

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Public Service Company Of New Hampshire d/b/a Eversource Energy

Petition for Exemption from Town of Bethlehem Zoning
Ordinance, Art. II, Part D, under RSA 674:30, III

Docket No. DE 24-087

Reply of the Office of the Consumer Advocate to
Public Service Company of New Hampshire d/b/a Eversource Energy's Motion for
Clarification of Scope of Proceeding

NOW COMES the Office of the Consumer Advocate (“OCA”), the state agency tasked with representing the interests of New Hampshire’s residential utility customers, and interposes the following reply to the “Eversource Motion for Clarification of Scope of Proceeding” (the “Motion”) submitted by Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) on October 4, 2024 in the above-captioned proceeding. The Motion proposes, and requests that the New Hampshire Public Utilities Commission (“Commission”) adopt, an overly restrictive view of this proceeding that improperly limits the legitimate review and analysis of parties including the OCA. The Commission should reject this invitation and subject Eversource’s projects to the review they rightfully merit.

As noted in the Motion, Eversource is asking the Commission for an exemption under RSA 674:30, III from operation of Article II, Part D of the Town of Bethlehem (“Town”) Zoning Ordinance, which imposes a 40-foot height limitation on

all buildings and structures within the Town, in connection with Eversource's "asset condition"¹ projects on the 115 kV X-178 and U-199 transmission lines occupying existing rights-of-way within the Town. Motion at 2. The existing structures in the Town already exceed the 40-foot limitation and Eversource requested but was denied a waiver from the Town's Planning Board to place new structures that are taller than the existing structures. Eversource does not contend that the Town's ordinance is illegal or improper, but only that it should not apply to these projects. Following its denial by the Town, Eversource now requests, pursuant to RSA 674:30, III, that the Commission declare these projects exempt from the ordinance.

Eversource correctly noted in its motion that during and following the Commission's September 16, 2024 prehearing conference in this matter, the Department of Energy and the OCA argued for robust discovery and other process regarding its request, while Eversource contended that any review should be more restricted. Motion at 3. In view of this difference of opinion, Eversource filed the Motion to request that the Commission clarify and limit the proceeding. By this submission, and as specified below, the OCA objects to Eversource's motion and requests that the Commission conclude that the docket is, consistent with the underlying statutory requirements, broader than Eversource contends.

¹ Consistent with its obligations under Attachment K of its Open Access Transmission Tariff, ISO-New England, the regional electric grid operator, regularly identifies transmission projects required to maintain reliability in the region. Separate from this process, the region's transmission owners, including Eversource, propose "asset condition projects" to upgrade existing facilities, replace deteriorated facilities, or for other reasons not specifically related to maintaining reliability of the regional grid as determined by ISO-New England. As reliability-related projects have waned in recent years, asset condition project spending in New England has accelerated. *See* ISO-New England's 2023 Regional System Plan at 95, available here: https://www.iso-ne.com/static-assets/documents/100005/20231114_rsp_final.pdf.

Pursuant to RSA 674:30, III, the Commission is authorized, following a public hearing, to grant exemptions from local ordinances, codes, or regulations if a waiver of such ordinance was denied by the municipality and where the Commission concludes that “the present or proposed situation of the structure in question is reasonably necessary for the convenience or welfare of the public . . .”. Before addressing Eversource’s particular contentions in the Motion, the OCA notes that the words of the statute itself answer the scope question pending before the Commission at present.

As noted, RSA 674:30, III provides that when a waiver has been denied, the Commission may yet grant an exception if the relevant structures are “reasonably necessary for the convenience or welfare of the public.” In other words, to override a local zoning decision the Commission must find that an underlying project that would place particular structures in particular locations is one that is needed to assure the welfare of the public. While Eversource contends that there is no need or no ability for the Commission to evaluate the necessity of the project itself (as opposed to reviewing only certain physical attributes), it would be effectively impossible for the Commission to exercise its authority under RSA 674:30, III without such an evaluation. Further, the statute does not restrict the analysis to particular categories or considerations. Rather, it is broadly constructed. Far from some limited inquiry about the prudence of a project already completed, the analysis under RSA 674:30, III is concerned with understanding what the public welfare requires and determining whether or how a proposed utility project will

serve that need. Accordingly, the statute itself requires a meaningful inquiry into the convenience or welfare of the public, and Eversource's request to limit the review should be rejected.

Despite the broad authority and obligations inherent in RSA 674:30, III, Eversource seeks to place bounds upon the Commission's review in this case by looking to inapposite precedent. Specifically, Eversource contends that *Appeal of Milford Water Works*, 127 N.H. 127 (1985), delimits the factors the Commission may consider in this matter. Eversource is mistaken.

In *Milford Water Works* the municipal water utility in Milford had, without Commission approval, begun construction of a water infrastructure project that extended into an abutting municipality, Amherst. *Milford Water Works*, 126 N.H. at 129. Residents of Amherst brought a court challenge to the project as being potentially harmful to their water supplies. *Id.* By settlement agreement, and despite the project having already been completed, Milford agreed to apply to the Commission for an exemption from Amherst's requirements regarding the placement of its facilities in that town. *Id.* In that case, the Commission granted the requested exemption but applied a series of conditions Milford found objectionable. *Id.* at 130. Milford challenged the Commission's conditions based upon its belief that RSA 31:62 (a predecessor to RSA 674:30) limited the Commission's authority to impose conditions. *Id.*

At the time, there was no relevant authority in this state on which the New Hampshire Supreme Court could rely to determine the scope of any review. Thus,

the Court looked to judicial construction of a similar statute in New Jersey for guidance. The New Hampshire Court observed that the New Jersey Court, in *In re Monmouth Consolidated Water Co.*, 220 A.2d 189 (1966), “noted that the exemption provision was necessary to ensure that the agency which supervises public utilities has the authority *to compel a utility to provide adequate service* even where a zoning ordinance conflicts with the need for expansion or extension of utility services within a community.” *Milford Water Works* at 131. (emphasis added). The New Jersey Court also laid out a series of seven factors it considered relevant to the exemption determination when weighing local interests in its case. *Id.* at 131-32.

As a first matter, this is not a case where the Commission must exercise authority to override a restrictive ordinance to compel the utility to provide adequate service. Eversource is already providing service and is attempting to reconfigure its facilities to continue the service it provides. Thus, this is not a case where a zoning ordinance conflicts with the need for expansion or extension of utility services.

Second, and more notably, at no point in the *Milford Water Works* case did the New Hampshire Supreme Court state that these New Jersey factors were the best or only features to review when determining whether to exempt projects from local zoning. Eversource itself acknowledges this fact when it states that “the Commission is not required to make findings of fact on the seven factors, nor is it required to analyze or weigh the factors in any particular fashion.” Motion at 5.

Indeed, in the most recent case from the Commission interpreting and applying RSA 674:30, the Commission did not explicitly review the factors cited in *Milford Water Works*, but conducted a more general analysis of the “the convenience or welfare of the public.” *Hampstead Area Water Company*, Order No. 23,759 in Docket No. DW 00-214 (August 7, 2001) at 10. That the Court looked with approval on another state’s analysis of a predecessor statute to RSA 674:30 as instructive nearly 40 years ago does not mean, as Eversource contends, that the Commission is bound by that analysis today. In this case, the Commission must review the welfare of the public and how such welfare may be impacted by upholding or rejecting the application of the ordinance at issue.

Beyond contending that the Commission’s review is limited, Eversource takes the additional step of arguing that the Commission lacks jurisdiction to even review matters such as the prudence or cost of the underlying projects. Eversource bolsters this argument by contending that the Commission has recently acknowledged its lack of jurisdiction, and by arguing that any flaws in the review of projects such as those in issue are matters of federal, rather than state, concern. In so doing, Eversource misinterprets the Commission’s recent decisions regarding its review of transmission projects and misunderstands the Commission’s and the Town’s roles in this process.

As already pointed out, the Commission is required by statute to consider the welfare of the public. How the Commission will do so while explicitly ignoring the prudence of the project or its cost implications Eversource does not make clear.

Instead, Eversource contends that in its recent decision in Docket No. DE 23-056, the Commission determined that it did not have authority to review the prudence of transmission infrastructure projects at all and that it should, therefore, eschew such a review here. The Commission did no such thing.

In Docket No. DE 23-056, the Commission was asked to undertake a broad assessment of all of Eversource's asset condition projects in the State. Following briefing, the Commission declined to undertake the requested investigation. In declining that invitation, however, the Commission was clear that in light of its "review of the statutes cited by the petitioner and the OCA, the Commission concludes that it does have the discretion to investigate Eversource's Asset Condition projects in New Hampshire. The authorities do not, however, compel the Commission to do so." Order No. 26,925 (January 5, 2024) at 8. In ruling on requests for reconsideration, the Commission again noted that while it understood it did have authority to review Eversource's investments in New Hampshire "no statute *requires* the Commission to ensure FERC-approved transmission rates, and any underlying determinations as to the prudence of investments in transmission infrastructure, are consistent with New Hampshire law." Order No. 26,946 (February 12, 2024) at 7 (emphasis added). Thus, the Commission did not, and has not, concluded that it lacks authority to review Eversource's projects in the State, but only that it was not compelled to do so in that circumstance.

As to Eversource's second contention, that these projects are subject to federal oversight and not any state-level review, Eversource is incorrect. While it is

true that there is a defined process for the review of proposed asset condition transmission projects through regional and federal forums, the existence of that process does not diminish to destroy the rights of state and local authorities over siting and zoning determinations. In its motion, Eversource concentrates on the authority of federal entities, notably the Federal Energy Regulatory Commission (“FERC”), over the operation of electric transmission facilities and the transmission of energy in interstate commerce. Motion at 7-8. The OCA will spend no time addressing those issues because neither of them apply to this matter.

Issues of siting and zoning regarding electric transmission facilities have historically been the province of state and local authorities. *See* FERC Order No. 1977, 187 FERC ¶ 61,069, (May 13, 2024) at ¶ 2. The existence of the Site Evaluation Committee and its authority under RSA Chapter 162-H is a testament to this very authority. Following the enactment of the Federal Energy Policy Act of 2005, 119 Stat. 594, the FERC was granted limited “backstop” authority to site transmission facilities under certain circumstances. *See* 16 U.S.C. § 824p². Nevertheless, the initial determination for the siting of a facility remains with state and local authorities. Only if there is a conflict between local zoning and a federal requirement will there be a federal preemption issue.

In this case neither the state nor the municipality are exercising jurisdiction over the operation of transmission facilities or wholesale energy sales. Rather they

²While the bounds of this siting authority have been altered somewhat by the amendments to the Federal Power Act contained in the Infrastructure Investment and Jobs Act of 2021, Pub. L. 117-58, sec. 40105, 135 Stat. 429 (2021), determinations on siting remain, in the first instance, with state and local authorities. *See* Order No. 1977 at ¶ 2.

are acting under their lawful authority regarding siting and zoning. Further, Eversource has not demonstrated that there is any conflict between the local zoning and federal determinations that has any bearing on this matter. Eversource's reliance upon the cursory review of regional and federal bodies to contend that the Town's zoning decision must fall is wrong.

As a final matter, the OCA agrees with the statements in Eversource's motion that the OCA has advocated for, and will continue to advocate for, more robust processes for review of asset condition transmission projects at the regional and federal levels. Whether such changes will occur, however, has nothing to do with the review to be conducted in this case. The Town has an appropriate ordinance in place and to be exempted from it Eversource has the burden to show the Commission that the projects it is undertaking are needed to address the convenience or welfare of the public. The quality of a review in another forum has no bearing on that analysis.

Conclusion

For the reasons stated above, the Office of the Consumer Advocate respectfully requests that the Commission enter an order declining to limit discovery in the manner proposed by Eversource and reaffirming that the scope of this proceeding will remain as stated in the August 20, 2024 order in this docket, commencing the adjudicative case: "whether Eversource's proposal to replace the existing wooden transmission poles in Bethlehem with steel poles that are greater than 40-feet in height is 'reasonably necessary for the convenience or welfare of the

public' under RSA 674:30, III; and, if so, whether the Commission should grant an exemption from the [Town's Zoning] Ordinance." The Commission should further direct the parties to confer with respect to an appropriate procedural schedule and submit a proposal or proposals for such a schedule by a date certain. If, at the threshold of hearing, the parties remain in disagreement on the scope of the evidence to be entered into the record, the Commission can convene a follow-up prehearing conference as necessary. The OCA does not believe it will be necessary.

WHEREFORE, the OCA respectfully requests that this honorable tribunal:

- A. Reject the request of Public Service Company of New Hampshire d/b/a Eversource Energy to limit the scope of this proceeding and reaffirm that the scope of the proceeding remains as stated in the Commission's August 20, 2024 Order;
- B. Direct the parties to confer and submit a proposed procedural schedule or schedules ten days after its Order rejecting Eversource's request;
and
- C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,



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October 21, 2024

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.



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