

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire d/b/a Eversource Energy
Petition of Kris Pastoriza for Review of “Asset Condition” Transmission Projects
Docket No. DE 23-056

Reply Brief of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and submits the following reply brief pursuant to the procedural order entered by the Commission in this docket on July 14, 2023. The OCA has reviewed the initial briefs submitted by Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) and the Department of Energy (“Department”), both of which contend that the Commission should not move forward with the investigation requested by petitioner Kris Pastoriza. For the reasons that follow, federal law does not preclude the Commission from investigating Asset Condition projects in New Hampshire and the Commission should move forward with the requested investigation.

I. Federal Preemption

Eversource, as the state’s major owner of the transmission facilities of which every electricity ratepayer in New Hampshire is a captive customer, has every reason to deflect the Commission away from looking into how billions of dollars in

so-called “Asset Condition” transmission projects are allowed to move forward, finding their way into non-bypassable retail transmission charges, without any regulatory scrutiny at either the federal or the state level. As we noted in our initial brief, the Commission has plenary authority over the state’s public utilities pursuant to RSA 374:3, RSA 374:4, and – as to just and reasonable rates – RSA 374:1. Therefore, the only possible basis for concluding the Commission may not proceed with this investigation is that the statutory authority created by the General Court is preempted by federal law. *See, e.g., Maine Forest Products Council v. Cormier*, 51 F.4th 1, 6 (CA1 2022) (noting that the Supremacy Clause of the U.S. Constitution “makes federal law the supreme Law of the Land, which overwhelms ‘any Thing in the Constitution or Laws of any State to the Contrary’ Congress thus has the power to pre-empt state law.” (citing Article VI, Clause 2 of U.S. Constitution) (other citations internal quotation marks omitted)).

Although Eversource helpfully describes how various entities, all regulated by the Federal Energy Regulatory Commission (“FERC”), have at least some authority to discuss if not actually approve Asset Condition projects, it is noteworthy that neither the word “preemption” nor any variation on the word appear in the Eversource brief. Instead, and quite helpfully, the bulk of the Eversource brief is devoted to details of how the three different processes by which Asset Condition projects move forward. In each instance, while there are lots of regional meetings and presumably no shortage of conversational opportunities at such gatherings, there is never a point at which Eversource or any other

transmission owner confronts the possibility of an Asset Condition project being rejected as imprudent, unnecessary, or otherwise unworthy of moving forward. *See* Eversource Brief (tab 14) at 3-4 (describing the process applicable to “projects located on regional Pool Transmission Facilities (“PTF”) with an estimated cost of \$5 million or more,” involving “informational presentation[s]” to the regional Planning Advisory Committee (“PAC”) followed by “review” by the NEPOOL¹ Reliability Committee and ISO New England); *id.* at 4-5 (describing the process for Asset Condition projects exceeding \$5 million that are “located on the non-PTF system,” involving “advisory stakeholder input” from “interested members of the PAC”); *id.* at 5 (describing the process for Asset Condition projects of less than \$5 million, involving an opportunity for “interested parties” to “participate in an information exchange process”). The footnotes to this section of the Eversource Brief refer to Attachments F and K to the ISO New England Open Access Transmission Tariff (“OATT”), byzantine documents that focus almost entirely on processes governing new transmission projects as opposed to existing facilities that allegedly require replacement or upgrade. The first sentence on page 3 of the Eversource Brief succinctly describes a ‘trust-me’ process: “Asset Condition transmission projects are reviewed and approved through a process implemented by the New England Participating Transmission Owners (“PTOs”) . . . with involvement of ISO-NE and New England Power Pool (“NEPOOL”) committed and

¹ NEPOOL – i.e., the New England Power Pool – is the anachronously named stakeholder advisory body to ISO New England. Prior to the formation of ISO New England, NEPOOL was the entity that operated the region’s transmission grid and dispatched generation assets in a coordinated fashion, the original purpose being to avoid anything like the infamous blackout that crippled the New York City region in the fall of 1965.

review by ISO-NE and stakeholders.”² A “process implemented” by Eversource and its fellow profit-maximizing transmission owners in New England stands in sharp contrast to a process implemented by regulators or anyone else with a right to say “no” in appropriate circumstances.

The Eversource Brief is devoid of citations to authorities binding in New Hampshire (as opposed to the Fifth and Ninth Circuits, which cover regions far distant from New Hampshire) or demonstrating that the Commission may not investigate Asset Condition projects in New Hampshire. The Ninth Circuit precedent referenced by Eversource, *California ex rel. Bill Lockyer v. Dynergy, Inc.*, 375 F.3d 831 (CA9 2004), stands simply for the proposition that Congress drew a “bright line” in the Federal Power Act such that all wholesale sales of electricity in interstate commerce (without mentioning anything concerning transmission) are exclusively within FERC’s jurisdiction. *Id.* at 850. The Fifth Circuit case cited by Eversource, *AEP Texas North Co. v. Texas Industrial Energy Consumers*, 473 F.3d 581 (CA5 2006), involves “whether a state regulatory agency may set retail rates based on its own determination that a utility has not complied with a [FERC-approved] tariff.” *Id.* at 582. Reasonably enough, the U.S. Court of Appeals for the Fifth Circuit answered that question in the negative – a principle that is inapposite here inasmuch as no one is alleging non-compliance with a FERC-approved tariff.

² According to the Department of Energy, ISO New England does not simply review Asset Condition projects – it approves them. Department of Energy Brief (tab 16) at 2. But the Commission cannot and should not assume that ISO New England is evaluating these projects to determine whether the costs are prudently incurred – and, more importantly, no regulatory body at either the federal or state level currently adopts or rejects whatever determinations are made by ISO New England, NEPOOL, or the PAC about Asset Condition projects.

Finally, Eversource invokes the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *South Carolina Public Service Authority v. FERC*, 762 F.3d 41 (CADDC 2014). This case is inapposite because it discusses the extent of FERC’s authority to require transmission owners to participate in regional transmission planning. The case simply has nothing to say about the extent to which state authority is or is not limited in the realm of transmission. *See id.* at 56 (“The authority and obligation that Congress vested in [FERC] to remedy certain practices is broadly stated and the only question is what limits are fairly implied.”).

Eversource does not and, indeed, cannot argue that states play no role in transmission issues because it is well-established that under the Federal Power Act the authority to *site* transmission facilities, be they dedicated to intrastate or interstate commerce, remains with the states. This is clear upon examination of the “backstop siting” authority vested in FERC via the 2005 Energy Policy Act, codified as 16 U.S.C. § 824p. As noted in paragraph (b) of this provision, if FERC designates a “national interest electric transmission corridor” and the relevant state either lacks state-law siting authority or cannot consider interstate or interregional benefits in exercising such authority, at that point FERC has siting authority. As to every other situation, the authority to site transmission facilities remains with New Hampshire and every other state jurisdiction. There is no exception to this non-preemption principle for Asset Condition projects; the Commission has the right to ascertain their need and their prudence even where the rate-setting authority lies

with the federal regulator. Therefore, the investigation requested by Ms. Pastoriza here is well within the Commission's authority.

The Brief submitted by the Department likewise eschews the use of the word "preemption" or any of its variants. Nor does the Department's brief cite any caselaw or statutory authority for the proposition that the Commission is foreclosed from conducting the requested investigation. Both Eversource and the Department devote considerable attention to various statutes cited by Ms. Pastoriza in her initial and revised petitions, both submitted as *pro se* pleadings drafted by a non-attorney.³ Eversource concedes that pursuant to RSA 365 the Commission has "broad authority . . . to conduct inspections and independent investigations regarding public utility matters." Eversource Brief at 16. In these circumstances, the Commission should not get caught up in the various arguments made by Eversource and the Department concerning the non-applicability of statutes governing utility easements, the crossing of water and/or state lands by utility facilities, eminent domain, energy efficiency, distributed energy resources, renewable energy generally, or pole inspections. The Commission should simply invoke the plenary authority it enjoys under state law to investigate what transmission-owning New Hampshire utilities are up to.

Our last point concerning the Commission's jurisdiction reiterates an argument we made in our initial brief. Even assuming, *arguendo*, that the Commission is preempted or otherwise precluded from ordering any relief in this docket, the question of Asset Condition projects is significant enough to warrant the

³ Ms. Pastoriza has since obtained counsel and is no longer *pro se*.

Commission exercising its unquestionable authority to inform itself fully of the relevant facts and circumstances. If, for the sake of argument, the only possible recourse would be for the Commission, the Department, the OCA, and/or some other interested party to file a petition with FERC, this docket would comprise a factfinding exercise that would be well worth the Commission's time and attention.

II. Wisdom from Commissioner Christie of FERC

The OCA would like to take this opportunity to elaborate, briefly, on why it is suggesting that the Commission move forward with an investigation that we are not responsible for proposing initially and which, admittedly, could embroil the Commission in federalism controversies. Oversight of the bulk power transmission system is a policy realm in which both federal regulators and their state counterparts play a role, the question here being what role is appropriate for state regulators in New England. In the first instance, as we noted in our initial brief, it was NESCOE that sounded an alarm about Asset Condition projects that was particularly resonant. NESCOE pointed out that Asset Condition projects dwarf new transmission facilities when it comes to accounting for what drives the region's transmission rates. But we have also been influenced by FERC Commissioner Mark Christie, who served as chair of the Virginia State Corporation Commission (a counterpart agency to the New Hampshire Public Utilities Commission) prior to being nominated and confirmed to his federal post two years ago.

Unlike orders of FERC, informal pronouncements by FERC Commissioners do not have the force and effect of law. But those of us laboring at the state level

should take note of Commissioner Christie’s outspokenness since joining FERC about the vital role states must play in keeping transmission costs under control at a time when regions like New England (i.e., regions that rely on regional transmission organizations like ISO New England) pay for transmission under FERC-approved “formula” rates.

Repeatedly – and, usefully, on the record at the technical conference convened by FERC on October 6, 2022 to discuss issues related to transmission planning and transmission costs⁴ – Commissioner Christie has called for vigorous state prudence-oriented oversight of transmission projects that find their way into rate base and thus FERC-endorsed formula transmission rates. After noting that transmission rate base has more than doubled across the country during the preceding eight years, Commissioner Christie argued at the October 2022 technical conference that

state commission[s] ought to be looking at need in both regional and local projects. And [what] they ought to be looking at is the prudence of the cost. Is this cost justified? . . . [E]ven in an RTO state it shouldn't just be “Well, the RTO put it in a plan, therefore let it go.” The states need to be looking at these too and doing a strong level of scrutiny as to need, cost and of course obviously there’s siting.

Transcript at 19, lines 8-17. Commissioner Christie noted that transmission planning as overseen by RTOs is “not an adversarial process” but a “planning process.” *Id.* at 201, line 14. Thus, he added (speaking colloquially at a gathering

⁴ FERC assigned docket number AD22-8 to the technical conference on transmission planning and costs. Thus, the transcript of the conference and other documents related to that gathering are available on the FERC web site (www.ferc.gov) under that docket number, via the web site’s “eLibrary.”

that was, although transcribed, conducted informally), you can add . . . a million stakeholders, and you can fiddle with the stakeholder process and make it more byzantine than it already is, it's not going to get you there." *Id.*, lines 14-17. By "there," Commissioner Christie clearly meant certainty that the costs in question are prudently incurred. "Only a robust state CPCN is where you can litigate it and dig behind the assumptions and dig behind the claims that are made." *Id.* at lines 17-20. By "CPCN" Commissioner Christie meant "certificate of public need and necessity" – a phrase that does not appear in New Hampshire law but in other jurisdictions means state-law processes that determine whether a particular transmission project is prudent and necessary.

In fairness, Commissioner Christie was discussing transmission projects generally; he was not focusing on "Asset Condition" projects that involve pre-existing transmission facilities specifically. But his meta-point bears directly on the instant proceeding here in New Hampshire: Not only is there a state role in overseeing the development of transmission infrastructure; the role is an essential one in a paradigm where the only FERC action is approval of formula rates via which capital projects related to transmission are automatically inserted into rate base without any scrutiny at the federal level. In other words, as FERC Chairman Richard Glick stated at the October 2022 technical conference, there is a "regulatory gap" between FERC's authority and state authority when it comes to "protecting

consumers from . . . decisions that are made on local transmission planning, regional transmission planning and *other transmission activities.*” *Id.* at 284, lines 12-19 (emphasis added).⁵

The point here is that federal regulators perceive a regulatory gap through which billions of dollars may be finding their way into transmission rate base with little or no scrutiny. The OCA is not proposing how to fill that gap at this juncture of this case. Rather, we are suggesting that as a matter of agency discretion the Commission should not take up Eversource’s invitation to assume the Commission has no role to play in addressing the issues raised by Ms. Pastoriza’s complaint.

III. Ms. Pastoriza’s Motion

On August 14, 2023, Ms. Pastoriza submitted a motion (tab 18) containing four distinct requests. After arguing, persuasively, that the Commission is not preempted from moving forward with the instant proceeding, Ms. Pastoriza seeks (1) a timeline for her two submit data requests of Eversource, the Department, and the OCA, (2) an order directing Eversource to provide her with up to \$325,000 to allow her to retain an expert to conduct discovery, (3) similarly, an order directing Eversource to provide both Ms. Pastoria and intervenors with up to \$25,000 to retain an independent expert who would testify at hearing, and (4) a procedural order specifying a general timeline for the docket.

The OCA opposes the first request to the extent it applies to our office, and we oppose outright the two requests for a total of \$375,000 in funding. The OCA is

⁵ Chairman Glick left office at the end of 2022, but Commissioner Christie remains at FERC and continues to sound the alarm about unscrutinized transmission investments.

not a public utility (and thus not itself subject to the plenary authority of the Commission, nor to the Commission's investigative authority under RSA 365) and we, obviously, do not own, operate, develop, replace, or upgrade any transmission assets. Accordingly, we do not have any information that could be material to the outcome of this proceeding. We should therefore not be subject to discovery.

As for the requested financial assistance, RSA 365:38-a authorizes the Commission to "allow recovery of costs associated with utility proceedings" for "retail customers that are subject to the rates of the utility who demonstrate financial hardship." Recovery is limited to a maximum of \$10,000 and requires a showing that the party seeking the financial assistance "substantially contributes to the adoption by the commission, in whole or in part, of a position advocated by the . . . party in that proceeding, or in a judicial review of that proceeding." Such recovery requires the approval of the Governor and Executive Council and any amounts awarded pursuant to section 38-a are recoverable by the utility from its customers.

Here, Ms. Pastoriza's request is premature (since the statute contemplates such awards being made at the conclusion of proceedings when the results are known), vastly in excess of the statutory limit, and seemingly oblivious to the fact that her interests (and that of Eversource's other residential customers) are already represented by the OCA, which by statute is ultimately paid for by ratepayers pursuant to RSA 363-A:2, IV. RSA 363:38-a awards must meet a "public interest"

standard as well as being “just and reasonable.” Her motion does not explain why it would be in the public interest, or just and reasonable, for her to be paid to duplicate the efforts of the OCA. However, in deference to the possibility that facts and circumstances might emerge over the course of the proceeding that would justify RSA 363:38-a cost recovery, the Commission should deny the request at this time but without prejudice to its renewed assertion at the conclusion of the proceeding.

IV. Conclusion

For the reasons stated above, the Commission should proceed with the requested investigation of Asset Condition transmission projects. Nothing precludes the Commission from simply gathering information at this stage so that Commissioners are fully informed about the extent to which Asset Condition transmission projects are going unregulated and unscrutinized. The question of what, if anything, to do about this problem at the state level should be deferred. In these circumstances, we respectfully suggest that it would be improvident to do as Eversource suggests and simply assume the Commission has no role to play here.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Issue a procedural order stating that the Commission intends to proceed with an investigation of Asset Condition transmission projects,
- B. Deny, without prejudice, the motion of petitioner Chris Pastoriza for funding of the efforts she plans to undertake in this docket, and

C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,



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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.



Donald M. Kreis