



**Public Service  
of New Hampshire**

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The Northeast Utilities System

**Robert A. Bersak**  
Assistant Secretary and  
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March 10, 2010

Ms. Debra A. Howland  
Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 Fruit Street, Suite 10  
Concord, New Hampshire 03301



**Re:   Docket No. DE 09-067**  
**Complaint of Clean Power Development, LLC Against Public Service of New Hampshire**

Dear Secretary Howland:

By Order No. 25,075 dated February 24, 2010 (the "Order"), the Commission determined that it would commence an adjudicative proceeding in Docket No. DE 09-067, "Complaint of Clean Power Development, LLC ('CPD') Against Public Service of New Hampshire ('PSNH')." That Order provided an additional opportunity for intervention and ordered that any party objecting to a Petition to Intervene make said Objection on or before March 10, 2010. The Commission further ordered that legal memoranda regarding the nature and extent of PSNH's duty to negotiate with and contract for power from CPD shall be due on or before March 26, 2010.

PSNH is unaware of the submission of any new petitions for intervention. As the Order did not require copies of any such intervention petitions to be served on PSNH, there may in fact be new parties seeking intervention in this proceeding. If so, PSNH requests the opportunity to object to any such petitioner at such time that it becomes aware of their existence.

PSNH respectfully requests that the Commission reconsider the date specified for the filing of legal memoranda. In those memoranda, the Commission noted it was, "particularly interested in the parties' interpretation of Section 210 of the Public Utilities Regulatory Policies Act of 1978,<sup>1</sup> 16 U.S.C.A. Section 824a-3, RSA Chapter 362-A, the Limited Electrical Energy Producers Act,<sup>2</sup> and any other legal standard that might impose an obligation on PSNH under these circumstances." Order at 2.

PSNH is already on record in this docket many times concerning any obligation to negotiate or contract with CPD. PSNH has repeatedly stated that except for obligations under PURPA, there are

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<sup>1</sup> PURPA.

<sup>2</sup> LEEPA.

no other obligations requiring PSNH or any other electric distribution utility in New Hampshire to enter into negotiations with or agree to a long term power contract with any electric generator. See, PSNH's Letter of March 16, 2009 to CPD;<sup>3</sup> PSNH's Letter of April 8, 2009, to Mayor of Berlin;<sup>4</sup> PSNH's filing with Commission dated April 28, 2009;<sup>5</sup> PSNH's Letter to the Commission dated June 1, 2009;<sup>6</sup> PSNH's Letter to the Commission dated September 24, 2009;<sup>7</sup> and the statements made on the record on behalf of PSNH during the Prehearing Conference held in this proceeding on November 3, 2009.

A dozen years ago, by 1998 N.H. Laws, 261:6 the Legislature unequivocally eliminated any further obligation under LEEPA for utilities of this state to purchase the output from limited electrical energy producers. 1998/261:6 was captioned "Limited Electrical Energy Producers Act; Purchase of Output by Public Utilities; *New Purchases Not Required After Competition Certified.*" (Emphasis added.) This section reads in full:

6 Limited Electrical Energy Producers Act; Purchase of Output by Public Utilities; New Purchases Not Required After Competition Certified. Amend RSA 362-A:3 to read as follows:

362-A:3 Purchase of Output of Limited Electrical Energy Producers by Public Utilities.

*I. The entire output of electric energy of such limited electrical energy producers, if offered for sale to the electric utility, shall be purchased by the electric public utility which serves the franchise area in which the installations of such producers are located.*

*II. No purchases and related transactions involving qualifying facilities shall take place under RSA 362-A:3 or RSA 362-A:4 in any location where retail electric competition is certified to exist pursuant to RSA 38:36, unless such purchase or related transaction is pursuant to:*

*(a) Commission orders or agreements providing for qualifying facility power sales existing prior to such certification;*

*(b) Negotiated qualifying facility power purchase contracts existing prior to such certification; or*

*(c) Commission orders or agreements resulting from the renegotiation of orders, agreements, or contracts referenced in subparagraphs (a) and (b).<sup>8</sup>*

This amendment to RSA 362-A:3 took effect on August 25, 1998. Since May 1, 2001, the date that electric competition was certified to exist in PSNH's service territory,<sup>9</sup> except for certain conditions

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<sup>3</sup> Filed with the Commission by PSNH as Attachment 5 of the Company's April 28, 2009, response to CPD's initial complaint, as required by Secretarial Letter of April 14, 2009.

<sup>4</sup> Docketed in this proceeding on April 10, 2009.

<sup>5</sup> PSNH's response to CPD's initial complaint, as required by Secretarial Letter of April 14, 2009.

<sup>6</sup> Filed in response to CPD's request to open a formal investigation.

<sup>7</sup> Filed pursuant to the Commission's inquiry regarding the status of PSNH's review of offers submitted to PSNH by CPD and Concord Steam.

<sup>8</sup> Matter added to the then-current law appears in bold italics.

not applicable here, the obligation under LEEPA is clear – “*No purchases and related transactions involving qualifying facilities shall take place under RSA 362-A:3 or RSA 362-A:4 in any location where retail electric competition is certified to exist....*”

Other than any remaining PURPA obligations, PSNH is unaware of “any other legal standard that might impose an obligation on PSNH” to negotiate or contract with any merchant generator. Thus, PSNH is at a loss regarding what it could discuss regarding “any other legal standard” in a legal memorandum.

That leaves obligations under PURPA as the sole matter for which a substantive discussion could take place in a legal memorandum. PSNH has repeatedly informed CPD that the only legal mandate PSNH had to purchase the output of a merchant generating plant was found in PURPA, if that plant was a “qualifying facility” (“QF”). PSNH has detailed its many notices to CPD of CPD’s rights under PURPA in its “Request for Leave to Answer and Answer to Motions to Intervene and Protests” filed with the Federal Energy Regulatory Commission on February 18, 2010, in Federal Energy Regulatory Commission (“FERC”) Docket No. QM10-4-000.<sup>10</sup> (PSNH will comment on this on-going FERC proceeding below.)

PURPA does not require a utility to either negotiate a power purchase agreement with a QF or enter into a power purchase agreement with a QF. A utility may voluntarily choose to both negotiate and enter into a power purchase agreement with a QF, if it so desires. PURPA does give a QF the right to seek from the state regulatory authority (in New Hampshire, the Commission) a “legally enforceable obligation” to purchase its output at an avoided cost rate determined by that state regulatory authority.<sup>11</sup> The FERC recently explained this distinction in *JD Wind I, LLC*, 129 FERC ¶61,148 (2009). This Commission has spelled out the procedure for seeking a “legally enforceable obligation” under PURPA in Docket No. DE 83-62, *Re Small Energy Producers and Cogenerators*, 68 NHPUC 531 (1983). Pursuant to the procedure spelled out in Docket No. DE 83-62, the Commission in the past issued dozens of orders creating legally enforceable obligations under PURPA – obligations that ultimately cost PSNH’s customers billions of dollars in over-market payments.

As the Commission is aware, in the Energy Policy Act of 2005 Congress enacted amendments to PURPA.<sup>12</sup> Section 1253 of the Energy Policy Act of 2005 added Section 210(m) to PURPA exempting electric utilities from the Mandatory Purchase Requirement if the FERC finds that qualifying facilities (“QFs”) in the utilities’ respective service territories have “non-discriminatory access” to certain wholesale markets. Subsequently, the FERC issued Order Nos. 688 and 688-A, which adopted regulations to implement Section 210(m).

On January 7, 2010, pursuant to PURPA Section 210(m) and the FERC’s implementing regulations, PSNH filed with the FERC an “Application of Public Service Company of New Hampshire for Authorization to Terminate the Mandatory Power Purchase Obligation from Qualifying Facilities

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<sup>9</sup> See, Commission Letter dated March 30, 2001, certifying May 1, 2001 as “Competition Day for Public Service Company of New Hampshire.”.

<sup>10</sup> The Commission has previously been served a copy of the referenced FERC filing, which is available on-line from FERC at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12267947>

<sup>11</sup> See, 18 C.F.R. §292.304.


<sup>12</sup> Certain amendments to PURPA contained in the Energy Policy Act of 2005 were considered by the Commission in Docket No. DE 06-061, “Investigation Into Implementation of the Energy Policy Act of 2005.”

with Net Generating Capacity of Five Megawatts or Greater.” That filing was docketed by the FERC as Docket No. QM10-4-000. Copies of PSNH’s FERC filing were served on both CPD and Concord Steam, as well as every qualifying facility in New Hampshire, the Commission and the Office of Consumer Advocate. Of note, on February 3, 2010, CPD filed a “Motion to Intervene and Protest” in the pending FERC docket.<sup>13</sup>

In its FERC Application, PSNH requested relief from the mandatory power purchase obligations of Section 292.303(a) of the FERC’s regulations for qualifying cogeneration facilities and qualifying small power production facilities (collectively, “QFs”) with a net generating capacity of 5 megawatts or greater. If PSNH’s Application is granted by the FERC, PSNH would no longer have any mandatory purchase obligation under PURPA from these QFs retroactive to the date of the Application.<sup>14</sup>

Due to the pendency of PSNH’s FERC filing, the company’s obligations to purchase the output from a QF under PURPA cannot be meaningfully discussed until there is a final, unappealable order deciding FERC Docket No. QM10-4-000. Therefore, PSNH respectfully requests that the Commission delay the date for filing legal memoranda regarding the nature and extent of PSNH’s duty to negotiate with and contract for power from CPD until one month after there is a final, unappealable order in FERC Docket No. QM10-4-000.

Sincerely,



Robert A. Bersak  
Assistant Secretary and  
Assistant General Counsel

cc: Service List, Docket No. DE 09-067

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<sup>13</sup> CPD sent a copy of its FERC filing to the Commission, which was docketed in this proceeding on February 5, 2010. Other entities filing intervention petitions in FERC Docket No. QM10-4-000 include Brookfield Energy Marketing Inc., Somersworth Hydro Co., Inc., Sweetwater Hydroelectric, Inc., Mascoma Hydro Corporation, Consolidated Hydro New Hampshire, Inc., WM Renewable Energy, L.L.C., Granite State Hydropower Association, Inc., Indeck Energy-Alexandria, LLC, and Gestamp Biotermica, Inc.

<sup>14</sup> FERC Order No. 688-A at P137, fn. 60 (“As we noted above, once the Commission has made a finding that a particular QF has nondiscriminatory access to one of the specified markets, this conclusion would be binding in proceedings involving the same QF and other electric utilities, absent a showing of changed circumstances. Accordingly, as of the date of the first electric utility’s filing seeking termination of the obligation to purchase from a particular QF, any subsequent state filing that a QF makes will not result in a grandfathered obligation.”).

## **SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED**

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**Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.**

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### **FILING INSTRUCTIONS:**

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**

DEBRA A HOWLAND  
EXEC DIRECTOR & SECRETARY  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**