

168 FERC ¶ 61,169  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

New England Ratepayers Association

Docket No. EL19-10-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued September 19, 2019)

1. On November 2, 2018, pursuant to section 292.207(d)(1)(iii) of the Commission's regulations<sup>1</sup> and Rule 207 of the Commission's Rules of Practice and Procedure,<sup>2</sup> New England Ratepayers Association (New England Ratepayers) filed a petition for declaratory order (Petition), requesting that the Commission find that a recently enacted New Hampshire statute, Senate Bill 365 (SB 365),<sup>3</sup> mandating a purchase price for wholesale sales by certain generators in the state, is preempted by the Federal Power Act (FPA) and section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>4</sup> For the reasons discussed below, we grant the Petition.

**I. Background**

2. In 2018, the New Hampshire Legislature, overturning the Governor's veto, passed SB 365 requiring electric distribution companies (i.e., utilities), subject to the New Hampshire Public Utilities Commission's (New Hampshire Commission) approval, to make offers to purchase the net output of eligible biomass and waste facilities<sup>5</sup> within

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<sup>1</sup> 18 C.F.R. § 292.207(d)(1)(iii) (2019).

<sup>2</sup> 18 C.F.R. § 385.207. (2018)

<sup>3</sup> N.H. Rev. Stat. Chapter 362-H.

<sup>4</sup> 16 U.S.C. § 824a-3 (2018).

<sup>5</sup> SB 365 defines "eligible facilities" as "any electric producing facility that uses biomass or municipal solid waste as a primary energy source with a capacity of 25 MW or less." N.H. Rev. Stat. Chapter 362-H:1.V.(a). In New Hampshire, there are seven eligible facilities, with capacities ranging from 13 MW to 21.5 MW. New England Ratepayers Comments at 5-6.

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their service territories at a rate based on 80 percent of the retail rate for default energy service.<sup>6</sup> SB 365 provides for the utilities to recover the difference between the rate that utilities pay the eligible facilities and the market clearing price via a service charge applicable to all retail customers.<sup>7</sup>

3. Public Service Company of New Hampshire (PSNH) is the purchasing utility of the seven eligible facilities. As discussed further below, PSNH previously has been granted relief from its mandatory purchase obligation under PURPA section 210(m) and thus is not required by PURPA to purchase the net output from any qualifying facility (QF) with capacity over 20 MW.<sup>8</sup>

## II. Petition

4. New England Ratepayers request that the Commission find that SB 365: (1) establishes a wholesale rate for energy and is, thus, preempted by the FPA; (2) violates PURPA by setting a rate that exceeds the avoided cost rate; and (3) requires PSNH to purchase QF output from a 21.5 MW QF, even though PSNH has been granted relief from its mandatory purchase obligation under PURPA section 210(m) for QFs with capacity over 20 MW.<sup>9</sup>

5. New England Ratepayers assert that SB 365 violates the FPA by setting wholesale energy rates, which are within the Commission's exclusive jurisdiction.<sup>10</sup> New England Ratepayers note that the Supreme Court invalidated a similar Maryland statute, finding

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<sup>6</sup> SB 365 defines "Default Energy Rate" as "the retail rate, as approved by the New Hampshire Commission, for residential electric customers who are otherwise without an electric supplier." N.H. Rev. Stat. Chapter 362-H:1.IV.

<sup>7</sup> N.H. Rev. Stat. Chapter 362-H:2.V.

<sup>8</sup> *Pub. Serv. Co. of N.H.*, 131 FERC ¶ 61,027, at PP 2, 16 (2010) (terminating PSNH's mandatory purchase obligation on a service territory-wide basis for QFs with a net capacity in excess of 20 MW). One of the seven eligible facilities has a net capacity of 21.5 MW, as discussed further below. New England Ratepayers Petition at 6.

<sup>9</sup> New England Ratepayers Petition at 4.

<sup>10</sup> New England Ratepayers Petition at 10 (citing *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288 (2016) (*Hughes*)). New England Ratepayers state that, in *Hughes*, the Supreme Court indicated that states may not set a wholesale price for energy in order to advance a state's renewable policy objectives. *See id.* at 2 (citing *Hughes*, 136 S. Ct. 1288 at 1297-99).

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that the Commission had authorized PJM Interconnection, L.L.C.'s (PJM) capacity auction to set the permissible wholesale price in the PJM market and that the Maryland statute established a different wholesale price inconsistent with the Commission's exclusive jurisdiction under the FPA.<sup>11</sup> New England Ratepayers assert that similarly here, New Hampshire is impermissibly establishing a wholesale rate in violation of the FPA by (1) requiring utilities to purchase the net output of the eligible facilities at a rate based on 80 percent of the retail rate for default energy service; and (2) after selling into the ISO New England, Inc. (ISO-NE) market at the ISO-NE market clearing price, allowing utilities to recover from ratepayers the difference between the state-established rate for the purchase and the ISO-NE real-time market clearing price.<sup>12</sup>

6. New England Ratepayers add that, although the power purchase agreements (PPAs) between the utilities and the eligible facilities mandated under SB 365 are contracts for the sale of energy, they are not bilateral contracts because the contract price is mandated by the state legislature, rather than the result of arms-length negotiation, as discussed in *Allco*.<sup>13</sup> New England Ratepayers note that SB 365's requirement that the utilities offer to purchase the eligible facilities' net output at a predetermined energy rate (80 percent of the default service retail rate) is absolute and does not allow the utilities to negotiate a different price. New England Ratepayers also state that, although SB 365 requires utilities to submit each proposed PPA to the New Hampshire Commission for review of whether the PPA conforms to SB 365, SB 365 does not condition the PPA's effectiveness upon the Commission's review of the PPA under FPA section 205.<sup>14</sup>

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<sup>11</sup> *Id.* at 12 (citing *Hughes* 136 S. Ct. 1288 at 1297).

<sup>12</sup> *Id.* New England Ratepayers also point to other instances where, they explain, the Commission found that state attempts to set wholesale prices were preempted. *Id.* at 13-15 (citing *Connecticut Power & Light Co.*, 70 FERC ¶ 61,012, at 61,025-26, 61,029-30 (1995), *reconsideration denied*, 71 FERC ¶61,035 (1995), *appeal dismissed*, *Niagara Mohawk Corp. v. FERC*, 117 F.3d 1485 (D.C. Cir. 1997); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067, at 61,244-46 (1997) (*Midwest Power*); *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, at PP 64-67, 70 (*California Commission I*), *order on clarification*, 133 FERC ¶ 61,059 (2010) (*California Commission II*), *reh'g denied*, 134 FERC ¶ 61,044 (2011) (*California Commission III*)).

<sup>13</sup> New England Ratepayers Petition at 12-13 (citing *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, at 98 (2d Cir. 2017) (*Allco*)).

<sup>14</sup> *Id.* at 13 (citing *Allco*, 861 F.3d 82 at 99-100).

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7. New England Ratepayers also argue that (1) the legislature did not “invoke PURPA” as a basis for New Hampshire to set rates for these eligible facilities; and (2) even if the legislature had invoked PURPA, SB 365 does not conform to PURPA because it does not establish an eligible facility’s rate based on the utility’s avoided costs. New England Ratepayers note that the New Hampshire Commission has previously determined that the utility’s avoided cost for energy is equal to ISO-NE’s real-time market price.<sup>15</sup> New England Ratepayers assert that a predetermined rate of 80 percent of the retail service price bears no relation to a utility’s avoided cost and is estimated to exceed the established avoided cost rate, which violates PURPA.<sup>16</sup>

### **III. Notice of Filing and Responsive Pleadings**

8. Notice of the Petition was published in the *Federal Register*, 83 Fed. Reg. 56,076 (2018), with interventions and protests due on or before December 17, 2018.<sup>17</sup>

9. Calpine Corporation, Electric Power Supply Association (EPSA), Eversource Energy Service Company on behalf of PSNH d/b/a Eversource Energy (PSNH), National Grid, New England Small Hydropower Coalition (New England Hydropower),<sup>18</sup> New Hampshire Generator Group (NH Generators),<sup>19</sup> New Hampshire Office of Consumer Advocate (NH Consumer Advocate), NRG Power Marketing, LLC, Office of the People’s Counsel for the District of Columbia, and State of New Hampshire (New Hampshire) filed timely motions to intervene.

10. EPSA, Katie Lajoie (on behalf of herself and 12 other individual rate payers), New England Hydropower, New Hampshire, NH Generators, New Hampshire Legislature, and

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<sup>15</sup> *Id.* at 3 (citing *Pub. Serv. Co. of N.H. d/b/a/ Eversource Energy*, Order No. 25,920, 2016 WL 3613349 at \*51 (N.H.P.U.C. July 1, 2016)).

<sup>16</sup> *Id.* at 3, 19-20.

<sup>17</sup> On December 4, 2018, the comment period was extended from December 3, 2019 to December 17, 2019. Notice Granting Extension of Time, Docket No. EL19-10-000 (Dec. 4, 2019).

<sup>18</sup> New England Hydropower represents Granite State Hydropower Association, Bay State Hydropower Association, and Vermont Independent Power Producers Association.

<sup>19</sup> NH Generators include Bridgewater Power Company, L.P.; DG Whitefield LLC; Pinetree Power – Tamworth LLC; Pinetree Power, Inc.; Springfield Power, LLC; and Wheelabrator Concord Company, L.P.

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NH Consumer Advocate filed comments. New England Ratepayers, New Hampshire, and NH Generators filed answers.

11. On January 7, 2019, PSNH filed a motion to lodge the pleading that it filed with the New Hampshire Commission on December 27, 2018. On January 22, 2019, NH Generators filed a response.

**A. Comments**

**1. Comments Supporting Petition**

12. EPSA argues that SB 365 impermissibly establishes a wholesale rate, which is within the Commission's exclusive jurisdiction under the FPA.<sup>20</sup> EPSA contends that the reasonableness of the SB 365 rate has not been established by negotiation or competitive solicitation but rather through legislative mandate.<sup>21</sup> Although EPSA notes that SB 365 does not indicate that the New Hampshire legislature was acting pursuant to PURPA or relied on the eligible facilities' current QF status to justify SB 365's purchase requirement and/or rates, EPSA agrees that SB 365 violates PURPA and the Commission's implementing regulations because SB 365's adjusted energy rate is not capped at the utilities' avoided cost.<sup>22</sup> EPSA also asserts that SB 365 will suppress energy prices in the ISO-NE market and shield the seven eligible facilities from competing in the market, which violates the FPA's prohibition against unduly preferential or discriminatory treatment.<sup>23</sup>

13. In addition to arguing that SB 365 is preempted by the FPA and PURPA,<sup>24</sup> NH Consumer Advocate asserts that SB 365 violates the Dormant Commerce Clause, which

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<sup>20</sup> EPSA Comments at 4-5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 6-9.

<sup>23</sup> *Id.* at 9-10.

<sup>24</sup> NH Consumer Advocate Comments at 5-12. *See also* NH Consumer Advocate Dec. 17, 2018 Amended Comments at 2-3 (asserting that SB 365 is also preempted under the doctrines of conflict preemption (citing *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990))) (NH Consumer Advocate Amended Comments), 5 (arguing that requiring PSNH to purchase electricity from Pinetree-Tamworth, a 21.5 MW facility, conflicts with a Commission decision relieving PSNH of any requirement to

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“prohibits states from engaging in economic protectionism, such as preferential treatment of in-state competitors over out-of-state competitors.”<sup>25</sup> NH Consumer Advocate contends that state laws that facially discriminate among competitors based on state of origin are invalid, unless the law ““advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.””<sup>26</sup> NH Consumer Advocate adds that state laws that have the effect of discriminating among competitors based on state of origin are valid, unless the ““burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.””<sup>27</sup> NH Consumer Advocate claims that SB 365 fails both tests.<sup>28</sup>

14. Separately, NH Consumer Advocate claims that the Petition is ripe for consideration because PSNH has attempted to implement the provisions of SB 365 by soliciting and receiving bids from QFs for default energy.<sup>29</sup> NH Consumer Advocate also states that the petition PSNH filed with the New Hampshire Commission on December 4, 2018 reveals that PSNH is unable to fully comply with both PURPA and SB 365, thereby supporting the position that SB 365 is ““conflict pre-empted”” by PURPA and demonstrating that there is currently an actual controversy and uncertainty for this Commission to resolve.<sup>30</sup> NH Consumer Advocate adds that SB 365 cannot be viewed as part of New Hampshire’s integrated resource planning or renewable portfolio standard requirements because nothing in SB 365 references New Hampshire’s integrated resource planning or renewable portfolio standards. NH Consumer Advocate contends that

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purchase electricity from QFs with net capacity in excess of 20 MW (citing *Pub. Serv. Co. of N.H.*, 131 FERC ¶ 61,027 at PP 2, 16)).

<sup>25</sup> *Id.* at 12-13 (citing *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) (*Oregon Waste*)).

<sup>26</sup> *Id.* at 13 (quoting *Oregon Waste*, 511 U.S. at 100-01).

<sup>27</sup> *Id.* (citing *Oregon Waste*, 511 U.S. at 99 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))).

<sup>28</sup> *Id.* at 12-15.

<sup>29</sup> NH Consumer Advocate Amended Comments at 3-5.

<sup>30</sup> *Id.* (citing Exhibit A, paragraphs 10, 12).

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SB 365 is a separate stand-alone statute that only applies to purchases from a small subset of renewable resources.<sup>31</sup>

15. New England Hydropower states that, although it does not take a position on whether SB 365 is pre-empted by PURPA, it does protest SB 365's use of the ISO-NE real-time locational marginal price (LMP) to establish the avoided cost rate.<sup>32</sup> New England Hydropower contends that real-time LMP does not reflect a utility's avoided cost because it does not reflect the ultimate price a utility pays for its portfolio of energy to serve load over a reasonable utility planning horizon.

## 2. Comments Opposing Petition

16. New Hampshire asserts that the Petition is premature because there is no current violation of the FPA.<sup>33</sup> New Hampshire argues that the Petition ignores that SB 365 does not (1) impose an obligation on eligible facilities to sell to utilities;<sup>34</sup> (2) compel utilities to sell into the ISO-NE market; or (3) make any proclamations regarding Commission jurisdiction over any agreement if eligible facilities do sell to electric utilities. New Hampshire further asserts that the New Hampshire Commission has not yet had the opportunity to review the eligible facility agreements that the electric utilities would submit in the New Hampshire Commission proceedings concerning the utilities' periodic default energy service solicitation and resulting rates.<sup>35</sup> For these reasons, New Hampshire contends that there is no state statute currently in conflict with the FPA and, thus, no controversy or conflict to resolve at this time.<sup>36</sup> New Hampshire asks the Commission to avoid addressing the federal-state legal issues raised in the Petition until SB 365 is implemented by the utilities, the eligible facilities, and the New Hampshire Commission and then only if implementation creates a controversy.<sup>37</sup>

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<sup>31</sup> *Id.* at 6.

<sup>32</sup> New England Hydropower Protest at 1, 6-8.

<sup>33</sup> New Hampshire Protest at 1-4.

<sup>34</sup> *Id.* at 3 (citing *S. Maryland Elec. Coop.*, 157 FERC ¶ 61,118, at P 26 (2016)).

<sup>35</sup> New Hampshire Protest at 2-4. We note that, since this filing, the New Hampshire Commission has issued a ruling. *See infra* P 35.

<sup>36</sup> *Id.* at 2 (citing *Idaho Power Co.*, 161 FERC ¶ 61,284, at P 15 (2017)).

<sup>37</sup> *Id.* at 4 (referencing Rule 207).

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17. NH Generators argue that EPSA, New England Ratepayers, and NH Consumer Advocate misrepresent facts about SB 365.<sup>38</sup> First, NH Generators argue that SB 365 does not require utilities to purchase energy from eligible facilities to sell into ISO-NE markets. Instead, NH Generators argue that SB 365 was crafted to avoid requiring either the eligible facility or the purchasing utility to offer into or clear energy in any Regional Transmission Organization (RTO)/Independent System Operator (ISO) market.<sup>39</sup> Second, NH Generators contend that SB 365 does not set a price or authorize the New Hampshire Commission to set the price; instead, it mandates a purchase (not a sale) if certain requirements are met and requires that the purchase price is based on a 20 percent discount of the default service rate, which is determined through an organized, competitive solicitation process.<sup>40</sup> Third, NH Generators explain that the competitive default service solicitation results in wholesale PPAs between the default service providers and the utilities, under which the utility purchases power for resale to its customers.<sup>41</sup> NH Generators add that New Hampshire law requires its utilities to periodically issue solicitations to competitively procure power supply, which results in the default service rate.<sup>42</sup> Fourth, NH Generators claim that SB 365 does not intrude upon the Commission's review of a wholesale sale, arguing that the New England Ratepayers' assertion to the contrary is unsupported.<sup>43</sup>

18. New Hampshire and NH Generators do not agree that the FPA preempts SB 365. New Hampshire argues that the presumption against preemption is particularly strong when a state is regulating health and safety matters, which are addressed here through SB 365's fuel diversity and environmental benefits.<sup>44</sup> NH Generators add that the courts

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<sup>38</sup> NH Generators Protest at 9-11.

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.* at 9-10; NH Generators Dec. 17, 2018 Supplemental Comments at 2-3 (NH Generators Supplemental Comments).

<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 10-11; NH Generators Supplemental Comments at 3-4. New Hampshire and New Hampshire Legislature make similar arguments. *See* New Hampshire Protest at 3; New Hampshire Legislature Comments at 1.

<sup>44</sup> New Hampshire Protest at 5 (citing *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U. S. 190, 205 (1983) ("Need for new power

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have long recognized state authority over resource planning and utility “buy side” issues,<sup>45</sup> adding that states have the ability to favor certain generation resources, even through direct subsidies.<sup>46</sup> As for New England Ratepayers’ dissatisfaction with the adjusted energy rate that is tied to the rate for utilities’ competitively procured default energy for residential ratepayers, New Hampshire argues that, in exercising their traditional authority over electricity generation and retail operations, states may encourage renewable resources by requiring utilities under state jurisdiction to purchase renewable generation.<sup>47</sup> Noting prior Commission precedent allowing matters to be decided in more appropriate venues, New Hampshire urges the Commission to allow the state regulatory agency to implement SB 365 and allow parties alleging harm to bring those matters in the appropriate court.<sup>48</sup>

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facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.”)).

<sup>45</sup> NH Generators Protest at 13-14 (citing *New York v. FERC*, 535 U.S. 1, 24 (2002) (*NY v. FERC*); *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm’n*, 837 F.2d 600, 602 (3d Cir. 1988)).

<sup>46</sup> *Id.* (citing *Hughes*, 136 S. Ct. 1288 at 1299; *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (*Entergy v. Shumlin*); *NY v. FERC*, 535 U.S. at 24 (citing Order No. 888 to note these same areas of state authority); *California Commission I*, 132 FERC ¶ 61,047 at P 69; *California Commission III*, 134 FERC ¶ 61,044 at P 30; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,3782 [sic] n.544 (1996) (cross-referenced at 77 FERC ¶ 61,080), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. NY v. FERC*, 535 U.S. 1; *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, at 62,080 (1995) (*SCE*); *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078, at P 6 (2006)).

<sup>47</sup> New Hampshire Protest at 5-6 (citing *Entergy v. Shumlin*, 733 F.3d 417 (citing *SCE*, 71 FERC at 62,080; *NY v. FERC*, 535 U.S. 1 at 8, 24; *id.* at 24; *Exelon Corp. v. PPL Elec. Util. Corp.*, 117 FERC ¶ 61,176, at P 27 (2006)).

<sup>48</sup> New Hampshire Protest at 7.

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19. NH Generators contend that New England Ratepayers misrepresent current field preemption precedent and ignore the FPA's framework of cooperative federalism between the Commission and the states.<sup>49</sup> NH Generators assert that SB 365 does not "target" an area reserved for federal authority under the FPA, which is the field preemption test in *Oneok* that was reiterated in *Hughes*.<sup>50</sup> NH Generators argue that, to the contrary, SB 365 is not intended to encroach or aimed at encroaching upon an area of exclusive federal jurisdiction; rather it is designed to promote fuel diversity through utility purchasing decisions and oversight over utility resource portfolios.<sup>51</sup> NH Generators add that *Hughes* does not support a finding of field preemption because SB 365 is not "tethered" to participation in a RTO market (i.e., it does not require an eligible facility to offer its capacity (or energy) into or to clear an organized wholesale market).<sup>52</sup> NH Generators point to the rejection of similar preemption claims against two state programs that subsidized particular generation facilities because they were not tethered to the regional RTO market.<sup>53</sup> NH Generators also note that SB 365 does not prohibit the Commission from asserting jurisdiction over any resulting PPAs.<sup>54</sup>

20. As for *Allco*, NH Generators claim that New England Ratepayers incorrectly argue that the court's decision hinges upon whether utilities are compelled to enter into PPAs, noting that the court expressed no opinion on that point.<sup>55</sup> NH Generators contend that instead, the court found that the Connecticut program soliciting requests for proposals from renewable energy providers did not condition capacity transfers on a Commission-approved auction and, therefore, was not preempted because the program was not tethered to wholesale power markets.<sup>56</sup> NH Generators contend that Commission and court findings also undercut New England Ratepayers' suggestion that mandated utility

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<sup>49</sup> NH Generators Protest at 11-12, 22-23.

<sup>50</sup> *Id.* at 13, 15-16 (citing *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599-1600 (2015) (*Oneok*); *Hughes* 136 S. Ct. 1288 at 1290).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 17-18, 22.

<sup>53</sup> *Id.* at 20-22 (citing *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018); *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (*Zibelman*)).

<sup>54</sup> *Id.* at 17, 20.

<sup>55</sup> *Id.* at 19 (citing *Allco*, 861 F.3d 82 at 100 n.15).

<sup>56</sup> *Id.* at 19 (citing *Allco*, 861 F.3d 82 at 99, 102).

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purchases of generation would be preempted.<sup>57</sup> NH Generators also assert that, like the program approved in *Allco*, SB 365 provides for bilateral contracts between utilities and generators and nothing in SB 365 exempts PPAs from full compliance with Commission requirements.<sup>58</sup>

21. New Hampshire argues that addressing whether SB 365 violates PURPA is premature because the record does not provide evidence of the actual adjusted energy rate that will be applied to a PPA or a state determination of the utilities' avoided cost.<sup>59</sup> New Hampshire adds that there is no evidentiary support for arguments that (1) there is no relationship between the SB 365 rate and the buyers' avoided cost; or (2) the SB 365 rate will exceed the utilities' avoided cost.<sup>60</sup> New Hampshire contends that, as in *California Commission I*, here the Commission has no record upon which to determine that the adjusted energy rate is inconsistent with PURPA's rate requirement.<sup>61</sup> New Hampshire argues that, in the first instance, the New Hampshire Commission must determine the avoided cost and whether the SB 365 rate exceeds the utilities' avoided cost.<sup>62</sup> New Hampshire adds that the question of whether SB 365 is consistent with PURPA is secondary to the question of whether SB 365 is preempted by the FPA and should be answered after the FPA preemption question is answered.<sup>63</sup>

22. NH Generators assert that SB 365 is not preempted by PURPA because SB 365 does not set any rate, let alone one that exceeds avoided cost.<sup>64</sup> NH Generators explain that eligible facilities are effectively price-takers at a value that is a discount from a

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<sup>57</sup> *Id.* (citing *Allco*, 861 F.3d 82 at 101 (citing *Entergy v. Shumlin*, 733 F.3d 393 at 417; *SCE*, 71 FERC ¶ at 62,080)).

<sup>58</sup> *Id.* at 20 (citing *Allco*, 861 F.3d 82 at 101).

<sup>59</sup> New Hampshire Protest at 7-12.

<sup>60</sup> *Id.* at 8-9.

<sup>61</sup> *Id.* at 11 (citing *California Commission I*, 132 FERC ¶ 61,047 at PP 64-65, 67-68).

<sup>62</sup> *Id.* at 9-10 (quoting *California Commission III*, 134 FERC ¶ 61,044 at P 30).

<sup>63</sup> *Id.* at 7.

<sup>64</sup> NH Generators Protest at 4, 23; NH Generators Supplemental Comments at 4.

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competitive solicitation.<sup>65</sup> NH Generators argue that eligible facilities have the option of either (1) not participating in the default energy service; or (2) taking the price offered and submitting a proposed schedule of hourly net output.<sup>66</sup> NH Generators contend that, if the Commission finds that a QF cannot accept a competitively determined default service price, it would effectively find that PURPA preempts all QFs, even those with market-based rates that do not seek to make a wholesale sale under PURPA, from participating in a state-mandated competitive auction that may result in a price above avoided cost.<sup>67</sup> If an avoided cost were calculated, NH Generators disagree that the avoided cost calculation should be based on the price of energy in ISO-NE.<sup>68</sup> NH Generators argue that, because the Commission has given states latitude in determining avoided cost, including multi-tiered avoided cost rate structures and the ability to make separate avoided cost calculations based on procurement segments, any avoided cost should be based on the purchase of power from such biomass and waste-to-energy renewable resources within the utilities' service territories.<sup>69</sup>

23. NH Generators emphasize that SB 365 is not directed at purchasing power from QFs under PURPA and does not require eligible facilities to be or remain a QF.<sup>70</sup> NH Generators argue that generators could rely upon exempt wholesale generator status and market-based rate authority to make wholesale sales, rather than PURPA.<sup>71</sup> NH Generators state that, prior to making any sales under any PPA under SB 365, all of its generators will have or will obtain exempt wholesale generator status with market-based rate authority under FPA section 205.<sup>72</sup> NH Generators further state that, if necessary,

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<sup>65</sup> *Id.* at 8, 23-24.

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 24.

<sup>68</sup> *Id.* at 25.

<sup>69</sup> *Id.* at 24-25 (citing *California Commission II*, 133 FERC ¶ 61,059 at PP 22-26; *California Commission III*, 134 FERC ¶ 61,044 at PP 27-30); NH Generators Supplemental Comments at 4.

<sup>70</sup> *Id.* at 4, 25; NH Generators Supplemental Comments at 4.

<sup>71</sup> NH Generators Supplemental Comments at 4.

<sup>72</sup> NH Generators Protest at 25.

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the eligible facilities will relinquish their QF status prior to the effective date of any PPA executed pursuant to SB 365, which would make PURPA inapplicable.<sup>73</sup>

**B. Answers**

24. New England Ratepayers claim that their preemption claims are ripe because SB 365 sales could commence on February 1, 2019 and it is not necessary to wait until contracts have been executed to act on the Petition.<sup>74</sup> New England Ratepayers add that SB 365 does not preserve Commission jurisdiction over wholesale rates because SB 365 does not permit a different rate to be charged, whether the different rate is determined by the Commission or otherwise.<sup>75</sup> New England Ratepayers explain that SB 365 requires utilities to pay, and pass through to ratepayers, a wholesale rate for energy mandated by New Hampshire.<sup>76</sup> New England Ratepayers ask the Commission to address the Petition at this time because sales under SB 365 could go into effect without any review under the FPA or PURPA.<sup>77</sup>

25. New England Ratepayers assert that, contrary to NH Generators' assertions, *Hughes* does not narrow the scope of the Commission's exclusive jurisdiction over wholesale rates.<sup>78</sup> New England Ratepayers argue that the Commission's jurisdiction over wholesale sales is not limited to sales occurring in or "tethered" to RTOs because it includes exclusive jurisdiction over bilateral wholesale sales of electricity.<sup>79</sup> New England Ratepayers contend that, regardless of whether there is a tether to sales in

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<sup>73</sup> *Id.* at 4, 25-26; NH Generators Supplemental Comments at 4.

<sup>74</sup> New England Ratepayers Answer at 27 (citing *Midwest Power*, 78 FERC at 61,247-48; *S. Cal. Edison*, 70 FERC ¶ 61,215, at 61,677-78 (1995)).

<sup>75</sup> *Id.* at 19.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 28-32.

<sup>78</sup> *Id.* at 9. New England Ratepayers add that the court did not hold that states are free to set the rates for wholesale sales of electricity if they avoid conditioning the payment of a subsidy on a generator's RTO participation. *Id.* at 10-12.

<sup>79</sup> *Id.* at 9.

(continued ...)

ISO-NE, SB 365 is preempted by the FPA because, through SB 365, New Hampshire has engaged in directly setting the rate for the wholesale sale of energy.<sup>80</sup>

26. New England Ratepayers further claim that, although SB 365 is preempted regardless of whether the energy is sold into the ISO-NE market, SB 365 and ISO-NE market rules require that the energy purchased under SB 365 be sold into the ISO-NE market.<sup>81</sup> New England Ratepayers contend that, if the eligible facility seeks to be dispatched solely for wholesale energy market revenues or in support of a bilateral transaction, the eligible facility must sell into the ISO-NE market and will be compensated by ISO-NE at the LMP for the energy produced.<sup>82</sup>

27. New England Ratepayers argue that, regardless of whether the rate is based on another product (i.e., load-following default energy service) that is set competitively or uses a formula that incorporates other references or variables (i.e., 80 percent of the competitively-determined price for default energy service), SB 365 does set rates through the following language: “the electric distribution company’s purchases of energy from the eligible facility *shall be priced at* the adjusted energy rate derived from the default service rates approved by the [New Hampshire] commission in each applicable default service supply solicitation and resulting rates proceeding.”<sup>83</sup> New England Ratepayers add that New Hampshire’s choice of the 80 percent component of the rate and decision that the rate of as-available energy should be based on the rate for firm, load-following default energy service, individually and collectively, entail setting a wholesale rate.<sup>84</sup>

28. New England Ratepayers also assert that, by directly setting wholesale rates, SB 365 is distinct from cases cited by NH Generators involving zero emission credits.<sup>85</sup> New England Ratepayers claim that such zero emissions credit cases have no bearing here because New Hampshire has not confined itself to providing subsidies that exist “separately from wholesale sales,” rather SB 365 directly sets the rate for wholesale

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 12-15.

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *Id.* at 16 (citing N.H. Rev. Stat. § 362-H:2(I)(a) (emphasis added)).

<sup>84</sup> New England Ratepayers Answer at 17.

<sup>85</sup> *Id.* at 21-22.

(continued ...)

sales.<sup>86</sup> New England Ratepayers contend that, although the states do have legitimate policy tools to promote certain types of generation, the Commission has rejected the argument that a state may manage utility procurement by setting an offer to purchase, finding that, outside of PURPA, Congress has not authorized opportunities for states to set rates for wholesale sales.<sup>87</sup>

29. New England Ratepayers assert that, contrary to NH Generators' assertions, tariffs for the sale of energy at market-based rates on file for the eligible facilities would not satisfy the requirements of the FPA because the sales are compelled by SB 365 and utilities are not permitted by SB 365 to negotiate a different rate.<sup>88</sup> New England Ratepayers argue that the sales under SB 365 cannot be market-based rate sales because they are not the product of arms-length bargaining.<sup>89</sup>

30. In response to NH Generators' argument that SB 365 does not set the price for sales but only the price for purchases, New England Ratepayers state that the Commission has recognized that this distinction is irrelevant for purposes of determining the line between Commission and state authority.<sup>90</sup> New England Ratepayers claim that here SB 365 is setting a rate at which a buyer is obligated to purchase wholesale power, which by definition sets the rate at which the seller is selling that power.<sup>91</sup>

31. New England Ratepayers contend that *Allco* does not support NH Generators' arguments because, in *Allco*, (1) the request for proposals subjected any resulting bilateral contract to review by the Commission for justness and reasonableness; (2) the absence of state compulsion to enter into a contract at non-negotiated rates was essential to the court's holding; and (3) the state did not set a rate for wholesale sales but rather relied on

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<sup>86</sup> *Id.* at 21-22 (citing *Zibelman*, 906 F.3d 41 at 52, 53, 55).

<sup>87</sup> *Id.* at 20 (citing *Hughes*, 136 S. Ct. 1288 at 1298; *California Commission I*, 132 FERC ¶ 61,047 at PP 37, 64, 70; *Midwest Power*, 78 FERC at 61,244).

<sup>88</sup> *Id.* at 17 (citing N.H. Rev. Stat. §§ 362-H:2(I)(a); 362-H:2(III)).

<sup>89</sup> *Id.* at 17-18 (citing *AmerGen Energy Co., L.L.C.*, 90 FERC ¶ 61,080, at 61,282 (2000) (citing *Ameren Servs. Co.*, 86 FERC ¶ 61,212 (1999)); *Allegheny Energy Supply Co.*, 89 FERC ¶ 61,258, at 61,758 (1999)).

<sup>90</sup> *Id.* at 21 (citing *California Commission I*, 132 FERC ¶ 61,047 at PP 5, 17, 64).

<sup>91</sup> *Id.*

(continued ...)

market forces and arm's-length bargaining by ordering the purchasing utility to conduct a solicitation for renewable energy.<sup>92</sup>

32. With respect to PURPA, New England Ratepayers contend that NH Generators concede that, because New Hampshire did not invoke PURPA and made no attempt to set the mandated rate based on avoided cost, PURPA cannot save the state's action; SB 365 must rise or fall with preemption under the FPA.<sup>93</sup> New England Ratepayers separately disagree with NH Generators' arguments that PURPA does not preempt SB 365 or that PURPA could save it.<sup>94</sup>

33. New Hampshire reiterates that the New Hampshire Commission is the appropriate venue to resolve concerns over state law issues and, until the state claims before the state commission are resolved, it is premature to rule on the Petition.<sup>95</sup> New Hampshire claims that there are no agreements currently in effect because PSNH informed eligible facilities that it does not intend to enter into voluntary bilateral PPAs with such facilities and would only make SB 365 purchases if and to the extent the New Hampshire Commission ordered it to do so.<sup>96</sup> New Hampshire also asserts that SB 365 does not preclude the New Hampshire Commission from establishing an avoided cost rate for biomass facilities and comparing that rate to the adjusted default energy rate.<sup>97</sup>

34. NH Generators reiterate that SB 365 does not require participation in ISO-NE.<sup>98</sup> NH Generators state that *Hughes* does not support New England Ratepayers' preemption claim, arguing that tethering to the ISO-NE market is necessary.<sup>99</sup> NH Generators contends that there is no Commission requirement precluding a generator's use of

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<sup>92</sup> *Id.* at 22-24.

<sup>93</sup> *Id.* at 24.

<sup>94</sup> *Id.* at 25-26.

<sup>95</sup> *Id.* at 1-5. We note that, since this filing, the New Hampshire Commission has issued a ruling abstaining from acting on the jurisdictional question until we address the Petition. *See infra* P 35.

<sup>96</sup> New Hampshire Answer at 4.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> NH Generators Answer at 3-5.

<sup>99</sup> *Id.* at 5-8.

(continued ...)

market-based sales when a state mandates a purchase by unaffiliated utilities that does not raise cross-subsidization concerns.<sup>100</sup> NH Generators disagree with New England Ratepayers' arguments that (1) the Commission is ousted from jurisdiction when a state mandates a purchase and (2) SB 365 sets a rate.<sup>101</sup> NH Generators argue that the zero emission credit cases and *Allco* support arguments against a finding of preemption.<sup>102</sup> NH Generators assert that New Hampshire simply exercised its states' rights by enacting SB 365.<sup>103</sup> NH Generators add that, until New Hampshire seeks to set a PURPA rate, PURPA would not provide an independent basis for preemption here.<sup>104</sup>

#### IV. New Hampshire Commission PSNH Order

35. On January 11, 2019, the New Hampshire Commission issued an order,<sup>105</sup> stating that

[a]ll the parties in this docket have requested that the [New Hampshire Commission] abstain from deciding the constitutional arguments made by [New England Ratepayers] in its pleadings in this docket and by the parties in the FERC Challenge....[T]he [New Hampshire Commission] will abstain

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<sup>100</sup> *Id.* at 8-10.

<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.* at 11.

<sup>103</sup> *Id.* at 11-12.

<sup>104</sup> *Id.* at 12.

<sup>105</sup> The New Hampshire Commission issued this order in response to PSNH's petition seeking review of the responses it had received for its solicitation from wood-fired generation plants pursuant to SB 365.

PSNH's solicitation provided that it would make purchases required by statute only if ordered to do so by the New Hampshire Commission. In its petition to the New Hampshire Commission, PSNH asked the New Hampshire Commission to clarify whether the obligation to purchase an eligible facility's net electrical output includes energy and capacity, or just energy. PSNH also requested approval of recovery of its costs allowed by SB 365. PSNH further argued that it could not comply with SB 365 because, given this proceeding, it would be imprudent to commit ratepayer funds to pay the eligible facilities an amount that could be determined unconstitutional. *See* New Hampshire Commission PSNH Order, Order No. 26,208 at 4-10.

*(continued ...)*

from reaching constitutional issues while the issues are pending before the FERC. If we are presented with a question that requires resolution of the preemption issue, and if preemption has not already been decided by FERC or a court of competent jurisdiction, we will consider certifying the issues to the New Hampshire Supreme Court pursuant to RSA 365:20.<sup>106</sup>

36. In discussing the relationship between the current avoided cost rate and the adjusted energy rate established by SB 365, the New Hampshire Commission acknowledged that the current avoided cost rate is “based on the ISO-NE market clearing price, and is generally much lower than the adjusted energy rate established by [SB-365].”<sup>107</sup> With respect to PURPA, the New Hampshire Commission stated that

[t]here is nothing in [SB 365] referring to PURPA or avoided costs, and nothing tasking the [New Hampshire] Commission with ordering alternative methods of implementing the statute....[T]he extent of the Commission’s role is to “review” agreements “for conformity with this chapter.”<sup>108</sup>

## V. Discussion

### A. Procedural Matters

37. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

38. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept New England Ratepayers’, New Hampshire’s, and NH Generators’ various answers because they have provided additional information that assisted us in our decision-making process.

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<sup>106</sup> New Hampshire Commission PSNH Order, Order No. 26,208 at 17.

<sup>107</sup> *Id.* at 22-23.

<sup>108</sup> *Id.* at 18.

39. We deny the motion to lodge. PSNH's brief to the New Hampshire Commission was included in PSNH's filing in this proceeding and, therefore, is already part of the record in this proceeding. Accordingly, we find that the motion to lodge is unnecessary.

**B. Substantive Matters**

40. We agree with New England Ratepayers that the Petition is ripe for our review. The New Hampshire Commission's stated abstention from addressing this issue until we issue an order on the Petition<sup>109</sup> moots commenters' claims that the Commission should refrain from acting at this time.

41. SB 365 requires utilities to offer to purchase the net output of eligible biomass and waste facilities at a state-established rate. As explained below, this requirement establishes a rate for wholesale sales of electric energy in interstate commerce,<sup>110</sup> which intrudes on the Commission's exclusive jurisdiction over wholesale sales of electric energy in interstate commerce.<sup>111</sup> We therefore conclude that the rate established by SB 365 is preempted by the FPA.

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<sup>109</sup> See *supra* P 35 n.105.

<sup>110</sup> Although SB 365 is structured as requiring an "offer to purchase," the Commission has previously found that mandating what rate a wholesale buyer must pay a wholesale seller constitutes the setting of the rate for a wholesale sale. *California Commission I*, 132 FERC ¶ 61,047 at P 64.

<sup>111</sup> 16 U.S.C. §§ 824, 824(b)(1), 824d, 824e; see *Hughes*, 136 S. Ct. at 1292, 1298 (finding that the Commission has exclusive jurisdiction over sales of electric energy in interstate commerce and over rates for such sales and that the Maryland program at issue intruded on that authority and was therefore preempted); *Oneok*, 135 S. Ct. at 1599-1600 (noting that a state law "directed at" the Commission's control of rates and facilities of natural gas companies would be preempted because such matters are "precisely the things over which [the Commission] has comprehensive authority" under the Natural Gas Act (emphasis in original)); *FERC v. Electric Power Supply Assn.*, 136 S.Ct. 760, 780 (2016) ("The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.") (internal quotation marks omitted); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

42. The Supreme Court last addressed preemption under the FPA in *Hughes*. That case involved a “contract for differences,” which required the generator in question to bid its energy and capacity into the relevant PJM auction and guaranteed the generator a predetermined rate for any energy or capacity that cleared the auction.<sup>112</sup> The Court held that the Maryland program was preempted because it impermissibly “set[] an interstate wholesale rate, contravening the [FPA’s] division of authority between state and federal regulators.”<sup>113</sup>

43. *Hughes* supports our finding that the FPA preempts SB 365. SB 365 establishes a wholesale rate by requiring purchasing utilities to offer to purchase electricity from eligible facilities at a specific state-established rate (i.e., 80 percent of the retail default energy rate).<sup>114</sup> In so doing, SB 365 “sets an interstate wholesale rate, contravening the [FPA’s] division of authority between state and federal regulators.”<sup>115</sup>

44. Although the facts here differ from *Hughes*, we conclude that the result is the same because SB 365 does explicitly what the Maryland program in *Hughes* did implicitly. Whereas the Maryland program overturned in *Hughes* established a wholesale rate by adjusting the revenue that the generator received in the PJM auction to reflect a predetermined rate, SB 365 directly establishes a predetermined rate and requires utilities within the state to offer to purchase electricity at that specific state-established rate. We find that the logic of the Court’s opinion in *Hughes* applies with equal force here, and that holding, along with prior precedent,<sup>116</sup> supports a finding that SB 365 is preempted by the FPA.<sup>117</sup>

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<sup>112</sup> *Hughes*, 136 S. Ct. at 1294-95. If the generator’s energy or capacity cleared in the relevant PJM auction and the auction set a rate above that predetermined rate, the generator would refund the excess revenue to Maryland utilities. On the other hand, if the auction set a rate below that predetermined rate, the same Maryland utilities would pay the generator the difference between the auction rate and the predetermined rate. *See id.*

<sup>113</sup> *Id.* at 1297.

<sup>114</sup> N.H. Rev. Stat. Chapter 362-H:2.I.(a).

<sup>115</sup> *Hughes*, 136 S. Ct. at 1297.

<sup>116</sup> *Id.*; *see supra* note 112.

<sup>117</sup> In *Hughes*, the Court explained that the “fatal defect” with respect to the contract for differences in that case was that it “condition[ed] payment of funds on capacity clearing the [PJM] auction.” *Hughes*, 136 S. Ct. at 1299. SB 365 does not  
(continued ...)

45. The U.S. Courts of Appeals cases on which commenters rely do not require a contrary conclusion. As an initial matter, *Allco* is not applicable here. Contrary to commenters' assertions, the Connecticut program approved in *Allco* required the Connecticut Department of Energy and Environmental Protection to solicit proposals from renewable resources; it did not establish a rate for any resulting purchases.<sup>118</sup> In addition, in *Allco*, the contracts at issue were arms-length bilateral contracts between utilities and generators that were subject to Commission review because they were contracts for wholesale electricity sales over which the Commission has jurisdiction.<sup>119</sup>

46. The recent court decisions involving zero emissions credits are also inapplicable here. Those cases involved state programs that provided generators payments for something other than the provision of wholesale energy and capacity and, therefore, are not necessarily pre-empted by the FPA.<sup>120</sup> Here, New Hampshire did not limit its support for these biomass and waste facilities to providing financial support separately from wholesale sales of energy and capacity in interstate commerce.<sup>121</sup> Instead, as noted, SB 365 provides financial support to certain generation facilities by directly setting the rate at which utilities must offer to purchase the output from those facilities and thus establishes a rate for a Commission-jurisdictional wholesale sale.

47. An exception to the Commission's exclusive authority to ensure that rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities are just and reasonable is provided in PURPA, which allows states to determine the avoided cost rate at which an electric utility purchases QF output under the mandatory purchase obligation.<sup>122</sup>

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condition payment on the purchasing utilities selling energy purchased from the eligible facilities into the ISO-NE market. Nevertheless, for the reasons explained above, SB 365 "intrude[s] on FERC's authority over interstate wholesale rates," *id.* at 1298, even though it does not exhibit the "fatal defect" that the Court identified in *Hughes*.

<sup>118</sup> *Allco*, 861 F.3d at 89.

<sup>119</sup> *Id.* at 99-100.

<sup>120</sup> *Zibelman*, 906 F.3d at 52; *Elec. Power Supply Ass'n v. Star*, 904 F.3d at 524.

<sup>121</sup> *Zibelman*, 906 F.3d at 52, 53, 55.

<sup>122</sup> *California Commission I*, 132 FERC ¶ 61,047 at P 64.

48. In the *California Commission* orders, the Commission addressed California's enactment of a statute that required utilities in California to offer to purchase at a price established by the California Commission from generators under 20 MW that met certain energy efficiency and environmental requirements. In reviewing the statute, the Commission found that, even though California did not argue that its program was an implementation of PURPA, the California statute would not be preempted by the FPA, PURPA, or the Commission's regulations so long as (1) the eligible generators obtained QF certification; and (2) the rate established by the California Commission did not exceed the avoided cost of the purchasing utility.<sup>123</sup>

49. Here, we understand that the eligible biomass and waste facilities are certified as QFs pursuant to PURPA. The issue thus becomes whether the state-established rate in SB 365 (i.e., 80-percent-of-the-default-energy-rate) exceeds the purchasing utilities' avoided cost.<sup>124</sup> The SB 365 rate is not based on the purchasing utilities' avoided cost, but rather is based on the state's retail default energy rate. Also, the New Hampshire Commission has found that the SB 365 rate will likely exceed the current avoided cost rate.<sup>125</sup> Further, nothing in SB 365 limits the rate to a rate equal to or less than the avoided cost rate or otherwise allows the New Hampshire Commission to limit the eligible facilities' rate so that it would not exceed the avoided cost rate. Accordingly, we find that SB 365 is also inconsistent with PURPA.

50. We need not reach the remaining challenges to SB 365. First, because we find that SB 365 is inconsistent with the Commission's authority under the FPA and PURPA, it is not necessary to address PSNH's argument that SB 365 violates the relief PSNH has been granted from the mandatory purchase obligation pursuant to PURPA section 210(m) for purchases from QFs above 20 MW. Second, because we find that SB 365 is inconsistent with the FPA, we find it unnecessary to reach the Dormant Commerce Clause issues raised by commenters. Finally, we find beyond the scope of this proceeding New England Hydropower's arguments regarding the use of LMP to establish an avoided cost rate.

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<sup>123</sup> *California Commission II*, 133 FERC ¶ 61,059 at P 5 (emphasis in original; footnotes omitted).

<sup>124</sup> *See California Commission I*, 132 FERC ¶ 61,047 at P 67.

<sup>125</sup> *See* New Hampshire Commission PSNH Order at 22-23 (“the current avoided cost rate under PURPA is based on the ISO-NE market clearing price and is generally much lower than the adjusted energy rate established by [SB 365]”).

The Commission orders:

New England Ratepayers' Petition is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.