

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 17-124

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a Eversource Energy

Sale of Generating Facilities

OBJECTION
of
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
to
PETITIONS TO INTERVENE

August 18, 2017

Pursuant to RSA 541-A:32, N.H. Code of Admin Rule Puc 203.07, and the Order of Notice issued in this proceeding, Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) hereby objects to the Petitions to Intervene (“Petitions”) filed in this proceeding by the Sierra Club and NextEra Energy Resources, LLC (“NextEra”) (Sierra Club and NextEra collectively being the “Petitioners.”) The Petitioners have not set forth facts demonstrating any rights, duties, privileges, immunities or other substantial interests that may be affected by this proceeding. Hence, their Petitions do not meet the standards of RSA 541-A:32 to be granted intervenor status.

In support of this Objection, PSNH states:

1. Per the Order of Notice, this proceeding has a specific and narrow scope:

This proceeding is intended to review the results of the auction process for the sale of Eversource’s generation facilities as provided by Order No. 25,920. This matter raises, *inter alia*, issues related to whether the sale or sales maximize the value of the sale(s) and

conform to Order No. 25,920, the Settlement Agreements, RSA Chapter 369-B, RSA Chapter 374-F and RSA 374:30.

2. The standard for reviewing petitions for intervention is set forth in the Administrative Procedure Act at RSA 541-A:32. To qualify for intervenor status as of right, a petitioner must set forth “facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law.” RSA 541-A:32, I(b). RSA 541-A:32, II provides the Commission discretion to grant to others if such intervention “would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.” In both cases, a petitioner for intervention must also meet the requirement “that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.” *Id.* at I(c) and II.

3. During its 2014 session, the General Court enacted Chapter 310 of the New Hampshire Session Laws of 2014, “An Act relative to the divestiture of PSNH assets and relative to the siting of wind turbines.” At Chapter 310:1, “Purpose,” the Legislature directed:

The purpose of allowing the public utilities commission to determine if divestiture of Public Service Company of New Hampshire’s (PSNH) remaining generation assets is in the economic interests of PSNH’s retail customers should be to maximize economic value for PSNH’s retail customers, minimize risk to PSNH’s retail customers, reduce stranded costs for PSNH’s retail customers, promote the settlement of outstanding issues involving stranded costs, and, if appropriate, provide for continued operation or possible repowering of PSNH’s generation assets.

4. In Chapter 310, the legislature amended RSA 369-B:3-a. As its title states, RSA 369-B:3-a, “Divestiture of PSNH Generation Assets,” sets forth the standard to be followed for the divestiture of PSNH’s generation assets. Prior to the 2014 amendment, RSA 369-B:3-a contained both “economic interest” and “public interest” standards regarding divestiture, retirement, or modification of PSNH’s generating assets. In 2014, the Legislature amended RSA 369-B:3-a and deleted

references to the “public interest,” requiring that all decisions regarding PSNH’s generating assets be made using only the “economic interest” standard.

5. The “economic interest” standard is narrower than the “public interest” standard. In *Appeal of Pinetree Power, Inc.*, 152 N.H. 92 (2005), the New Hampshire Supreme Court discussed RSA 369-B:3-a and that statute’s former “public interest” standard, noting, “the ‘public interest’ of PSNH’s customers encompasses more than simply rates.” 152 N.H. at 97. The Court continued by stating, “the public interest standard for modification is broader than just economic interests.” *Id.* As the law stands today, this proceeding is governed by the narrower “economic interest” standard. Parties asserting standing based upon grounds not encompassed by this standard have not demonstrated an adequate foundation for their intervention request.

6. Considering the Legislature’s determination that the narrower “economic interest” standard applies in this proceeding in lieu of the broader “public interest” standard, petitioners for intervention must demonstrate that their requisite rights, duties, privileges, immunities or other substantial interests fall within this narrower “economic interest of PSNH’s retail customers” scope. Granting intervenor status to entities that have no such standing would contravene RSA 369-B:3-a, result in a much more complex and controversial proceeding than necessary, and impair the orderly and prompt conduct of the proceedings contrary to RSA 541-A:32.

7. The New Hampshire Supreme Court has held that to have standing a party must have specific personal legal or equitable rights at stake. *Duncan v. State*, 166 N.H. 630, 638 (2014) (an injury or an impairment of rights is required for standing). In *Liberty Utilities*, Docket No. DE 14-211, Order No. 25,715 (September 8, 2014), the Commission ruled on its prerequisites for consideration of and the granting of intervention requests:

The Commission reviews the facts alleged in the petition and determines whether the petition has demonstrated ‘rights, duties,

privileges, immunities or other substantial interests [that] may be affected by the proceeding’ RSA 541-A:32, I(b).

Slip op. at 3. Rejecting petitions for intervention filed by Freedom Logistics LLC d/b/a Freedom Energy Logistics and NextEra Energy Power Marketing LLC (“NEPM”), both participants in the region’s wholesale power markets (and NEPM being an affiliate of NextEra), the Commission stated:

A general interest in competitive markets or in a bidding process that has not yet occurred is insufficient to entitle these parties to intervene pursuant to RSA 541-A:32, I.

Id.

8. NextEra asserts that it is entitled to intervenor status because:

The determinations in this proceeding could have other impacts on the wholesale power market in New England in which NEER affiliates operate. Therefore, NEER's rights, duties, privileges or substantial interests as a wholesale generation owner and operator and wholesale power marketer may be affected by this proceeding.

NextEra Petition at, ¶4. NextEra’s professed interest in this proceeding is identical to that of NEPM in the *Liberty Utilities* proceeding; *i.e.*, generalized interests in competitive markets. NextEra underscores this general interest by alleging non-specific claims that the docket “*could* have other impacts” and that its interests “*may* be affected.” In the instant case, NextEra’s professed general interest in this proceeding does not identify any specific personal legal or equitable rights at stake as required by *Duncan v. State* and does not create legal standing supporting its request for intervention. This is a special proceeding with a very limited scope - - review of contracts entered into to divest PSNH’s generating assets. The standard is the “economic interest of PSNH’s retail customers,” which, under the 2015 PSNH Settlement, involves maximization of the Total Transaction Value. NextEra has no role to play in this process, and will suffer no injury or impairment from the Commission’s decision in this docket.

9. The New Hampshire Supreme Court has held that competition alone is not typically deemed to be a legal harm conferring standing on a party. *Nautilus of*

Exeter v. Town of Exeter, 139 N.H. 450 (1995). In *Nautilus*, the Supreme Court rejected a property owner’s denial of standing to participate in a town zoning board proceeding. The standard set forth in RSA 676:5 for participation in such zoning matters is similar to the RSA 541-A:32 standard applicable in this proceeding. RSA 676:5, I allows appeals to be taken “by any person aggrieved.” This standard is substantially similar to that in RSA 541-A:32, I,(b), requiring the demonstration “that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding.” Based on RSA 676:5’s standard for standing, the Court held, “We agree with the trial court that the only adverse impact that may be felt by the plaintiffs as a result of the ZBA's decision is that of increased competition with their businesses. This type of harm alone is insufficient to entitle the plaintiffs to standing to appeal the ZBA's decision: ‘[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy.’ *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 545 (1979) (quotation omitted).” *Nautilus* at 452; *see also Hannaford Bros. Co. v. Town of Bedford*, 164 N.H. 764, 769 (2013) (“The petitioner acknowledges that ‘increased’ business competition is not a type of harm sufficient to confer standing.”). Competitors in the marketplace such as NextEra do not have legal standing to intervene in this proceeding to avoid the “natural risk[s] in our free enterprise economy.”

10. The Legislature has clearly directed that the divestiture process should proceed quickly. *See* 2014, 310:2 requiring commencement of a proceeding before January 1, 2015; requiring the Commission to “expedite” such a proceeding; and for the Commission to submit a progress report to the Legislature by March 31, 2015. Allowing entities without standing to intervene in this proceeding would create additional complexities, create more difficulties regarding the dissemination and safeguarding of confidential bid information, and make the overall proceeding more controversial.

11. For the reasons set forth above, the petition for intervention filed by NextEra should be denied.

12. PSNH also objects to the petition for intervention of the Sierra Club. The Sierra Club asserts that it is nonprofit environmental organization whose purposes include: to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment. Petition to Intervene, ¶1. Sierra Club states it has legal standing to intervene because such intervention will allow the Sierra Club to protect its members' "direct and substantial interests in the outcome of this proceeding including, but not limited to, its environmental and economic repercussions." *Id.*, ¶4. The Sierra Club also asserts that in the event of a failed auction, "This determination. . . would directly affect the environmental impacts flowing from operation of Eversource's generation assets." *Id.* Like NextEra, Sierra Club's generalized allegations of harm fail to meet the legal standard for intervention.

13. The Commission ruled on a similar intervention request by the Conservation Law Foundation ("CLF") made in Docket No. 14-120, PSNH's 2013 "Reconciliation" proceeding. In Order No. 25,689 dated July 7, 2014, *slip op.* at 5, the Commission found "that CLF has not demonstrated any rights, duties, or privileges that would be affected by this docket and that would mandate its intervention." The Commission noted that it was not persuaded that CLF's mission as an environmental advocacy organization included protecting its members from financially imprudent decisions of utility companies or PSNH's financial prudence in generating its own power. *Id.* at 6. Similarly, PSNH questions Sierra Club's claim that it is a membership organization with a goal of protecting its "members'" financial interests. There is no indication that "membership" in Sierra Club provides any specific benefits, or gives the "members" any apparent say in the governing of the organization. Instead, it appears that the only requirement for becoming a "member" is the making of a financial contribution. Based upon those

criteria, every non-profit organization could claim intervenor status in this proceeding based upon its claim of representing its “member” donors. Sierra Club has demonstrated no interest in this proceeding, either in its own right, or as relates to the potential economic interests of its “members.”

14. Sierra Club’s claim that its intervention in this docket is justified by the environmental interests of its members is not relevant to this proceeding. As noted earlier, the scope of this proceeding is not governed by the broader “public interest” standard that might include such environmental issues; instead, the standard is the narrower economic interest of PSNH’s retail customers.

15. This is not the first time that the Sierra Club has sought intervention into a generation asset divestiture proceeding. In Docket DE 16-817, “Auction of Generation Facilities,” the Sierra Club also filed a petition for intervention. During the pre-hearing conference for that proceeding, the Chair asked Sierra Club (and CLF) whether they “have some vast expertise in asset auctions that will help inform everyone... .” Transcript, 9/9/16 at p. 12, line 18. Sierra Club offered that it has experience “in situations in which assets have been -- have been moved from one entity to another, in terms of ownership. I think that there's a degree of expertise there that could be offered.” Despite questions from the Commission itself during that proceeding, in its instant Petition Sierra Club has not set forth any specific “part of the statute that we're following here, the order, the Settlement, all these things” - - matters questioned by the Commission in that prior Docket. Transcript, *Id.* at p. 9, line 19.

16. As with NextEra, Sierra Club has no role to play in this process, and will suffer no injury or impairment from the subject matter of this docket; its request for intervenor status should be denied.

WHEREFORE, PSNH respectfully objects to the petitions for intervention filed by NextEra and Sierra Club. Those intervention requests should be rejected because they fail to state any legal standing affected by this proceeding; such interventions would impair the orderly conduct of this proceeding; and, they would negatively impact the expedited nature of this proceeding.

Respectfully submitted this 18th day of August, 2017.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By:  _____

Robert A. Bersak
Chief Regulatory Counsel

Matthew J. Fossum
Senior Counsel

Public Service Company of New Hampshire
d/b/a Eversource Energy
780 N. Commercial Street, P.O. Box 330
Manchester, NH 03105-0330
603-634-3355
Robert.Bersak@Eversource.com
Matthew.Fossum@Eversource.com

CERTIFICATE OF SERVICE

I certify that on this date I caused this Objection to be served on parties listed on the Commission's service list for this docket, as well as on counsel for NextEra and NH OSI.

August 18, 2017



Robert A. Bersak