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October 4, 2010

Katherine Deverell
Administrative Secretary
NH Department of Revenue Administration
P.O. Box 457
109 Pleasant Street
Concord, NH 03302-0457

Dear Ms. Deverell:

The New England Power Generators Association, Inc. (NEPGA) is pleased to submit our comments on the New Hampshire Department of Revenue Administration's ("DRA") proposed Chapter Rev 1400, Utility Property Tax Rules. NEPGA is the largest trade association representing competitive electric generating companies in New England. Our member companies represent approximately 27,000 megawatts (MW) of generating capacity throughout New England, and over 2,600 MW of generation in New Hampshire, representing approximately two-thirds of the electric generating capacity in the state. Our five NEPGA New Hampshire member companies directly affected by these proposed rules include:

- ***Brookfield Renewable Power***, the owner and operator of hydroelectric power facilities in North America and Canada with 45 MW of installed capacity at 8 generating stations in New Hampshire.
- ***GDF Suez Energy***, which manages a range of energy businesses including electric generation, natural gas and LNG facilities, and wholesale and retail sales. In New Hampshire, GDF Suez owns two biomass generation facilities, totaling 38 MW.
- ***Granite Ridge Energy***, owner and operator of the 720 MW natural gas-fired, combined cycle generating facility in Londonderry.
- ***NAEA Newington Energy***, owner and operator of the 525 MW natural gas-fired, combined cycle generating facility in Newington.
- ***NextEra Energy Resources***, owner and operator of a 88 percent share of Seabrook Station, a 1,245 MW nuclear generation station in Seabrook.

Overall, our New Hampshire companies pay nearly \$36 million annually in state and local taxes, and provide over 1,200 well-paying New Hampshire jobs.

NEPGA’S Position

NEPGA does not support the current draft of the DRA’s Initial Proposal in Rev 1400 (8-9-2010 draft), and believes the over-arching nature of these proposed rules create an anti-business environment in the state not only for electric utilities, but for all businesses looking to locate in New Hampshire. When the utility property tax was passed in 1999, the provisions of the legislation were embodied in RSA 83-F. In promulgating rules regarding this statute, the rationale for some of the broad changes contemplated in the DRA’s Initial Proposal are not clear, and the implementation of these changes would have significant impact on our members’ ability to conduct business in New Hampshire. Specifically, NEPGA has three major concerns with the DRA’s proposed rule:

- ***Appropriateness of the DRA Proposal*** – On a procedural level, NEPGA has significant concerns with the appropriateness of the DRA offering what represents proposed policy changes, and queries if the Legislature, not an administrative state agency, ought to be the entity contemplating significant policy changes to the utility property tax.
- ***Inclusion of “intangibles” in the definition of “electric utility property”*** – On a more substantive level, NEPGA has significant concerns with the policy choice made by the DRA to include “intangibles” in the definition of electric utility property, subject to taxation pursuant to the Utility Property Tax. Not only is there no precedent for this treatment of intangibles, but the implementation of this change would be cumbersome and open to unnecessary ambiguity.
- ***Inclusion of a host of new, anti-business provisions*** – In reviewing the DRA’s Initial Proposal against the existing guidelines for administering the Utility Property Tax as found in NH RSA 83-F, there are several new provisions regarding the administration of the utility property tax. The rationale for these provisions is also not clear, and impose new and cumbersome requirements on owners of electric generation in the state.

To further clarify NEPGA’s concerns, the remainder of this document will address each of these issues in greater depth.

Appropriateness of the DRA Proposal

NEPGA has significant concerns with the type of policy changes being proposed by the DRA, a state agency with the mandate to “collect the proper amount of taxes due, incurring the least cost to the taxpayers, and in a manner that merits the highest degree of public confidence in our integrity, efficiency and fairness.” The type of policy changes being contemplated in the proposed rule changes are more appropriately and correctly addressed at the legislative level through the New Hampshire General Court. We believe the DRA is overstepping its rulemaking authority, as detailed in RSA 83-F:7, III, as well as RSA 21-J:13 of the New Hampshire statutes which lists the DRA rule-making authority as pertaining to rules regarding the collection of states taxes, forms for taxable entities to provide information to the DRA, auditing, and other items related to the *collection* of taxes. Nowhere in the rule-making authority is there a reference to the ability to define *what* is taxed, only to define *how* the taxes will be collected.

Once the DRA has completed its process to finalize the proposed rules, the proposal is submitted to the Joint Legislative Committee on Administrative Rules (“JLCAR”). The JLCAR is designed to provide legislative oversight in the area of administrative rulemaking by the agencies of the executive branch. The Senate President and Speaker of the House appoint five members from each chamber to this Committee. While NEPGA appreciates the role envisioned by the JLCAR in this rule-making process, the mere fact that the JLCAR will review the final rule does not obviate our concern regarding the role of the DRA in re-defining electric utility property. The JLCAR can object to the DRA’s rule, however, the DRA can still move forward with its rule even with the JLCAR objection. The JLCAR only represents a small portion of the Legislature and is in a role of reacting to the DRA’s policy proposal rather than the Legislature’s more proper role of developing the state’s tax policies.

Inclusion of “Intangibles” In The Definition Of “Electric Utility Property”

Regarding the substance of the DRA’s proposal, NEPGA is opposed to the inclusion of “intangibles” in the definition of electric utility property, subject to the utility property tax.

NEPGA has questions regarding the expansion of the definition, including:

- ***How are “intangibles” defined?*** As proposed, the rules do not offer any guidance on what will constitute an intangible pursuant to this definition. A general definition for intangibles includes items such as stocks, bonds, cash, and copyrights. Is this what the DRA proposes? Or does it include contracts and studies? The term “intangibles” is not clear and adding this undefined term as part of the definition of what will be taxes pursuant to the utility property tax is ambiguous and difficult, if not impossible, to implement and administer.
- ***What assurance is there that the definition of “intangibles” will be uniformly applied to all entities subject to the utility property tax?*** Without a clear definition of what is contemplated by “intangibles,” what assurance is there that all power plants will be taxed on a fair and equitable basis?
- ***What is the rationale for proposing this definitional change?*** NEPGA believes making such a fundamental change to the definition of electric utility property tax is an unacceptable example of changing the rules mid-stream. Decisions were made by investors to bring their money into New Hampshire and invest in power plants. All of the NEPGA plants in New Hampshire are owned by companies who, over the past 10 years, have made a business decision to either buy an existing plant or develop a new plant in our state. These business decisions – which greatly benefit our state in terms of jobs and taxes – were made based on a certain set of rules. Changing the rules without a clear rationale, and through an improper process, sends a very anti-business message to existing companies, and companies looking to come into New Hampshire.

NEPGA strongly opposes the expansion of the definition of electric utility property to include intangibles. We believe the term is not well-defined and open to subjective and ambiguous implementation with no guarantee of parity among affected facilities. No rationale has been provided for this proposed change. This type of procedurally incorrect changing of the rules mid-stream sends a very anti-business message to not only the electric industry, but to all industries looking to move businesses to New Hampshire, eroding our state’s enviable competitive advantage.

Further, this proposed change would also discourage further generation investment in the state. As of May 1st, the ISO New England reported that there are 10 proposed generation development projects in New Hampshire totaling approximately 600 MW of proposed new generation. New Hampshire is the only state in the region that has a special property tax solely targeting utilities. Making this tax more burdensome by adding “intangibles” makes it more onerous and jeopardizes potential new investment and the resultant jobs by creating market uncertainty and sending the message that New Hampshire is not a good place to do business. Developers of these projects may decide to look to other states for developing these projects. Once a state has a reputation of being anti-business, it becomes even harder to attract new development – of any kind – to the state.

Includes a Host of New, Anti-Business Provisions

In addition to the intangible definition issues, there are several other proposed provisions in the DRA’s draft rule that NEPGA considers to be unacceptably anti-business in nature. Not only do these provisions place additional administrative burdens on our members, but they do so without a clear rationale for why they are necessary. Further, some of the provisions seek confidential information that is extremely market sensitive and if released into a public setting, could raise competitive concerns for our members. These other anti-business provisions include:

- ***Section 1405.2, Change of Ownership.*** NEPGA has concerns with the DRA’s proposal to require companies to provide notice 30 days prior to an anticipated sale of real property or assets. Any of our members would be willing to provide this information as necessary once a sale has been announced and/or completed. Providing this information prior to a sale – especially 30 days prior – is not feasible and may not even be possible. Further, there may be competitive considerations as to why a company would not want an impending sale to be known by the general public with this much advance notice. This provision is not found in Section 83-F of the state statutes and it is not clear the rationale for suggesting its inclusion at this point.
- ***Section 1405.04, Record Retention.*** Section 83-F 6(b) currently states that an entity must “preserve such records for the period of at least 3 years or until any litigation or prosecution under this chapter is finally determined.” The DRA’s proposal makes this requirement more ambiguous stating that a utility shall retain its records for “as long as necessary to resolve litigation.” The proposed revisions do not make it clear that the litigation in question would be pursuant to issues surrounding the utility property tax. NEPGA believes Section 83-F 6 adequately outlines the requirements for record retention and sees no reason to adopt new, less clear, language
- ***Section 1406.03, Utility Property Tax Information Update.*** In Rev 1406.03(b) the DRA proposes that the “utility” must submit a series of attachments to its Form PA-20, Utility Property Tax Information Update. These attachments include an operating expense summary and a maintenance expense summary. NEPGA opposes this additional requirement and does not see how providing this commercially sensitive information would aid the DRA in its duties to determine the value of property at a facility.

Conclusion

In summary, NEPGA does not support the current draft of the DRA's proposed Chapter Rev 1400, Utility Property Tax rules. On a process level, NEPGA believes the DRA has overstepped its authority and certain provisions of these rules represent a back door approach to increasing taxes on electric generators in the state. This type of policy issue regarding what is subject to a statewide tax in New Hampshire is the purview of the Legislature, not a state agency charged with implementing the statute resulting from the Legislature. NEPGA also believes that other new proposed requirements such as notifying of a change in ownership 30 days prior to sale, and requiring the submission of commercially sensitive information such as operating expense and maintenance expense summaries are not necessary and are unnecessarily anti-business. NEPGA respectfully requests the removal of these provisions, as well as intangibles from the definition of "electric utility property." Moreover, NEPGA believes there is no need to change the language found in Section 83-F 6 to the language proposed in Rev 1405.04 regarding record retention.

Thank you for your consideration of our comments. I would be happy to discuss any of our concerns with you in more detail. I can be reached at 603-436-3037 or at shennequin@nepga.org.

Sincerely,

A handwritten signature in cursive script that reads "Sandi Hennequin".

Sandi Hennequin
Vice President
New England Power Generators Association, Inc.