THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 18-002

2019 ENERGY SERVICE SOLICITATION

IMPLEMENTATION OF SENATE BILL 365

PARTIAL OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY TO THE MOTION OF THE WOOD IPPs FOR CLARIFICATION AND, IN THE ALTERNATIVE, REHEARING OF ORDER NO. 26,208

On February 8, 2019, Springfield Power LLC ("Springfield"), DG Whitefield LLC ("Whitefield"), Bridgewater Power Company, L.P. ("Bridgewater"), Pinetree Power Tamworth LLC ("Pinetree Tamworth") and Pinetree Power LLC ("Pinetree") (collectively, the "Wood IPPs")[1] moved the Commission for clarification and, in the alternative, rehearing of Order No. 26,208 (the "Rehearing Motion"). The Rehearing Motion is more than just a motion for rehearing as described in RSA 541:3. It also seeks myriad clarifications; it submits new materials that were not in the record at the time of the Order; and it seeks relief that the Wood IPPs had heretofore not requested from the Commission. Notwithstanding this panoply of procedural

[1] A sixth wood-fired "eligible facility" under SB 365, Indeck Energy – Alexandria, chose not to respond to Eversource's November 2018 solicitation. However, the Alexandria plant has informed Eversource that it has tentative plans to restart its mothballed generator in time for the next solicitation (Aug 2019) and that it would intend to participate in the solicitation at that time. In addition, there is a seventh eligible facility, Wheelabrator Concord Company, L.P., fueled by municipal solid waste that is not located in Eversource's service territory.

problems, Eversource will respond in total as succinctly as it can.[2] Pursuant to Rule Puc §203.07(e) and (f), Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") objects in part and concurs in part with the relief sought by the Wood IPPs as set forth below.

Introduction

1. As noted in Eversource's Objection filed in this proceeding on December 27, 2018, Eversource has neither ignored the requirements of SB 365[3] (which created RSA chapter 362-H) nor refused to comply with the requirements of SB 365. The path Eversource has embarked upon is one that reflects the changing circumstances caused by the pending legal challenge to that law[4] and that best implements the intent of the law while protecting its New Hampshire customers if SB 365 is found to violate the Supremacy Clause of the U.S. Constitution.

2. The Commission itself has taken a path similar to that of Eversource. In Order No. 26,208 (the "Order"), the Commission recognized that it was "faced with a newly enacted statute while a constitutional challenge to that statute is pending before FERC [Federal Energy Regulatory Commission]." Order at 16. While acknowledging that "RSA 362-H:2,V expressly allows EDCs to recover any above-market costs of purchases from eligible facilities as part of a nonbypassable charge to all electric delivery customers," the Commission rejected Eversource's request for assurance of such recovery, stating, "While a federal preemption challenge to the legality of RSA 362-H remains unresolved, however, we are not willing to separately order recovery of stranded costs from Eversource customers for the reasons explained below." *Id.* at 23-24. The Commission has stated that its reluctance to rule on the recovery by Eversource of the over-market costs that SB 365 creates would continue "[u]ntil the constitutionality of the statue is determined… ." *Id.* at 24. Notably, in a subsequent order (Order No. 26,215 issued on January 28, 2019, in Docket No. DE 18-182, Eversource's Stranded Cost Recovery Charge

[2] To aid in such succinctness, Eversource incorporates in this response the pleadings and testimony in this proceeding that it has previously provided.

[3] 2018 N.H. Laws, Chapter 379.

[4] FERC Docket No. EL19-10, Request for Declaratory Ruling of the New England Ratepayers Association ("NERA"), wherein NERA has requested a declaratory order from the Federal Energy Regulatory Commission finding that SB 365 is preempted by the Federal Power Act.

docket), despite the statutory mandate contained in RSA 362-H:2,V providing for recovery of any above-market costs, the Commission expressly excluded recovery of the forecast over-market costs via Eversource's nonbypassable stranded cost recovery charge that took effect on February 1, 2019.[5]

3. Both Eversource and the Commission recognize the tension created in this situation. In its communications with the Wood IPPs, Eversource has referred to this tension as creating a "roadblock" to implementation of SB 365.[6] The Legislature enacted a law setting a mandated rate for the purchase of energy in the wholesale market, but the legality of that rate is being challenged before the FERC. That rate is neither an "avoided-cost" rate nor a "market-based" rate. It is an arbitrary figure that would require Eversource's retail customers to pay an estimated $23.348 million in over-market costs for the first twelve months that SB 365 is operative.[7] Seemingly, both Eversource and the Commission are searching for a means of implementing SB 365 in the near-term while also protecting customers from having to pay costs based upon a rate that may be found to run afoul of federal law.[8] Eversource has the added fiduciary obligation to its shareholders of not having such over-market costs "trapped" if it is ordered to put the law into effect without the Commission's assurance of full recovery of those costs.

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[5] "We find that excluding the SB 365 costs from the calculation of the SCRC at this time results in just and reasonable rates. … In the event that Eversource and the eligible facilities enter into agreements under SB 365, we will use an expedited process to review and determine whether and how to update the SCRC rate." Order No. 26,215 at 7-8.

[6] *See* Rehearing Motion at 7-8; 12; 16; 22-23. *See also* Eversource letters at Rehearing Motion Exhibit 1, page EF RHG-1; Exhibit 9, page EF RHG-189; and Exhibit 18, page EF RHG-471.

[7] SB 365 extends for a total of three years. The Governor noted, "Senate Bill 365 creates another immense subsidy for New Hampshire's six independent biomass plants. It would cost New Hampshire ratepayers approximately $25 million a year over the next 3 years, on top of the subsidy for these plants that already became law last year through Senate Bill 129." Governor's Veto Message Regarding Senate Bill 365 and Senate Bill 446, June 19, 2018.

[8] In Eversource's letter of February 6, 2019, to the Wood IPP (attached to the Motion at Exhibit 18, page EF RHG-471), the Company noted that because of the "roadblock" regarding recoverability of above-market costs:

> The path forward requires either removal of the roadblock or going around the roadblock. Removal of the roadblock would require a decision on the Constitutional issue, followed by an order from the NHPUC assuring Eversource of its entitlement to recovery of all over-market costs. Going around the roadblock would be enabled by institution of a so-called "customer protection" mechanism (see Order No. 26,208) that secures re-payment of all over-market costs created by implementation of SB 365 "[u]ntil the constitutionality of the statu[t]e is determined" (Order No. 26,208 at 24) and the NHPUC authorizes Eversource to recover all such over-market costs "through a nonbypassable delivery services charge applicable to all customers in the utility's service territory." (RSA 362-H:2, V).

Motion for Clarification

4. In the Rehearing Motion, the Wood IPPs state that they seek clarification of ten specific items (Rehearing Motion at pages 31-33, items A through J) and rehearing of seven specific items (Rehearing Motion at pages 33-34, items K through Q).

5. Of the ten requests for clarification, many do not reference matters in the Order at all. On January 31, 2019, the Wood IPPs revised their purchase proposals under SB 365 from those originally submitted to the Commission by Eversource in its Petition dated December 4, 2018. The Wood IPPs request that the Commission review these new proposals – proposals that Eversource has not accepted – and issue clarifications based thereon.

6. In the Rehearing Motion, the Wood IPPs state:

> Eversource and Wood Plants have successfully negotiated the January 31, 2019 Proposals (with the exception that Eversource refuses to select and submit them as agreements unless its statutorily impermissible escrow provision is imposed therein)… .

Rehearing Motion at 29.[9]

7. What the Wood IPPs are saying is that there are no agreements. "A valid, enforceable contract requires offer, acceptance, and a meeting of the minds on all essential terms. *Durgin v. Pillsbury Lake Water Dist*., 153 N.H. 818, 821 (2006)." *Glick v. Chocorua Forestlands Ltd. P'ship*, 157 N.H. 240, 252 (2008), as modified on denial of reh'g (June 25, 2008). Due to the question regarding the recoverability through rates of tens of millions of dollars of above-market costs, the establishment of a customer protection security provision that completely protects those dollars for as long as their recoverability remains in question is an essential term of this transaction. As the Commission noted in the Order, "The two forms of proposed agreement do not match, and therefore we do not have a final form of agreement, whether signed

[9] Strangely, the Wood IPPs argue one page earlier that "the process for achieving the statutorily mandated power purchase agreements is straight forward, and leaves Eversource with no discretion." Rehearing Motion at 28. Thus, the Wood IPPs are arguing that these are statutorily mandated contracts in which Eversource has no discretion, and, at the same time, that Eversource and the Wood IPPs have "successfully negotiated" the relevant proposals. Accordingly, it is unclear whether the Wood IPPs believe Eversource has any authority or ability to actually negotiate contracts, or whether it has only ministerial duties (which would result in a state-mandated rate order or similar item, rather than a contract or an agreement). In the Order, however, the Commission "reject[ed] Eversource's proposal that we issue 'rate orders' requiring it to purchase power from the eligible facilities," (Order at 18) and noted "the extent of the Commission's role is to 'review' agreements 'for conformity with this chapter.'" (*Id.*).

or unsigned, submitted for our review." Order at 18. There is still no final form of agreement for the Commission to review. Without such agreement, Eversource has not "selected" any of the proposals. Without assurance of recoverability of all above-market costs from customers through a nonbypassable charge Eversource cannot be required to implement the Wood IPPs' proposals.

8. The Wood IPPs state that because RSA 362-H:2,V already provides for recovery of the above-market costs created by SB 365, "Eversource does not need a separate order on recovery from the Commission," and "Eversource cannot refuse to select otherwise conforming proposals simply because the Commission might not separately order rate recovery." Rehearing Motion, requested clarification items F and H. Eversource has previously referred[10] to another statutory mandate, installation of scrubber technology at Merrimack Station required by RSA 125-O:11, *et seq.*,[11] to indicate why, notwithstanding the statute, an appropriate order from this Commission assuring recoverability of those above-market costs is necessary. In its Objection of December 27, 2018, Eversource quoted from two Commission decisions in the scrubber docket where, despite the statutory mandate in the scrubber law, the Commission held:

> No utility may proceed blindly with the management of its assets or act irrationally with ratepayer funds; PSNH had a duty to its ratepayers to consider the appropriate response, possibly even including a decision to no longer own and operate Merrimack Station, when facing changing circumstances."

Public Service Company of New Hampshire, Order No. 25,565 (August 27, 2013) at 7; *see also Public Service Company of New Hampshire*, Order No. 25,714 (September 8, 2014) at 6.

9. In the instant case, the filing at FERC of the "Petition for Declaratory Order" by NERA on November 2, 2018 (prior to the issuance of solicitations to the eligible facilities by Eversource pursuant to RSA 362-H:2,I) put Eversource on notice that the state law's pricing provision might be unconstitutional under the Supremacy Clause of the U.S. Constitution. Given the scrubber precedent, rote compliance with SB 365 would put both the customers and the shareholders of Eversource at risk. "PSNH [Eversource] had a duty to its ratepayers to consider the appropriate response. . .when facing changing circumstances." *Id.* The Constitutional challenge to the legality of SB 365 is such a "changing circumstance[ ]." If Eversource ignored

[10] *See* Eversource's Objection dated December 27, 2018 at 11-12.

[11] *See, e.g.,* RSA 125-O:13, I ("***The owner [Eversource] shall install*** and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than July 1, 2013.") (Emphasis added.)

the challenge to the law, and that law was ultimately found to be constitutionally infirm, Eversource may again face a prudency investigation for not protecting customers. Also, if the law is set aside as unconstitutional, it is unlikely that the Wood IPPs would willingly refund the above-market amounts of payments they had received while the law was under challenge, even assuming they would be in a financial position to do so.

10. In summary: Eversource has a duty to its ratepayers to consider the appropriate response to implementing the statute. The statute has been challenged as being unconstitutional under the Supremacy Clause of the United States Constitution and such challenge was initiated before Eversource or the Wood IPPs took any actions in furtherance of the statute. The Commission has considered it appropriate in the Order to delay potential enforcement of RSA 362-H:2,V until the Constitutional challenge is resolved, stating: "Until the constitutionality of the statue is determined, and the authority for recovery of over-market charges from customers is upheld, the Commission cannot order rate recovery of over-market costs associated with compliance with the statute." Order at 24.[12] The Wood IPPs have refused to agree to establishment of a customer protection security mechanism that unquestionably ensures the availability of funds covering the over-market amounts until such time as this Commission issues a final, unappealable order granting Eversource the ability to recover those over-market costs "through a nonbypassable delivery services charge applicable to all customers in the utility's service territory." Hence, the "roadblock."

11. The Wood IPPs ask that this Commission clarify its decision by ordering Eversource to comply with the law. Any such order must also include assurance that the mandated recovery provision of the law at RSA 362-H:2,V will also be complied with allowing Eversource to include the law's over-market costs in a nonbypassable charge.

12. By Item J in the list of items for which clarification is sought and in the Rehearing Motion at page 2 the Wood IPPs request that "if the Commission determines that Eversource is failing or omitting to do anything required of it by law" the Commission should send this matter

[12] Thus, the issue regarding assurance of recovery of over-market costs by Eversource is not the Commission's willingness to "*separately* order recovery of stranded costs from Eversource customers" as set forth in the Rehearing Motion at pp. 6, 18, 22, 24, 30, and 32, but "*whether*" such recovery will ever be authorized by the Commission. *See, e.g.,* Order No. 26,215 at 7-8 ("In the event that Eversource and the eligible facilities enter into agreements under SB 365, we will use an expedited process ***to*** review and ***determine whether*** and how to update the SCRC rate." (Emphasis added.)

to the Attorney General for judicial action under RSA 374:41.[13] This request for clarification clarifies nothing. Further, there is no need for any referral under RSA 374:41. Since the start of this proceeding by Eversource's initial Petition of December 4, 2018, the Company has stated that it "would make the purchases specified by SB 365 if and to the extent that this Commission orders it to do so." Petition at 4.[14] If the Commission deems it necessary and proper to implement all of SB 365 now, for Eversource to make the purchases specified by SB 365, and for Eversource to recover the difference between its energy purchase costs and the market energy clearing price through a nonbypassable delivery services charge applicable to all customers in the utility's service territory, the Commission itself has the power to put that into effect. The Commission need not ask the Attorney General to go to court. If the Wood IPPs deem a judicial intervention to be necessary, available, and proper, they can seek such a remedy themselves.

Motion for Rehearing

13. The Wood IPPs seek rehearing pursuant to RSA 541:3 for items K through Q in their Rehearing Motion (at pages 33-34). The fundamental basis asserted by the Wood IPPs for rehearing in their Rehearing Motion is

> Eversource must not be allowed thwart the language and purpose of RSA 362-H - which requires it to select and submit conforming power purchase agreements to the commission for its review - by imposing terms and conditions first upon its November 6, 2018 Solicitation and now after the Commission's issuance of its Order, which are contrary to the language, purpose and policy of RSA 362-H.

Rehearing Motion at 25.

14. As noted at the beginning of this Pleading, Eversource has never sought to "thwart" the law. Eversource has shown a willingness to move forward with the law in a way that navigates around the pending Constitutional challenge, this Commission's precedent

[13] **RSA 374:41 Commission May Institute.** – Whenever the commission shall be of opinion that a public utility is failing or omitting, or about to fail or omit, to do anything required of it by law or by order of the commission, or is doing anything, or about to do anything, or permitting anything, or about to permit anything, to be done contrary to, or in violation of, law or any order of the commission, it shall have authority to lay the facts before the attorney general, and to direct him immediately to begin an action in the name of the state praying for appropriate relief by mandamus, injunction or otherwise.

[14] *See also* Petition at 8 ("Eversource requests a Commission order determining the nature and extent of the Company's obligations under SB 365."); Eversource's December 27, 2018 Objection ("Eversource noted its willingness to comply with a Commission order that directs the purchases under SB 365 and which sets forth the governing commercial terms of the transactions.")

concerning the duties of utilities, and the Commission's determination that RSA 362-H:2,V cannot be enforced at this time. Had Eversource intended to "thwart" the law, it would have stopped at these inconsistent legal requirements and allow the process to play itself out; instead, the Company offered a path "around the roadblock" by offering to implement SB 365 in a timely manner in a way that effectively and completely deals with the issue of the law's above-market costs. That path involves creation of a customer protection security mechanism that unquestionably ensures the availability of funds covering the over-market amounts until such time as this Commission issues a final, unappealable order granting Eversource the ability to recover those over-market costs "through a nonbypassable delivery services charge applicable to all customers in the utility's service territory." Such a mechanism – one that the Commission itself encouraged the parties to voluntarily include in any agreements[15] - would properly place the "risk" with the "reward." The Wood IPPs stand to gain upwards of $75 million in above-market payments under SB 365; they should bear the risk of the law being invalidated - not customers.

15. The Wood IPPs have consistently rejected the creation of an appropriate customer protection security mechanism. In their initial "Motion for Determination that Agreements Conform with RSA 362-H and to Direct Eversource to Comply with RSA 362-H" dated December 17, 2018, the Wood IPPs complained of Eversource's proposal to pay the Commission-approved avoided cost rate for energy "until such time as all challenges to NH RSA Chapter 362-H are finally resolved and not subject to further appeal." December 17 Motion at 9.

16. Subsequently, the Wood IPPs offered to provide a modicum of security regarding the above-market costs. In their letter to Eversource of January 17, 2018 (Rehearing Motion Exhibit 2 at EF RHG-5), the Wood IPPs stated that they:

> are willing to agree to the voluntary inclusion of a 60-day customer protection provision beginning on February 1, 2019 in order to allow additional time for a determination on the constitutionality of RSA 362-H. Under this voluntary customer protection provision, the eligible facilities would have the choice to utilize any of the commonly used forms of security that have been accepted in the

[15] Order at 25. ("While we recognize that the pendency of a constitutional challenge to RSA 362-H raises potential customer protection concerns in the event that a constitutional challenge invalidates the statute after it has been implemented, we are not authorized by the statute to impose customer protection terms in any eligible facility agreement. Nonetheless, we encourage the parties to consider voluntary inclusion of appropriate customer protections against the possibility of constitutional invalidation of the statute in any eligible facility agreement that is submitted to the Commission for review.")

> industry in power purchase agreements (e .g., letters of credit, parent guarantees, and/or cash collateral) for the expected above-market portion for a 60-day period, or have the above market portion for that 60-day period escrowed. The 60-day voluntary customer protection would remain in place for one year, after which the security or escrow would terminate and be returned to the eligible facility.

17. Eversource rejected this customer protection proposal in its January 23, 2019 response to the Wood IPPs (Rehearing Motion Exhibit 9 at EF RHG-189), stating:

> In order to be an "appropriate customer protection[ ] against the possibility of constitutional invalidation of the statute," there must be a customer protection mechanism that continues its operation until the final adjudication of the law's validity – not just for 60 days. Moreover, any customer protection mechanism must be one where the funds are immediately accessible to re-pay customers should the law be invalidated, not one where further litigation might be required.

18. The Wood IPPs offered a new customer protection security mechanism in their revised proposals of January 31, 2019. What the Wood IPPs now deem to be "an appropriate customer protection provision" (Rehearing Motion at 19), reads as follows:

> 5.5 Security. Upon Buyer's written request, Seller shall provide Buyer with collateral in the form of cash, letter(s) of credit, suitable guaranty, or other type of reasonable security mutually acceptable to the parties in an amount equal to the estimated difference between Buyer's Energy Price and the Market Energy Clearing Price within ten (10) business days following receipt of such written request. Such security may only be exercised in the event that Buyer is required through a final and non-appealable order of the NHPUC to refund to its ratepayers the amount Buyer paid to the Seller above the Market Energy Clearing Price. The collateral would remain in place for the earlier of the Term or the date that the FERC issues a determination in Docket No. EL19-10 on the constitutional validity of RSA Chapter 362-H.

Rehearing Motion at 14.

19. By letter dated February 6, 2019 (Rehearing Motion at Exhibit 18, page EF RHG-471), Eversource rejected this latest customer protection proposal. Eversource noted that the latest proposed customer protection security mechanism was unacceptable as to both form and duration. Agreement upon a proper customer protection mechanism has been a key issue. A proposal to move forward with SB 365 now and to leave agreement on the customer protection security mechanism for further negotiation is unacceptable. Moreover, a customer protection mechanism which could terminate before this Commission finally rules on the recoverability of the law's above-market costs is patently insufficient, as the security might be gone before the underlying issue has been finally determined.

20. Eversource stands by its willingness to move forward with implementation of SB 365 prior to a final determination on the Constitutional issue if the Wood IPPs agree to a customer protection mechanism that unquestionably ensures the availability of funds covering the over-market amounts until such time as this Commission issues a final, unappealable order granting Eversource the ability to recover those over-market costs as required by that law "through a nonbypassable delivery services charge applicable to all customers in the utility's service territory."

21. Any order that mandates Eversource to implement SB 365 without providing for full recovery of the costs created by that law may ultimately lead to a "trapping" of the above-market costs of SB 365; that is a situation where Eversource has paid those costs but is not allowed by this Commission to recover those costs from customers. Such a "trapping" would create another Constitutional issue - - an uncompensated taking of property by the State from Eversource prohibited by both the "Takings Clause" of the Fifth Amendment to the United States Constitution and Part 1, Article 12 of the New Hampshire Constitution. Eversource strongly objects to those rehearing requests of the Wood IPPs that might lead to such an unconstitutional taking of property.

22. In the Rehearing Motion, the Wood IPPs assert that no matter what FERC rules in the pending challenge to SB 365, "such an order in and of itself would have 'no legal moment unless and until a district court adopts that interpretation.'" Rehearing Motion at 23; 30. In support of this assertion, the Wood IPPs provide the following citation at both footnotes 80 and 96:

> "An order that does no more than announce the Commission's interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA." *Xcel Energy Servs. Inc. v. F.E.R.C.*, 407 F.3d 1242, 1244 (D.C. Cir. 2005) (Ginsburg, J.) (quoting Niagara *Mohawk Power Corp. v. F.E.R.C.*, 117F.3d 1485, 1488 (D.C. Cir. 1997).

23. This quotation, and the cited cases, make it clear that this precedent applies only to FERC determinations made under Section 210 of PURPA[16] – the Public Utility Regulatory Policies Act. A more detailed reading of the *Niagara Mohawk Power*

[16] 16 U.S. Code §824a–3.

case further demonstrates that this limitation asserted by the Wood IPPs results only from Section 210 of PURPA:

> ***Section 210 [of PURPA] sets out a self-contained scheme by which the purposes of the PURPA are to be realized.*** [*Industrial Cogenerators v. F.E.R.C.,* 47 F.3d 1231, 1235–1236 (D.C. Cir. 1995)]. The FERC is to promulgate rules that will encourage cogeneration. 16 U.S.C. § 824a–3(a). The public utility commission (PUC) of each state must implement those rules, § 824a–3(f), and the Commission may bring an enforcement action in federal district court against any state regulatory authority that fails to do so. §§ 824a–3(h)(2)(A), (B). A private party may petition the FERC to initiate such an enforcement action and, if the FERC declines, may itself sue the state PUC in district court. § 824a–3(h)(2)(B).
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> In *Industrial Cogenerators,* we concluded that it would be fundamentally inconsistent with this enforcement scheme—indeed, would "usurp the role of the district court as the court of first instance"—for this court to review an order of the Commission ***concerning the agency's interpretation of the PURPA***. 47 F.3d at 1235. ***An order that does no more than announce the Commission's interpretation of the PURPA*** or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation ***when called upon to enforce the PURPA.*** *Id*. As a result, in the framework established by the Congress it is the district court that has been given the task of deciding in the first instance whether to adopt or reject a position advocated by the Commission. The courts of appeals accordingly do not have pre-enforcement jurisdiction to review a declaratory order that merely announces the position advocated by the FERC.

Niagara Mohawk Power Corp. v. F.E.R.C., 117 F.3d 1485, 1488 (D.C. Cir. 1997) (emphases added). In *Xcel Energy*, the court also said, "***Under the PURPA's enforcement scheme***, however, 'it is always the district court that first passes upon the merits of whatever position the Commission may take ***concerning the implementation of the PURPA***,'" citing to *New York State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1476 (D.C.Cir.1997). *Xcel Services* at 1243 (emphasis added). Unless the issues regarding SB 365 are PURPA-related and fall under PURPA Section 210's "self-contained enforcement scheme," the Wood IPPs assertion regarding the ineffectiveness of any FERC ruling in the declaratory order docket does not hold.

24. Is this a PURPA-related proceeding? The Wood IPPs have insisted that PURPA has nothing to do with the issues surrounding SB 365.[17] In their pleadings filed with FERC in Docket No. EL19-10, the Wood IPPs have said, "issues with respect to the Public Utility Regulatory Policies Act of 1978 ("PURPA") are irrelevant to this proceeding."[18] They have also stated, "[O]nly if and when New Hampshire seeks to set a PURPA rate would such PURPA arguments become relevant. Until such time, they are irrelevant and should not be considered."[19] The decisions in the *Xcel Services* and *Niagara Mohawk Power* cases are similarly irrelevant if PURPA is irrelevant to this proceeding.

25. The Wood IPPs cannot have it both ways. They cannot rely upon decisions relating to PURPA's enforcement scheme as a reason to ignore a FERC decision while also claiming that PURPA does not apply to this situation. If PURPA does apply, and Eversource believes it does, then the State is limited to pricing purchases from Qualifying Facilities ("QFs") at the avoided-cost rate,[20] and FERC's order eliminating any mandated PURPA purchases by Eversource from QFs larger than 20 MW would also apply.[21]

26. In addition, one term in the Wood IPPs' January 31 proposals for implementation of SB 365 reads: "FERC Status. Seller shall obtain and maintain any

[17] *See* Order at 16. ("The Wood Plants took the position that PURPA is not relevant because RSA 362-H does not require Eversource to purchase energy from QFs as defined by PURPA and therefore does not require that rates be set at avoided costs.")

[18] "Answer of the New Hampshire Generator Group," FERC Docket No. EL19-10, January 4, 2019 at 3. The "New Hampshire Generator Group" or "NHGG" is defined in footnote 1 of NHGG's "Motion to Intervene and Protest" dated December 3, 2018 in the FERC docket as "the following entities: Bridgewater Power Company, L.P., DG Whitefield LLC, Pinetree Power – Tamworth LLC, Pinetree Power, Inc., Springfield Power, LLC, and Wheelabrator Concord Company, L.P. The New Hampshire Generator Group is not an organized entity, but is *an ad hoc* group with similar interests in opposition to the Petition."

[19] "Answer of the New Hampshire Generator Group," FERC Docket No. EL19-10, January 4, 2019 at 12.

[20] *See* 18 CFR 292.304(a)(2), which implements Section 210 of PURPA (16 U.S. Code 824a-3(b) and (d)): "Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases." *See also,* Eversource's Retail Tariff approved by this Commission, "NHPUC No. 9 – Electricity Delivery" at Section 33, "Rates for Purchases from Qualifying Facilities." ("Rates: Qualifying Facilities selling their output to the Company will be eligible to receive Short Term Avoided Cost Rates equal to the payments received by the Company for the sale of QF generation to the ISO-NE power exchange, adjusted for line losses, wheeling costs and administrative costs incurred by the Company for the transaction.")

[21] *Public Service Co. of New Hampshire*, 131 FERC ¶ 61,027, 61,185 (Apr. 15, 2010) (Appended to Eversource's Petition as Attachment C).

requisite authority to sell the output of the Facility under applicable law."[22] As the Wood IPPs have said that PURPA is irrelevant to this matter, then their sales to Eversource cannot be made under PURPA's exception to the Federal Power Act;[23] all sales would have to be made in compliance with the other "applicable law," the Federal Power Act.

27. At FERC, the Wood IPPs are relying upon market-based rate authority as the basis of the "requisite authority to sell the output of the Facility under applicable law." The Wood IPPs have told FERC, "All of the generators that are part of the NHGG have either obtained or will obtain exempt wholesale generator ("EWG") status and authority to make wholesale sales of energy, capacity and ancillary services at market-based rates prior to making any sales under any power purchase agreements entered into as a result of 362-H."[24] But, the "adjusted energy rate" defined by RSA 362-H:1,I is anything but a "market-based rate." If the "adjusted energy rate" was "market-based" there would be no issue regarding SB 365's implementation. FERC has described a market-based rate ("MBR") to be one arrived at via arms-length negotiations.[25] As NERA notes in its "Request for Leave to Answer and Answer" at 17-18, filed in the FERC proceeding on December 20, 2018, "Indeed, the generators' own 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] SB 365's "adjusted energy rate" is <u>not</u> a rate established by arms-length agreement between the purchaser (Eversource) and the Seller (the Wood IPPs).[27] The "adjusted energy rate" is a state-mandated rate intended to

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[22] *See, e.g.,* Draft "Governing Terms for the Purchase of Energy by Public Service Company of New Hampshire d/b/a Eversource Energy Pursuant to the Legal Mandate Contained In New Hampshire RSA Chapter 362-H" prepared by the Wood IPPs at Section 3.1 (i), as attached to the Rehearing Motion in Exhibit 8 at page EF RHG-172.

[23] PURPA Section 210(e); 16 U.S. Code 824a-3(e) and 18 CFR § 292.601.

[24] NHGG's "Motion to Intervene and Protest," FERC Docket No. EL19-10, December 3, 2018 at 4.

[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 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's MBR tariff filing is available from the FERC website at: https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15093555

[27] In its Order No. 697, "Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities," 119 FERC ¶ 61,295 (2007), FERC noted "that the purpose of a MBR tariff of general applicability is not to direct the terms and conditions of particular sales but to ensure that the tariff on file reflects in a

provide above-market subsidies to the "eligible facilities"[28] including the Wood IPPs; it is a rate that is anything but "market based." Without appropriate tariff authority from FERC for the Wood IPPs to make sales under SB 365, the governing terms of the underlying transaction documents would preclude such sales from being made.

Conclusion

28. From the beginning, Eversource has asked this Commission for an "order determining the nature and extent of the Company's obligations under SB 365. That Commission determination should mandate such obligations and set forth the terms, conditions, and pricing of any such obligations." Petition at 8. Eversource has also requested that in any Commission order mandating purchases from the eligible facilities, the Commission also order that the costs of compliance will be recovered as part of Eversource's stranded cost recovery charge. *Id.* at 7. Eversource has also asked the Commission for an "order that directs the purchases under SB 365 and which sets forth the governing commercial terms of the transactions." Objection of December 27, 2018 at 13. And Eversource has asked the Commission to determine how to protect customers from excessive charges in the event the law is ultimately set aside. *Id*. at 15.

29. To the extent that the Wood IPPs' motion for rehearing is consistent with these requests of Eversource, Eversource does not object. Eversource objects to the Wood IPPs' motion for rehearing to the extent that the Rehearing Motion is inconsistent with Eversource's requests.

consistent manner only those matters that are required to be on file, namely, the identity of the seller(s), the docket number(s) of the market-based rate authorization, the seller's requirement to follow the conditions of market-based rate authorization contained in the proposed regulations, ***and that the rates, terms and conditions of any particular sale will be negotiated between the seller and individual purchasers***." (Emphasis added.)

[28] RSA 362-H:1, V.

Respectfully submitted this 15th day of February, 2019.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

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CERTIFICATE OF SERVICE

I certify that on this date I caused this pleading to be served in accordance with Rule Puc 203.11(c) to all parties on the Commission's service list for this docket.

February 15, 2019

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