STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 23-009

SQUAM RIVER HYDRO, LLC

Petition for Reconnection of Qualifying Facility,
Payment of Avoided Costs and Payment of Lost Revenues

Order Regarding Jurisdiction

O R D E R N O. 26,937

January 25, 2024

In this order, the Commission determines that it lacks jurisdiction to adjudicate the claims contained in the petition filed by Squam River Hydro, LLC (SRH) in the above-captioned docket.

I. PROCEDURAL HISTORY

On January 31, 2023, SRH filed a petition requesting that the Commission order the Town of Ashland Electric Department (Ashland ED) and the Town of Ashland (collectively, Ashland) to reconnect its hydropower facilities to Ashland's electric grid and to compensate SRH for certain costs and lost revenues. In its petition, SRH stated that it owns two hydropower generating facilities located within the service boundaries of the Ashland ED. Petition (Pet.), ¶ 1. SRH averred that on January 1, 2012, Ashland entered into a power purchase agreement (PPA) with SRH. Pet., ¶ 2. It stated that, pursuant to the PPA, Ashland purchased the power generated by SRH's facilities until January 2020, when Ashland terminated the PPA. *Id.* According to SRH, Ashland subsequently and unlawfully disconnected SRH's facilities from its electric grid. *Id.*

SRH claimed that Ashland continued to have a legal obligation to purchase power from SRH or compensate it based on Ashland's avoided costs, despite Ashland's termination of the PPA. Pet., ¶¶ 2, 6. In addition to ordering Ashland to reconnect its

hydropower facilities, SRH requested that the Commission order Ashland to reimburse it for interconnection costs associated with the 2012 PPA and lost revenues, including avoided costs and renewable energy certificate (REC) alternative compliance payments.

The Commission issued an order of notice on March 31, 2023, which scheduled a prehearing conference on May 18, 2023. Ashland filed a preliminary response to SRH's petition on May 2, 2023, in which it asserted that the Commission lacked jurisdiction in this matter, and that some or all of SRH's claims were barred. On May 10, 2023, the Commission issued a procedural order cancelling the May 18 prehearing conference and ordering the parties to file a procedural schedule, including deadlines for filing briefs addressing the issue of jurisdiction. The Commission approved the proposed procedural schedule filed by the parties, and both sides filed initial and reply briefs.

By procedural order dated September 22, 2023, the Commission scheduled an oral argument on November 7, 2023 on the issue of jurisdiction and requested the New Hampshire Department of Energy (DOE) to file its position. Following oral argument, the Commission issued a procedural order on November 7, 2023 requesting SRH, Ashland, and the DOE to submit by November 17, 2023 additional filings that the Commission deemed relevant to its decision on jurisdiction, with a November 30, 2023 deadline for any responses. All parties timely submitted the requested filings. On November 30, 2023, SRH filed a response to Ashland's and the DOE's submissions.

II. POSITIONS OF THE PARTIES

A. Squam River Hydro, LLC

In its briefs, SRH acknowledged that Ashland is not a "public utility," as defined by RSA 362:2, but it submitted that Ashland is still subject to the Commission's oversight and jurisdiction under New Hampshire law, citing: RSA chapter 362-A,

"Limited Electrical Energy Producers Act;" RSA chapter 362-F, "Electric Renewable Portfolio Standard" (RPS); RSA chapter 374, "General Regulations;" RSA chapter 38, "Municipal Electric, Gas, or Water Systems;" and RSA chapter 125-O, "Multiple Pollutant Reduction Program." It asserted that the Commission has ratemaking authority over Ashland pursuant to RSA 38:17, so that the Commission has jurisdiction under RSA 362-A:8, II(a) and the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. sections 2601, *et seq*. to require Ashland, an "electric utility," as defined by 16 U.S.C. 2602(4), to purchase power produced by SRH, a "qualifying facility" under PURPA, and to ensure SRH's connection to Ashland's electric grid. SRH also raised the issue of whether Ashland operated entirely within its corporate limits. *See* SRH Reply Brief at 3, n.3.

SRH responded to the Commission's request, contained in its November 7 procedural order, for "proof that it has been recognized by the Federal Energy Regulatory Commission (FERC) as a 'qualifying facility,'" by stating that it met the requirements for a qualifying facility and no certification by the FERC was required. In its November 30 filing, SRH stated that "[w]hile RSA 362-F may not require Ashland to connect SRH to its electrical system [citing the DOE's November 17, 2023 filing], . . . PURPA *does* obligate Ashland to interconnect with SRH and purchase its power or pay avoided costs." (Emphasis contained in original). SRH cited *In re Arrangements Between Qualifying Facilities and Electric Utilities,* No. 24365 (Texas P.U.C., June 20, 2002) in support of its argument that the Commission has sufficient ratemaking authority over municipal electric utilities to implement PURPA's mandates.

B. Town of Ashland

Ashland stated in its briefs that the Commission has only that authority delegated to it by the legislature and noted that SRH had cited no express legal

authority for the Commission to act in this matter. Ashland argued that the Commission has no jurisdiction over Ashland, a municipal electric utility operating only within its municipal boundaries, because Ashland is not a "public utility," as this term is defined by RSA 362:2. Similarly, Ashland contended that the Commission has no authority to regulate such municipal electric utilities pursuant to RSA 362-A:8, which refers to the obligations of "public utilities," and other provisions of RSA chapter 362-A, which use the term "public utility," such as RSA 362-A:3 and :4. It asserted that the Commission lacks authority under RSA chapter 362-F to regulate municipal electric utilities operating within their corporate boundaries, because they are excluded from the definition of "provider of electricity" under RSA 362-F:2, XIV.

Concerning the Commission's jurisdiction under PURPA, Ashland stated that the Commission only has authority to implement PURPA regulations with regard to electric utilities for which it has ratemaking authority. Ashland maintained that the Commission has no ratemaking authority over municipal electric utilities operating within their corporate boundaries under New Hampshire law, including RSA chapter 38 and RSA chapter 125-O, so that Ashland is a "nonregulated electric utility" under PURPA. Ashland argued that RSA 38:17 applies only when a municipality is selling power from acquired electric plants to customers outside its municipal boundaries. Transcript of November 7, 2023 Hearing at 34-35, 84. Ashland requested that the Commission dismiss SRH's petition due to lack of jurisdiction, arguing that SRH's remedy is to file its claims with the FERC.

In its response to the Commission's November 7 procedural order, Ashland confirmed that all the customers to which it provides electric service are located with its corporate boundaries. Additionally, Ashland stated that it sets its own electric rates.

C. Department of Energy

The Commission's November 7 procedural order requested the DOE to file a position statement regarding whether a municipal electric utility owes any obligations to a renewable energy producer under RSA chapter 362-F. The DOE concluded that municipal electric utilities are generally exempt from the requirements of RSA chapter 362-F, so that they are not obligated to either procure RECs from a renewable energy provider or to connect a renewable energy provider to their electrical systems. Accordingly, the DOE's position was that Ashland had no legal obligations to SRH under RSA chapter 362-F.

III. COMMISSION ANALYSIS

The Commission is a "creation of the legislature," and it has only that authority expressly granted to it by statute, or which is "fairly implied by statute." *Appeal of Pub. Serv. Co. of N.H.,* 122 N.H. 1062, 1066 (1982). Settled rules of statutory construction require statutes to be interpreted, whenever possible, as consistent with other statutes dealing with a similar subject matter, so that the legislative purpose behind each statute is effectuated and statutes do not contradict each other. *In re J.S.,* 174 N.H. 375, 380-81 (2021). Likewise, a statutory provision should not be interpreted in isolation, but should be construed within the context of the overall statutory scheme. *See Appeal of Pennichuck Water Works,* 160 N.H. 18, 27-28 (2010) (interpreting provisions of RSA chapter 38 together).

In the different statutes relating to the Commission's authority, the legislature has indicated its intention to distinguish between "public utilities" and municipal entities, such as "municipal corporations" and "municipal utilities," by consistently using these different terms. *See State Emps. Ass'n of N.H. v. N.H. Div. of Pers.,* 158 N.H. 338, 345 (2009) (stating that, unless context indicates otherwise, it is assumed

that legislature intended words or phrases used in related statutes to have same meaning unless different language used). The Commission, with the DOE, has general oversight over all "public utilities and the plants owned, operated or controlled by the same." RSA 374:3. A municipal corporation operating within its corporate boundaries is generally not subject to the Commission's jurisdiction, because it is not a "public utility," as defined by RSA 362:2, I. *Appeal of Pennichuck Water Works,* 160 N.H. at 33.

SRH cited RSA chapters 374, 362-A, and 362-F in support of its argument that the Commission has jurisdiction in this matter. Yet these statutory chapters concern the Commission's authority to regulate "public utilities."

RSA chapter 374 uses the term "public utilities" in provisions which provide the Commission with authority to supervise and investigate public utilities, *see* RSA 374:3, :4 and :7, as well as regulate their rates, *see* RSA 374:2. Its provisions contain no reference to municipal entities.

RSA chapter 362-A also refers to "public utilities." RSA 362-A:3, entitled "Purchase of Output of Limited Electrical Energy Producers by Public Utilities," requires an "electric public utility" serving the franchise area in which a limited electrical energy producer's installations are located, to buy "[t]he entire output of electrical energy" produced by a limited electrical energy producer, if offered for sale. *Id.,* I. Pursuant to RSA 362-A:4, "public utilities" buying such power must pay rates the Commission sets based on the purchasing utility's avoided costs. The obligations of "public utilities" under applicable federal and state law and Commission orders to buy energy or energy and capacity from qualifying small power producers and qualifying cogenerators are codified in RSA 362-A:8, entitled "Payment Obligations; Public Utilities." RSA chapter 362-A does not mention municipal entities other than "municipal hosts," "municipal aggregations or aggregators," and municipalities

permitted to enter into agreements with renewable generation facilities for payments in lieu of taxes. *See* RSA 362-A:1-a, II-b and II-c; :2-b, VII and IX; :6-a; and :9, II. Therefore, the Commission's authority under RSA 362-A:5 to adjudicate disputes arising under the provisions of RSA chapter 362-A respecting the obligations of "public utilities" does not include the authority to adjudicate claims against municipal electric utilities operating within their corporate boundaries.

RSA chapter 362-F does not provide the Commission with authority to regulate municipal utilities, because municipal utilities are not subject to the RPS. *See Renewable Energy Incentive Program for Commercial and Indus. Solar Projects,* Order No. 25,878 at 32 (April 6, 2016) (Table 1, Item No. 4); *Establishing a Commercial and Indus. Renewable Energy Rebate Program,* Order No. 25,151 at 2, n.1 (October 1, 2010). RSA 362-F:3 requires a "provider of electricity" to obtain RECs. However, the term "provider of electricity" excludes "municipal suppliers that are municipal utilities pursuant to RSA 38." *See* RSA 362-F:2, XIV.

Nor does the Commission have any authority to regulate municipal utilities under RSA chapter 125-O, which SRH also cited in its briefs. As the Commission stated in *Electric Utilities and Competitive Electric Service Providers,* Order No. 25,664 (May 9, 2014), "the Commission has no jurisdiction over municipal corporations operating within their corporate limits (RSA 362:2, I), other than the direction in RSA 125-O:23, II. . . ." *Id.* at 3. RSA 125-O:23, II requires the Commission to determine how excess Regional Greenhouse Gas Initiative auction proceeds should be rebated to "all retail electric ratepayers," but it does not provide the Commission with any other authority over municipal electric utilities.

SRH further argues that the Commission has ratemaking authority over municipal electric utilities, so that the Commission is required to implement the

FERC's rules under PURPA with regard to Ashland. According to SRH, these rules would require Ashland to interconnect with SRH and purchase its power or pay avoided costs.

The Commission has authority "to establish and implement rates at which *regulated electric companies* may purchase power from qualifying small power producers" pursuant to RSA chapter 362-A and section 824a-3 of PURPA. *Appeal of Marmac,* 130 N.H. 53, 57 (1987) (emphasis added). Section 824a-3(f) requires state regulatory authorities to implement FERC cogeneration and small power production rules "for each electric utility for which it has ratemaking authority," 16 U.S.C. § 824a-3(f)(1), which is how "State regulated electric utility" is defined, *see* 16 U.S.C. § 2602(18). A "nonregulated electric utility," defined as "any electric utility other than a State regulated electric utility," in 16 U.S.C. § 2602(9), implements the requirements of PURPA with respect to itself. *See Qualifying Facility Rates & Requirements,* 2020 FERC LEXIS 1965, *11, n.25, 173 F.E.R.C. P61,158 (November 19, 2020). 16 U.S.C. section 2602(11) defines the term "ratemaking authority" as the "authority to fix, modify, approve, or disapprove rates."

PURPA does not indicate the extent of "ratemaking authority" a state regulatory authority must have before it may enforce PURPA mandates against a particular "electric utility." *In Re Arrangements Between Qualifying Facilities & Elec. Utils.,* No. 24365, 2002 Tex. PUC LEXIS 26, at *23-24, 219 P.U.R.4th 139 (June 20, 2002) [*Arrangements Between QFs and Electric Utilities*]. In *Arrangements Between QFs and Electric Utilities,* a decision in which the Public Utility Commission of Texas (PUCT) adopted an amendment to section 25.242 of its administrative rules, entitled "Arrangements Between Qualifying Facilities and Electric Utilities,"[1] the PUCT

[1] This rule stated that it "does not apply to municipal utilities . . . ." 16 Tex. Admin. Code § 25.242(b).

indicated that, nonetheless, some ratemaking authority is required for a state regulatory authority to have jurisdiction to implement PURPA obligations. *See id.* at *23-24, 51-52.

Although not specifically identified, *Arrangements Between QFs and Electric Utilities* appears to have been cited by the New Mexico Public Regulation Commission (NMPRC) in *In the Matter of the Formal Complaint of Gladstone New Energy, LLC Against Tri-State Generation and Transmission Association, Inc.,* 2020 N.M. PUC LEXIS 135, *9-10 (March 18, 2020) [*Gladstone New Energy, LLC*] for the proposition that PURPA does not require a state regulatory authority to have "unlimited" ratemaking authority over an electric utility in order to implement PURPA's provisions. The NMPRC determined in *Gladstone New Energy, LLC* that it had authority to administer and enforce PURPA and the FERC's regulations implementing PURPA against Tri-State Generation and Transmission Association, Inc. (Tri-State), a generation and transmission cooperative with no retail sales in New Mexico, but whose rates were subject to the NMPRC's limited or conditional review under state law. *Id.* at *6-11, 17-18. The relevant law, N.M. Stat. Ann. § 62-6-4(D), required generation and transmission cooperatives to file advice notices of their proposed rates with the NMPRC. It provided that

> If three or more New Mexico member utilities file protests and the commission determines there is just cause in at least three of the protests for reviewing the proposed rates, the commission shall suspend the rates, conduct a hearing concerning reasonableness of the proposed rates and establish reasonable rates.

Id. The NMPRC found that it had sufficient ratemaking authority over Tri-State so that Tri-State was a "State regulated electric utility." *Gladstone New Energy, LLC*, 2020 N.M. PUC LEXIS 135, at *9-10, 17-18.

SRH relies on RSA chapter 38, specifically *Appeal of Ashland Electric Department,* 141 N.H. 336 (1996) and RSA 38:17, in arguing that the Commission has ratemaking authority over municipal electric utilities such as Ashland, so that the Commission is required to implement the FERC's cogeneration and small power production rules under PURPA with regard to Ashland. However, RSA chapter 38, the purpose of which is to empower municipalities to take privately owned utilities by eminent domain so that municipalities can maintain and operate these facilities, *State v. City of Dover,* 153 N.H. 181, 190 (2006), gives the Commission only limited authority over municipalities.

In *Appeal of Ashland Electric Department,* Ashland petitioned the Commission for a declaratory ruling that it was not required to obtain the Commission's approval under RSA chapter 38 or RSA 364:1 before expanding its service area in Ashland by constructing additional distribution plant along North Ashland Road, in territory that was served by New Hampshire Electric Cooperative, Inc., because it was acting within town limits. 141 N.H. at 338. The New Hampshire Supreme Court upheld the Commission's order denying Ashland's petition, ruling that a municipal utility may expand its service area within its corporate limits without Commission approval, but it must comply with the procedures in RSA chapter 38 if it intends to construct distribution lines in territory already served by a public utility. *See id.* at 340-42. The Court based its decision on an interpretation of relevant provisions of RSA chapter 38, noting that they should be read together and not in isolation. *See id.* at 340-41 (construing RSA 38:3 in conjunction with RSA 38:10).

RSA 38:17, entitled "Supply Contracts," follows several provisions in RSA chapter 38 dealing with a municipality's expansion of its existing municipal plant or acquisition of the plant, property, or facilities owned by a utility. *See, e.g.,* RSA 38:12-

:16. RSA 38:14, "Operation of Plant," provides that a municipality acquiring a utility's plant, property, or facilities in another municipality, which then operates "outside its own limits," shall be subject to the Commission's jurisdiction. RSA 38:17 states that

> Any *such municipality* may contract to supply electricity, gas, or water to individuals, corporations, *other municipalities,* or any person for any of the purposes named or contemplated in this chapter, and make such contracts, and establish such regulations *and such reasonable rates for the use thereof, as may from time to time be authorized by the commission.*

(Emphasis added). Interpreting RSA 38:17 in the context of the purpose of RSA chapter 38 and in conjunction with RSA 38:14, "such municipality" likely refers to a municipality that has acquired the facilities of a public utility in another municipality and then operates outside its corporate boundaries. RSA chapter 38 does not provide the Commission with ratemaking authority over municipal utilities to the extent they operate within their municipal boundaries.

IV. CONCLUSION

The Commission has no discretion to accept jurisdiction in a particular proceeding, but is limited by its statutory authority. When the various statutes relating to the Commission's authority are interpreted in relation to one another and in a manner that avoids contradictory results, it is apparent that the Commission's authority to regulate municipal utilities operating within their municipal boundaries is limited and does not include ratemaking authority. The Commission is unable to enforce PURPA's mandates against entities as to which it has no ratemaking authority. Ashland has confirmed that it operates solely within its municipal boundaries.

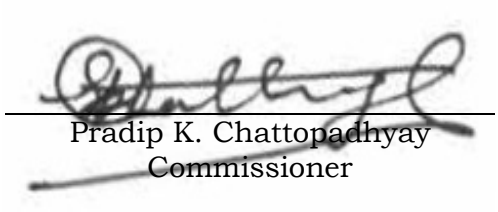
The Commission has found no legal authority, and none has been cited by SRH, that would provide the Commission with authority to adjudicate the claims contained in SRH's petition. Accordingly, the Commission finds that it has no jurisdiction in this matter and dismisses SRH's petition.

Based upon the foregoing, it is hereby

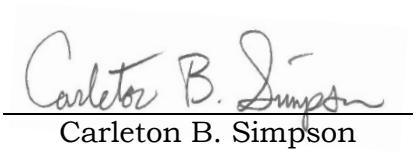
ORDERED, that the Commission has no jurisdiction in this matter; and it is

FURTHER ORDERED, that SRH's petition is DISMISSED WITHOUT PREJUDICE.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of January, 2024.



Pradip K. Chattopadhyay
Commissioner



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Service List - Docket Related

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