

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**New England Ratepayers Association )**

**Docket No. EL19-10-000**

**SUPPORTING COMMENTS OF  
THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to the notice issued by the Federal Energy Regulatory Commission (the “Commission”) in the above-captioned proceeding,<sup>1</sup> the Electric Power Supply Association (“EPSA”)<sup>2</sup> hereby submits these comments supporting the petition filed on November 2, 2018 by the New England Ratepayers Association (“NERA”).<sup>3</sup> EPSA strongly supports the Petition, and urges the Commission to act swiftly to remind states once again that they are not permitted to intrude upon the Commission’s exclusive jurisdiction over wholesale sales under the Federal Power Act (the “FPA”),<sup>4</sup> and that states are also prohibited from taking action that is contrary to the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and the Commission’s implementing regulations.<sup>5</sup> Prompt Commission action is necessary not only to enforce the FPA and

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<sup>1</sup> *New England Ratepayers Assoc.*, Docket No. EL19-10-000 (Nov. 5, 2018) (unreported).

<sup>2</sup> Launched over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue EPSA has separately moved to intervene in this proceeding. See doc-less Motion to intervene of Electric Power Supply Association, Docket No. EL19-10-000 (filed Nov. 29, 2018).

<sup>3</sup> Petition for Declaratory Order and Request for Expedited Action of the New England Ratepayers Association, Docket No. EL19-10-000 (filed Nov. 2, 2018) (the “Petition”).

<sup>4</sup> 16 U.S.C. § 824, *et seq.* (2012).

<sup>5</sup> 18 C.F.R Pt. 292 (2018).

PURPA, but to maintain the integrity of the wholesale markets in New England and ensure that all generation resources receive rates that are just, reasonable, and not unduly preferential or discriminatory.

## I.

### **BACKGROUND**

As explained in detail in the Petition, Senate Bill 365 (“SB 365”),<sup>6</sup> which was recently enacted by the New Hampshire legislature, requires electric distribution companies (“EDCs”) to purchase power from seven specific “eligible facilities” at an “adjusted energy rate.” The eligible facilities under SB 365 consist of six biomass plants, which are located within the service territory of Public Service Co. of New Hampshire (d/b/a Eversource Energy) (“PSNH”), and one waste-to-energy plant, which is located in the service territory of Unitil Corporation (“Unitil”). The “[a]djusted energy rate” is defined 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. . . .”<sup>7</sup> Because the “[d]efault energy rate” is, in turn, 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,”<sup>8</sup> this means that EDCs like PSNH and Unitil would have to agree to purchase power from the eligible facilities at a rate that is essentially “equal to 80% of the *retail* rate for default service . . . .”<sup>9</sup>

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<sup>6</sup> The text of SB 365 is available at <https://legiscan.com/NH/text/SB365/2018>.

<sup>7</sup> N.H. Rev. Stat. § 362-H:1(I).

<sup>8</sup> N.H. Rev. Stat. § 362-H:1(IV).

<sup>9</sup> Petition at 7 (footnote omitted) (emphasis in original).

The Petition explains that, by mandating the rate at which EDCs must purchase power, SB 365 “intrudes on this Commission’s exclusive jurisdiction to set rates for wholesale sales of electricity.”<sup>10</sup> In addition, although each of the eligible facilities is a qualifying facility (“QF”) under PURPA, the Petition explains that “[t]he New Hampshire legislature did not invoke PURPA as a basis for the State to set rates under SB 365,” and that “the legislature made no attempt to set the rate for these wholesale energy sales according to the EDCs’ avoided cost”<sup>11</sup> as required under the Commission’s PURPA regulations. The Petition further explains that the New Hampshire Public Utilities Commission (“NHPUC”) has determined that “the EDCs’ avoided cost for energy is equal to the ISO New England Inc. (“ISO-NE”) real time price,” with certain adjustments.<sup>12</sup> Nonetheless, SB 365 expressly contemplates that the adjusted energy rate will exceed the ISO-NE real time price, and therefore imposes a non-bypassable charge that will allow EDCs to recoup from retail customers the difference between the adjusted energy rate and the ISO-NE market-clearing price.<sup>13</sup> The Petition also states that the Commission has terminated PSNH’s obligation under PURPA to purchase energy from QFs in excess of 20 MW, and that New Hampshire is therefore barred from requiring PSNH to purchase energy from one of the eligible facilities because it exceeds 20 MW in size.<sup>14</sup>

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<sup>10</sup> *Id.* at 2 (citation omitted).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* (citation omitted).

<sup>13</sup> *See id.*

<sup>14</sup> *See id.* at 20 (citing *Public Serv. Co. of N.H.*, 131 FERC ¶ 61,027 (2010) (“PSNH PURPA 210(m) Order”), *reh’g denied*, 134 FERC ¶ 61,041 (2011)).

The Petition asks the Commission to issue a declaratory order finding that (1) SB 365 is preempted by the FPA; (2) SB 365 is additionally preempted because it violates PURPA and the Commission's implementing regulations, and (3) as to any requirement for PSNH to purchase power from QFs in excess of 20 MW in size, SB 365 is preempted by the Commission's PSNH PURPA 210(m) Order.

## II.

### **SUPPORTING COMMENTS**

The Petition not only correctly reflects long-standing judicial and Commission precedent emphasizing the exclusive nature of the Commission's jurisdiction over wholesale sales, but is also necessary to protect competition in the ISO-NE market. The Commission should therefore act expeditiously and issue a declaratory order as requested in the Petition.

#### **A. SB 365 Is Preempted By The FPA**

The Supreme Court has repeatedly and consistently recognized that the FPA grants the Commission "exclusive jurisdiction" and "plenary authority" over wholesale sales.<sup>15</sup> SB 365 clearly violates such precedent, because the New Hampshire legislature dictated the rate at which the EDCs would purchase power that would then be used for "default service supply"<sup>16</sup> to their retail customers. In so doing, the New Hampshire impermissibly set the rate for the "sale of electric energy to any person for

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<sup>15</sup> *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). See also, e.g., *New England Power v. New Hampshire*, 455 U.S. 331, 340 (1982) (the Commission has "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce" (citation omitted)).

<sup>16</sup> N.H. Rev. Stat. § 362-H:2(I)(a).

resale,”<sup>17</sup> a task that lies at the heart of this Commission’s responsibilities under the FPA.

As the Petition correctly points out, the Supreme Court’s recent decision in *Hughes v. Talen Energy Marketing, LLC*<sup>18</sup> is particularly instructive in this case, and requires that the Commission find SB 365 to be preempted. In that case, the Supreme Court recognized that the state of Maryland had acted to “encourage construction of new in-state generation,” but nonetheless admonished that states “may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates . . . .”<sup>19</sup> Similarly, the fact that SB 365 is ostensibly aimed at ensuring the continued operation of the seven identified eligible facilities<sup>20</sup> does not justify the New Hampshire legislature’s intrusion onto the Commission’s turf. In fact, the legislative findings stating that these eligible facilities “are at-risk due to energy pricing volatility”<sup>21</sup> only highlights the fact that the state was attempting “to second-guess the reasonableness of interstate wholesale rates.”<sup>22</sup> This is expressly forbidden.

To be clear, SB 365 is not saved by the fact that the Commission permits sellers without market power to make sales at negotiated rates, or by the fact that the Commission exempts certain QFs from rate regulation under Sections 205 and 206 of

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<sup>17</sup> 16 U.S.C. § 824(d) (2012).

<sup>18</sup> 136 S. Ct. 1288 (2016) (“*Hughes*”).

<sup>19</sup> *Id.* at 1290-91.

<sup>20</sup> See Petition at 5.

<sup>21</sup> SB 365, Findings. Notably, an earlier draft of SB 365 was even more explicit, stating that, “[t]he state’s renewable electricity generators are also adversely affected by the region’s reliance on natural gas generation and the resulting price volatility because their electrical sales occur in the regional market where natural gas generation sets the price.” See SB 365 (as introduced), Purpose, <https://legiscan.com/NH/text/SB365/id/1662352>.

<sup>22</sup> *Hughes*, 136 S. Ct at 1298.

the FPA.<sup>23</sup> As an initial matter, and as the Petition points out, this is not a case where the reasonableness of a rate is established by the willing agreement of buyer and seller, or some kind of competitive solicitation.<sup>24</sup> Rather, the rate here “is mandated by legislative fiat pursuant to the state’s police power.”<sup>25</sup> Equally important, because the Commission cannot redraw the jurisdictional boundaries established by Congress, neither inaction nor consent on the part of the Commission validates a state’s attempts to set wholesale rates.<sup>26</sup>

Consistent with a long line of judicial and Commission precedent barring the enforcement of a state law that would encroach upon the Commission’s exclusive jurisdiction,<sup>27</sup> the Commission should therefore find that SB 365 is preempted.

**B. SB 365 Violates PURPA And The Commission’s Implementing Regulations**

As explained in the Petition, there is nothing in SB 365 to indicate that the New Hampshire legislature was acting pursuant to PURPA or otherwise intended to rely on the eligible facilities’ current QF status to justify the purchase requirements and/or rates

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<sup>23</sup> See 18 C.F.R. § 292.601(c)(1) (2018).

<sup>24</sup> See Petition at 12-13.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> See, e.g., *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988) (“*Mississippi*”) (“The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings.” (citation omitted)); *Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982); *Entergy Servs., Inc.*, 120 FERC ¶ 61,020 at P 28 (2007) (FERC’s “ratemaking obligations under the FPA cannot be delegated to a state” (citations omitted)).

<sup>27</sup> See, e.g., *Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 50 (2003) (state regulatory action preempted because it affected rates under Commission-approved rate schedule); *Mississippi*, 487 U.S. at 371 (state proceedings affecting interstate rates preempted); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) (Natural Gas Act occupied field of wholesale sales and transportation of natural gas, preempting state laws regulating the issuance of securities by natural gas companies).

mandated under SB 365.<sup>28</sup> In any event, it is clear that the adjusted energy rate, as defined in SB 365, does not comply with PURPA or the Commission's implementing regulations because it is not capped at the EDCs' avoided costs.<sup>29</sup> To the contrary, while the NHPUC has determined the ISO-NE real-time energy price to be the avoided cost for EDCs,<sup>30</sup> SB 365 recognizes that the adjusted energy rate will be higher than the ISO-NE price, thereby stating that "[t]he [EDC] shall recover the difference between its energy purchase costs and the market energy clearing price through a non-bypassable delivery services charge applicable to all customers in the utility's service territory."<sup>31</sup>

On this point, the Petition correctly states that the Commission has repeatedly held 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."<sup>32</sup> In fact, as far back as 1988, the Commission made clear that "it will not be permissible for states to impose rates exceeding avoided cost on wholesale purchases in interstate commerce."<sup>33</sup> The Commission explained that "[i]t is beyond dispute that the states cannot impose rates exceeding avoided cost in implementing the Commission's rules under section 210(a) of PURPA,"<sup>34</sup> because

Section 210(f) of PURPA requires the states to establish rates as provided by the Commission's rules. Because

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<sup>28</sup> See Petition at 15-16.

<sup>29</sup> See 18 C.F.R. § 292.304(b) (2018) ("a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section"); 18 C.F.R. § 292.304(a)(2) (2018) ("Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.").

<sup>30</sup> See Petition at 18-19.

<sup>31</sup> N.H. Rev. Stat. § 362-H:2(V).

<sup>32</sup> Petition at 17 (quoting *Southern Cal. Edison Co.*, 70 FERC ¶ 61,215, 61,675 (1995)).

<sup>33</sup> *Orange & Rockland Utils. Inc.*, 43 FERC ¶ 61,067 at 61,194 (1988) ("*Orange & Rockland*").

<sup>34</sup> *Id.*

PURPA imposes the avoided cost limit on the Commission's authority to prescribe the parameters within which the states are required to set rates under section 210(f) of PURPA, the states can necessarily go no further in establishing rates under § 210(f) than to establish avoided cost rates. The legislative history of PURPA supports this conclusion. The conference report indicates that the avoided cost limit "is meant to act as an upper limit on the price at which utilities can be required under this section to purchase electric energy."<sup>35</sup>

The Commission further found that "[t]he industry has come of age and does not need the competitive advantage of the subsidies that result from rates exceeding avoided cost," and that "the impact of rates exceeding avoided cost outweighs the need for any additional encouragement that those rates provide."<sup>36</sup>

Critically, *Orange & Rockland* also recognized that "the Commission cannot on its own initiative authorize states to set wholesale rates in interstate commerce," and that "[r]egulation of wholesale rates in interstate commerce is a task that has been statutorily reserved for this Commission by the [FPA]."<sup>37</sup> Accordingly, unless exempted from rate regulation in accordance with the Commission's PURPA regulations, "the FPA would preempt all state regulation of interstate wholesale rates for purchases from qualifying facilities, including rates exceeding avoided cost."<sup>38</sup> As a result, the Petition was correct in stating that "SB 365 cannot escape preemption unless it complies with PURPA and this Commission's regulations enacted thereunder,"<sup>39</sup> including the

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<sup>35</sup> *Id.* at n.7 (citations omitted).

<sup>36</sup> *Id.* at 61,195.

<sup>37</sup> *Id.* at 61,194.

<sup>38</sup> *Id.* at 61,195 (citation omitted).

<sup>39</sup> Petition at 15.

requirement that rates for purchases not exceed avoided cost.<sup>40</sup> Similarly, it is abundantly clear that New Hampshire cannot order PSNH to purchase power from a QF that exceeds 20 MW in size, when the Commission has expressly relieved it of that obligation.<sup>41</sup> The Commission should therefore find that SB 365 is further preempted because it conflicts with PURPA and the Commission's regulations thereunder.

**C. The Relief Requested In The Petition Is Necessary To Safeguard The Integrity Of The Wholesale Markets**

For over two decades, the Commission has sought to promote competition in the wholesale markets, recognizing that “competition is valuable because it encourages utilities to make efficient decisions with a minimum of regulatory intervention,” which will ultimately allow consumers to “benefit from lower prices as competition improves efficiency.”<sup>42</sup> Under the market clearing system used in ISO-NE and other bulk power markets, more efficient generators with lower costs are selected to serve load, resulting in clearing prices that signal less efficient generators to eventually retire. But as the Commission well knows from recent proceedings, this system is severely disrupted when states enact subsidy programs to support a subset of resources that are otherwise uneconomic.<sup>43</sup> That is precisely the case here: indeed, SB 365 expressly

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<sup>40</sup> In a more recent decision reaffirming that states cannot require purchases from QFs at rates in excess of the purchasing utility's avoided cost, the Commission also made clear “whether 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 [PURPA] regulations, the [state] may not set rates for the sale for resale of energy and capacity by a QF that exceeds the purchasing utility's avoided cost.” *California Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at P 70 (citations omitted), *clarified*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011).

<sup>41</sup> See PSNH PURPA 210(m) Order, 131 FERC ¶ 61,027.

<sup>42</sup> *Pacific Gas & Elec. Co.*, 38 FERC ¶ 61,242, 61,790 (1987).

<sup>43</sup> See generally *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018), *reh'g pending*; *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018), *reh'g pending*.

states that the EDC purchases at the adjusted energy rate are necessary to support resources that are “at-risk due to energy pricing volatility.”<sup>44</sup>

The energy purchases mandated under SB 365 will guarantee the eligible facilities the right to sell their output to the EDCs at inflated prices, and shield these eligible facilities from having to fairly compete in the ISO-NE market. At the same time, SB 365 can also be expected to suppress energy prices, because the EDCs will be purchasing energy directly from the eligible facilities, thereby lowering demand in the market. This is an unjust and unreasonable result that also violates the FPA’s prohibition against unduly preferential or discriminatory treatment.<sup>45</sup> Consumers will have to pay non-bypassable charges to cover the adjusted energy rate, even though cheaper power would have been available from the ISO-NE market. At the same time, more efficient resources will suffer from lower market prices and could potentially be forced to retire prematurely. The Commission must therefore take prompt action to prevent SB 365 from distorting the competitive ISO-NE markets, and grant the Petition.

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<sup>44</sup> SB 365, Findings.

<sup>45</sup> See 16 U.S.C. § 824d(b) (2012); 16 U.S.C. § 824e(a) (2012).

III.

**CONCLUSION**

WHEREFORE, for the reasons set forth in these comments, EPSA respectfully requests that the Commission expeditiously issue a declaratory order as requested in the Petition.

Respectfully submitted,

/s/ Nancy Bagot

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On behalf of the  
**Electric Power Supply Association**

Dated: December 3, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington D.C., this 3<sup>rd</sup> day of December, 2018.

/s/ Nancy Bagot

Nancy Bagot