STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Electric Distribution Utilities
Potential Jurisdictional Conflicts Related to Authorization of Pilot Programs Under
RSA 362-A:2-b
DOCKET NO. DE 23-026

BRIEF OF THE OFFICE OF THE CONSUMER ADVOCATE

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and submits the following brief in accordance with the Commission's Prehearing order of May 16, 2023. This brief contends that (1) there is no federal-state jurisdictional conflict concerning the use of the distribution system for pilot programs as authorized by RSA 362-A:2-b, and (2) that RSA 362-A does not *per se* require any New Hampshire utility to violate its federally approved transmission operator's agreement ("TOA"), nor does the statute require revisions to the federally approved open access transmission tariff ("OATT") of regional transmission organization ISO-New England. In support of its positions, the OCA states as follows:

I. Lack of Jurisdictional Conflicts

The Commission opened this docket in response to an explicit statutory directive to do so. Initially, the General Court directed the Commission to "determine definitively" the answers to two legal questions: (1) "whether any jurisdictional conflicts exist concerning the use of the distribution or transmission system," and (2) "whether the activities allowed by [RSA 362-A] would require a utility to violate its transmission owners operators agreement [sic] or require a

recalculation of any ISO-NE open access transmission tariffs." RSA 362-A:2-b, III.[1] We take up these questions in the order posed and answer both in the negative.

A. Introduction: The Federal Power Act, *Electric Power Supply Association*, and *Hughes*

Under the Federal Power Act ("FPA"), the jurisdiction of the Federal Energy Regulatory Commission ("FERC") over the electric industry applies only to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). This provision expressly reserves to the states all authority over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." *Id*. The term "sale of electric energy at wholesale" means a sale of electric energy to any person for resale. 16 U.S.C. § 824(d).

In *FERC v. Electric Power Supply Association*, 577 U.S. 260 (2016), the U.S. Supreme Court confronted these basic jurisdictional realities in the context of a dispute over FERC Order 745, which requires wholesale electricity markets to pay the same price for conserving energy as they do for producing energy. The Court ruled in favor of FERC, concluding that although Order 745 influences retail markets, the Order governs a practice directly affecting wholesale electricity rates and was thus properly within FERC's section 824 authority. *Id*. at 295-96. Expressly avoiding a gloss on the FPA that would give the federal regulator authority over "indirect or tangential impacts on wholesale electricity rates, the Court therefore adopted what it characterized as a "common-sense construction" of the FPA as focused exclusively on direct impacts on wholesale rates. *Id*. at 278 (citations omitted).

[1] The Legislature also directed the Commission to determine whether the pilot programs authorized by the statute would "produce avoided transmission cost savings," RSA 362-A:2-b, III, a factual question which the Commission presumably intends to address later in the proceeding as necessary.

In a complimentary a case decided by the U.S. Supreme Court later in the same year, *Hughes v. Talen Energy Marketing*, the Maryland Public Service Commission thought that FERC was inadequately encouraging the development of new power plants. *Hughes v. Talen Energy Marketing*, 578 U.S. 150, 158 (2016). Therefore, the state regulators sought proposals for the construction of new power plants and required load-serving entities to enter a "contract for differences" with the winning bidder to insulate that bidder from fluctuations in the regional wholesale electricity market. *Id*. at 158. The Court held that although states may regulate in areas incident to FERC's domain, state regulation is pre-empted when it denies full effect to the rates set by FERC, even if the State does not seek to tamper with the actual terms of an interstate transaction. *Id*. at 161-62. In other words, a state may not "disregard an interstate wholesale rate required by FERC" but can encourage the development of new energy resources, particularly "clean" ones, if such encouragement is "untethered to a generator's wholesale market participation." *Id*. at 166.

B. The current legal landscape: difficult but navigable terrain

These two U.S. Supreme Courts are the legal landscape through which the Commission must navigate federal and state jurisdictional boundary issues in the electric industry.

A reality of that landscape is that wholesale and retail markets are inextricably linked, and, in practice, intrastate wholesale markets are a grey area. For example, net metering is a wholesale transaction, which can fall under either state or FERC jurisdiction despite what the FPA lays out. However, FERC does not consider state net metering to intrude on its jurisdiction when there is no net sale over the billing period. *Sun Edison LLC*, 129 FERC ¶ 61, 146, at 6 (2009); *MidAmerican Energy Company*, 94 FERC ¶ 61, 340, at 62, 262-63 (2001). But even in cases like *MidAmerican*, which identifies what a reasonable billing period looks like (1-month),

FERC suggests that other billing periods could also be reasonable in determining whether a net sale of energy to a utility has occurred. *Id*. This is an example of what makes the legal landscape difficult terrain. Further, here we have the FERC claiming it can regulate intrastate wholesale transactions under the FPA while simultaneously eschewing some of that very same legislative authority to the State. *See MidAmerican*; *Sun Edison*.

C. Reasons for No Jurisdictional Conflict Concerning the Distribution system

Pilots introduced under RSA 362-A:2b are not federally jurisdictional because the pilots are untethered from the interstate wholesale market regulated under the Federal Power Act. RSA 362-A:2-b states that "intrastate sales of electricity across the distribution grid under an approved pilot shall be facilitated and accounted for by LSEs that are either competitive electricity suppliers [. . .] or municipal or county aggregations under RSA 53-E operating as or in conjunction with LSEs." RSA 362-A:2-b, IX. RSA 362-A:2-b further states that "if approved pursuant to this section, a limited producer of electrical energy may sell its produced electrical energy to one or more purchasers other than the franchise electric utility. Such purchasers may be any non-residential retail electricity customers located within the same New Hampshire electric distribution utility franchise area where the limited producer is located, or any electricity suppliers serving retail load within such area." RSA 362-A:2-b, VIII. In other words, the statute authorizes retail customers to sell electricity to each other at distribution voltage — transactions devoid of the sort of tethering deemed impermissible under *Hughes*.

For example, one may analogize a pilot program under RSA 362-A:2-b to Unitil's Kingston Solar Project (the "Kingston Project"). *See* Unitil's Petition of 10/31/22 (tab 1) in Docket No. DE 22-073 (explaining how the Kingston Project is a load reducer and does not engage with the ISO-NE wholesale market). The value stack of the Kingston Project is the same

value stack that a third party would seek to implement under the pilot statute — just with different parameters (e.g., 2 megawatts ("MW") cap under RSA 362-A:2-b v. 5 MW cap under RSA 374-G). "The Kingston Solar Project operates as a load reducer, meaning that the energy produced by the Project will be delivered directly into [Unitil's] electric distribution system and the [Kingston Solar] Project will not participate in the ISO-NE wholesale market." Unitil's Petition at 5. "The [Kingston Solar] Project realizes a number of benefits" that include "avoided purchased power; avoided transmission costs; local transmission savings; regional transmission savings; and renewable energy certificates ("REC") savings." *Id*. "Moreover, by reducing energy that otherwise would be received from the transmission system, the [Kingston Solar] Project directly offsets distribution system losses." *Id*. at 6. This illustrates how a distributed energy resource is untethered from the wholesale market while also providing benefits comparable to those contemplated by RSA 362-A:2-b.[2] While Unitil introduced the Kingston Project under RSA 374-G rather than RSA 362-A:2-b, nevertheless the Kingston Project is an example of Commission-approved load reducer that does not interfere with the ISO-NE wholesale market.

Therefore, just as Unitil has created its own product and is selling it at retail, so too can a municipal aggregator create its own pilot program and sell the resulting product at retail while remaining untethered from the ISO-NE wholesale market. However, just as Unitil passes savings generated from the Kingston Project onto its customers pursuant to RSA 374-G:3, I, so too would the municipal aggregator pass some of its savings generated onto ratepayers pursuant to RSA 362-A:2-b, XI(b), and RSA 362-A:2-b, XI(c).

[2] Eversource, Unitil, and Liberty concede that a Network Customer can avoid transmission charges by reducing its Monthly Regional Network Load, and one way of doing so is with distributed energy resources (e.g., the Kingston Project). Eversource Energy Joint Response to Commission Information Requests of 4/21/23 (tab 9) in docket DE 23-026 at 9. And the investor-owned utilities acknowledge that avoided transmission costs can be attributed to distributed generation, demand response, and/or energy efficiency. *Id*. at 11.

D. The Investor-Owned Utilities

RSA 362-A:2-b, XI(a) is drafted in a way that is difficult to untangle. What is essentially taking place under RSA 362-A:2-b, XI(a) is a reduction in coincident peak demand, and avoided transmission costs, through rates approved under State jurisdiction, where some of that benefit is passed onto ratepayers. Since there is no wholesale transaction taking place, there is no issue of federal preemption issue raised.

Eversource, Liberty, and Unitil (the "Investor-Owned Utilities") claim that there is a possible federal preemption issue created under RSA 362-A:2-b, XI(a) through the Legislature's allegedly ambiguous usage of the phrases "transmission cost" and "transmission charge." *See* Eversource Energy Joint Response to Commission Information Requests of 4/21/23 (tab 9) in Docket DE 23-026 at 8-11 (suggesting that these terms create uncertainty as to the purpose of the request). The Investor-Owned Utilities' position is that one possible interpretation of RSA 362-A:2-b, XI(a) is that the Commission could "authorize the assessment of transmission charges in excess of those set by FERC to fund the LEEP Act's transmission credits." *Id*. at 11. However, a well-established canon of statutory construction is that, whenever possible, a statute should be interpreted in a way that avoids placing its constitutionality in doubt. *See Polonysky v. Town of Bedford*, 173 N.H. 226, 236 (2020). Construing RSA 362-A:2-b, XI(a) in a way that accounts for the benefits of avoided transmission costs in the same manner that Unitil accounts for identical benefits from the Kingston Project would avoid an interpretation that results in federal preemption. The Investor-Owned Utilities already concede that Network Customers[3] can avoid

[3] A Network Customer purchases regional network service, which is a transmission service under schedule 9 of the Open Access Transmission Tariff, to serve their regional network load in the New England Balancing Authority Area. https://www.iso-ne.com/participate/support/faq/oatt-iso-tariff

transmission charges by reducing their Monthly Regional Network Load ("RNL")[4] through distributed energy resources and avoided transmission costs can be attributed to distributed generation. *See* Joint Response at 9, 11. Therefore, construing the statue in this way does not implicate federal preemption consistent with both the relevant interpretive canon and concessions of the Investor-Owned Utilities.

Lastly, pilots under RSA 362-A:2-b will not register on any wholesale meters operated by any New Hampshire utility. Since only the distribution system is utilized, the retail meters would not be used for transmission service billing. And since there is no wholesale transaction taking place, the wholesale meters would not track the load reducer's impact. Therefore, the pilots are not federally jurisdictional.

II. Issues related to the Transmission Operators Agreement and the Open Access Transmission Tariff

The second legal question posed by RSA 362-A:2-b, III and committed to the Commission for a definitive answer, concerns whether the activities allowed by RSA 362-A would "require a utility to violate its transmission owner's operator's agreement or require a recalculation of any Independent System Operator-New England ("ISO-NE") open access transmission tariffs." The answer to both parts of this question is "no."

A. The Transmission Operator's Agreement

New England's bulk power transmission grid, privately owned by the utilities around the region, operates according to a FERC-approved document bearing the title "Transmission

[4] Regional Network Load ("RNL") Costs are charges or payments related to regional network service ("RNS"). https://www.iso-ne.com/markets-operations/market-performance/load-costs/. RNS is wholesale electricity transmitted over pool transmission facilities ("PTFs") – the network of high-voltage transmission lines and related facilities that ISO-NE operates. *Id*.

Operating Agreement" ("TOA"). [5] The transmission-owning utilities, along with ISO-NE, are parties to the Agreement.

RSA 362-A:2-b causes no TOA violation because the TOA continues works as intended: Section 2.04(a)(v) of the TOA states (subject to certain exceptions not applicable here) that assets whose activities are "unrelated to the transmission of electricity located on, or making use of, the transmission facilities" are an Excluded Asset, even if owned by a transmission facility. TOA at 13. An Excluded Asset is not subject to operation by ISO-NE under the TOA. *See* TOA § 2.01(f). Therefore, pilot programs whose activities are unrelated to the transmission of electricity located on, or making use of, the transmission facilities are excluded assets because pilot programs are taking place exclusively at the distribution level and do not participate in the ISO-NE wholesale market, even if owned by a transmission facility.

Unitil's Kingston Project serves as a model of an excluded asset which avoids TOA violations. The Kingston Project does not participate in the ISO-NE wholesale market, is limited to Unitil's distribution system, and does not participate in the transmission of electricity located on, or making use of, the transmission facilities subject to the TOA. The Kingston Project is an asset that is used in the distribution and trading of electricity. Thus, pilot programs would benefit from identification as ISO-NE Excluded Asset to acknowledge they will not participate in the ISO-NE wholesale market, even if owned by a participating transmission owner. And therefore, there is no TOA violation because the TOA exempts excluded assets.

[5] Transmission Operating Agreement. https://www.iso-ne.com/participate/governing-agreements/transmission-operating-agreements."

B. The Open Access Transmission Tariff

ISO-NE's Open Access Transmission Tariff ("OATT") is designed to ensure fair and open access to transmission service in New England. [6] The OATT is found within Section II of the ISO-NE Tariff. [7] The OATT details the rights and responsibilities of transmission owners and transmission customers as well as the procedures they must follow, and the fees transmission customers must pay to access the transmission system. [8]

The only generation facilities implicated by the OATT are those the tariff defines as a "Generator Asset".[9] In relevant part, Section II.21.2 of the OATT applies to Generator Assets. If a resource is not a Generator Asset, it will offset a Network Customer's measured Monthly Regional Network Load ("RNL") — which means that the Network Customer will be charged less for receiving transmission services. *See* OATT II.21.2. But because the pilot programs are not Generator Assets as defined in the tariff, the pilot program will not implicate the OATT because the resource is operating exclusively on the distribution system, is not participating in the ISO-administered wholesale markets, and the OATT is functioning as intended. Thus, a simple standard to apply to RSA 362-A:2-b would be to require each pilot participant to certify it has not registered with ISO-NE as a Generator Asset.

[6] ISO New England Open Access Transmission Tariff rules and procedures, https://www.iso-ne.com/participate/rules-procedures/tariff/oatt.
[7] ISO New England Open Access Transmission Tariff, https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_2/oatt/sect_ii.pdf.
[8] ISO New England Open Access Transmission Tariff rules and procedures, https://www.iso-ne.com/participate/rules-procedures/tariff/oatt
[9] An Asset Generator is a generator that is between 1 MW and 5 MW and has an interconnection voltage less than 115kV that is participating in the ISO-administered markets. ISO New England Asset Registration https://www.iso-ne.com/participate/applications-status-changes/asset-registration/. Generation Assets have different criteria for registering depending on the facility's interconnection voltage and max net output. ISO New England Generator Asset Registration Options Checklist https://www.iso-ne.com/static-assets/documents/2014/10/generator-asset-registration-options.pdf

Furthermore, FERC has implicitly disclaimed jurisdiction regarding generation assets by only requiring those generation assets with a rated interconnection of 5 megawatts ("MW") or more to register with ISO-NE. *Participating Transmission Owners Administrative Committee*, 178 FERC ¶ 61,086 at 17, and 21 (2022). Additionally, FERC has acknowledged how interconnection of distributed energy and storage programs could create uncertainty as to whether certain interconnections are subject to FERC or state/local jurisdictions and thus has explicitly left state interconnection procedures to state processes, so long as wholesale market issues are not implicated by state interconnection. *ISO New England Inc.*, 180 FERC ¶ 61, 129, at 10-11 (2022).

As long as a pilot program does not register with ISO-NE as a Generator Asset, it can avoid getting tangled up in the OATT and, thus, no revisions to the OATT would be necessary for the pilot program to proceed.

III. Conclusion

First, RSA 362-A:2-b raises no preemption issues. Just as Unitil's Kingston Project is untethered from the ISO-NE wholesale market, so too can a municipal aggregator create its own pilot program and sell the resulting product at retail while remaining untethered from the ISO-NE wholesale market. The pilot programs are not federally jurisdictional. Second, there is no TOA violation because section 2.04(a)(v) of the TOA accounts for Excluded Assets. Excluded Assets are not subject to operation by ISO-NE under the TOA and are unrelated to the transmission of electricity located on, or making use of, the Transmission Facilities. Pilots introduced under RSA 362-A:2-b are excluded assets. Third, no revision of the ISO-NE OATT is required because the pilots should be required to elect not to register as Generator Assets.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Determine that RSA 362-A:2-b is not preempted by the Federal Power Act, and

B. Rule that RSA 362-A does not require a utility to violate its transmission owner operator's agreement ("TOA") or raise any issues under the ISO New England Open Access Transmission Tariff, and

C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

Dated: June 23, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Michael J. Crouse