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November 2, 2018

Via eFiling

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: New England Ratepayers Association, Docket No. EL19-___-000
Petition for Declaratory Order and Request for Expedited Action

Dear Ms. Bose:

Attached for filing, please find the Petition for Declaratory Order and Request for Expedited Action of the New England Ratepayers Association.

Pursuant to Sections 385.207(c) and 381.302(a) of the Federal Energy Regulatory Commission's (FERC) regulations, the filing fee for this petition for declaratory order, in the form of a check payable to the Treasurer of the United States, in the amount of $27,130, will be delivered via courier today to the FERC Filing Desk, along with a copy of the receipt of this efiling for identification.

Thank you for your assistance.

Sincerely,

/s/ David B. Raskin

David B. Raskin
On behalf of the New England Ratepayers Association

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Ratepayers Association) Docket No. EL19-___-000

PETITION FOR DECLARATORY ORDER AND REQUEST FOR EXPEDITED ACTION OF THE NEW ENGLAND RATEPAYERS ASSOCIATION

The New England Ratepayers Association ("NERA") brings this Petition pursuant to Rule 207[1] of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure, requesting that the Commission issue a declaratory order finding that Senate Bill 365 ("SB 365"),[2] a recently-enacted New Hampshire statute that mandates a purchase price for wholesale sales by seven generators operating in the state, is preempted by the Federal Power Act. NERA further requests a declaration that the same law violates Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[3] because the legislature ignored the requirement under PURPA and this Commission's implementing regulations[4] that any rates set by the states for wholesale sales by QFs may not exceed the purchasing utilities' avoided costs. In addition, NERA requests that, pursuant to an Order issued by the Commission under section 210(m) of PURPA terminating PSNH's mandatory purchase obligation on a

[1] 18 C.F.R. § 385.207 (2018).

[2] 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.

[3] 16 U.S.C. §824a-3 (2012).

[4] 18 C.F.R. §§ 292.304(a); 292.101(b)(6) (2018).

service territory-wide basis for QFs with a net capacity in excess of 20 MW, the Commission find that the state is pre-empted from ordering purchases that are contrary to that Order. Finally, NERA requests that the Commission rule on this Petition by February 1, 2019 (the date customers may first bear the costs of SB 365).

NERA is a non-profit organization incorporated in the Commonwealth of Massachusetts, and was established to advocate for ratepayers located throughout every state in New England. It is dedicated to promoting reductions in rates for utility services for New England ratepayers, and focuses on a range of regulated services, including energy, water, and telecommunications.

SB 365 requires "Electric Distribution Companies" ("EDCs") to enter into contracts with certain eligible independently-owned biomass and municipal-waste-powered generators (hereinafter "eligible facilities"), all of which are "qualifying facilities" under PURPA, for the facilities' entire net energy output. But the statute goes further, and impermissibly sets an arbitrary price for these wholesale sales equal to 80% of the full requirements *retail* rate for default service, termed the "Adjusted Energy Rate." In so doing, the law intrudes on this Commission's exclusive jurisdiction to set rates for wholesale sales of electricity.[5] Precedent from the Supreme Court and this Commission make clear that whatever the states may do to encourage the use of renewable or fuel-diverse generation, they may not advance those objectives by setting the price for wholesale sales of electricity. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297-99 (2016) ("States may not seek to achieve ends, however legitimate,

[5] 16 U.S.C. §§ 824(b), 824d(a) (2012).

through regulatory means that intrude on FERC's authority over interstate wholesale rates . . . .").[6]

The New Hampshire legislature did not invoke PURPA as a basis for the State to set rates under SB 365. But regardless, PURPA cannot save the statute from preemption, because the legislature made no attempt to set the rate for these wholesale energy sales according to the EDCs' avoided cost, and SB 365 does not authorize the New Hampshire Public Utilities Commission ("NHPUC") to do so. Notably, the NHPUC has already determined that the EDCs' avoided cost for energy is equal to the ISO New England Inc. ("ISO-NE") real time price (as adjusted for line losses, wheeling costs, and administrative costs incurred by the utility for the transaction).[7] SB 365 not only ignores PURPA's avoided cost requirement and the NHPUC's implementation thereof, but acknowledges that the legislatively-prescribed rate for these sales *will exceed* the ISO-NE price. The statute recoups the excessive charges paid to eligible facilities by requiring retail customers to bear the cost of these excess payments to generators by imposing a non-bypassable charge for the difference between the "Adjusted Energy Rate" and the ISO-NE market-clearing price. By setting rates above avoided cost, SB 365 violates the fundamental requirement of PURPA that retail customers must remain indifferent to the

[6] *Accord S. Cal. Edison Co.*, 70 FERC ¶ 61,215 at 61,676 (1995) (suggesting that states may "require a utility . . . to purchase power from the supplier of a particular type of resource," but – unless the seller is a QF and the rate set equal to the purchasing utility's avoided cost – the "rates for wholesale sales would be regulated by this Commission"), *order on reconsideration*, 71 FERC ¶ 61,269 (1995); *see also Conn. Light & Power Co.*, 71 FERC ¶ 61,035 at 61,153 (1995) (order denying reconsideration) ("[S]tates have no authority outside of PURPA to set QF rates at wholesale."); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 at 61,247-48 (1997).

[7] *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order No. 25,920, 2016 WL 3613349, at *51 (N.H.P.U.C. July 1, 2016).

EDCs' procuring power from eligible facilities. *See Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 858 (9th Cir. 1994).[8]

Recently, the Commission and the courts have been presented with cases that raise difficult jurisdictional questions – cases in which the precise line between FERC and state authority must be discerned with respect to new products or novel circumstances. This case is not one of those cases. The jurisdictional issue raised in this Petition is straightforward, and the Commission has decided it previously on several occasions. The State of New Hampshire is simply attempting to set the rate for a physical sale of power at wholesale, a matter that is at the heart of the Commission's Federal Power Act jurisdiction. The State does not attempt to justify its action by reference to its limited rate setting authority under PURPA and the rate it established bears no relationship to the buyers' avoided cost. Accordingly, NERA respectfully requests that the Commission issue a declaration that: (1) SB 365 is preempted under the Federal Power Act because it impermissibly sets rates for wholesale sales of energy; (2) SB 365 is additionally preempted because it violates this Commission's regulations and sets a rate for sales in excess of avoided cost, in violation of PURPA; and (3) as to PSNH, any mandate requiring purchases from QFs with a net generation in excess of 20 MW is pre-empted by Order of this Commission under section 210(m) of PURPA.

[8] *See also* 18 C.F.R. § 292.304(a)(2) ("Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.").

I. COMMUNICATIONS

The names, titles and mailing addresses of the persons who should be served with communications regarding this filing are as follows:

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II. New Hampshire's Enactment of SB 365

On September 13, 2018, the New Hampshire General Court (New Hampshire's bicameral legislative body) enacted SB 365, over the Governor's veto. The statute's legislative findings reflect a determination that "continued operation of the state's 6 independent biomass-fired electric generating plants and the state's single renewable waste-to-generating plant are at-risk due to energy pricing volatility." The seven "eligible facilities" defined by SB 365[9] are as follows:

1. **Springfield Power, LLC**
   Springfield, NH
   17.7 MW (biomass)[10]

2. **DG Whitefield, LLC**
   Whitefield, NH
   17.7 MW (biomass)[11]

[9] N.H. Rev. Stat. § 362-H:1(V).

[10] Springfield Power, LLC filed a Form No. 556 Self-Recertification for QF Status in Dkt. No. QF84-423-006 on April 12, 2012.

3. **Indeck Energy-Alexandria L.L.C.**
Alexandria, NH
15.2 MW (biomass)[12]

4. **Bridgewater Power Company, L.P.**
Bridgewater, NH
16 MW (biomass)[13]

5. **Pinetree Power - Tamworth LLC**
Tamworth, NH
21.5 MW (biomass)[14]

6. **Pinetree Power, Inc.**
Bethlehem, NH
15.9 MW (biomass)[15]

7. **Wheelabrator Concord Company, L.P.**
Penacook, NH
13 MW (waste-to-energy)[16]

The six biomass plants all burn wood and are located within the service territory of Public Service Co. of New Hampshire (d/b/a Eversource Energy, hereinafter referred to alternatively as "PSNH" or "Eversource").[17] The Wheelabrator waste-to-energy plant is located in the service territory of Unitil Corporation ("Unitil").

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[11] DG Whitefield, LLC filed a Form No. 556 in Dkt. No. QF84-444-007 on April 12, 2012.

[12] Indeck Energy-Alexandria, L.L.C. filed a Form No. 556 in Dkt. No. QF86-377-003 on September 9, 2011.

[13] Bridgewater Power Co., L.P. filed a Form No. 556 in Dkt. No. QF86-53-004 on March 20, 2015.

[14] Notice of Self-Recertification of Qualifying Facility Status of Pinetree Power - Tamworth, Inc. to Reflect Change of Ownership, Dkt. No. QF86-511-005 (Dec. 15, 2008).

[15] Notice of Self-Recertification of Qualifying Facility Status of Pinetree Power, Inc. to Reflect Change of Ownership, Dkt. No. QF85-270-005 (Dec. 15, 2008).

[16] Wheelabrator Concord Co., L.P. filed a Form No. 556 in Dkt. No. QF86-176-001 on March 19, 2015.

[17] It should be noted that there are two additional independently-owned biomass-fueled generators located in New Hampshire, both within PSNH's retail service territory – the 75 MW

SB 365 mandates that each EDC required to procure default service, which includes both PSNH and Unitil, "shall offer to purchase the net energy output of any eligible facility located in its service territory."[18] These EDCs are required to solicit proposals from the eligible facilities as part of their solicitations of power supply needed to provide default service.[19] But proposals from eligible facilities for SB 365 contracts are *not* to be competitively bid. On the contrary, SB 365 mandates that EDCs must accept offers for sales of energy by eligible facilities at a pre-determined price[20] termed the "Adjusted Energy Rate." This mandated rate is equal to 80% of the *retail* rate for default service, minus an adjustment for the cost of compliance with the state's renewable portfolio standards law.[21]

Burgess Biomass Plant in Berlin, New Hampshire, and the 50 MW Schiller Unit 5 Facility located in Portsmouth, New Hampshire. Although all biomass plants in New Hampshire are part of the same ISO-NE market and compete for the same fuel sources, neither of these other two facilities would receive the subsidies mandated by SB 365.

[18] N.H. Rev. Stat. § 362-H:2.

[19] Under the statute, this mandate extends for each EDC's "next 6 sequential solicitations of its default service supply," a period of roughly three years. N.H. Rev. Stat. § 362-H:2(I)(a).

[20] N.H. Rev. Stat. § 362-H:2(I)(a). The "Adjusted Energy Rate" mandated for these sales is "derived from the default service rates approved by the [NHPUC] in each applicable default service supply solicitation and resulting rates proceeding." *Id.*

[21] N.H. Rev. Stat. § 362-H:1(I) (defining the "Adjusted Energy Rate" as "80 percent of the rate . . . resulting from the default energy rate minus, if applicable, the rate component for compliance with the renewable energy portfolio standards law"). The "Default Energy Rate," from which the "Adjusted Energy Rate" is derived, is defined as the "default service energy rate applicable to residential class customers . . . which is available to retail electric customers who are otherwise without an electricity supplier." N.H. Rev. Stat. § 362-H:1(IV).

Default service is the full-requirements retail electric service the EDCs are required to provide to customers who do not buy from a competitive retail supplier.[22] The default service rate is determined based on the results of the EDCs' solicitations for firm, all-requirements, load-following power needed to provide such full-requirements service.[23] Suppliers who bid to provide the EDCs' default energy service "are offering to provide what is fundamentally retail service down to the customer meter," and accordingly bids submitted in the default service solicitations reflect not only the cost of providing energy, but various other components such as ancillary services, line losses, and, significantly, a component designed to manage variable load risk.[24]

The NHPUC approved the most-recent default service solicitations for PSNH for the six-month period beginning August 1, 2018 on June 15, 2018, and, on October 5, 2018, approved Unitil's rates for the six-month period beginning December 1, 2018.[25] Under these orders, PSNH's rate for default service to its Small customer group (which

[22] N.H. Rev. Stat. § 374-F:2, I-a ("'Default service' means electricity supply that is available to retail customers who are otherwise without an electricity supplier and are ineligible for transition service.").

[23] *See* PSNH May 9, 2018 Request for Proposals for Power Supply for Energy Service, Attachment FBW-1 at 3, N.H.P.U.C. Dkt. No. DE 18-002 (filed June 8, 2018); PSNH Energy Service Rate Setting August 1, 2018 through January 31, 2019, Small Customers, Attachment CJG-1 at 1, N.H.P.U.C. Dkt. No. DE 18-002 (filed June 8, 2018).

[24] *Electric Utilities: Review of Default Service Procurement Processes for Electric Distribution Utilities*, N.H.P.U.C. Dkt. No. IR 14-338, May 27, 2015 Hr'g Tr. 61-63 (May 27, 2015), Attachment JRS-R-10 (at 3) to the Rebuttal Testimony of James R. Shuckerow on behalf of PSNH, N.H.P.U.C. Dkt. No. DE 14-238 (filed Nov. 19, 2015).

[25] *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order Approving Solicitation Process and Resulting Rates, Order No. 26,147, 2018 WL 3068167 (N.H.P.U.C. June 15, 2018); *Unitil Energy Sys., Inc.*, Order Approving Petition, Order No. 26,180, 2018 WL 4929445 (N.H.P.U.C. Oct. 5, 2018).

includes residential customers) is 9.412 cents/kWh. This rate includes an adder of 0.369 cents/kWh for the cost of compliance with renewable portfolio standards (RPS). Unitil's rate is 11.689 cents/kWh for residential customers, which includes a RPS adder of 0.082 cents/kWh.

The sales contemplated under SB 365's mandated power purchase agreements ("PPAs") are for the entire energy output of the eligible facilities.[26] Eligible facilities are required to submit a nonbinding proposed schedule of hourly net output amounts in their response to the EDC's solicitation,[27] but the EDC is required to submit for approval to the NHPUC all proposals from eligible facilities that conform to the statutory requirements—i.e., the EDC is not allowed to negotiate a price for the eligible facility's sales that differs from the "Adjusted Energy Rate."[28] Likewise, SB 365 narrowly circumscribes the scope of the NHPUC's review of the eligible facilities' PPAs, as the NHPUC may only review those PPAs "for conformity with this chapter,"[29] meaning that the NHPUC too lacks discretion to modify the price to anything other than the "Adjusted Energy Rate."

Finally, SB 365 requires that each EDC "recover the difference between its energy purchase costs [under the PPAs with eligible facilities] and the market energy clearing price through a non-bypassable delivery services charge applicable to all customers in the

[26] N.H. Rev. Stat. § 362-H:2(I)(b) (EDC's purchase is "for 100 percent of the eligible facility's net electrical output").

[27] N.H. Rev. Stat. § 362-H:2(II).

[28] N.H. Rev. Stat. § 362-H:2(III).

[29] N.H. Rev. Stat. § 362-H:2(IV). "Chapter" refers to Chapter 362-H of the New Hampshire Revised Statutes, which Chapter was created by SB 365.

utility's service territory."[30] Thus, the statute requires that PSNH and Unitil: (1) purchase the full energy output of seven specific plants at a price mandated by state law that is arbitrarily based on the cost of retail default service, (2) sell that energy into the ISO-NE market, and (3) recover from retail customers through a non-bypassable charge the difference between the price the EDCs pay to the generators and the market price for the energy. In this way, the statute mandates the payment of above-market wholesale prices, and ensures that retail customers in the EDCs' service territories will bear the cost of these above-market payments for the eligible facilities' energy.

III. Petition for Declaratory Order

SB 365 is preempted under federal law, because it sets the rate for wholesale sales of energy, a matter exclusively reserved to this Commission's jurisdiction under the Federal Power Act. Although PURPA creates an exception to this Commission's exclusive jurisdiction by allowing States to set rates for wholesale sales by QFs at the utility's avoided cost, the New Hampshire legislature did not invoke PURPA as a basis for SB 365, and did not attempt to set the rate for sales by eligible facilities in accordance with the EDCs' avoided costs. By failing to set rates in accordance with PURPA's avoided cost rules, SB 365 violates PURPA.

A. SB 365 Is Preempted by the Federal Power Act Because the Statute Impermissibly Sets Rates for Wholesale Sales of Energy

The Federal Power Act vests this Commission with exclusive jurisdiction over wholesale sales of energy. *Hughes*, 136 S. Ct. at 1291-92; 16 U.S.C. § 824(b)(1). Under

[30] N.H. Rev. Stat. § 362-H:2(V).

the doctrine of field preemption, the Supremacy Clause of the U.S. Constitution preempts state laws where "'Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.'" *Hughes*, 136 S. Ct. at 1297 (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989)).[31] Because the setting of wholesale electricity is exclusively reserved for this Commission, states' attempts like SB 365 to set such rates are preempted under the Federal Power Act.

In *Hughes*, the Supreme Court addressed an order of the Maryland Public Service Commission requiring the state's load-serving entities (LSEs) to enter into a twenty-year "contract for differences" with the developer of new generation that guaranteed the developer would receive different compensation than the wholesale price of capacity set by the PJM market. The Court found that Maryland's program was preempted under the Federal Power Act because it "sets an interstate wholesale rate" distinct from the rate determined by PJM, the FERC-regulated auction market. *Hughes*, 136 S. Ct. at 1297. The contract for differences in *Hughes* differed from a traditional bilateral contract for the sale of capacity, because the LSEs did not take title to capacity under the contract and were instead providing a price guarantee to the developer. *Id*. at 1295. But that fact did not stop the Court from finding those contracts preempted, because Maryland's program

[31] The principal question in this case is one of field preemption, which arises where the federal government has regulated an area so pervasively as to "occup[y] a given field" such that no room is left for state regulation. *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983); *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 97-98 (1963). Even where Congress has not occupied an entire field, preemption may also be found under the separate doctrine of conflict preemption if there is an "actual and immediate conflict between the federal and state regulations." *N. Nat. Gas*, 372 U.S. at 97.

bypassed the mechanism FERC had chosen to set the price for sales of capacity (the PJM auction) and instead guaranteed that the developer would receive a different, state-determined price for its wholesale capacity sales to PJM, "regardless of the clearing price." *Id*. at 1297-99.

Just like Maryland's program in *Hughes*, SB 365 "disregards an interstate wholesale rate required by FERC" and mandates that EDCs (and after pass-through, retail customers) pay a price for the eligible facilities' wholesale sales that is different than the FERC-determined price. The statute guarantees that eligible facilities receive prices equal to 80% of the *retail* rate for default energy service, and guarantees that these generators will receive the same compensation regardless of the ISO-NE clearing price. Indeed, New Hampshire's intrusion on this Commission's jurisdiction is even more stark than in *Hughes*, because the contracts mandated by SB 365 *are* for wholesale sales of energy, not contracts for differences.[32]

Importantly, though the PPAs mandated under SB 365 are contracts for the sale of energy, they are not truly "bilateral" because the contract price is not the result of negotiated, arms-length bargaining between two parties (the EDCs and eligible facilities), but instead is mandated by legislative fiat pursuant to the state's police power. *Cf. Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 98 (2d Cir. 2017) (finding contracts resulting from state renewable resources solicitation were not preempted, in part because LSEs were given

[32] In *Hughes*, the Court noted that Maryland had taken the position that the contract at issue was not subject to review and approval by FERC because it did not contemplate the sale of capacity outside of the auction, but instead provided a financial guarantee separate from the underlying wholesale transaction. *Id*. at 1299.

discretion whether to enter into contracts with the RFP winners).[33, 34] Further, SB 365 makes no provision for filing the PPAs with FERC for review under section 205 of the Federal Power Act, and does not condition the PPAs' effectiveness upon FERC approval. *Cf. Allco Finance*, 861 F.3d at 99-100 (holding that bilateral capacity contracts entered pursuant to state renewable generation RFP were not preempted, because the RFP program required that any contracts be filed with FERC and were subject to FERC's approving the contracts as just and reasonable). Thus, under SB 365, the State of New Hampshire will set an arbitrary price for wholesale sales by the eligible facilities, under a process that makes no allowance for arms-length negotiation or competitive solicitation followed by FERC review and approval to determine a just and reasonable rate.

This Commission has addressed similar state attempts to set wholesale prices on several occasions, and each time has concluded that those efforts were preempted. *Connecticut Power & Light Co.* addressed whether a Connecticut statute that set the rate for sales by a resources recovery facility at a price that may have exceeded the purchasing utility's avoided cost was preempted by federal law. 70 FERC ¶ 61,012 at 61,025-26, 61,029 (1995). This Commission held that, with respect to any sales by public utilities that are not QFs, FERC has exclusive jurisdiction over wholesale rates,

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[33] The *Allco* court distinguished *PPL EnergyPlus, LLC v. Solomon*, 761 F.3d 241 (3d Cir. 2014), noting that the Third Circuit found preemption in that case in part because the "utilities were 'compel[led]' to enter into capacity contracts *on terms chosen by state agencies*." *Allco*, 861 F.3d at 100 (emphasis added).

[34] SB 365 states that EDCs "shall offer to purchase the net energy output of any eligible facility located in its service territory." N.H. Rev. Stat. § 362-H:2. Under New Hampshire Law, the use of the word "shall" in legislation constitutes a mandate. *Appeal of Algonquin Gas Transmission, LLC*, 186 A.3d 865, 874 (N.H. 2018) ("The use of the word 'should' allows the PUC to exercise its discretion and judgment; in contrast, the word 'shall' establishes a mandatory duty.").

and states are absolutely preempted from setting rates for wholesale sales. *Id*. at 61,030. In its Order Denying Reconsideration, this Commission noted that "PURPA gave the states a specific but limited role to set wholesale rates pursuant to the statute and the Commission's regulations—a role that in most instances they would not otherwise have had since QF sales primarily are sales for resale in interstate commerce. In other words, states have no authority outside of PURPA to set QF rates at wholesale." *Conn. Light & Power Co.*, 71 FERC at 61,153 (internal footnote omitted).

Similarly, in *Midwest Power* , 78 FERC at 61,244-45, this Commission held that orders of the Iowa Utilities Board requiring Midwest Power and other Iowa utilities to enter into long-term contracts from certain generators at a rate "substantially in excess of [Midwest Power's] avoided cost" was preempted by both PURPA and the Federal Power Act. The Iowa Board expressly disclaimed reliance on PURPA, arguing that it was not attempting to set an avoided cost rate and that any contracts entered pursuant to the Iowa Board's orders were not preempted because they could later be filed with and reviewed by this Commission. *Id*. at 61,246. The Commission rejected that argument, and found the orders were preempted under the Federal Power Act to the extent they set rates outside the bounds of PURPA for energy "sold at wholesale in interstate commerce by public utilities." *Id*. at 61,247.

Finally, this Commission held that an order by the California Public Utilities Commission ("CPUC") implementing a California statute that required utilities to offer to purchase energy from certain combined heat and power ("CHP") generators at a pre-set, CPUC-determined price could only avoid preemption if the relevant generators were QFs

and the CPUC set the rates for such sales according to the utilities' avoided cost. *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 64-67, 70, *order on clarification*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011). Otherwise, any wholesale rates set by the CPUC were preempted.

Because the New Hampshire statute purports to set the rates for wholesale sales by "eligible facilities" outside of PURPA, it is plainly preempted under this Commission's analysis in the foregoing cases.

B. SB 365 Violates PURPA's Avoided Cost Requirement and Thus Is Not Saved from Preemption

The New Hampshire legislature did not invoke PURPA as authorization for the state to set the rates for sales by eligible facilities pursuant to SB 365. The statute contains no reference to "avoided cost" or "incremental cost," and although all seven of the eligible facilities have obtained QF status, the law does not require that any seller obtain or maintain status as a QF in order to qualify for the mandatory purchase obligation created by SB 365.[35] Nevertheless, as the cases above hold, any attempt by the states to set rates for wholesale sales by these generators[36] outside the context of PURPA is plainly preempted under the Federal Power Act. Thus, SB 365 cannot escape preemption unless it complies with PURPA and this Commission's regulations enacted thereunder. Because the legislature completely ignored PURPA's avoided cost

[35] *See* N.H. Rev. Stat. § 362-H:1(V) (defining qualifications for an "Eligible Facility").

[36] None of the seven generators is a state or federal agency or other entity that might be excepted from this Commission's jurisdiction under Section 201 of the Federal Power Act. 16 U.S.C. § 824(f) (2012).

requirement and made no effort to set the price for the eligible facilities' sales at avoided cost, SB 365 violates PURPA and is preempted.

In determining that QFs are to be compensated at the full avoided cost rate, the Commission's PURPA-implementing regulations opted for the "maximum rate authorized by Congress." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417-18 (1983).[37] But as the Commission has recognized:

> [A] rate in excess of avoided cost is, by definition, a rate higher than what ratepayers would pay if the utility had generated the electric energy itself or purchased it elsewhere. By stating that states cannot impose rates in excess of avoided cost, section 210 of PURPA and the Commission's regulations balance the competing Congressional concerns of promoting cogeneration and small power production and yet not burdening ratepayers; *imposing a rate in excess of avoided cost would subsidize QFs and burden ratepayers.*

Conn. Light & Power Co., 70 FERC at 61,029 n.46 (internal citations omitted) (emphasis added). Acknowledging that "Congress did not intend QFs to have any rate benefit above a market rate level," the Commission has emphasized that the need to "ensure that QF rates do not exceed avoided cost" is "critical," because "QF rates that exceed avoided cost will, by definition, give QFs an unfair advantage over other market participants" and thereby "hurt ratepayers." *S. Cal. Edison Co.*, 70 FERC at 61,675-76 & n.14. Thus, PURPA's avoided cost requirement is a critical consumer protection requirement that ensures "consumers are not forced to subsidize QFs." *Indep. Energy Producers*, 36 F.3d at 858.

[37] 16 U.S.C. § 824a-3(b)(2) (providing that, in enacting its implementing regulations under PURPA, the Commission was not permitted to "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy").

The Commission has recognized that states lack authority under PURPA to set rates for QF sales in excess of avoided cost.[38] *Conn. Power & Light*, 70 FERC at 61,023 ("Rates may be established by the state but only pursuant to and consistent with this Commission's regulations under PURPA"; *id*. at 61,027-29 (states lack authority "to prescribe rates for sales by QFs at wholesale that exceed the avoided cost cap contained in PURPA"). In *Southern Cal. Edison Co.*,[39] the Commission acknowledged that "PURPA does not permit either the Commission, or the States in their implementation of PURPA, to require a purchase rate that exceeds avoided cost," and held that a CPUC order violated PURPA because it failed to set a rate for avoided costs that took into account all sources able to sell to the utility. *See also Midwest Power*, 78 FERC at 61,247 (holding that orders of the Iowa Board were alternatively preempted by the Federal Power Act, or, if they set rates for QFs in excess of avoided cost, by PURPA); *see also Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 67, 70 ("[W]hether a rate is filed under section 205 of the FPA for Commission approval, or is exempt from scrutiny from FPA sections 205 and 206 pursuant to the Commission regulations, the CPUC may not set rates for the sale for resale of energy and capacity by a QF that exceeds the purchasing utility's avoided cost.").

[38] The Commission's regulations defined avoided cost as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

[39] 70 FERC at 61,675, 61,677-78.

As noted above, the legislature did not even attempt to set the price for these sales at avoided cost. The law simply mandates that EDCs purchase energy from eligible facilities at a price equal to 80% of the retail rate for default energy service. In contrast, the NHPUC has, since the beginning of restructuring in 1999, generally set the EDCs' avoided cost as being equal to the real-time price of energy in ISO-NE. The NHPUC reaffirmed this determination in 2016, finding that the ISO-NE real-time energy price (as adjusted for line losses, wheeling costs, and administrative costs) properly reflects the EDCs' marginal costs. *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order No. 25,920, 2016 WL 3613349, at *51, *53, *55-56 (N.H.P.U.C. July 1, 2016). In making this finding, the NHPUC rejected an argument that the avoided cost rate for Eversource should be set based on the "costs Eversource incurs to generate electricity and make supplemental purchases to serve default service load and, following divestiture, on the results of its procurement of default service supply through a competitive RFP process."[40] The NHPUC deemed it proper to use the ISO-NE price as the measure of Eversource's avoided cost, because that was the measure that best reflected Eversource's marginal cost of energy.[41] In other words, the NHPUC rejected the argument that the default service rate – the very rate upon which SB 365 relies in determining the rate to be paid for sales

[40] *Id*. at *51. The Intervenor abandoned that position midway through the proceedings, and instead contended that the avoided cost price should be calculated based on the day-ahead ISO-NE price rather than the real time price, a position that the NHPUC also rejected. *Id*. at *51, 53-56.

[41] *Id*. at *53 (citing *Indus. Cogenerators [Corp.]*, 72 N.H.P.U.C. 8, 1987 WL 1501794 (Jan. 7, 1987) (utility's avoided cost determined based on costs of generating units operating on the margin).

under the statute – reflects Eversource's avoided cost.[42] Unitil's NHPUC-approved avoided cost for purchases under PURPA is also the ISO-NE real-time energy price.[43]

Thus, the legislature's determination to set the rate for eligible facility sales based on a fixed percentage of the retail rate for default energy service cannot reflect the EDCs' avoided cost of energy, does not adopt the NHPUC's determinations as to the EDCs' actual avoided cost, and therefore SB 365 violates PURPA. In fact, the Commission need look no further than SB 365's own text as proof that the law provides compensation to the generators in excess of the EDCs' avoided cost, because the statute provides that EDCs shall recover the difference between the costs of purchasing from eligible facilities and the market-clearing price of energy in ISO-NE through a non-bypassable charge to retail customers.[44]

The Commission has acknowledged that its responsibilities for supervising states' implementation of the avoided cost requirement compel it to "ensur[e] the *process* used to calculate the per unit charge (i.e., implementation) accords with the statute and our regulations." *S. Cal. Edison Co.*, 70 FERC at 61,677 (emphasis added). Here, the New

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[42] Though it is true that the statute sets the "Adjusted Energy Rate" at 80% of the default energy rate and thus compensates eligible facilities at something less than the *full* cost of providing default service for their sales of energy, the 20% deduction in the rate is an arbitrary figure and is not an actual determination of avoided cost.

[43] Unitil Energy Systems, Inc. Tariff for Electric Delivery Service, NHPUC No. 3, Fifth Revised Page 76. ("Rates for Qualifying Facilities 1 MW or Greater: Qualifying Facilities that have a design capacity of 1 MW or greater shall have their output metered and purchased at rates equal to the payments received by the Company from the ISO-NE, net of all charges imposed by the ISO-NE for such output, for the hours in which the Qualifying Facility generated electricity in excess of its requirements.").

[44] N.H. Rev. Stat. § 362-H:2(V).

Hampshire legislature set the rate for these sales without employing *any process* to determine avoided costs. Such an act is plainly not a valid implementation of this Commission's PURPA regulations, and the Commission should rule accordingly.

C. SB 365 Is Additionally Preempted with Respect to Sales from One of the Eligible Facilities, Pinetree Power Tamworth LLC, Because the Commission Has Terminated the Mandatory Purchase Obligation as to This Generator

One of the "eligible facility" generators, Pinetree Power Tamworth, LLC, has a net capacity of 21.5 MW. In April 2010, the Commission issued an order pursuant to section 210(m)[45] of PURPA terminating PSNH's mandatory purchase obligation on a service territory-wide basis for QFs with a net capacity in excess of 20 MW. *Pub. Serv. Co. of N.H.*, 131 FERC ¶ 61,027 at P 2 (2010). Thus, under that order, New Hampshire is preempted from ordering any mandatory purchases from this facility by PSNH under PURPA, even if (contrary to fact) SB 365 were an otherwise proper implementation of PURPA that correctly set an avoided cost rate.

IV. Request for Expedited Action

NERA requests that the Commission issue a decision on this Petition on or before February 1, 2019, so that the unlawful contracts are not permitted to go into effect. SB 365 became effective immediately upon its enactment on September 13, 2018, and applies to the "next 6 sequential solicitations of [each impacted EDC's] default service supply after the [statute's] effective date."[46] PSNH's next default service supply solicitation – the first subject to SB 365 – begins on November 8, for the six-month

[45] 16 U.S.C. § 824a-3(m).

[46] N.H. Rev. Stat. § 362-H:2(I)(a).

period beginning February 1, 2019.[47] Thus, the first PPAs with eligible facilities priced according to the mandatory and unlawful "Adjusted Energy Rate" would go into effect on February 1, 2019, and PSNH's compliance with the mandates set forth in SB 365 must be underway before November 8. Expedited action is thus warranted because, as this Commission has emphasized, the appropriate time to challenge a contract as violative of PURPA or preempted by the Federal Power Act is *before* the contract has been executed. In similar circumstances, the Commission has not hesitated to act prior to contract execution to avoid subsequently disturbing the expectations of the parties. *E.g.*, *S. Cal. Edison Co.*, 70 FERC at 61,677-78; *Midwest Power*, 78 FERC at 61,247-48. Moreover, there is no reason to delay a decision until after the NHPUC has reviewed the contracts, because the statute denies the NHPUC any authority to set a different rate than the one the legislature has chosen.[48]

V. CONCLUSION

For the foregoing reasons, NERA respectfully requests that the Commission issue a declaratory order finding that (1) SB 365 is preempted under the Federal Power Act because it impermissibly sets rates for wholesale sales of energy; (2) SB 365 is additionally preempted because it violates this Commission's regulations and sets a rate for sales in excess of avoided cost, in violation of PURPA; and, (3) as to PSNH, any

[47] The NHPUC approved PSNH's most recent solicitation for default service supply on June 15, 2018 (covering the six-month period running from August 1, 2018 through January 31, 2019). *Pub. Serv. Co. of N.H. d/b/a Eversource Energy*, Order Approving Solicitation Process and Resulting Rates, Order No. 26,147, 2018 WL 3068167 (N.H.P.U.C. June 15, 2018).

[48] N.H. Rev. Stat. § 362-H:2(IV).

mandate requiring purchases from QFs with a net generation in excess of 20 MW is pre-empted by Order of this Commission under section 210(m) of PURPA.

Respectfully submitted,

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