

State of New Hampshire
Public Utilities Commission
Docket DE-23-056
In the Matter of the RSA 365 Petition of Kris Pastoriza

Motion for Reconsideration

Petitioner Kris Pastoriza respectfully moves the New Hampshire Public Utilities Commission for Reconsideration of the January 5, 2024 Order dismissing her Petition.

Status of Case

On June 29, 2023 Petitioner filed her Petition seeking review by the New Hampshire Public Utilities Commission (Commission) of over a billion dollars of Eversource Energy (Eversource) transmission projects Eversource describes as “Asset Condition” projects.

On January 5, 2024 the Commission recognized it had jurisdiction over the issues raised in the Petition but declined to exercise jurisdiction ruling that it had “discretion” to avoid review of the projects.

The Pastoriza Petition raises serious and substantial legal and factual issues that must be heard and determined by the Commission. The Commission dismissed the Petition in error by overlooking its mandatory statutory duty to New Hampshire ratepayers.

The Commission Has an Absolute New Hampshire Statutory Duty to Ensure That New Hampshire Electricity Consumers Have a Safe and Reliable Supply of Electricity and That Utility Expenditures for Transmission and Distribution Infrastructure Are Prudently Incurred and Reasonable in Cost

The Commission Has No Discretion Whatever to Avoid Its Duty to Ensure Public Utilities’ Infrastructure Expenditures Are Prudent and Reasonable Costs Because Those Utility Decisions Impact the Rates Retail Customers Must Pay

RSA Chapter 374 obligates the Commission to ensure that utilities provide safe and reliable supply of electricity at reasonable cost. RSA 378:7 expressly provides that the Commission upon complaint must determine, after a hearing, if electricity rates are unjust and unreasonable.

The Pastoriza Petition is a complaint that the Commission must accept for hearing on the merits. The Commission suggests that the Petition asks that a rate case docket be opened. The Petition does not ask that a rate case be opened. The Petition asks that the Commission do what RSA 378:7 requires it to do: examine if the Eversource “asset condition” expenditures are prudent, just and reasonable.

The Immensity of the Costs Already Spent and Planned by Eversource on the Projects Has Had and Will Have on Ratepayers Demands Commission Review After Discovery and Evidentiary Hearing

The Legal and Factual Issues Raised by the Pastoriza Petition Are Serious and Substantial

What was the purpose the projects detailed in the Petition? Were the “asset condition” projects transmission maintenance projects or were the projects substantial capacity upgrades to transmission infrastructure? Were the projects prudent? What was the cost of the projects? Were the costs just and reasonable? What, if any, assessment was made of the prudence and reasonableness of the costs? How were the costs allocated to New Hampshire ratepayers? How did Eversource book the projects? Were the projects capitalized or treated as operation and maintenance expenses? What rate of return has Eversource claimed on project costs?

What was the amount of the costs charged to ratepayers? When were the costs charged? In what Commission dockets were the project costs approved for inclusion in ratepayers’ periodic statements?

The Federal Power Act Provides That the Transmission of Electricity in Interstate Commerce for Sale in Wholesale Markets Falls within Federal Jurisdiction.

The Federal Power Act Provides That the Transmission of Electricity for Sale in Retail Markets Falls within State Jurisdiction

The United States Supreme Court in Federal Energy Commission v. EnerNOC, Inc. et. al. 577 US 260 (2016) provided a comprehensive analysis of the jurisdictional boundaries of the federal (FERC) responsibility and the responsibilities of state responsibilities (NHPUC). The EnerNOC case arose from a jurisdictional dispute regarding demand response programs. The Court majority, speaking through Justice Kagan, found that demand response programs were within FERC jurisdiction but her analysis is critical to understanding the line between federal and state responsibilities.

Justice Kagan for the Court, at page 264 of EnerNOC:

“The Federal Power Act (FPA or Act), 41 Stat. 1063, as amended 16 USC Section 791 *et. seq.* authorizes the Federal Energy Regulatory Commission (FERC or Commission) to regulate ‘the sale of electric energy at wholesale to interstate commerce’ including both wholesale electricity rates and any rule or practice ‘affecting’ such rates. Sections 824(b), 824e(a). But the law places beyond FERC’s power and leaves to the States alone, the regulation of ‘any other sale’ ---most notably, any retail sale---of electricity. Section 824(b). that standard division generates a steady flow of jurisdictional disputes because---in point of fact if not of law---the wholesale and retail markets are inextricably linked.”

At EnerNOC page 266-267, the Court states:

“Alongside those grants of power, however, the Act also limits FERC’s regulatory reach, and thereby maintains a zone of exclusive state jurisdiction. As pertinent here, Section 824(b)(1)---the same provision that gives FERC authority over wholesale sales---states that ‘this subchapter’, including its delegation to FERC, ‘shall not apply to any other sale of electric energy’. Accordingly, the Commission may not regulate either within-state wholesale sales or more pertinent here, retail sales of electricity “(*i.e.* sales directly to users. *See* New York, 535 US at 17, 23, 122 S. Ct. 1012. State utility commissions continue to oversee those transactions.”

Eversource, the New Hampshire Department of Energy (DOE) and the Office of Consumer Advocate (OCA) have misstated the law regarding the jurisdiction of the Commission.

Each such entity, one a public utility and two public agencies all charged by law with ratepayer responsibilities, has represented to the Commission that the federal government has exclusive jurisdiction over the Eversource “Asset Condition” projects¹.

These representations are irresponsible, and ask that the Commission walk away from its Chapter RSA 374 statutory mandate to protect New Hampshire ratepayers from unjust and unreasonable charges.

Commission responsibility is clear.

First, the Commission must determine if 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. If that is the case, 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.

Second, if the 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.

**The Commission in Its Order Recognized That It Has Oversight
Responsibility of Transmission Related Asset Condition Projects² with
Relevance to New Hampshire Ratepayers but Evinced Concern About the
Scope of Enquiry**

¹ The federal jurisdiction over transmission projects is exercised. with Federal Energy Commission (FERC) sanction by a sub-committee of ISO-New England.

² Order, page 9.

The Commission Suggested That a “Narrowly Tailored” Enquiry Initiated by the DOE or the OCA Would Be a Basis for a Commission Enquiry

Petitioner Pastoriza agrees with the Commission that the scope of the Petition is broad. Petitioner also agrees that the DOE and OCA must participate into the enquiry about the rate impacts of the projects on New Hampshire ratepayers.

Neither the DOE or the OCA have offered any filing or proof of record that it has played any role whatever in the approval of the Eversource “Asset Condition” projects now in place or proposed. New Hampshire ratepayers do not know how the regional project costs were allocated to them or what the costs were. Ratepayers have no idea if the projects were prudent and if the costs were just and reasonable. Ratepayers do not know if the projects were within federal jurisdiction or New Hampshire jurisdiction.³

The Commission must order the DOE and OCA to examine each of the Eversource “Asset Condition” projects now in place as detailed in the Petition and to file a fact-based report on the allocation of the project costs to New Hampshire ratepayers, the prudence of the projects and if the costs were just and reasonable.

The Commission must order the DOE and the OCA to examine each of the Eversource “Asset Condition” projects proposed for New Hampshire with the same criteria.

For illustration, Petitioner Pastoriza has prepared a summary of four asset condition projects proposed for New Hampshire. Each of the projects transmit electricity to substations that reduce voltages for sale to Eversource retail customers. The projects fall within the exclusive jurisdiction of the Commission. The Commission must decide if the projects are prudent and if the costs are just and reasonable before inclusion in ratepayer charges. The Pastoriza Summary and Map are attached hereto. These documents provide the Commission a tailored scope for review of the substantial jurisdictional and review basis of the Pastoriza Petition.

The Commission must order the DOE and the OCA to examine each of the proposed Eversource “Asset Condition” projects including those identified by the Petitioner and file a fact-based based report with the Commission.

³ The DOE in its filings in the case improperly argues and excuses its inaction arguing jurisdiction over the projects is entirely federal. This is a misstatement of the law.

Wherefore

Petitioner respectfully requests that:

1. The Commission reconsider its Order dismissing the Petition and order a procedural schedule for the conduct of a full adjudicative docket;
2. The Commission order the DOE and OCA to investigate the Eversource “Asset Condition” projects detailed in the Petition having impacts on New Hampshire ratepayers to determine the prudence of the projects; if the costs of the project were just and reasonable; and, the factual justification of the projects cost allocation to New Hampshire ratepayers;
3. The Commission order the DOE and OCA to investigate the proposed Eversource “Asset Condition” 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 are just and reasonable; and, the factual justification of the projects anticipated cost allocation to New Hampshire ratepayers;
4. 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 at paragraphs 2 and 3 above for presentation in a full adjudicative hearing before the Commission; and.
5. Such other relief proper in the matter.

Respectfully submitted

January 12, 2024

/s/ Arthur B. Cunningham

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Certificate

This filing was served pursuant to the NH PUC Rules.

/s/Arthur B. Cunningham

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