

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Docket No.: DE 16-693

**PETITION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
FOR APPROVAL OF A POWER PURCHASE AGREEMENT**

**PHASE I BRIEF
OF THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to New Hampshire Public Utilities Commission (“Commission”) Code Admin. Rule 2013.32 and the October 15, 2016 Order of Notice, the New England Power Generators Association, Inc., (“NEPGA”)¹ hereby submits its Phase I Brief regarding the legality of the proposal by Petitioner Public Service of New Hampshire d/b/a/ Eversource Energy (“PSNH” or “the Company”) in this matter. NEPGA submits that the proposed Power Purchase Agreement (“PPA”) between PSNH and Hydro Renewable Energy Inc., (“HRE”), an indirect wholly-owned subsidiary of Hydro-Quebec, contravenes the New Hampshire Restructuring Statute (as defined below) and is not supported by other statutes. In addition, the PPA encompasses direct and indirect wholly owned subsidiaries of parent company Eversource Energy (“Eversource”) that are all deeply involved and invested in the development of, transmission over and purchase of power from the Northern Pass Transmission line, violates the recently promulgated Affiliate Transaction Rules, N.H. Code Admin. Rules, Chapter Puc 2100, and may be constrained by the Federal Power Act.

¹ The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

I. INTRODUCTION

On June 28, 2016, PSNH filed a petition, pursuant to RSA 374:57² for approval by the Commission of the PPA. Through the PPA, PSNH, a wholly owned subsidiary of Eversource, seeks to purchase, over a 20-year term, approximately 100 megawatts (“MW”) of firm, on-peak electric energy delivered to Eversource’s Deerfield Substation via the proposed to be constructed Northern Pass Transmission line (the “NPT line”), being developed by Eversource’s indirect wholly owned subsidiary, Northern Pass Transmission, LLC (“NPT”). *See* Petition of Public Service Company of New Hampshire d/b/a Eversource Energy for Approval of a Power Purchase Agreement (“PSNH Petition”) at Bates 1. Subject to obtaining all required approvals and permits, and the successful construction of the NPT line by Eversource (through NPT), HRE proposes to sell to PSNH power at prices based upon the MA Hub NYMEX forward adjusted prices; in turn, this energy will be sold into the ISO-New England (“ISO-NE”) energy market by Eversource (through its affiliate, PSNH). *Id.* at Bates 2.

For ratemaking purposes, PSNH proposes that the PPA would be accounted for through PSNH’s Stranded Cost Recovery Charge (“SCRC”) established by the 2015 Restructuring Settlement Agreement (“Settlement Agreement”) and approved by the Commission by Order No. 25,920 (July 1, 2016) in Docket Nos. DE 11-250 and DE 14-238. Order of Notice at 1-2. Although not explicitly stated, there can be no doubt that the transaction is expressly designed to benefit the NPT line under development by one Eversource affiliate (NPT) by the purchase of power delivered on the NPT line by PSNH, another Eversource affiliate.³

² RSA 374:57 requires the approval by the Commission of any agreement with a term of one year or more for the purchase of generating capacity, transmission capacity or energy.

³ Although PSNH does not provide any explanation as to why it seeks 100 MW of energy from HRE, presumably such a purchase will benefit the NPT line project, *e.g.*, lower risk and promote financing and approvals of the NPT line. The significant and problematic affiliate implications of this transaction are discussed in II. D., *infra*.

II. ARGUMENT

A. RSA Chapter 374-F Requires a Restructuring of the New Hampshire Electric Market Through the Separation of Generation from Transmission and Distribution.

The New Hampshire Electric Utility restructuring statute, RSA Chapter 374-F (“Restructuring Statute”), directs the restructuring of the industry, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services.⁴ The Restructuring Statute, originally passed in 1996, and recently further refined in HB 1602 and the Settlement Agreement, was designed to establish a competitive market and customer choice with electric generation separated from transmission and distribution services. The Restructuring Statute establishes the operational and regulatory framework for electric distribution companies (“EDCs”) in New Hampshire, and PSNH (and other EDCs) are required to comply with the strict requirements of the statute and its functional separation of and limitations on generation services. EDCs are required to exit the business of owning and operating electric generation facilities (*i.e.*, generation services) and to leave electric generation services to be provided by competitive entities.

This PPA represents yet another attempt by PSNH for approval of a contract that contravenes the express purpose of the Restructuring Statute. The Commission decisively rejected PSNH’s recent effort in DE 16-241 to expand its reach into the natural gas business via a pipeline capacity contract to be paid for by its captive electric customers. *See* Order 25,950 at 11-

⁴ RSA 374-F:3, III states, in part: “When customer choice is introduced, services and rates should be unbundled to provide customers clear price information on the cost components of generation, transmission, distribution, and any other ancillary charges. Generation services should be subject to market competition and minimal economic regulation and at least functionally separated from transmission and distribution services which should remain regulated for the foreseeable future. However, distribution service companies should not be absolutely precluded from owning small scale distributed generation resources as part of a strategy for minimizing transmission and distribution costs.”

12 (October 6, 2016). In that case, PSNH's request was inconsistent with the Restructuring Statute⁵ and undermined the benefits of competitive markets, *i.e.*, lower prices, less risk, and economic benefits to ratepayers, efficiencies and customer choice.⁶ Here, the Company impermissibly endeavors yet again to get back into the generation services business.

In a restructured role, PSNH and other EDCs have a limited and specifically defined role relating to generation services: to provide, pursuant to RSA 374-F:3, V(c), electric supply through default service, which is offered only to those customers who have not opted to purchase their electricity from a competitive supplier. Default service must be competitively procured and is designed to be a safety net for customers who do not choose an independent competitive supplier. Order 25,950 at 12; RSA 374-F:3, V(c). The legislature has also permitted EDCs to enter into long term contracts for renewable energy (RSA 362-F:9) and to own small scale distributed generation as part of a strategy to minimize transmission and distribution costs (RSA 374-F:3, III).

⁵ See Order 25,950 at 8-9 (“In weighing the restructuring policy principles of RSA 374-F, we [] find that the overriding purpose of the Restructuring Statute is to introduce competition to the generation of electricity. The competitive generation market is expected to produce a more efficient industry structure and regulatory framework, by shifting the risks of generation investments away from customers of regulated EDCs toward private investors in the competitive market. The long-term results should be lower prices and a more productive economy. To achieve that purpose, RSA 374-F:3, III directs the restructuring of the industry, separating generation activities from transmission and distribution activities, and unbundling the rates associated with each of the separate services. A more efficient structure involves placing investment risk on merchant generators who can manage that risk, and allowing customers to choose suppliers, thus enabling customers to pay market prices and avoid long-term over market costs. This purpose is underscored by the Legislature’s recent strong encouragement, through the passage of HB 1602 and SB 221, to approve the 2015 Settlement Agreement that will accomplish the functional separation of Eversource’s generation activities from its distribution activities.”) (citations omitted).

⁶ See also Order 25,920 at 68-69 (“Divestiture may unlock the potential of market cost-discipline arising from competitive dynamics in the New England energy markets. Furthermore, divestiture will remove the operational risks, including the risks of future upswings in capital-expenditure requirements for Eversource’s generation fleet. We find that this should, in the long run, protect ratepayers from costly rate shocks related to environmental-compliance requirements and the ongoing need to replace or upgrade obsolescent equipment”).

For the reasons set forth below, PSNH's proposed PPA violates strict requirements of the Restructuring Statute and does not qualify within any exception to the separation of generation and transmission and distribution services.

B. PSNH's Proposal Contravenes the Strict Requirements of the Restructuring Statute.

In this case, as in DE 16-241, it is beyond dispute that PSNH seeks to procure generation services. Its proposal to contract for 100 MWs of firm power from HRE, commencing on the operation date of Transmission Services Agreement ("TSA"),⁷ and extending for a term of 20-years, is a contract for generation services. *See* Daly Testimony, Attachment A at Bates 35-36, Articles 4.1, 5.1, 5.2. Under the terms of the contract, PSNH proposes to purchase energy from a generation mix of hydroelectricity from facilities owned by Hydro Quebec, affiliates of HRE. *Id.* at Bates 35-36, Articles, 5.1, 5.2. The PPA, even in redacted form as filed, contains all standard terms associated with a contract for firm energy supply, including an obligation to procure and pay for 100 MWs (5.2), over 20-years (5.3), following commercial operation (5.4), consistent with ISO-NE protocols (5.6).⁸ *See e.g., Id.* at Bates 18-55. Accordingly, the PPA constitutes a component of "generation services" under RSA 374-F:3, III, which requires the separation of generation activities from transmission and distribution activities, and unbundling the rates

⁷ The Transmission Services Agreement, as defined in the PPA, means the Transmission Services Agreement entered into as of October 4, 2010 between NPT and HRE. Bates at 31. The TSA was accepted for filing by FERC, effective February 14, 2011. *See* FERC Docket ER11-2377, Northern Pass Transmission, LLC 134 FERC ¶61,095. A subsequent, amended TSA was accepted for filing by FERC, effective January 3, 2014 (Docket No. ER14-597). Pursuant to the TSA, NPT will design, engineer, procure equipment and permits and approvals and construct the line. Support for these expenditures, defined as "owner's costs", will come in the form of equity contributions from Eversource (up to 50% of total costs) and construction loans. The TSA was not filed with this case.

⁸ The PPA also sets forth expected provisions relating to costs and interconnection (Article 5.9), payment and netting (Article 6), force majeure and contingencies (Articles 7, 8), default (Article 9), limitations of liability (Article 10), governmental charges and regulatory changes (Articles 13,14) and standard provisions. PSNH filed a redacted PPA in this case and NEPGA reserves its right to comments on the merits of any PPA provisions should the Commission determine that further review in this case is warranted. *See generally* Daly Testimony, Attachment A.

associated with each of the separate services.

NEPGA submits that this PPA for generation services clearly violates both the letter and the spirit of the Restructuring Statute. Specifically, as noted below, the Company's PPA: (i) does not serve default customers; (ii) is not competitively procured; (iii) is not a permissible renewable energy contract; and (iv) is not a small scale generation project, all in clear violation of state law.

Default Service and Competitive Procurement

PSNH states in its filing that energy from the PPA will not supply default energy service. PSNH Petition at Bates 14, 61-62. Moreover, the Company concedes, that as a sole source contract between PSNH and HRE, the contract was not competitively procured.⁹

The Company's PPA should be rejected on this basis alone. This Commission has recognized the fundamental requirement of EDCs to provide competitively procured default service (as mandated by RSA 374-F:3) and rejected a similar attempt by PSNH to circumvent that requirement:

[F]ollowing electric restructuring, electric utilities do not arrange electric supply for their customers. Instead, pursuant to RSA 374-F:3, V(c), electric utilities provide electric supply through default service, which is offered only to those customers who have not opted to purchase their electricity from a competitive supplier. Default service is designed to be a safety net for customers who do not choose an independent competitive supplier. Further, default service must be competitively procured. *Id.* As a result of the Restructuring Statute, electric distribution utilities are no longer required to conduct long-term planning for electric supply. Accordingly, we find that in a restructured electric industry, the planning requirements for an EDC are limited to procurements of electric supply for the EDC's default service customers. That obligation is not broad enough to justify approval of a proposal like Eversource's. Order 25,950 at 11-12.

The Commission's holding is determinative here as well. It is a fundamental assumption and requirement of the Restructuring Statute that utilities provide generation service, competitively

⁹ As PSNH notes: "The PPA...will not be used to supply default service, and the competitive procurement of default service will not change as a result of the PPA." Chung Testimony at Bates 62.

procured, for default customers. PSNH's failure to comply with this requirement is a material, fatal flaw in its proposal.

The Company seemingly acknowledges this requirement to serve default customers, but instead opines that serving default customers (as required) would create the very risk that restructuring was designed to avoid--an adverse risk to competition (and competitive suppliers): "If [PPA] revenues were credited to PSNH's default customer, these revenues might distort PSNH's default service price and the competitive market, because competitive suppliers could find it difficult to compete with the default rate." Chung Testimony at Bates 17, 61. The Commission should reject PSNH's brazen attempt to use the very principles that compelled the legislature to require restructuring in the first instance, *i.e.* the value of competition and competitive markets, to justify a contract does not serve default customers through a competitive process as required.

Moreover, the Company has not provided any specific legal support for its proposal to ignore strict requirements that it serve default customers. Instead, the Company attempts to justify its proposal through unsubstantiated claims that RSA 374-F:3's general "call for full and fair competition" supports its use of the SCRC to flow costs related to the PPA to "all of PSNH's distribution customers, and not just customers taking default service energy from PSNH". PSNH Petition at Bates 61.¹⁰

¹⁰ "Using the SCRC ensures that the net benefits of the PPA flow to all of PSNH's distribution customers, and not just customers taking default service energy from PSNH. Furthermore, to the extent that the planned divestiture of the PSNH generating fleet may result in any stranded costs, the PPA benefits will have a mitigating effect, and such a ratemaking methodology would be consistent with the terms of the 2015 Settlement Agreement. Finally, the flow of net benefits through the SCRC serves to eliminate any adverse effect to the competitive electric market that might otherwise occur if such net benefits were to flow through PSNH's default energy service rate." PSNH Petition at Bates 60.

The Commission rejected a similar gambit by PSNH in DE 16-241 relating to its proposal to charge distribution customers for gas capacity contract related costs: “Including such a generation-related cost in distribution rates would combine an element of generation costs with distribution rates and conflict with the functional separation principal.” Order 25,950 at 9. Likewise, there is no legal basis to charge distribution customers here.

Renewable Energy Contracts

RSA 362-F:1,¹¹ relating to the Renewable Portfolio Standards (“RPS”), also fails to provide any authorization for this PPA. The legislature’s recognition of the importance of renewable energy technologies and renewable energy resources as an alternative to fossil fuels does not stand for the proposition that this contract is authorized. Rather, RSA 362-F:9 authorizes PPAs, subject to explicit requirements, that meet reasonably projected renewable portfolio requirements.

Distributed Energy Resources

Nor does the Restructuring Statute’s recognition of the importance of distributed energy

¹¹ RSA 362-F:1: Renewable energy generation technologies can provide fuel diversity to the state and New England generation supply through use of local renewable fuels and resources that serve to displace and thereby lower regional dependence on fossil fuels. This has the potential to lower and stabilize future energy costs by reducing exposure to rising and volatile fossil fuel prices. The use of renewable energy technologies and fuels can also help to keep energy and investment dollars in the state to benefit our own economy. In addition, employing low emission forms of such technologies can reduce the amount of greenhouse gases, nitrogen oxides, and particulate matter emissions transported into New Hampshire and also generated in the state, thereby improving air quality and public health, and mitigating against the risks of climate change. It is therefore in the public interest to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities.

resources as provided for in RSA 374-G:1¹² justify this PPA. In fact, RSA 374-G:2,¹³ narrowly defines distributed energy resources to mean electric generation equipment, and is focused primarily on minimizing transmission and distribution costs as provided for in RSA 374-F:3, III. The statute expanded the scope of investments that an electric distribution utility could make as an alternative to its traditional investments in transmission and distribution to allow a limited exception for distributed energy resources. This limited, narrowly defined provision does not apply to the PPA.

Accordingly, the PPA is not authorized by RSA 374-F. As part of the Restructuring Statute, EDCs are authorized to enter into competitively procured PPAs to serve default service pursuant to RSA 374-F:3, V(c), or to meet renewable portfolio requirements pursuant to RSA 362-F:9, or to provide for distributed energy resources pursuant to RSA 374-G:2. In each of the enumerated instances, the legislature has authorized EDCs to provide specifically identified generation services to customers. This affirmative action by the legislature indicates its clear intent that in the absence of any such authorization, EDCs are prohibited by negative implication from providing any generation related services to customers.¹⁴ This PPA was not brought under any of

¹² 374-G:1: Distributed energy resources can increase overall energy efficiency and provide energy security and diversity by eliminating, displacing, or better managing traditional fossil fuel energy deliveries from the centralized bulk power grid, in keeping with the objectives of RSA 362-F:1. It is therefore in the public interest to stimulate investment in distributed energy resources in New Hampshire in diverse ways, including by encouraging New Hampshire electric public utilities to invest in renewable and clean distributed energy resources at the lowest reasonable cost to taxpayers benefiting the transmission and distribution system under state regulatory oversight.

¹³ 374-G:2: "Distributed energy resources" means electric generation equipment, including clean and renewable generation, energy storage, energy efficiency, demand response, load reduction or control programs, and technologies or devices located on or interconnected to the local electric distribution system for purposes including but not limited to reducing line losses, supporting voltage regulation, or peak load shaving, as part of a strategy for minimizing transmission and distribution costs as provided in RSA 374-F:3, III.

¹⁴ The Commission has recognized that the New Hampshire Supreme Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. Order 25, 950 at 7.

the aforementioned statutes, thus absent some exception to the blanket restriction imposed by the statute (which does not exist here), the PPA clearly constitutes the impermissible provision of generation services and accordingly, should be rejected.

C. PSNH Has Failed to Identify Any Specific Statutory Authority Authorizing the PPA.

PSNH refers to a patchwork of statutes, outside of the Restructuring Statute, to justify the PPA. As set forth below, this reliance on unrelated statutes is unavailing.

RSA 374:57

The Company primarily relies upon RSA 374:57 as authority to enter into the PPA.

PSNH Petition at Bates 2-3. RSA 374:57 provides as follows:

Purchase of Capacity. – Each electric utility which enters into an agreement with a term of more than one year for the purchase of generating capacity, transmission capacity or energy shall furnish a copy of the agreement to the commission no later than the time at which the agreement is filed with the Federal Energy Regulatory Commission pursuant to the Federal Power Act or, if no such filing is required, at the time such agreement is executed. The commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest.

RSA 374: 57 does not authorize PSNH's proposed contract. The plain language of the statute, designed to strengthen and expand Commission oversight, simply requires filing and Commission review of the agreements referenced in the statute. It does not confer separate authority on a party, such as PSNH, to enter into any agreement that is contrary to the Restructuring Statute. The statute's purpose was to compel a review of, not expand, PSNH's contracting authority. *See* Order 25,950 at 13. In addition, RSA 374.57, enacted prior to passage of the Restructuring Statute, cannot now be read to be inconsistent with the Restructuring Statute. As the Commission has determined: “[w]hen a conflict exists between two statutes, the later statute will control, especially when the later statute deals with the subject in a specific way and

the earlier enactment treats that subject in a general fashion.” *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152 (1978); *see also Appeal of Pennichuck Water Works*, 160 N.H. 18, 34 (2010) (quoting *Appeal of Plantier*, 126 N.H. 500 (1985)). Consequently, even if RSA 374:57 could be read in such a way that would allow PSNH to enter into the PPA (which NEPGA does not concede), such a reading would be inconsistent with and contrary to the later-enacted Restructuring Statute in that it relates to a service (generation) regulated by the Restructuring Statute. Accordingly, RSA 374:57 does not support the Company’s request as presented in this proceeding.

Policy Statutes

In addition to RSA 374:57, the Company cites broadly to (i) policies described in the Restructuring Statute;¹⁵ (ii) a general obligation to plan for adequate resources to meet the expected demands of electric customers (RSA 378:37, :38) and bring a new, and renewable, source of electric supply to the state and the region in conformance with the state’s policy to “meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources” (RSA 378:37); (iii) a general obligation to “take prudent actions as a utility operating in New Hampshire” citing to RSA

¹⁵ In his testimony, Mr. Chung without detailed discussion generally to RSA 374-F:3, V (ensuring the availability of universal electric service); RSA 374-F:3, VIII (encouragement of environmental improvement); RSA 374-F:3, XI (ensuring that New Hampshire’s electric rates are competitive with other regional rates); RSA 374-F:3, XII (requiring utilities to take all reasonable measures to mitigate stranded costs); and RSA 374- F:3, XIII (encouraging regional solutions to issues relating to electric restructuring) in support of the PPA. NEPGA submits that the PPA contravenes the Restructuring Statute for the reasons set forth in Section II.B; these statutes do not authorize generation services and cannot provide independent justification for the PPA. Bates 61-63.

378:37¹⁶ and RSA 374-F:3, XII, (c)¹⁷ (Chung Testimony at Bates 61-63); (iv) the State's interest in a diversity of fuel source consistent with the 10-year Energy Strategy RSA 4-E1,I,C (Daly Testimony at Bates 15); (v) the intent of the legislature finding to be in the public interest diversified sources of supplemental electrical power (which lessen the state's dependence upon other sources that may, from time to time, be uncertain) and the use of indigenous and renewable fuels (which have beneficial impacts on the environment and public health) (RSA 362-A:1); (vi) the general legislative objective to promote renewable energy technology (RSA 362-F:1) (Daly Testimony at Bates 15).

Essentially, PSNH takes a shotgun approach to this case in the hope that the Commission might determine that one of the statutes could somehow be read to confer authority to enter into the PPA. As set forth below, none of the statutes cited provide any support for its proposal, and, if they did, as in the case of RSA 374:57 (passed in 1989), the statutes are directly superseded by the subsequent enactment of the Restructuring Statute in 1996. A review of the numerous statutes referenced by PSNH demonstrates the lack of statutory support for this PPA.

First, the Company incorrectly references RSA 378:37, which relates to the general energy policy of the New Hampshire and the need for lowest reasonable costs, reliability and diversity. Chung Testimony at Bates 62. In citing these provisions, PSNH misinterprets the statute to conclude that silence (the lack of any prohibition) is permission. The Company suggests that its

¹⁶ RSA 378:37: "The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources."

¹⁷ RSA 374-F:3, XII, (c): "Utilities have had and continue to have an obligation to take all reasonable measures to mitigate stranded costs. Mitigation measures may include, but shall not be limited to: (1) Reduction of expenses. (2) Renegotiation of existing contracts. (3) Refinancing of existing debt. (4) A reasonable amount of retirement, sale, or write-off of uneconomic or surplus assets, including regulatory assets not directly related to the provision of electricity service."

requirement to plan for adequate energy supply under this statute provides legal support for the PPA. No such authority actually exists. The Commission correctly rejected PSNH's claim that RSA 378:37 (and the related requirements of RSA 378:38) provided for some affirmative obligation of the Company with respect to generation planning. Order 25,950 at 11-12.

In addition, PSNH's reliance on statutes that relate to diversity of supply is misplaced. Specifically, the Company claims: "...this PPA helps to ensure that New Hampshire would receive a unique benefit from an energy source that does not depend upon fossil fuels. Providing electricity from a different fuel source, and one that relies upon renewable energy in contrast to the region's substantial reliance upon natural gas for electric generation, is consistent with the State's public policy goals as they are described in the State's 10-Year Energy Strategy. A number of other statutes also set forth the public interest of having fuel diversity in electric generation, including RSA 4-E:1, I, (c); RSA 378-7-a; RSA 374-F:8; RSA 374-G:1; and, RSA 362-F:1." Daly Testimony at Bates 15.

The referenced statutes in turn refer to the Office of Energy's planning's obligation to prepare a 10-year energy strategy for the state (RSA 4-E:1),¹⁸ including, among other things, consideration (for both electric and gas utilities) of demand, generation and the Commission's directive to establish requirements for net metering, fuel diversity, fossil fuel generation efficiency, advanced metering, time-based rates, and interconnection with on-site generation facilities (RSA 378-7-a).¹⁹ Similarly, RSA 374-F:8 authorizes the Commission to advocate for

¹⁸ RSA 4-E:1: The office of energy planning, in consultation with the state energy advisory council established in RSA 4-E:2, with assistance from an independent consultant and with input from the public and interested parties, shall prepare a 10-year energy strategy for the state.

¹⁹ 378:7-a Energy Policy Act Standards: The commission may establish requirements for net metering, fuel diversity, fossil fuel generation efficiency, advanced metering, time-based rates, and interconnection with on-site generation facilities of customers in a manner not inconsistent with section 111 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. section 46) as amended by the Energy Policy Act of 2005.

New Hampshire interests before the Federal Energy Regulatory Commission (“FERC”) and other regional and federal bodies.²⁰ None these obligations and directives relating to the Office of Energy Planning, the 10-year plan, or to the Commission, authorize PSNH to commit to a multi-year PPA for generation as proposed here.

Accordingly, the Restructuring Statute clearly prohibits the PPA as proposed. In addition, the statutes that PSNH claims support its proposal do not or cannot be deemed to apply because the Restructuring Statute, passed later, supersedes them. The Commission’s correct conclusion as set forth in 16-241 is equally applicable here:

The change in the industry through the Restructuring Statute, first passed in 1996, effectively ended a restructured EDC’s ability to participate in the generation side of the electric industry. Given the centrality of the separation of functions between distribution and generation in the Restructuring Statute, allowing an EDC to “participate in electric power facilities” [] in the manner proposed by Eversource would make little sense in light of RSA 374-F.

D. The Commission Should Apply the Affiliate Rules to the PPA and Deny the Petition.

Eversource, as discussed *supra*, is a public utility holding company with affiliate entities, PSNH (wholly owned) and NPT (wholly owned), that have a shared material interest in the PPA. NPT has entered into a comprehensive Transmission Services Agreement with HQ Hydro. HQ Hydro is an affiliate of H.Q. Energy Services, Inc. which in turn is a subsidiary of Hydro Quebec,

²⁰ RSA 374-F:8: The commission shall advocate for New Hampshire interests before the Federal Energy Regulatory Commission and other regional and federal bodies. The commission shall participate in the activities of the New England Conference of Public Utility Commissioners, the National Association of Regulatory Utility Commissioners, and the New England States Committee on Electricity, or other similar organizations, and work with the New England Independent System Operator and NEPOOL to advance the interests of New Hampshire with respect to wholesale electric issues, including policy goals relating to fuel diversity, renewable energy, and energy efficiency, and to assure nondiscriminatory open access to a safe, adequate, and reliable transmission system at just and reasonable prices.

a crown corporation owned by the Government of Quebec. HRE is also an indirect wholly owned subsidiary of Hydro Quebec.

The overlapping, incestuous relationship between Eversource, PSNH and NPT is self-evident: Eversource is an investor in the NPT line and parent company to NPT, NPT is responsible for developing and constructing the NPT line which will convey power (over 1,000 MW) from HRE, and Eversource direct subsidiary, PSNH, has proposed to purchase the lesser of 100 MW or 10% from HRE in this case. Thus, it is beyond dispute that developer NPT (and Eversource, as investor) have a mutual interest in securing power over the NPT line as provided for in the TSA and Eversource has a corporate interest in directing PSNH to buy such power. PSNH concedes that the “effectiveness of [the] PPA is conditioned upon the successful completion of [the pending] regulatory proceedings relating to NPT.” *Id*; *see also* Daly Testimony at Bates 11 (“The energy PSNH would purchase under the PPA is expressly limited to energy that Hydro-Québec would deliver using the Northern Pass transmission line”). Thus, there is a direct nexus between and benefit to, Eversource, its affiliates PSNH and NPT, and the proposed PPA.

Given these overlapping relationships, the Commission’s affiliate transactions rules apply. The rules recognize the need in a restructured environment to protect against preferential treatment by a utility towards its competitive affiliate. *See generally* RSA chapter 366; RSA 378:10. N.H. Code Admin. Rules, Chapter Puc 2100 (statutory and regulatory provisions designed to protect against affiliate abuse by requiring nondiscrimination, separation and regulatory oversight in transactions between affiliated entities). Indeed, when the Commission evaluated the potential approaches of EDCs to address cost and price volatility issues in the New Hampshire wholesale electricity market, it emphatically stated:

Under [Puc 2100], there exists a strong policy preference against self-dealing in relations between New Hampshire EDCs and their unregulated affiliates. Functionally, this would tend to militate against the use of a sole-source acquisition approach by a New Hampshire EDC seeking to only acquire a gas capacity product from its competitive, unregulated affiliate. Also, there is a recognition in private industry and regulatory bodies throughout the United States that competitive bidding acquisition processes provide powerful benefits for ensuring prudence in utility expenditure and, by extension, cost savings for utility customers, through the introduction of cost discipline, open participation by competitors, and choices in product acquisition.

See Order No. 25,860 at 4-5, IR 15-124 (January 19, 2016) (emphasis added).

While considered in the context of EDCs acquiring natural gas pipeline capacity, the Commission nonetheless firmly established that efforts from EDCs to acquire generation services to benefit customers must be “predicated on competitive evaluation and selection processes undertaken by entities unaffiliated with the project sponsors.” *Id.* at 5. Continuing, the Commission added that it “expects that any acquisition of gas capacity by a New Hampshire EDC for the ultimate benefit of electric customers would be undertaken through an open, transparent, and competitive bidding/Request for Proposals (RFP)-type process, in which competitors of the New Hampshire EDC’s corporate affiliates or business partners would also be able to participate.” *Id.*

The Commission’s affiliate transaction rules were expressly designed to promote transparency in conduct between affiliated entities and to ensure a level playing field in the competitive marketplace. Although NPT is not a direct party to the PPA, its relationship with Eversource and PSNH, as discussed *supra*, falls squarely within the definitions provided by the rules. NPT is a “competitive affiliate” of PSNH under Puc 2102.03,²¹ as it provides marketing services, *i.e.* transmission services, to Hydro-Quebec and, pursuant to the provision of the TSA,

²¹ Puc 2102.03: "Competitive affiliate" means any affiliate of a utility that is engaged in the sale or marketing of products or services on a competitive basis and includes any competitive energy affiliate.

would be marketing transmission services in the event there was unused transmission capacity. Moreover, as the developer and owner of the NPT line, which will deliver generation to competitive power markets in New England, NPT is also clearly a “competitive energy affiliate” under Puc 2102.04:

“Competitive energy affiliate” means any competitive affiliate of a utility that is engaged in the sale, brokering, or marketing of natural gas or electricity to retail customers, **the development of an energy related generation, transmission, or distribution project, or the provision of related products or services.**

"Competitive energy affiliate" does not include an affiliate to the extent that affiliate performs corporate support services for the utility as described in Puc 2105.04.

(emphasis added).

Therefore, since the proposed PPA is a commercial transaction involving Eversource and its competitive affiliates NPT, (and its captive affiliate PSNH), the specific rules governing utilities and their dealings with competitive affiliates are applicable. *See* N.H. Admin. Rules Puc 2103.02 (disallowing “preferences to competitive affiliates regarding products and services, distribution system information, and customer information.”). The rule expressly requires utilities to “provide its products and services, including but not limited to terms and conditions, pricing, and timing, to competitive affiliates, and to non-affiliated competitors in a non-discriminatory manner” *Id.* at Puc 2103.02(c). Similarly, the Commission’s regulations require that if utilities provide their competitive energy affiliates with “any product or service,” the utilities “shall make the same products or services available to non-affiliated energy competitors in a non-discriminatory manner.” *Id.* at Puc 2103.04; see also RSA 378:10 (prohibiting public utility from making or giving any undue or unreasonable preference or advantage to any person or corporation).

The proposed PPA contracts for energy delivered to one Eversource affiliated entity (PSNH), on a transmission line that will be developed, owned, and operated by another

Eversource affiliated entity (NPT). That HRE is the provider of the energy, does not in any way dilute the inextricable corporate relationship between the Company and NPT, and the business arrangement that produced this PPA. There can be no doubt that an action by a utility that confers a benefit to or favors its affiliate over other competitors in the market is subject to the Commission's rules. Here, PSNH failed to engage in a competitive bidding process and solicit other proposals, and thereby provided a de facto advantage to its competitive affiliate, NPT. Additionally, this transaction is completely lacking in transparency, and thus inevitably raises the specter of NPT having access to PSNH's customer information, pricing, and timing among other things, that non-affiliated competitors do not.

Accordingly, the Commission should reject, as a matter of law in Phase I, this attempt by PSNH to circumvent the affiliate transaction rules by entering into a PPA on the pretense that HRE, the direct counterparty, buffers this statutorily prohibited arrangement with NPT. Alternatively, the Commission should defer any approval of the PPA until such time as the Commission has the opportunity to sufficiently address and resolve the attendant affiliate issues.

E. The Proposed Transaction Has Federal Affiliate Rule Implications.

Preventing affiliate abuse is a concern at the federal level as well. In *Electric Power Supply Association et al. v. AEP Generation Resources, Inc. and Ohio Power Company* (“EPSA”), FERC determined that a power purchase agreement between an Ohio franchised public utility and its affiliated entity was prohibited under FERC's affiliate transaction standards.²² 155 F.E.R.C. P61,102 (April 27, 2016).

²² “The Commission evaluates market-based affiliate transactions based on the standards set forth in *Boston Edison Co. Re: Edgar Electric Energy Co.*...In *Edgar*, the Commission provided the following examples of ways to demonstrate lack of affiliate abuse: (1) evidence of head-to-head competition; (2) evidence of prices which non-affiliated buyers were willing to pay for similar services from the project; and (3) benchmark evidence that shows the prices, terms, and conditions of sales made by non-affiliated sellers, which could include purchases made by the utility itself or by other buyers in the relevant market.” *EPSA*, 155 F.E.R.C. at P61,102, 61,658 (citing *Edgar*, 55 FERC P 61,382 at 62,168-69 (1991)).

In sum, FERC concluded that Ohio retail ratepayers were captive since they would incur non-bypassable generation-related charges under the affiliated PPA, a contract which they have no choice in. *See EPSA*, 155 F.E.R.C. at P61,665 (“While it is true that Ohio ratepayers will continue to have a statutory right to choose one retail supplier over another, we conclude, based on the record, that those AEP Ohio retail ratepayers are nonetheless captive in that they have no choice as to payment of the non-bypassable generation-related charges incurred under the Affiliate PPA. These non-bypassable charges present the “potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,” and, thus, could undermine the goal of the Commission's affiliate restrictions.”).

Specifically, the problem with imposing such charges is that the ratepayers are “[] involuntarily. . . in a situation in which [their] rates subsidize or support another entity--i.e., they must pay a non-bypassable generation-related charge, through the PPA Rider, representing a contract for price differences in wholesale energy, capacity, and ancillary services, as determined by the state regulatory authority, irrespective of their retail provider.” *See EPSA*, 155 F.E.R.C. at P61,665 (internal quotations omitted).

In the present case, PSNH’s proposed PPA is notably similar to how the Ohio affiliate contract was described by one complainant, in that it contemplates an “uneconomic non-exit— i.e., subsidized retention of resources” that otherwise would be divested from under New Hampshire’s restructuring laws. *See EPSA*, 155 F.E.R.C. at P61,659 (internal quotations omitted). Consequently, NEPGA submits that at least these types of federal affiliate issues are implicated in this transaction and warrant further consideration should the Commission undertake further review of the PPA in Phase II.²³

²³ NEPGA notes also the possible implications relating to Phase II stemming from the Supreme Court’s recent decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 993 (2016).

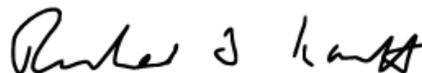
III. CONCLUSION

For the reasons set forth above, the PPA violates the Restructuring Statute, is unsupported by any other state statute and contravenes Chapter Puc 2100. Accordingly, NEPGA respectfully requests that the Commission reject PSNH's request to approve the PPA.

Respectfully Submitted,

**New England Power Generators
Association, Inc.**

By its attorneys,

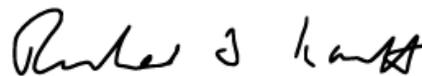


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Certificate of Service

I hereby certify that on November 21, 2016, pursuant to Puc 203.02 & 203.11, I served an electronic copy of this Phase I Brief on each person identified on the Commission's service list for this docket and with the Office of the Consumer Advocate, by delivering it to the email address specified on the Commission's service list for the docket.



Richard A. Kanoff