughes*, the State did not directly set the rate of a wholesale sale of energy, but rather utilized a "contract-for-differences" that was separate from the FERC-jurisdictional wholesale sale. In contrast, here New Hampshire has *directly* set a rate for

[4] SB 365 has been codified as N.H. Rev. Stat. Chapter 362-H. For consistency with the Petition and most of the comments filed, NERA will continue to refer to the statute as SB 365, although it intends by those references to refer to the statute now known as N.H. Rev. Stat. Chapter 362-H.

a FERC-jurisdictional wholesale sale of energy. In the latter case, the State's rate-setting was not merely "*tethered*" to a wholesale sale; the State set the rate *for* a wholesale sale. That makes this an easy preemption case. Indeed, if the Generator Group's argument were accepted, a series of long-standing Commission decisions correctly holding that states are preempted (other than in compliance with PURPA) from directly setting the rate for a wholesale sale of electricity would be eviscerated.[5] Pushed to its logical conclusion, such a radical reinterpretation of the FPA would permit States that operate outside of RTOs to set the rates for wholesale energy sales delivered within their States. *Hughes* did nothing of the sort. *Hughes* reinforced FERC's exclusive jurisdiction over wholesale energy rates—it did not narrow it. FERC's exclusive rate jurisdiction includes both bilateral sales of wholesale energy and sales of energy in RTO markets.

The Protesters' remaining arguments similarly seek to confuse and obfuscate the simple facts and well-established legal principles set forth in the Petition—facts and principles that they cannot overcome on the merits. In particular:

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[5] *Conn. Power & Light Co.*, 70 FERC ¶ 61,012 at 61,025-26, 61,029-30 *reconsideration denied*, 71 FERC ¶ 61,035 at 61,153 (1995) (holding that "states have no authority outside of PURPA to set QF rates at wholesale"); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 at 61,244-45 (1997) (holding that orders of state utilities board were preempted under the FPA to the extent they set rates outside the bounds of PURPA for energy "sold at wholesale in interstate commerce by public utilities"); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 64-67, 70 (holding that order by the California Public Utilities Commission ("CPUC") implementing a California statute that required utilities to offer to purchase energy from certain combined heat and power generators at a pre-set, CPUC-determined price could only avoid preemption if the relevant generators were QFs and the CPUC set the rates for such sales according to the utilities' avoided cost), *order on clarification*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011).

- The Generator Group claims that the Petition mischaracterizes SB 365 by stating that it requires the energy purchased under the statute to be sold in the ISO-NE market, whereas the Generator Group claims that it does not. The Generator Group is wrong. Both SB 365 and ISO-NE market rules absolutely mandate that the energy purchased under SB 365 be sold into the ISO-NE market. (See Section II.B., *infra.*) In any case, this argument is a red herring—SB 365 is preempted because it sets the wholesale rate at which eligible generators sell energy to the EDCs, irrespective of the fact that the energy is also required to be sold into the ISO-NE market.
- The Comments of the 10 New Hampshire Legislators describe SB 365 as providing for the purchase of energy from the eligible generators "at a 20% discount from the competitively procured rate." Comments at 1. SB 365, however, does nothing of the kind. The "competitively procured rate" referenced in the Comments refers to the rate for the purchase of default energy service, which is a firm, load-following service in which the suppliers provide energy, capacity, ancillary services, line losses, and manage variable load risk, all to meet the full requirements of retail customers.[6] The rate for this service is typically in the range of 9 cents/kWh to 11 cents/kWh.[7] The product that the eligible generators sell under SB 365 is non-firm, as-available energy. This product is

[6] *See* NERA Petition at 8-9.

[7] *Id.*

fundamentally different from default energy service and is in no way a substitute for it. The market rate for as-available energy is determined in the ISO-NE spot market and is often a small fraction of the rate for default energy service. To compare the two, as these Comments have done, is akin to setting the price of wheat, arbitrarily, at 80% of the price of gold and claiming that this provides a discount for wheat because the price of gold is set by a market.

- The Generator Group claims that SB 365 does not actually set a rate at all, because it uses a formula based on 80% of the rate for default energy service. This makes no sense. The rate formula in SB 365 determines, down to the penny, the price that the EDCs must pay for energy sold under the statute, with no variance permitted. That, most plainly, constitutes the setting of a rate. That SB 365 requires that the rate for energy from the eligible generators be set at an arbitrary percentage of the price for a fundamentally different product cannot, and does not, change the fact that SB 365 sets the rate at which the EDCs are required to buy wholesale energy from eligible generators.
- The Generator Group argues that the sales under SB 365 are in accordance with the FPA because the eligible generators have on file, or are seeking FERC approval of, tariffs to sell power at market-based rates. This argument fails because the rates at issue are not market-based, but rather are set by state law. The very market-based rate tariffs on which the

Generators seek to rely define a market-based rate as a rate agreed to by the seller and buyer. Eversource stated in a filing with the NHPUC that it informed the buyers that its compliance with SB 365 is involuntary and based solely on the State's police power.[8] Under no plausible definition could a price imposed by State law on an unwilling buyer be termed "market-based." Market forces, as applied to the eligible generators' sales of energy under SB 365, played absolutely no role in setting the rate.

- The Generator Group, the NH-AG, and the Comments of the 10 New Hampshire Legislators contend that SB 365 falls within the States' authority to manage resource procurement and to encourage fuel diversity and renewables. It does not. The Commission has long and clearly stated that States have many tools at their disposal to manage resource procurement, but that those tools do not include the setting of wholesale rates except in accordance with PURPA. SB 365 falls well outside of the

[8] Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365 at 4, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, N.H.P.U.C. Dkt. DE 18-002 (filed Dec. 4, 2018) ("In the solicitation, Eversource informed the eligible facilities that it was issuing the solicitation pursuant to the statutory mandate contained in SB 365 and not as the Company's voluntary act.") (attached hereto as Attachment A); *see also id.* at Attachment A to the Eversource Petition, November 6, 2018 Solicitation Mandated by New Hampshire RSA Chapter 362-H, "The Preservation and Use of Renewable Generation to Provide Fuel Diversity," at 3 ("Eversource notes that this solicitation and Eversource's actions pursuant to RSA Chapter 362-H are mandated by the force of law and are not being undertaken voluntarily. Eversource's actions will be taken solely to comply with the police power of the State of New Hampshire as set forth in RSA Chapter 362-H and only if, and to the extent, reviewed and required by express Order of the New Hampshire Public Utilities Commission.") (attached hereto as Attachment B).

States' procurement authority because it sets the price of wholesale sales while neither invoking nor complying with PURPA.

- The Generator Group argues that the Second Circuit's recent finding that States are permitted to set the price of Zero Emissions Credits ("ZECs") supports its claim that New Hampshire can set prices under SB 365. On the contrary, the ZEC decision has no bearing on this case. There, the court recognized that a sale of ZECs was not, itself, a sale of wholesale energy and proceeded to analyze (as the Court had done with the contract for differences in *Hughes*) the degree to which the State's setting of the price for ZECs affected the market price for wholesale energy. In stark contrast, SB 365 actually sets the price for sales of wholesale energy, an act that is plainly preempted.
- The Generator Group argues that PURPA preemption does not apply because SB 365 is not based on PURPA and does not even require that the eligible generators be QFs. This argument misstates the Petition's PURPA argument. NERA's point is that PURPA cannot save SB 365 from preemption under the FPA because SB 365 fails to comply with (and indeed violates) PURPA's pricing rules. By arguing that SB 365 is not an implementation of PURPA, the Generator Group concedes that PURPA cannot save SB 365.
- The NH-AG claims that NERA's preemption Petition is not yet ripe for Commission decision. This claim is incorrect. The preempted action by

> the State is complete with sales set to begin on February 1, 2019. SB 365 leaves the NHPUC no discretion to change the rate set by statute. Eversource reported to the NHPUC that at least five of the eligible generators have accepted SB 365's offer to make sales at the State-set price.[9] The Commission has ruled, on multiple prior occasions, that the time to resolve challenges to the validity of such State actions is prior to the time the sales commence (or the contracts are even executed)—that the salient timing consideration is to avoid disruption of parties' settled expectations.

Thus, contrary to the Generator Group's claim that NERA "[o]versimplif[ied] the field preemption analysis under the FPA," Generator Group Protest at 15, here, the preemption analysis is simple because New Hampshire's action was simple. The state passed a statute that sets an explicit rate for wholesale sales of energy. N.H. Rev. Stat. § 362-H:2(I)(a) ("[T]he electric distribution company's purchases of energy from the eligible facility shall be priced at the adjusted energy rate."). That act is preempted, because "the FPA allocates to FERC exclusive jurisdiction over 'rates and charges . . . received . . . for or in connection with' interstate wholesale sales." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. at 1297; FPA § 205(a), 16 U.S.C. § 824d(a).

[9] Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365 at 4, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, N.H.P.U.C. Dkt. DE 18-002 (filed Dec. 4, 2018) (attached hereto as Attachment A).

II. FPA PREEMPTION

A. *Hughes* Did Not Narrow the Scope of FERC's Exclusive Jurisdiction Over Wholesale Energy Rates

The Generator Group argues that, after *Hughes*, states are not preempted from setting rates for wholesale sales of electricity, so long as the state's action "does not condition payment of funds on capacity clearing the auction" and "is untethered to a generator's wholesale market participation."[10] Generators accuse NERA of mischaracterizing SB 365 as requiring the EDCs to sell the energy they receive from sales by the eligible facilities into ISO-NE, and from there make the further leap that absent mandatory sales into ISO-NE or other "tether" to participation in an RTO, there can be no preemption under the FPA.

The Generator Group's argument finds no support in *Hughes* and is irreconcilable with the FPA. FERC's exclusive jurisdiction over wholesale sales is *not* limited to sales occurring in (or "tethered to") RTOs, but also includes the exclusive jurisdiction over rates for bilateral wholesale sales of electricity. Because New Hampshire has engaged in *direct* setting of the rate for wholesale sales of energy,[11] the statute is preempted, regardless of whether there is any further "tether" to sales into ISO-NE.

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[10] Generator Group Protest at 2-3 (quoting *Hughes*, 136 S. Ct. at 1299); Generator Group Supplemental Comments at 4-5.

[11] N.H. Rev. Stat. § 362-H:2(I)(a) ("[T]he electric distribution company's purchases of energy from the eligible facility shall be priced at the adjusted energy rate . . . .").

Generators utterly mischaracterize the *Hughes* Court's discussion of "tethering" and organized wholesale markets.[12] That case did not hold that states are free to set the rates for wholesale sales of electricity so long as they avoid conditioning the payment of a subsidy on a generator's participation in an RTO. As the Court acknowledged, "'[t]he FPA leaves no room *either* for direct state regulation of the prices of interstate wholesales *or* for regulation that would indirectly achieve the same result.'" 136 S. Ct. at 1297 (emphasis added) (quoting *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 780 (2016)). The tethering requirement was imposed in *Hughes* because the State deliberately avoided setting a wholesale power rate. *Hughes* addressed a subsidy program that operated via a "contract for differences" that was not itself a sale of energy or capacity subject to FERC's wholesale jurisdiction.[13] But because receipt of the subsidy payments was nevertheless conditioned on, or "tethered to," the generator's participation and clearance in the PJM capacity auction, the Court held that the Maryland program was preempted "because it disregards an interstate wholesale rate required by FERC." *Id.* at 1299.

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[12] *See* Generator Group Protest at 18 ("Being 'tethered' to the bidding or clearing into the relevant regional transmission organization markets was singled out as the key feature that made the Maryland program impermissible in *Hughes*. 362-H contains no link to participation in the RTO markets, and therefore, NERA is unable to use *Hughes* to claim that the legislation is preempted by the FPA."); *id.* at 17 ("Nowhere does 362-H require capacity (or energy) from an eligible facility to be offered into or clear an organized wholesale market, and therefore, the holding in *Hughes* does not lead to the conclusion that 362-H is preempted by the FPA.").

[13] *See Hughes*, 136 S. Ct. at 1299 ("Notably, because the contract for differences does not contemplate the sale of capacity outside the auction, Maryland and [the generator] took the position . . . that the rate in the contract for differences is not subject to FERC's reasonableness review.").

This was the context for the Court's statement that it need not address "the permissibility of various other measures States might employ to encourage development of new or clean generation" that are "untethered to a generator's wholesale market participation." *Id.* at 1299. But in so stating, the Court did not create a new *sine qua non* of "participation in the RTO markets" (as the Generator Group puts it, Protest at 18) as the touchstone of FPA preemption. FERC's exclusive jurisdiction over wholesale rates extends to all rates "for or in connection with" wholesale sales by any public utility.[14] The Court's discussion of a "tether" to RTO participation was necessary in that case, because the Maryland subsidy was notionally "separate" from the jurisdictional sale of capacity.

Nonetheless, the Court held that the subsidy was a payment "in connection with" a wholesale sale, because payment was conditioned on clearing PJM's capacity auction. *Hughes*, 136 S. Ct. at 1297-98 n.9. Notably, *Hughes*' sole reference to a "tether" is immediately preceded by its hypothetical list of state actions that might be permissible—"tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector," *id.* at 1299—all of which are *separate* from the FERC-jurisdictional wholesale sale of electricity, and none of which entail the State setting the rate for a wholesale sale.

If FERC were to accept the Generators' position that preemption of wholesale rate-setting by States turns solely on the existence of a "tether" to RTO participation, that re-interpretation of the FPA, taken to its logical conclusion, would mean that States are

[14] FPA § 205(a), 16 U.S.C. § 824d(a).

free to set rates for wholesale sales of electricity in any State that is not part of an RTO. Such sales are not 'tethered" to the bidding or clearing into the relevant regional transmission organization markets" and "contain[] no link to participation in the RTO markets," Generator Group Protest at 18, but that in no way removes them from FERC's exclusive jurisdiction over rates for wholesale sales of electricity.

B. The Intervenors' Are Wrong in Their Claims that NERA Mischaracterized SB 365

Both the Generator Group and the NH-AG claim that NERA mischaracterized SB 365 by stating that the energy the EDCs purchase from the eligible generators is required to be sold into the ISO-NE market.[15] These claims are both irrelevant and false. They are irrelevant for the reasons explained above—that SB 365 is preempted because it sets the rate for wholesale energy sales from the generators to the EDCs regardless of whether the energy is also sold into the ISO-NE market. They are also false because the energy purchased under the statute must, in fact, be sold into the ISO-NE market. Such sales into the ISO-NE market are required by both the statute itself and the market rules in ISO-NE.

SB 365 provides that "recovery of the nonbypassable charge [to the EDCs' retail customers] shall be allocated among Eversource's customer classes using the allocation percentages approved by the commission in its docket DE 14-238 order 25,920 approving the 2015 Public Service Company of New Hampshire Restructuring and Rate

[15] *E.g.*, Generator Group Protest at 9 (accusing NERA of "misleadingly claim[ing] that there is a tie to the ISO-NE market"); NH-AG Protest at 2.

Stabilization Agreement."[16] Order No. 25,920[17] adopted the Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement ("Rate Stabilization Agreement") referenced in SB 365.[18] The Rate Stabilization Agreement provides the following: "Unless otherwise found by the Commission or other appropriate authority, for so long as PSNH purchases the output from QFs, IPPs, or pursuant to the PPAs, PSNH shall sell or bid such purchases into the pool at the ISO-NE market clearing price, with the resulting costs or credits recovered via Part 2 of the SCRC as a Non-Securitized Stranded Cost."[19] Thus, the cost recovery mechanism set forth in SB 365 adopts, by reference to the Rate Stabilization Agreement, the requirement that the EDCs "shall sell or bid such purchases [from the eligible generators] into the pool at the ISO-NE market clearing price."

Such a sale into the ISO-NE market of all energy purchased under SB 365 is also required by the market rules in ISO-NE. Under those rules, all participating generators over 5 MW must be registered with the ISO-NE as "Generator Assets."[20] No Generator

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[16] N.H. Rev. Stat. § 362-H:2(V).

[17] *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order No. 25,920, 2016 WL 3613349 at *1 (N.H.P.U.C. July 1, 2016).

[18] 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement, N.H.P.U.C. Dkt. No. DE 14-238 (June 10, 2015), https://www.puc.nh.gov/Regulatory/Docketbk/2014/14-238/MOTIONS-OBJECTIONS/14-238%202015-06-10%20PSNH%20DBA%20EVERSOURCE%20SETTLEMENT%20AGREEMENT.PDF.

[19] *Id.* at 26:685-88.

[20] *See ISO New England Operating Procedure No. 14 - Technical Requirements for Generators, Demand Response Resources, Asset Related Demands and Alternative Technology Regulation Resources* at 7. *See also ISO New England Operating Procedures No.1 Central*

Asset may produce net energy or utilize the ISO-NE grid unless dispatched by ISO-NE.[21] A Generator Asset can self-commit to minimum load but there is no "self-scheduling" above minimum output in ISO-NE except for certain intermittent resources subject to "do not exceed" dispatch rules. Whether the Generator Asset seeks to be dispatched solely for wholesale energy market revenues or in support of a bilateral transaction, the Market Participant for such Generator Asset must sell the energy into the ISO-NE market and is compensated by ISO-NE at the LMP for the energy produced.

In ISO-NE, bilateral arrangements are tied to a generating unit's dispatch and physical delivery of energy in that the generating unit receives the bilateral sale price while the buyer receives the ISO-NE LMP.[22] Under a bilateral arrangement, the LMP exposure is thereby transferred from the seller to the buyer. With dispatch also comes the right to use the transmission system; ISO-NE automatically arranges transmission service, in accordance with a least-cost security constrained dispatch solution, in the amounts necessary to serve the control area's loads. SB 365 requires the EDCs to purchase the full net energy output if offered by the eligible facilities. Pursuant to these

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Dispatch Operating Responsibilities and Authority at 4. A Generator Asset "is a generator that has been registered in accordance with the Asset Registration Process." ISO-NE OATT, § I.2.2.

[21] *ISO New England Operating Procedure No. 1 Central Dispatch Operating Responsibilities and Authority* at 4 ("ISO, as the System Operator, is responsible for matters pertaining to the central dispatch of each facility in each of the following categories: . . . Generator Asset . . . .").

[22] SB 365 requires the energy to be physically delivered to the EDC. "The output of the eligible facility *shall be delivered* to the electric distribution company at the eligible facility's interconnection point." N.H. Rev. Stat. § 362-H:3(III) (emphasis added).

market rules, only by selling the energy through the ISO-NE market can the eligible facilities produce and deliver their net energy to the EDCs in accordance with SB 365.

Thus, while NERA prevails on its preemption claim regardless of whether the energy the EDCs are required to purchase at the State-mandated rate is sold through the ISO-NE market, the statute does, in fact, require such a sale. Indeed, SB 365 embeds this requirement into the calculation of the nonbypassable customer charges. It provides that "[t]he electric distribution company shall recover the difference between its energy purchase costs and the market energy clearing price through a nonbypassable delivery services charge." N.H. Rev. Stat. § 362-H:2(V). By fixing the EDCs' cost recovery as equal to the difference between the Adjusted Energy Rate and the ISO-NE price at the time of the eligible facilities' sales to the EDCs, SB 365 necessitates that the EDCs sell the eligible facilities' energy into the ISO-NE market and earn the revenue from that ISO-NE sale. Otherwise, the EDC would not recover from retail ratepayers the total amount paid for the energy.[23]

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[23] *See* Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365, Direct Testimony of Frederick B. White at 3-4, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, N.H.P.U.C. Dkt. DE 18-002 (filed Dec. 4, 2018) ("As 'the market energy clearing price' changes every five minutes, and the output from multiple eligible facilities will each be continuously variable, the only practical way of establishing 'the difference between its energy purchase costs and the market energy clearing price' is to monetize the purchases from the eligible facilities by instantaneously selling that output into the ISO-NE marketplace. Had the legislation contemplated using the energy purchased under SB 365 . . . to serve default service load the legislation would logically [have] required the costs of the purchases to be recovered from default service customers.") (attached hereto at Attachment C).

C. SB 365 Sets a Rate for the Sale of Wholesale Energy

The Generator Group claims that "362-H does not set a price for the sale of wholesale power." Generator Group Protest at 22. That assertion flies in the face of the plain text of the statute, which provides: "[T]he electric distribution company's purchases of energy from the eligible facility **shall be priced at** the adjusted energy rate derived from the default service rates approved by the [New Hampshire] commission in each applicable default service supply solicitation and resulting rates proceeding." N.H. Rev. Stat. § 362-H:2(I)(a) (emphasis added).

Mandating what the rate "shall be" is setting the rate. The Generator Group tries to obscure this self-evident reality by falsely equating the competitive solicitation for a *different* product—firm, load-following default energy service—with the as-available energy sales from eligible facilities to the EDCs for which New Hampshire has set the wholesale rate. *See* NERA Petition at 8-9 (describing differences between the two products). The Generator Group contends that because the New Hampshire legislature chose to set the rates for these latter sales—which *were not* competitively bid into the default energy solicitation—at a fixed percentage (80%) of the competitively-determined price for a *different* product (default energy service), it is somehow not setting a rate for sales of the eligible facilities' energy at all. Generator Group Protest at 9-10.

But setting a price for one product (A) by reference to a fixed percentage of the price for another product (B) does not change the fact that doing so necessarily sets the price for Product A. That is so regardless of whether the price of Product B is set competitively, or based on a formula that incorporates other references or variables.

Likewise, in enacting SB 365, the State of New Hampshire set the rate for the eligible facilities' wholesale sales of energy to the EDCs, and that is why the Generator Group's argument collapses.

The Generator Group's argument begs two questions: (1) Who chose the 80% component of the rate; and (2) Who determined that the rate for one product (as-available energy) should be set based on the rate for a different product (firm, load-following default energy service)? The answer to each question is the State of New Hampshire, and both acts (individually or together) entail setting a wholesale rate.

D. The Generators Cannot Use Their Market-Based Rate Tariffs to Impose on the EDCs the Rates Mandated by the State in SB 365

The Generator Group asserts that each of the generators has on file with FERC (or is in the process of obtaining) tariffs for the sale of energy at market based rates ("MBR Tariffs") and argues that these MBR tariffs serve to satisfy the requirements of the FPA as to the sales to be made under SB 365. Generator Group Protest at 25. These assertions are wrong. Because the rate for the eligible facilities' sales has been set by the State, and because the EDCs are compelled by SB 365 to accept that rate and are not permitted to negotiate a different rate or to refuse a sale by the eligible facilities that complies with the statute's terms,[24] the sales are not the product of arms-length bargaining and cannot be deemed market-based rate sales.[25] Indeed, the generators' own

[24] *See* N.H. Rev. Stat. §§ 362-H:2(I)(a); 362-H:2(III).

[25] *See, e.g., AmerGen Energy Co., L.L.C.*, 90 FERC ¶ 61,080 at 61,282 (2000) ("Because the agreement does not result from arms-length negotiations, as one would typically see in the market place, it is not appropriately characterized as containing 'market-based rates.'") (citing *Ameren Servs. Co.*, 86 FERC ¶ 61,212 (1999)); *Allegheny Energy Supply Co.*, 89 FERC ¶ 61,258

MBR tariffs expressly require that the rates thereunder be set by agreement between the parties. The Bridgewater Power MBR tariff is typical: "All sales shall be made at rates established by agreement between the purchaser and Seller."[26] Here, the rates as set by state statue were, emphatically, not agreed to by the buyer. In its filing with the NHPUC seeking review of the eligible facilities' sales mandated by SB 365, Eversource stated: "In the solicitation, Eversource informed the eligible facilities that it was issuing the solicitation pursuant to the statutory mandate contained in SB 365 and not as the Company's voluntary act."[27] Thus, the generators cannot rely on their MBR Tariffs to avoid preemption under the FPA.

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at 61,758 (1999) ("[B]ecause the filing does not result from arms-length negotiations, it is not appropriately characterized as containing "market-based rates . . . .").

[26] Bridgewater Power Company, L.P., MBR Tariff § 3 (https://etariff.ferc.gov/TariffBrowser.aspx?tid=6109); Springfield Power, LLC, MBR Tariff § 3 (https://etariff.ferc.gov/TariffBrowser.aspx?tid=6114) (same); Wheelabrator Concord Company, L.P., MBR Tariff § 3 (https://etariff.ferc.gov/TariffBrowser.aspx?tid=6123) (same); DG Whitefield LLC, MBR Tariff § 3 (https://etariff.ferc.gov/TariffBrowser.aspx?tid=6113) (same); Pinetree Power-Tamworth, LLC, MBR Tariff § 4 (https://etariff.ferc.gov/TariffBrowser.aspx?tid=4461) ("Rates. All sales shall be made at the rates established between the Seller and the purchaser.").

[27] Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365 at 4, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, N.H.P.U.C. Dkt. DE 18-002 (filed Dec. 4, 2018) (attached hereto as Attachment A); *see also id.* at Attachment A to the Eversource Petition, November 6, 2018 Solicitation Mandated by New Hampshire RSA Chapter 362-H, "The Preservation and Use of Renewable Generation to Provide Fuel Diversity," at 3 ("Eversource notes that this solicitation and Eversource's actions pursuant to RSA Chapter 362-H are mandated by the force of law and are not being undertaken voluntarily. Eversource's actions will be taken solely to comply with the police power of the State of New Hampshire as set forth in RSA Chapter 362-H and only if, and to the extent, reviewed and required by express Order of the New Hampshire Public Utilities Commission.") (attached hereto as Attachment B).

E. Contrary to Intervenors' Claims, SB 365 Does Not Preserve FERC Jurisdiction Over Wholesale Rates

The Generator Group contends that SB 365 is not preempted because "there is no language in 362-H that avoids compliance with any FERC regulatory requirement." Generator Group Protest at 10. Thus, the Group claims, FERC retains its authority over the wholesale sales (and rates) mandated by SB 365. The NH-AG further contends that nothing in SB 365 precludes the generators from making a rate filing at FERC pursuant to Section 205 of the FPA. NH-AG Protest at 3. These arguments misconstrue the import of SB 365 and miss the essential point of NERA's Petition.

SB 365 forces the EDCs to pay, and pass through to ratepayers, a wholesale rate for energy mandated by the State. The statute does not permit a different rate to be charged, whether the different rate is determined by FERC or otherwise. This invades FERC's exclusive jurisdiction and, therefore, is preempted by the FPA. A FERC Order declaring SB 365 to be so preempted would not prevent a generator from filing with FERC a rate under Section 205, and seeking to meet its burden of proof that the rate so filed is just and reasonable and not unduly discriminatory or preferential. Such a FERC declaratory order would, however, serve to prevent the generator from charging the excessive rates set forth in SB 365 without meeting the requirements of the FPA because it would clarify that the rate set forth in SB 365 cannot be charged as it has not been determined to be lawful under the requirements of Section 205. That is the purpose of NERA's Petition. A finding that SB 365 set wholesale energy rates in violation of the FPA is thus necessary to preserve FERC's jurisdiction.

F. States' General Authority Over Procurement Does Not Permit States to Set Wholesale Rates

The Generator Group argues that in mandating that EDCs purchase energy from biomass- and municipal-waste-fired generators at a state-mandated price, SB 365 is nothing more than a permissible exercise of the State's traditional power over utility procurement and generation resources. Generator Group Protest at 3, 13-14. "But States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates . . . ." *Hughes*, 136 S. Ct. at 1298. No one questions that there are legitimate policy tools that States may use to promote certain types of generation, but under the black-letter test of the FPA, the setting of wholesale rates is *not* one of those tools. The Commission has previously rejected the argument that a state may advance its "traditional authority" over "management of utility procurement" by "setting an offer for purchase," finding that (outside of PURPA), "Congress has not authorized other opportunities for States to set rates for wholesale sales." *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 37, 64, 70 (noting that environmental considerations under the California law "do not excuse the Commission of its statutory obligations"); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 at 61,244 (1997) (noting that by rejecting orders by the Iowa Utilities Board that set rates for wholesale sales by non-Qualifying Facilities ("non-QFs"), and set rates in excess of avoided costs for QF sales, the Commission was "not acting in a manner that otherwise undermines the abilities of states to favor certain types of generating resources"). Granting NERA's Petition does nothing to undermine the legitimate policy choices that New Hampshire

may make to promote biomass generation, but is essential to maintain this Commission's exclusive jurisdiction over wholesale rates.

G. SB 365 Is Preempted Regardless of Whether It Sets the Sale Rate or the Purchase Rate for Wholesale Energy

In an apparent effort to avoid preemption, the Generator Group states that SB 365 does not set the price for sales but only for purchases. Generator Group Protest at 9-10, 22. As the Commission has recognized, this distinction is irrelevant for purposes of determining the line between FERC and State authority. In *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 5, 17, 64 (2010), the Commission rejected the identical argument, and found that a state law mandating utilities to offer to purchase power at a CPUC-determined rate "constitute[s] impermissible wholesale rate-setting by the CPUC." This is the only logical result; setting a rate at which a buyer is obligated to purchase wholesale power by definition sets the rate at which the seller is selling that power. The requirements of the FPA cannot be avoided by sophistry.

H. The Zero Emission Credit (ZEC) Cases Are Irrelevant Because ZECs Are Not Wholesale Energy

The Generator Group's reliance on the ZEC cases is unavailing. Generator Group Protest at 20-22. The ZEC cases—which involved a different scenario where the state program "avoids setting wholesale prices and instead regulates the environmental attributes of energy generation," *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018)—have no bearing on this case, because New Hampshire has not confined itself to providing subsidies that exist "separately from wholesale sales," *id.*, but rather has chosen to set the rate for a wholesale sale directly. Indeed, in its discussion

of prior analogous preemption precedent, the Court made clear that its analysis of whether the state measure was "tethered" to wholesale market participation was relevant precisely because the law at issue "does not formally regulate wholesale prices." *See id.* at 53, 55. New Hampshire has engaged in far more blatant intrusion on FERC's exclusive jurisdiction by directly setting the rate for a wholesale sale of electricity. The ZEC cases are thus irrelevant, and certainly cannot save SB 365 from preemption.

I. The *Allco* Case Undermines Rather than Supports the Generator Group's Arguments

The Generator Group claims that NERA distorted the holding in the *Allco* case and that, once those distortions are corrected, the case actually supports the Generator Group's position. Generator Group Protest at 19-20. These claims are false.

First, the RFP in *Allco*, as the Second Circuit described at length, differed in key respects from SB 365. *Allco Finance Ltd. v. Klee*, 861 F.3d 82, 99-100 (2d Cir. 2017). There, the court found that "the 2015 RFP requires that any bilateral contract that results from that process be subjected to review by FERC for justness and reasonableness." The language from the RFP, quoted in the Second Circuit's opinion, stated explicitly: "Any FERC-jurisdictional Rate Schedule or Tariff and Service Agreement agreed upon by an eligible bidder and the applicable [LSEs] will be filed with FERC under Section 205 of the Federal Power Act. The FERC must accept the filing before the Rate Schedule or Tariff and Service Agreement can become effective." *Id.* Those findings led the court to hold that "[b]ecause FERC has the ability to review any bilateral contracts that arise out

of Connecticut's RFPs, . . . Connecticut's 2015 RFP . . . is not preempted by the FPA." *Id.* at 100.

Second, the Generator Group incorrectly contends that the Second Circuit's explicit finding that Connecticut *did not* compel the utilities to enter contracts for sales of electricity at a state-mandated price, but rather gave the utilities discretion whether to enter such contracts, 861 F.3d at 98, 100, had nothing to do with its holding. Generator Group Protest at 19. The Second Circuit disagrees. In describing its holding, the *Allco* court stated as follows: "[W]e hold that Connecticut's 2015 RFP—insofar as it allows the DEEP Commissioner to direct (but not compel) utilities to enter into agreements (at their discretion) with generators, including non-QFs—is not preempted by the FPA." *Id.* at 100. Thus, the absence of state compulsion to enter into a contract at non-negotiated rates was essential to *Allco's* own statement of its holding.[28]

Third, in *Allco*, Connecticut *did not* set a rate for wholesale sales, but rather ordered the purchasing utilities to conduct a solicitation for renewable energy. Given the court's explicit factual findings that the resulting contracts were not compelled by the state and that the utilities retained discretion whether to enter into any contracts with the winning bidders and to negotiate the terms of any resulting contracts, *id.* at 98, the court

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[28] Also contrary to the Generator's claim that the absence of State compulsion was irrelevant, the Second Circuit again emphasized the importance of compulsion to preemption analysis in *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d at 52. There, recounting its decision a year earlier in *Allco*, the Second Circuit explained: "The plaintiff argued that the statute 'compelled a wholesale transaction' between the generators and utilities and thus regulated wholesale sales. We disagreed, because the generators and utilities (rather than the state) made the ultimate decision to sign the contracts." *Id.* (internal citation and brackets omitted).

in turn found that "the contracts at issue in the case before us are the kind of traditional bilateral contracts between utilities and generators that are subject to FERC review for justness and reasonableness under *Morgan Stanley*." *Id.* at 99. Unlike in *Allco*, where the state did not itself set a rate and instead relied on market forces and arms-length bargaining between the buyer and sellers to arrive at a rate that was ultimately subject to FERC review, here New Hampshire unilaterally set the rate for a wholesale sale of energy. Thus the holding in *Allco* undermines, rather than supports, the Generator Group's claims.

III. PURPA

The Generator Group's position on PURPA is contradictory and confused. It first states that PURPA is inapplicable to the State's setting of the wholesale rates for sales from eligible facilities to EDCs. Generator Group Protest at 25-26 ("[N]one of this should matter because 362-H does not require eligible facilities to possess QF status. . . . Where, as here, a state law mandates power purchases . . . but does not require that [the selling generators] be QFs, and where, as here, generators are relying upon market-based rate authority for the right to make sales, the Commission should determine that PURPA is inapplicable . . . ."). The Generator Group Supplemental Comments (at 4) reinforce this point, agreeing that SB 365 "was not passed in order to set an avoided cost rate under PURPA." Thus the Generator Group's arguments concede that, because the State has not invoked PURPA and has made no attempt to set the rates it mandates at a rate based on avoided cost, PURPA cannot save the state's action, and SB 365 must rise or fall with preemption under the FPA.

However, after it abandoned any reliance on PURPA, the Generator Group offers two arguments why PURPA does not preempt SB 365 or could save it. Both of these arguments are meritless. The first is a rehash of the Generator Group's fiction, laid bare above, that "362-H does not set any rate, let alone one that exceeds avoided costs." Generator Group Protest at 23-24. As explained above, the fact that the rate set by New Hampshire for the eligible facilities' as-available sales of energy is based on a reference to a different rate, for a fundamentally different product does not change the fact that New Hampshire has set a rate for the eligible facilities' wholesale sales. The Generator Group acknowledges that in determining the "Adjusted Energy Rate" under section 362-H:1(I), the State made no attempt to set the rate based on the EDCs' avoided cost. The Generator Group's contention that granting NERA's Petition would effectively preclude QFs with market-based authority from participating in any state-mandated competitive auction that yields a rate above avoided cost is meritless, and gets the issue backward. Generator Group Protest at 24. The point is not that QFs would somehow be barred under PURPA from participating in State-administered competitive procurements that comply with the FPA. Rather, the point advanced in NERA's Petition is that, where the State goes *further* and *sets a rate* for a wholesale sale—an action that ordinarily is preempted by the FPA—the State's rate-setting is only permissible if done in compliance with PURPA.

The Generator Group's second argument is that SB 365 is permissible under this Commission's decision in *California Public Utilities Commission*, 133 FERC ¶ 61,059 at PP 22-26 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011), because the state has latitude

to determine a "multi-tiered avoided cost rate structure." Generator Group Protest at 24. The Generator Group does not explain how SB 365 could be saved by such an avoided cost structure when the Generator Group already conceded that the SB 365 is not an implementation of PURPA and does not require eligible generators to be QFs. In any case, the argument fails. The State has made no attempt to set a rate based on a determination of the EDCs' avoided cost at all (multi-tiered or otherwise). NERA Petition 18-19. When considering whether a State has acted in accordance with PURPA, this Commission's focus is not on the State's determination of the actual avoided cost rate (which is left to states to determine in the first instance), but rather with whether the state's process complies with the rules—thus, FERC acts to "ensur[e] the process used to calculate the [avoided cost] accords with the statute and our regulations." *S. Cal. Edison Co.*, 70 FERC ¶ 61,215 at 61,677 (1995). Here, in setting the rate mandated by section 362-H:2(I)(a), the legislature did not employ *any* process to determine the EDCs' avoided cost, so its action could not be upheld as a valid exercise of States' authority under PURPA.[29] Thus, the Commission is not confronted with a situation where the State utilized a "multi-tiered" avoided cost under PURPA as the source of its rates.[30]

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[29] The price setting undertaken here is akin to that rejected by a district court in *Winding Creek Solar LLC v. Peevey,* 293 F. Supp. 3d 980, 990 (N.D. Cal. 2017) (rejecting a complex auction procedure burdened with arbitrary rules, such as a randomly selected two-month time period (as opposed to any other) and price adjustments applied in $4 increments).

[30] While SB 365 does not rely on a multi-tier avoided cost, NERA notes that, even if a State were to so rely, the legal validity of such an avoided cost would be questionable. FERC's guidance on multi-tiered avoided costs represented a 180 degree shift in law and policy from prior court and FERC precedent, and it has not been tested by a court.

IV. NERA'S PETITION IS RIPE FOR THE COMMISSION'S DECISION

The NH-AG contends that NERA's petition is not yet ripe for decision.[31] This is incorrect. SB 365 set in motion a process by which final arrangements for the power sales from eligible facilities to EDCs—for which the New Hampshire legislature has unlawfully set the binding wholesale rate—are now pending approval before the NHPUC. The February 1, 2019 date when those sales are to commence is fast approaching.[32] As this Commission has previously recognized in acting on petitions that raised similar preemption issues, there is no need to wait for a decision until such contracts are actually executed. Rather, it is appropriate and beneficial for the Commission "to intercede . . . prior to the date of contract execution" in order to avoid "upset[ting] the expectations of the parties," *Midwest Power*, 78 FERC at 61,247-48, and to "avoid parties spending further time and resources in pursuing contracts that would be unlawful." *S. Cal. Edison*, 70 FERC at 61,677-78; *accord Midwest Power*, 78 FERC at 61,248 (concluding that the Commission should not delay resolution of a preemption challenge, notwithstanding ongoing review of the challenged orders in state judicial fora). Here, the New Hampshire Legislature has already set the rate for the eligible facilities' wholesale sales, and by statute mandated that both the EDCs and the NHPUC are powerless to undo that unlawful act.

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[31] NH-AG Protest at 1-3, 7-10.

[32] *See* NERA Petition at 20-21; Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365 at 4, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, N.H.P.U.C. Dkt. DE 18-002 (filed Dec. 4, 2018) (eligible facilities' sales mandated by SB 365 would commence on February 1, 2019) (attached hereto as Attachment A); *infra* at 29.

A. The FPA Preemption Claim Is Ripe

The NH-AG argues that NERA's Petition is premature. First, the NH-AG contends that although the statute requires the EDCs to offer to purchase power from the eligible facilities, it does not require the eligible facilities to sell to the EDCs, and it is uncertain whether any sales at the SB 365 rate will ultimately happen. NH-AG Protest at 2-3. But five of the six eligible facilities have responded to PSNH's compelled solicitation indicating that they intend to pursue sales under SB 365.[33] SB 365 mandates that the EDCs must "select all proposals from eligible facilities that conform to the requirements" of the statute, including the requirement that the sales "shall be priced at the adjusted energy rate," and must submit all such conforming proposals to the New Hampshire Public Utilities Commission ("NHPUC") for approval.[34]

Second, the NH-AG argues that the Petition is premature because the NHPUC has not yet reviewed the contracts. However, SB 365 forbids the NHPUC from doing anything other than reviewing the proposals for conformity with the statute, N.H. Rev. Stat. § 362-H:2(IV). This means that the statute does not permit the NHPUC to change the rate mandated by section 362-H:2(I)(a) or to reject any sales at that rate that conform with the statute. Thus, review by the NHPUC cannot obviate the legal issues raised by NERA's petition nor do anything to undo the preempted action of the legislature in setting the wholesale rate. Third, the NH-AG claims that there is no facial conflict

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[33] Petition for Commission Review of Responses Received by Eversource Pursuant to RSA Chapter 362-H as Enacted by Senate Bill 365 at 4, *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, N.H.P.U.C. Dkt. DE 18-002 (filed Dec. 4, 2018) (attached hereto as Attachment A).

[34] N.H. Rev. Stat. §§ 362-H:2(I)(a), 362-H:2(III).

between SB 365 and the FPA because the statute neither compels EDCs to sell the eligible facilities' energy into ISO-NE or "make any proclamations about FERC jurisdiction." NH-AG Protest at 2-3. For the reasons stated above, none of these contentions overcomes the statute's clear preemption, and the NH-AG Protest does not point to any further implementation by the State required in order for the law's preempted impacts to materialize. With regard to sales to ISO-NE, NERA has explained that, regardless of whether the statute requires such sales, it is preempted because the state has directly set the rate for a wholesale sale, and there is accordingly no reason why the Commission cannot address that legal issue now.

Similarly, with regard to the issue of FERC review and approval of the contracts, as explained above, neither the statute nor the RFP makes any provision for filing of any PPAs with FERC under FPA Section 205 prior to the commencement of the SB 365 sales, which is to commence on February 1, 2019. Further, the Generator Group has taken the position that the sales are permissible under the Generators' current or pending market-based rate authorizations, a position that, if accepted, would also result in the PPAs not being filed under Section 205. Thus, without a ruling on NERA's Petition, the SB 365 sales will go into effect without FERC ever having reviewed them. As noted in NERA's Petition, FERC has repeatedly held, in the context of petitions raising virtually identical preemption issues, that the appropriate time to challenge a contract as violative

of PURPA or preempted by the FPA is before the contract has been executed, to avoid subsequently disturbing the expectations of the parties.[35]

B. The PURPA Claim is Ripe

The NH-AG's ripeness arguments with regard to PURPA also fail. It makes two principal arguments. First, the NH-AG claims that there "is no evidence" (or at least "insufficient information in the record") that the rate set by SB 365 is not in accordance with the EDCs' avoided cost. NH-AG Protest at 8, 11. That argument fails. Most importantly, as noted above, this Commission's decisions require that states employ a *process* aimed at determining avoided cost in accordance with PURPA's and this Commission's requirements, but in this case, the State did not use *any* process to determine an avoided cost rate for the eligible facilities' sales, or even identify that as an objective. *See supra* at 26. Moreover, as explained in the Petition, the rates set forth in SB 365 greatly exceed avoided cost, which is set, in accordance with prevailing NHPUC rulings, at the ISO-NE market price for energy.[36] The excessive rates in SB 365 will require retail customers to pay, through a nonbypassable charge, amounts far in excess of "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would . . . purchase from another source," all in plain violation of PURPA.[37] Thus, when the State legislature set the rate for the eligible facilities' sales in SB 365 it did not attempt to,

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[35] NERA Petition at 20-21 (citing *S. Cal. Edison Co.*, 70 FERC at 61,677-78; *Midwest Power*, 78 FERC at 61,247-48).

[36] NERA Petition at 8-9, 18-19.

[37] *See* 18 C.F.R. § 292.101(b)(6).

nor did it in fact, set those rates based on avoided cost. On the contrary, as the Generator Group acknowledged, there is nothing in the legislation to suggest that New Hampshire intended or understood SB 365 to be an implementation of PURPA. The Commission can, therefore, determine that SB 365 is not a valid implementation of PURPA (or PURPA's avoided cost requirement) on the record before it.

The NH-AG's second argument is that the NHPUC could later revisit previous avoided cost determinations, and that therefore NERA's Petition is premature and should await resolution unless and until the NHPUC makes a new determination of avoided cost. *See* NH-AG Protest at 9-10 ("Thus, the avoided cost for these EDCs and these eligible facilities in New Hampshire is not set in stone and is a matter for the NHPUC to determine."). That argument also fails, and is foreclosed by the plain text of SB 365. Here, the State is simply mistaken in its assertion that "the NHPUC may go about its business of setting the avoided cost rates and ensuring that the adjusted energy rate does not exceed such rates." *Id.* at 10. In fact, SB 365 only authorizes the NHPUC to review the eligible facilities' PPAs "for conformity with" the statute, including the legislatively-mandated rate. N.H. Rev. Stat. § 362-H:2(IV). The law prohibits the NHPUC from "ensuring that the adjusted energy rate does not exceed" avoided cost. The NHPUC does not have authority to take any action that might bring SB 365 into compliance with PURPA.

Moreover, it is irrelevant to the preemption analysis of SB 365 whether the NHPUC might later open a proceeding to re-evaluate the EDCs' avoided cost. SB 365 sets a rate *right now* for the eligible facilities' sales to the EDCs, which will go into effect

in a few weeks' time on February 1, 2019. In order to be lawful under the State's limited rate-setting authority under PURPA, that price must be based on the EDCs' avoided cost. The time is ripe for the Commission to decide whether SB 365 is a valid exercise of the State's PURPA authority. For the reasons explained in NERA's Petition, the answer clearly is no, because the State made no attempt to comply with the avoided cost requirement.

V. CONCLUSION

For the foregoing reasons, NERA respectfully requests that the Commission reject the intervenors' Protests and grant the relief requested in NERA's November 2, 2018 Petition.

Respectfully submitted,

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