STATE OF NEW HAMPSHIRE
SUPREME COURT

No: _____

Appeal of
Springfield Power LLC, DG Whitefield LLC,
Bridgewater Power Company, L.P., Pinetree Power Tamworth LLC,
and Pinetree Power LLC

APPEAL BY PETITION PURSUANT TO RSA 541:6
FROM THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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Complete Case Title and Docket Number in Administrative Agency

In Re: 2018 Eversource Energy Service Solicitation
New Hampshire Public Utilities Commission Docket No. DE 18-002

A. Names of Parties Seeking Review.

Springfield Power LLC, DG Whitefield LLC, Bridgewater Power Company L.P., Pinetree Power Tamworth, LLC, and Pinetree Power LLC (collectively, "Appellants")

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Names of Parties of Record, Counsel, and Addresses

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B. Administrative Agency's Orders and Findings Sought to be Reviewed.

1. New Hampshire Public Utilities Commission Order No. 26,208 (January 11, 2019) (App. at 583) (the "January Order")

2. New Hampshire Public Utilities Commission Order No. 26,224 (March 6, 2019) (Appendix ("App.") at 1159) (the "March Order")

C. Questions Presented for Review.

1. Whether the Commission erred as a matter of law when it concluded that it could not review as the statutorily mandated agreements Appellants' November 16, 2018 Proposals and/or January 31, 2019 Proposals, where Eversource solicited the November 16, 2018 Proposals and submitted them to the Commission for its statutorily mandated review under RSA 362-H, and where Appellants submitted their January 31, 2019

Proposals directly to the Commission because Eversource baselessly refused to select, submit or sign them, thereby thwarting the will and intent of the Legislature in enacting RSA 362-H.

2. Whether the Commission erred as a matter of law in declining to issue an order authorizing Eversource's recovery of costs associated with the agreements under RSA 362-H, where the recovery of such costs is explicitly authorized by RSA 362-H:2, V, where such costs are not excluded from recovery under RSA 374:2 or RSA 374-F:3, XII(d), and where RSA 362-H is valid and binding law.

D. Constitutional Provisions, Statutes, Ordinances, Rules or Other Legal Authorities Involved in the Case.

N.H. RSA 362-H:1, *et seq.*

N.H. RSA 374:2

N.H. RSA 374:41

N.H. RSA 374-F:2

N.H. RSA 374-F:3, XII(d)

The foregoing provisions are set forth verbatim at App. at 1–14.

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Letter from the Senate of the State of New Hampshire (February 26, 2019) (App. at 1157)

New Hampshire Public Utilities Commission Order No. 26,224 (March 6, 2019) (App. at 1159)

F. Statement of the Case.

This appeal arises from the New Hampshire Public Utilities Commission's ("Commission") January Order and March Order regarding the interpretation and implementation of a recently enacted New Hampshire law codified at RSA 362-H.[1] In Commission Docket No. DE 18-002, Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") sought Commission review of proposals for the purchase of Appellants' net electrical energy generation output that Eversource received from five biomass-fired electric generating plants ("Appellants"). Appellants submitted these proposals to Eversource in response to its solicitation of such proposals as mandated by RSA 362-H.

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[1] SB 365, 2018 N.H. Laws Ch. 379, an act relative to the use of renewable generation to provide fuel diversity, *codified at* N.H. Rev. Stat. Chapter 362-H.

I. *Overview of Senate Bill 365, codified as RSA 362-H.*

During the 2018 legislative session, the General Court overrode the Governor's veto and enacted Senate Bill 365, which became Chapter 379 of the Laws of 2018 and was codified as RSA 362-H (the "Act"). Section 1 of Chapter 379 sets forth the General Court's explicit findings and provides, in relevant part:

> The general court finds that the continued operation of the state's 6 independent biomass-fired generating plants and the state's single renewable waste-to-energy generating plant are at-risk due to energy pricing volatility. These plants (i) are important to the state's economy and jobs, and, in particular, the 6 biomass-fired generators are vital to the state's sawmill and other forest products industries and employment in those industries, and (ii) these indigenous-fuel renewable generating plants are also important to state policies because they provide generating fuel diversity and environmental benefits, which protect the health and safety of the state's citizens and the physical environment of the state. The general court finds that it is in the public interest to promote the continued operation of, and the preservation of employment and environmental benefits associated with these sources of indigenous-fueled renewables, and thereby promote fuel diversity as part of the state's overall energy policy.[2]

To implement this legislative public interest determination, the Act set forth a statutory scheme requiring energy distribution companies ("EDCs"), like Eversource, to purchase the net energy output of those eligible facilities, like Appellants, located in an EDC's service territory.[3]

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[2] 2018 N.H. Laws Ch. 379:1.

[3] There is no dispute that Appellants are considered "eligible facilities" as defined by RSA 362-H:1, V(b).

The statutory process set forth in the Act is straightforward. It begins with the EDC issuing a solicitation, which "shall inform eligible facilities of the opportunity to submit a proposal and enter into a power purchase agreement" for its energy purchase.[4] The Act delineates the terms of the proposals and, hence, of the statutorily mandated agreement. These statutory terms include the following: (i) the EDC must purchase 100% of the eligible facility's net energy output; (ii) the term of the agreement is coterminous with the EDC's default energy solicitation that gave rise to the agreement's purchase price;[5] (iii) the energy purchase price is the statutorily defined "adjusted energy rate"; (iv) only energy delivered to the statutorily defined delivery point will be purchased; and (v) only energy generated by the eligible facility (and not substituted with energy from another facility) will be purchased.[6] By mandating these terms, the Act creates the requisite elements of a contract under which the EDC is required to purchase energy from the eligible facility.

In response to the EDC's solicitation, eligible facilities may submit proposals to the EDC for the purchase of their energy, which must include

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4 RSA 362-H:2, I(a).

5 The Act relies upon the "default energy rate" to derive the contract price in each six (6) month period of the contract. "Default energy rate" is defined by the Act as "the default service energy rate applicable to residential class customers, expressed in dollars per mega-watt hour, as approved by the commission from time to time, and which is available to retail electric customers who are otherwise without an electricity supplier." RSA 362-H:1, IV. The Act is in effect for a three-year term and the statutorily mandated agreements with Eversource renew at revised adjusted energy rates with every six (6) month default service energy case per the terms of the Act.

6 RSA 362-H:2, I.

the above-noted statutory agreement terms.[7] The EDC is required to select those proposals that conform to the requirements of the Act, and then the EDC "shall submit all eligible facility agreements to the Commission" for review.[8] Because the Act mandates the purchase and does not leave it to the discretion of the EDC to reject the purchase, an EDC cannot thwart the statutory requirement to purchase energy by just refusing to agree or simply stating that there is no agreement to do so.

The Commission is charged with reviewing the statutorily mandated agreements for conformity with the Act.[9] In exercising its statutorily-mandated review, the Commission has the responsibility of ensuring that EDCs are not working to circumvent the Act's requirements. The Act does not authorize an EDC or the Commission to add terms to such agreements beyond those necessary to conform to the requirements of the Act. The Act also permits EDCs to recover any overmarket payments incurred in purchases of the net energy output under an agreement by way of a nonbypassable charge applicable to all customers in its service territory.[10]

II. *Factual and Procedural History.*

On November 6, 2018, Eversource, as an EDC, solicited proposals from Appellants to enter into power purchase agreements under the Act. The

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7 RSA 362-H:2, II.

8 RSA 362-H:2, III. ("With each eligible facility solicitation, the [EDC] *shall select* proposals from eligible facilities that conform to the requirements of this section. The [EDC] *shall submit* all eligible facility agreements to the commission as part of its submission for periodic approval of its residential electric customer default service supply solicitation.") (emphasis added).

9 RSA 362-H:2, IV.

10 RSA 362-H:2, V.

Eversource solicitation included its proposed agreement documents in the form of a draft confirmation and draft governing terms. Eversource's draft agreement documents contained some of the statutorily mandated provisions, but modified others. For example, the draft confirmation proposed to pay a rate (an avoided cost rate) different from the statutorily required adjusted energy rate[11] in the event any legal challenge against the Act was instituted.[12] The draft confirmation also sought to unilaterally impose additional non-statutory conditions and terms. Such additional terms included, *inter alia,* that Appellants maintain qualifying facility ("QF") status under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. Section 796 and 18 C.F.R. Section 292.101 (b)(1) and comply with all ISO New England Inc. ("ISO-NE") rules and regulations. Lastly, the Eversource solicitation stated that Eversource would not enter into formal purchase agreements with the eligible facilities and would only make the purchases required by statute if ordered to do so by the Commission.

On November 16, 2018, Appellants submitted their proposals to Eversource (the "November Proposals"), which provided Eversource with the information sought through its solicitation. The November Proposals also included revised drafts of Eversource's confirmations and governing terms in order to bring them into conformity with the requirements of the Act.

On December 4, 2018, Eversource submitted Appellants' November Proposals to the Commission for review in Docket DE 18-002. Eversource

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11 *See e.g.* App. at 40.

12 The New England Ratepayers Association had filed such a challenge on November 2, 2018 with the Federal Energy Regulatory Commission ("FERC") and hence the Eversource confirmation's payment provision did not comply with the Act's requirements.

specifically asked that the Commission review these proposals for conformity with the Act.[13] In conjunction with Eversource's petition for review, Eversource also sought clarification from the Commission on numerous alleged "ambiguities" it perceived in the statute. Eversource asked for a determination regarding: whether it was required to purchase an eligible facility's capacity in addition to its net energy output; whether it could change the Act's purchase price and pay its avoided cost rate instead of the adjusted energy rate for purchases under the agreement; whether the Commission would issue a rate recovery order granting Eversource recovery from ratepayers of the overmarket payments incurred in purchasing energy under an agreement; and whether the Commission would institute consumer protection mechanisms to mitigate any risks to consumers should the Act be invalidated due to the November 2, 2018 action brought by NERA at FERC.

Following Eversource's petition for review, Appellants intervened in Commission Docket DE 18-002. NERA and the New Hampshire Office of the Consumer Advocate ("OCA") also intervened.

On December 17, 2018, Appellants filed a Motion for Determination that Agreements Conform with RSA 362-H and to Direct Eversource to Comply with RSA 362-H ("Motion for Determination"). The Motion for Determination, *inter alia*, requested that the Commission review the November Proposals for conformity with the Act. Specifically, Appellants moved the Commission to determine that the November Proposals conformed to the

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13 App. at 22-23. "Eversource requests the Commission to perform such a review of the proposals submitted by the five eligible facilities for conformity with SB 365..."

Act and to order that Eversource must comply with the Act's terms by signing Appellants' conforming agreements.[14]

III. *The January Order.*

In the January Order (notwithstanding the fact that Eversource had submitted Appellants' November Proposals to the Commission and that Eversource and Appellants explicitly asked for review of those proposals in accordance with the Act[15] and that the Act specifically requires Eversource to purchase all of the energy from the eligible facilities), the Commission determined that no agreements were reached between Eversource and Appellants. To support its conclusion, the Commission cited the fact that the solicitations submitted by Eversource and the proposals returned by Appellants did not match. Rather than determine whether the November Proposals conformed to the Act, as it was required to do, the Commission concluded that it was precluded from so determining until Eversource selected proposals and submitted a single form of agreement. This ruling effectively gave Eversource a veto right over the Act's mandatory purchase obligation and the ability to nullify the General Court's public interest determinations. The Commission concluded that the statute does not grant it the express authority to order Eversource to sign agreements, nor can it issue "rate orders" to Eversource requiring it to purchase power from Appellants, despite the Act's explicit requirements for EDCs to purchase energy from eligible facilities.[16]

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14 *See* App. at 443.

15 App. at 22-23.

16 App. at 600.

While the Commission declined to review the November Proposals submitted by Eversource, it did make numerous determinations regarding the validity of certain of Eversource's draft confirmation conditions and the additional non-statutory conditions raised in the Eversource petition. The Commission stated that the plain meaning of the Act requires Eversource to only purchase Appellants' net energy output and capacity is not part of the Act's purchase requirement.[17] The Commission also determined that Eversource's inclusion of extra-statutory conditions, such as maintaining QF status, was "inconsistent" with the Act, and that requiring compliance with ISO-NE rules was not an explicit requirement of the Act.[18]

Regarding the other issues raised in Eversource's petition, the Commission found that Eversource was required to pay the adjusted energy rate for purchases from eligible facilities under the Act and not, as proposed in its draft confirmation, pay for such purchases at its avoided cost rate.[19] The Commission also concluded that the consumer terms proposed by Eversource were "contrary" to and "inconsistent" with the Act and the Commission lacked authority under the Act to impose consumer protections in any agreement between the parties, regardless of any constitutional challenge to the Act, but encouraged the parties to consider voluntary agreement to some form of reasonable consumer protections.[20] Finally, with respect to Eversource's rate recovery request, the Commission refused to issue an order granting recovery for the overmarket payments under an RSA 362-H

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17 App. at 601-02.
18 App. at 603-04.
19 App. at 602-03.
20 App. at 606-07.

agreement. The Commission reasoned that any such recovery must be lawful and constitutional under RSA 374:2 and RSA 374-F:3, XII(d), and that the mere pendency of NERA's petition filed with FERC meant that the Act might be invalidated in the future, even though there is no question that the Act is presently effective and binding law, and a FERC ruling on the NERA petition (which FERC is not required to issue) could not independently invalidate the Act.[21] If the Act were eventually found to be invalid or constitutionally preempted,[22] the Commission reasoned, then it would have no authority from which to have entered such an order on rate recovery given its perception of the requirements of RSA 374:2 and RSA 374-F:3, XII(d).[23]

IV. *Appellants' Motion for Clarification or Rehearing and the March Order.*

Following the entry of the January Order, Appellants, without conceding that their November Proposals did not conform to the Act, continued to correspond with Eversource on voluntary non-statutory confirmation terms and governing terms. Appellants supplemented the November Proposals with amended confirmations and governing terms. Amended proposals were submitted to Eversource on January 17, 2019 ("January 17th Proposals") and on January 31, 2019 ("January 31, 2019

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21 *See, e.g., Excel 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.,* 117 F.3d 1485, 1488 (D.C. Cir. 1997)) ("An order that does more than announce [FERC'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.").

22 At present, no such challenge has been submitted to a court with the authority to stay the Act or determine that it is constitutionally preempted by federal law.

23 App at 605-06.

Proposals") (collectively, the "January Proposals"). The January Proposals reflected Appellants' voluntary agreement to include certain consumer protection provisions. However, despite Appellants' strict compliance with the requirements of the Act and the inclusion of consumer protection mechanisms, Eversource refused to select Appellants' January Proposals or submit them as the statutorily mandated agreements to the Commission for its review as required under the Act.

As a result, on February 8, 2019, Appellants moved the Commission for clarification of issues arising from the January Order and their related communications with Eversource resulting in the January Proposals. To demonstrate their form of confirmation and governing terms continued to comply with the Act, Appellants submitted correspondence of the subsequent negotiations with Eversource, as well as the January Proposals, to the Commission.

Specifically, Appellants asked that the Commission find that the January Proposals (which contained the same statutory terms as their November Proposals) conform to the requirements of the Act, that Eversource was required by the Act to select conforming proposals, and that failure to do so constituted a violation of the Act. Further, Appellants requested that the Commission clarify that payments made in compliance with the Act are not precluded from rate recovery by Eversource because the Act is presently lawfully in effect, and its implementation has not been enjoined by any court or regulatory agency. Specifically, Appellants requested that the Commission "clarify its Order to state that the [Appellants'] January 31, 2019 Proposals are

conforming, and hence, they are agreements mandated by the statute."[24] Appellants also maintained that, should the Commission conclude that Eversource was failing to do anything required by law, the Commission could direct the Attorney General to begin an action against Eversource to compel compliance under RSA 374:41.

In conjunction with their petition for clarification, Appellants moved in the alternative for rehearing pursuant to RSA 541:3 and PUC 203.33. In support of the request for rehearing, Appellants argued that the Commission erred by failing to review the November Proposals and determine that they conformed with the Act.[25] Additionally, Appellants maintained in their rehearing petition that the Commission is vested with the authority to determine that Eversource's conduct thwarted the Act's purpose and violated its provisions, that Eversource continued to refuse to select and/or submit Appellants' January Proposals (as it is required to do), and that rehearing was warranted to "avoid the unlawful result that Eversource has created, in derogation of the language, purpose and policy of [the Act]."[26] Lastly, Appellants argued that the Commission erred in the January Order by determining that it lacked the authority to grant rate recovery to Eversource.

In the March Order, the Commission concluded that, even if it were to consider the January Proposals and Appellants' evidence regarding communications and document exchanges, it would reach the same conclusions expressed in the January Order. In reaching its decision, the Commission reiterated that it "still [has] not been presented with a final power

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24 App. at 625.
25 App. at 634.
26 App. at 638.

purchase agreement for review" and that it "still lack[s] express authority to order Eversource to enter into any such agreement."[27] With respect to Appellants' position regarding rate recovery, the Commission again cited NERA's pending petition before FERC seeking FERC's interpretation of whether the Act is preempted under federal law as precluding the Commission from entering any such order, even though an order from FERC in response to NERA's petition cannot stay or invalidate the effectiveness of the Act. Notwithstanding the fact that the Act remains binding and effective, the Commission determined that the "very authority for a Commission order authorizing rate recovery of those charges would be invalidated" if the Act was held to be unconstitutional, and concluded that it could not order rate recovery of over-market costs "until the constitutionality of the statue [sic] is determined."[28]

This appeal follows.

G. Jurisdictional Basis for Appeal.

The court has jurisdiction over this appeal pursuant to RSA 541:6.

H. Direct and Concise Statement or Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Question and Why the Acceptance of the Appeal would Protect a Party from Substantial and Irreparable Injury, or Present the Opportunity to Decide, Modify or Clarify an Issue of General Importance in the Administration of Justice.

This is the first time this court has been asked to address the statutory interpretation and implementation of the Act. As demonstrated by the record in this case, the Commission's determinations are inconsistent with the Act and

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27 App. at 1170.

28 App. at 1171.

have effectively allowed Eversource to veto the General Court's public interest determinations and thwart the Act's express purpose of providing energy diversity and economic stability to New Hampshire. Therefore, this appeal presents the opportunity for this court to clarify issues of general importance in the administration of justice in that it will provide much needed guidance to the Commission, EDCs like Eversource and generators of indigenous-fuel renewable energy like Appellants in all future proceedings under the Act. Specifically, this court is able to issue essential direction on: i) whether the Commission has the authority to require EDCs to comply with the mandatory purchase obligations in the Act; (ii) whether the Commission acted unlawfully and unreasonably in failing to construe the Act to require Eversource to purchase from eligible facilities under the Act when the statutory terms are met; and iii) whether the Commission may decline to exercise the lawful rate recovery authority vested upon it by the Act based upon a hypothetical legal challenge.

As detailed below, a substantial basis exists for a difference of opinion on the questions presented in this appeal.

I. *The Commission's Determination that it was Without Authority to Review the Eligible Facilities' Signed Confirmations and Governing Terms because it did Not Consider Them "Agreements" was in Error.*

A. *Eversource is Required by the Act to Purchase Energy from Appellants and Appellants have Fulfilled their Statutory Obligations Pursuant to RSA 362-H, yet the Commission Erroneously Concluded It Could Not Review the Agreements.*

Eversource's November 6, 2018 solicitation included draft confirmations and governing terms that contained requirements which the January Order determined to be inconsistent with or contrary to the Act.

Appellants, in submitting their November Proposals to Eversource, revised the Eversource governing terms and draft confirmations to exclude those inconsistent and contrary terms, and thereby submitted confirmations and governing terms that conformed to the applicable RSA 362-H requirements. The Act requires Eversource to "select all proposals from eligible facilities that conform to the requirements of" the Act and submit those "eligible facility agreements to the commission" for its review.[29] Eversource submitted the November Proposals with their confirmation and governing terms for review by the Commission in accordance with the Act. Eversource's Petition stated that Eversource was submitting the November Proposals to the Commission pursuant to the requirements of the Act and explicitly requested that the Commission review these proposals for conformity with the Act.[30]

The January Order makes clear that the additional requirements Eversource sought to impose on Appellants, including maintaining QF status, requiring that Appellants comply with ISO-NE rules and regulations, and efforts to impose certain customer protection provisions, were inconsistent with the Act. Therefore, such non-statutory terms could not form the basis for: (i) Eversource to refuse to comply with the Act; or (ii) the Commission to decline to review the November Proposals. The January Order also informed Eversource that it must pay pursuant to the Act's pricing terms (which were part of the November Proposals) and not the avoided cost rate contained in the Eversource form of confirmation and governing terms used in its solicitation. The Commission's January Order further informed Eversource

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29 RSA 362-H:2, III.

30 App. at 22-23.

that the Act required the purchase only of "net energy output," which is the product to be purchased under the November Proposals' confirmations.

Despite this, and contrary to the RSA 362-H:2, III requirement that it review "eligible facility agreements," the Commission determined that no formal "agreements" were presented to it because the draft confirmations contained in Eversource's solicitation and those contained in Appellants' proposals did not match. It therefore concluded it was without authority to review Eversource's submitted proposals for conformity with the Act as required of it. However, in so holding, the Commission erred by failing to comply with the RSA 362-H:2, III's requirement to review the November Proposals for conformity with the Act. These proposals should have been reviewed by the Commission in the discharge of its statutory obligations. Had it done so, it would have found that the November Proposals were in conformity with its January Order's statutory clarifications, including the fact that the confirmations in those proposals included the statutory provision on rate recovery. Instead, the Commission's holding turns a blind eye to Eversource's actions to frustrate the Act's purpose.

The Commission also erred in failing to review the November Proposals' confirmation and governing terms based on Eversource's continual and explicit refusal to voluntarily formalize the November Proposal's confirmation and governing terms or submit a single form of those agreements for Commission review. In refusing to enter into any such agreement, Eversource cited differences in material terms.[31] Had the Commission followed the requirement of RSA 362-H:2, III to review the

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31 App. at 590.

eligible facility confirmation and governing terms contained in the November Proposals it would have found that Eversource should have agreed to the November Proposals and the Commission should have required Eversource to agree. It would have also found that any "material differences" were created by Eversource failing to properly implement the statutory terms of agreement or impose non-statutory terms that were inconsistent with or contrary to the Act, as so determined by the January Order. The November Proposals' confirmations and governing terms presented the Commission with the conforming terms required by the Act, Eversource's refusal to agree to those terms was baseless, and the Commission should have ordered that Eversource agree. Any order to the contrary functionally permits an EDC to circumvent compliance with the Act's statutory requirements.

Appellants assert that it was erroneous as a matter of law for the Commission to decline to review the selected November Proposals, which conformed to the statute and were submitted for Commission review including at Eversource's request, merely because Eversource also submitted its form of agreement to the Commission. It was further error for the Commission to refuse to review the November Proposals based on Eversource's submission of its non-conforming form of confirmation and governing terms and refusal to sign Appellants' proposals "in order to preserve rights under the Federal Power Act ('FPA') and PURPA in the event that the legality of [the Act] was challenged."[32] Rather, Appellants maintain that, based upon the language used in the Act, and Eversource's submission of Appellants' November Proposals, the Commission should have concluded

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32 App. at 21.

that the November Proposals conformed to the Act and should therefore have required that Eversource enter into power purchase agreements with Appellants. Such a reading is consistent with the plain language of the Act and, purpose of the Act, and prevents EDCs from unilaterally thwarting implementation of the Act by simply refusing to "agree" or submitting a contrary form of agreement. The Commission's conclusion that it is precluded from determining whether these proposals selected and submitted by Eversource conform to the Act merely because they do not match Eversource's form constitutes an error of law.

B. *The Commission's Failure to Consider the January Proposals and Determine that Eversource was Noncompliant with the Requirements of the Act is Inconsistent with the Act's Purpose and Misconstrues the Statutory Scheme.*

Following the entry of the January Order and the Commission's refusal to review the November Proposals, Appellants, without conceding the validity of their November proposals, sought to address the voluntary non-statutory concerns raised by the January Order. Appellants communicated with Eversource in an effort to voluntarily agree to accept and incorporate consumer protection mechanisms to assuage Eversource's concerns regarding the Commission and Eversource's speculation on the lawfulness of the Act, even though the Commission helpfully determined that they are not required under the act. Appellants bridged all of the other gaps to ensure there were not inconsistent terms and conditions. These communications and amendments were incorporated into the January Proposals and were submitted to Eversource on January 31, 2018. However, despite being presented with fully compliant proposals which continued to conform to the

requirements of the Act, Eversource continually and baselessly refused to select the January Proposals or submit anything to the Commission for review. As a result of Eversource's flagrant disregard of its statutory obligations, Appellants sought a determination from the Commission that Eversource's refusal to, at a minimum, at least select and submit the January Proposals represented a failure to comply with the Act. In support of this request, Appellants submitted the January Proposals and communications and documents related to the January Proposals to the Commission to further the Act's purpose of arriving at agreements for Eversource's purchase of energy from eligible facilities.

In refusing to review the January Proposals and failing to find Eversource noncompliant with the Act and to order Eversource to purchase energy from Appellants as required by the Act, the Commission misconstrued the statutory scheme of the Act and has awarded Eversource veto power over the obligation to purchase from eligible facilities, even where the terms and conditions are consistent with the Act. The legislative intent behind the statute is clear, and lawmakers have expressed a desire that the Commission institute the Act's statutory scheme without delay.[33] The General Court set out its findings and found that the Act serves the public interest by providing economic benefits and energy diversity to the state, as well as the environmental benefits produced by utilizing renewable resources, specifically including those of Appellants.

Despite this demonstrated public interest and the statutory scheme, which does not grant Eversource a veto over submission of conforming

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[33] *See* App. at 1157.

agreements to the Commission, Eversource has consistently and explicitly refused to select conforming January Proposals and submit them to the Commission, and the Commission failed to direct Eversource to submit agreements for the purchase of energy from the eligible facilities. The Commission's failure to properly interpret the Act to require Eversource to submit the January Proposals as the mandated eligible facility agreements constitutes an error of law.

C. *The Commission Possesses the Authority to Order Eversource to Comply with the Statute and Can Refer Any Finding of Noncompliance to the New Hampshire Attorney General.*

The Commission determined in the January Order that it is without express authority under the Act "to order Eversource to sign agreements … or to order Eversource to purchase power … in the absence of any agreement."[34] However, the Commission, by virtue of its statutory authority to oversee public utilities, *is* properly authorized to enter an order determining whether Eversource's conduct in failing to select or submit conforming proposals violates the Act.[35] Similarly, in conjunction with such a finding, the Commission also possesses the authority to order Eversource to comply with the law.[36] Should the Commission make a determination that Eversource, or any public utility, "is failing or omitting … to do anything required of it by law or by order of the Commission … it shall have the authority to lay the facts before the attorney general, and to direct him immediately to begin an action

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34 App. at 600.
35 RSA 374:3.
36 *See* id.

in the name of the state praying for appropriate relief by mandamus, injunction or otherwise."[37]

Appellants moved the Commission for such a determination, citing Eversource's continued failure to select conforming January Proposals and its consistent efforts to frustrate the Act's purpose by refusing to submit the January Proposals. However, in the March Order, the Commission mischaracterized Appellants' request and again concluded that it "still lack[ed] express authority under the statute to order Eversource to enter into any such agreement."[38] The Commission did not address whether Eversource was noncompliant with the Act. Such a determination by the Commission is erroneous and is against public policy.

While Eversource has not identified any non-conforming statutory provisions in the proposals, it still flatly refuses to select or submit the January Proposals to the Commission. Eversource is in violation of RSA 362-H:2, III.[39] The Commission erred by not stating that it possesses both the authority to find Eversource noncompliant with the Act and the authority to construe the Act, and so construing the Act to require the submission of Appellants' January Proposal for Commission review as the RSA 362-H:2, III eligible facility agreement, as well as not forwarding the matter to the attorney general for appropriate action.

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37 RSA 374:41.

38 App. at 1170.

39 "[T]he electric distribution company *shall select all proposals* from eligible facilities that conform to the requirements of this section. The electric distribution company *shall submit* all eligible facility agreements to the commission..." RSA 362-H:2, III (emphasis added).

II. *RSA 362-H Authorizes the Recovery of Overmarket Payments and the Commission's Determination that it was Without Authority to Order Cost Recovery was In Error.*

The Act explicitly allows EDCs 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."[40] The confirmations submitted to Eversource by Appellants in conjunction with both the November and January proposals specifically included the statutory text on rate recovery. Had the Commission reviewed these submissions, it should have issued an order finding that these provisions of the Proposals conform to the Act and that no further order is required. However, the Commission misapplied the RSA 374:2 and 374-F:3 to erroneously preclude recovery.

A. *The Commission erred in holding that RSA 374-F:3 precludes rate recovery.*

RSA 374-F:3, XII(d) applies to the recovery of statutorily defined "stranded costs". It states recovery of any "stranded cost" must be lawful and constitutional. "Stranded costs" are defined as "costs, liabilities, and investments, such as uneconomic assets, that electric utilities would reasonably expect to recover if the existing regulatory scheme with retail rates for the bundled provision of electric service continued and that will not be recovered as a result of restructured industry regulation that allows retail choice of electrical suppliers, unless a specific mechanism for such cost recovery is provided."[41] RSA 374-F:2 goes on to provide, in relevant part, that

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40 RSA 362-H:2, V.

41 RSA 374-F:2 (emphasis added).

"[s]tranded costs may only include costs of: a) existing commitments or obligations incurred prior to the effective date of this chapter; b) renegotiated commitments approved by the commission; c) new mandated commitments approved by the commission ..."[42]

In both the January and March Orders, the Commission considered the overmarket payments to be stranded costs and analyzed them accordingly. The Commission recognized that "any recovery of stranded costs by an EDC such as Eversource must be 'lawful' and 'constitutional' under the electric restructuring statute."[43] Citing the "pending constitutional challenge" to the Act, the Commission determined that it was unable to order stranded cost recovery since its authority to do so would be invalidated if the statute was determined to be unconstitutional.

The Commission's conclusion that these overmarket payments are "stranded costs" is inconsistent with the statutory definition set forth in RSA 374-F:2. The Act specifically provides for a mechanism for recovery of overmarket payments in the form of a nonbypassable charge to customers. While this nonbypassable charge is similar to the method (i.e. a nonbypassable charge mechanism) by which stranded costs are recovered[44] the Act does not refer to or define overmarket payments as stranded costs and these costs are not within the scope of the stranded cost definition.

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42 The payments contemplated by the Act ***are not*** new mandated costs under RSA 374-F:2, IV(c) because the agreements referenced in Act are not "commitments approved" by the Commission. The Commission only reviews the agreements for conformity. The January and March Orders did not state the basis for the Commission's characterization of the RSA 362-H costs as stranded costs.

43 *See* RSA 374-F:3, XII(d).

44 *See* 374-F:3, XII(d).

Here, the plain text of RSA 374-F:2 and RSA 362-H:2, V takes such RSA 362-H cost recovery payments out of the ambit of RSA 374-F:2's definition of stranded costs. To the extent the Commission based its determination regarding its authority to issue an order allowing for cost recovery on its presumption that the overmarket payments were stranded costs, and thus RSA 374-F:3, XIII(d) applied to preclude recovery, such determination constitutes an error of law.

B. *The Commission has the Authority to Grant Rate Recovery Order Consistent with RSA 362-H, which is Currently a Valid Law that Allows for the Recovery of Charges to Customers.*

As the Commission properly noted in both the January and March Orders, RSA 374:2 limits charges demanded by public utilities only to those "permitted by law *or* by order of the Commission." (emphasis added.) The Commission held that it was not able to issue the requested rate recovery order because, should the Act be found unconstitutional, it would have no authority to do so. At present, there is no dispute that: i) the Act permits recovery of those costs incurred as a result of compliance with the Act by way of a nonbypassable charge[45] and ii) the Act is in full legal effect in New Hampshire.

To that end, there is no basis under which the Commission can decline to exercise statutory responsibilities required of it by the General Court, including under a theory that the authorizing statute *may someday be found* to be unconstitutional or otherwise unlawful in the future. Here, the Act clearly authorizes the nonbypassable charge and sets forth a clear mechanism governing how Eversource is to determine and apply such charge to

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45 RSA 362-H:2, V.

consumers.[46] The Act is a properly-enacted and legally effective statute in full force in New Hampshire. Therefore, the Commission was incorrect as a matter of law in its determination that its authority to order rate recovery under the Act was precluded by RSA 374:2.

I. Statement that Every Issue Specifically Raised has been Presented to the Administrative Agency and has been Properly Preserved for Appellate Review by a Contemporaneous Objection or, Where Appropriate, by a Properly Filed Pleading.

Every issue specifically raised herein has been previously presented to the Commission and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. Specifically, every issue raised in this appeal has been presented to the Commission in Appellants' Motion for Clarification or Rehearing (App. 609).

J. Content of Record on Appeal.

Appellants request that the court require the Commission to transmit to the court the entire record for appeal in Docket DE 18-002 as it pertains to the subject matter of this appeal.

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[46] Appellants also contend that the lack of a Commission order approving rate recovery in this instance should not preclude Eversource from recovering any overmarket payments through the nonbypassable charge. In addition to being authorized by law, the RSA 362-H rate recovery provision is explicitly incorporated in the November and January Proposals and, at least with respect to Eversource, the allocation percentages of the nonbypassable charge for the different classes of consumers used in the Act were previously approved by the Commission. (*See* Docket No. DE 14-238, Order 25, 920).

WHEREFORE, upon consideration of the foregoing, Appellants respectfully request that this honorable court accept this appeal and issue an appropriate briefing schedule.

Respectfully Submitted,

SPRINGFIELD POWER LLC,
DG WHITEFIELD LLC,
BRIDGEWATER POWER COMPANY L.P.,
PINETREE POWER TAMWORTH LLC, &
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By their Attorneys,

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April 4, 2019

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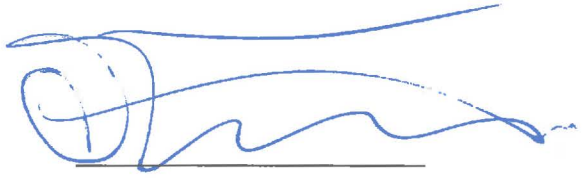
CERTIFICATE OF SERVICE

I certify that copies of this notice of appeal have this day been forwarded via U.S. Mail, postage prepaid, and/or via e-mail, to: Robert Bersak, Esquire, Eversource Energy, 780 N. Commercial Street, P.O. Box 330, Manchester, NH 03105; Suzanne Amidon, Esquire, New Hampshire Public Utilities Commission, 21 S. Fruit Street, Suite 10, Concord, NH 03301; D. Maurice Kreis, Esquire, Office of the Consumer Advocate, 21 S. Fruit Street, Suite 18, Concord, NH 03301; Marc Brown, New England Ratepayers Association, P.O. Box 542, Concord, NH 03302; and Gordon J. MacDonald, Esquire, Attorney General of New Hampshire, 33 Capitol Street, Concord, NH 03301.



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