

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Docket No. DE 23-056

KRIS PASTORIZA

Petition for Request for Review of Eversource Transmission Line Projects

**OBJECTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY TO PETITIONER'S MOTION FOR RECONSIDERATION**

Pursuant to N.H. Code Admin. Rules Puc 203.07(f), Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or the “Company”) hereby objects to the Motion for Reconsideration filed by Petitioner Kris Pastoriza (the “Petitioner”) on January 12, 2024 (the “Motion”).

The Motion requests that the New Hampshire Public Utilities Commission (the “Commission”) reconsider its Order No. 26,925 (January 5, 2024), which dismissed the petition filed by the Petitioner (the “Petition”) and order a procedural schedule for the conduct of a full adjudicative docket. In addition, the Petitioner asks the Commission to order the Department of Energy (“DOE”) and the Office of the Consumer Advocate (“OCA”) to investigate the completed and proposed Eversource “asset condition” transmission projects detailed in the Petition “having impacts on New Hampshire ratepayers to determine the prudence of the projects; if the costs of the proposed projects [were and] are just and reasonable; and, the factual justification of the projects anticipated cost allocation to New Hampshire ratepayers.” Motion at 6. The Motion further requests that the Commission order the DOE and the OCA “to file on or before 180 days from the date of this Order a fact-based report with the Commission on the investigations ordered . . . for presentation in a full adjudicative hearing before the Commission.” *Id.*

In support of those requests, the Motion asserts that the Petition filed in this docket “is a complaint that the Commission must accept for hearing on the merits.” *Id.* at 2. According to the Petitioner, if a transmission project “has costs allocated to New Hampshire ratepayers and is used for the transmission of electricity to retail customers, the Commission has sole jurisdiction under the Federal Power Act to determine the prudence of the project, if the costs are just and reasonable and the cost allocation is proper.” *Id.* at 4. If the Commission determines, however, that a transmission project that has costs allocated to New Hampshire ratepayers “is an interstate project used for the interstate transmission of electricity in wholesale markets,” then the Commission “must determine if the utility, the DOE and the OCA have responsibly participated in the project prudence and just and reasonable cost review at the federal level and will certify in accord with Chapter RSA 374 that the project is prudent; that the costs are just and reasonable and the cost allocation is proper.” *Id.* The Petitioner maintains that demarcation between state and federal jurisdiction is demonstrated by the decision of the United States Supreme Court in “*Federal Energy Commission v. EnerNOC, Inc. et. al.*,” 577 U.S. 260 (2016) (*EPSA*).¹ *Id.* at 3.

As demonstrated below, the Petitioner’s requests in the Motion lack any support in applicable statutory provisions and judicial precedent. Accordingly, the Motion should be denied, and this proceeding closed.

1. If the Petition were a complaint against Eversource, it would have to be brought first before the DOE before any action may be taken by the Commission.

As noted above, the Motion characterizes the Petition filed in this proceeding as a “complaint that the Commission must accept for hearing on the merits,” even though it is not styled as a complaint, nor does it allege any violation by the Company of state statutes or Commission

¹ The correct case name of this Supreme Court decision is *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 577 U.S. 260 (2016).

rules or orders or list any impermissible charge collected by the Company.² See also DOE Brief on Jurisdiction at 6-7. The provisions of RSA 365:1-4 describe the process to be followed with customer complaints – to be filed and investigated first by the DOE and then only potentially by the Commission – regarding “any thing or act claimed to have been done or to have been omitted by any public utility in violation of any provision of law, or of the terms and conditions of its franchises or charter, or of any order of the commission.” RSA 365:1. Under RSA 365:4, only if the DOE finds there are reasonable grounds therefor, it shall

investigate the same in such manner and by such means as it shall deem proper. After investigation, the [DOE] may bring proceedings on its own motion before the [Commission], with respect to any complaint or violation of any provision of law, rule, terms and conditions of its franchises or charter, or any order of the commission. If the party bringing the complaint is unsatisfied with the disposition of the complaint by the [DOE], then they may petition the [Commission] to resolve the matter through an adjudicative proceeding.

Therefore, even if the Petition had been brought as a complaint by a customer, which it was not, it would not be adjudicated by the Commission unless and until the DOE determined itself to take that step, or if the complainant was “unsatisfied with the [DOE’s] disposition of the complaint.” As neither of those conditions has occurred, the Petitioner’s “complaint” to the Commission is, at the very least, premature and cannot be acted on by the Commission.

2. The Commission lacks jurisdiction to review planned transmission projects or to determine the prudence of constructed transmission projects.

As noted above, the Motion asserts that the Commission has *sole jurisdiction* under the Federal Power Act to determine the prudence of a transmission project, and whether the costs are just and reasonable and the allocation of such costs proper, if the transmission project “has costs allocated to New Hampshire ratepayers and is used for the transmission of electricity to retail

² Because the Petitioner is not an Eversource retail customer subject to retail electric rates, there is a question whether she would even have standing to bring a customer complaint against the Company to the DOE under the provisions of RSA 365:1-4.

customers.” Report at 4. This is an inaccurate statement of the applicable federal statutory provisions and relevant judicial precedent. As Eversource demonstrated in its Brief on Jurisdiction (“Eversource Brief”) and its Objection to Petitioner’s Motion dated August 24, 2023 (the “August Objection”), under the Federal Power Act, the Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction over electric transmission in interstate commerce. *See* Eversource Brief at 5-7; Eversource August Objection at 2-3; *see also* DOE Brief on Jurisdiction at 2. This is true in particular in New England states like New Hampshire where transmission is fully unbundled from retail electric sales and delivery.³

The Petitioner quotes excerpts from the *EPSA* decision as purported support for its position regarding the Commission’s jurisdiction to determine the prudence of interstate transmission projects, including the Company’s so-called “asset condition” projects. But the quoted passages address *retail sales* of electricity and draw the distinction between *wholesale and retail power sales*, without addressing at all the transmission of electricity in interstate commerce. In fact, the quoted passages do not even contain the word “transmission.”⁴ The Petitioner therefore has provided no support for the assertion that the Commission has any jurisdiction over interstate transmission facilities or related rates, let alone for the claim that any such state jurisdiction is sole and exclusive.

All transmission facilities in New England are subject to FERC regulatory jurisdiction and come within the purview of the ISO New England (“ISO-NE”) and New England Power Pool

³ For example, this unbundling is the reason the Company has a separate rate component, the Transmission Cost Adjustment Mechanism, to cover transmission charges it is assessed through ISO New England and separately charge those costs on a pass-through basis to all of its electric end-use customers. *See, e.g.*, Docket No. DE 23-070.

⁴ Moreover, the *EPSA* decision actually supports the opposite conclusion, as the Court stated that: “The dissent hypothesizes a rule enabling generators to sell directly to consumers and fixing all generation, *transmission*, and retail rates. But of course neither FERC nor the States could issue such a rule: If FERC did so, it would interfere with the States’ authority over retail sales and rates as well as (most) generation; *if a State did so, it would interfere with FERC’s power over transmission.*” *EPSA*, 577 U.S. at 305 (emphasis added).

(“NEPOOL”) transmission planning processes and ISO-NE and/or participating transmission owner (“PTO”) rate design parameters. Under the Federal Power Act, FERC has jurisdiction over the transmission of electric energy in interstate commerce and “over all facilities for such transmission . . . of electric energy . . .” 16 U.S.C. §824(b)(1). The federal courts have long upheld this exclusive FERC jurisdiction over electric transmission facilities, as described in Eversource’s submissions in this proceeding. *See* Eversource Brief at 5-6; Eversource August Objection at 2-3. In the interest of brevity, the Company will not repeat those citations and analysis in this objection.

The FERC’s exclusive jurisdiction over transmission includes the setting of rates for transmission service, and therefore any prudency review may occur only at the federal level and not at the state level. A prudency determination is typically a prerequisite to including recovery of and on utility capital investments in rates charged to customers, and, in the case of transmission facilities, those rates are set through processes subject to FERC regulation and not state commission regulation. Moreover, state regulatory commissions are preempted from “trapping” costs authorized by FERC to be collected; “cost trapping” occurs when a state agency sets retail rates that prevent a utility from fully recovering its costs at FERC-approved rates such as wholesale power sales and transmission service rates. *See* Eversource August Objection at 3 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 275 (4th Cir. 2022)). The Petitioner’s arguments that the Commission must examine the prudency of “asset condition” transmission projects, and has the jurisdiction to do so, therefore are contrary to federal law and judicial precedent.

Although the Commission has broad statutory authority to investigate matters involving regulated public utilities, that investigative authority does not enable it to take any regulatory action that lies outside the limits of its jurisdiction. As demonstrated in Eversource’s submissions

in this proceeding, the Commission lacks jurisdiction to regulate the planning, construction, installation, replacement, and maintenance of electric transmission facilities, and the setting of rates to recover the costs of such transmission facilities. Instead, it is FERC that has regulatory jurisdiction over those activities, with implementation provided by ISO-NE and other FERC-regulated public utilities. State commissions and agencies have an opportunity to participate in the FERC-jurisdictional annual protocols process, as described in the Eversource Brief and the August Objection. But there is no basis for the Commission to review and evaluate any “asset condition” transmission projects, for prudence or otherwise, as sought under the Petition and requested by the Motion.

Eversource has provided undisputed support for the conclusion that the Commission lacks jurisdiction to undertake any review of transmission projects as sought by the Petition and the Motion, and so the Motion must be denied with prejudice.

WHEREFORE, Eversource objects to the Petitioner’s Motion for Reconsideration and requests that the Commission deny the Motion and conclude this proceeding by closing the docket.

Respectfully submitted,
Public Service Company of New Hampshire
d/b/a Eversource Energy

Date: January 19, 2024



By: _____
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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.



Date: January 19, 2024

Jessica A. Chiavara