

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**PETITION FOR APPROVAL OF A POWER PURCHASE AGREEMENT  
AND A RENEWABLE ENERGY CERTIFICATE OPTION AGREEMENT WITH  
LEMPSTER WIND, LLC  
DE 08-077**

**MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

NOW COME Intervenor Freedom Partners, LLC<sup>1</sup> (Movant or Freedom), by and through its undersigned counsel, and respectfully submits this Memorandum in Support of its Motion for Reconsideration.

**INTRODUCTION**

An evidentiary hearing was held in this proceeding on February 5, 2009. Subsequent to the hearing, on February 13, 2009, Movant filed a closing statement with the Commission. Order at 10. On February 17, 2009, PSNH filed its response. On or about February 23, 2009, Freedom filed its reply to the PSNH response.<sup>2</sup> The Commission”) issued Order No. 24,965 (May 1, 2009) whereby it “approved” the Power Purchase Agreement and Renewable Energy Certificate Option Agreement.

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. On appeal, a party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. In re Appeal of Pinetree Power, Inc. 152 N.H. 92 at 95 (2005) (Citation omitted).

**ARGUMENT IN SUPPORT OF RECONSIDERATION**

**A . RECs purchased by PSNH from Lempster Wind can only be used to meet New Hampshire RPS requirements.**

The law applicable to -year purchases from renewable energy sources is clear:

...the Commission may authorize an electric distribution company to enter into multi-year purchase agreements with renewable energy sources for certificates, in conjunction with or independent of purchased power agreements from such sources, to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements...

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<sup>1</sup> Freedoms Partners, LLC is a different corporate entity from Freedom Logistics, LLC.

<sup>2</sup> There is nothing in the Order that acknowledges Freedom’s reply comments.

RSA 362-F:9, I (Emphasis added).

In its Order, the Commission ruled that:

Although the statute does provide that multi-year agreements should be used to meet “reasonably projected renewable portfolio requirements,” RSA 362-F:9, I, there is nothing in RSA 362-F that bars a company from selling excess RECs procured through such agreements.

Order at 18. (Emphasis added.)

PSNH testified that it will not use the REC’s purchased under the Lempster PPA to meet its New Hampshire renewable portfolio requirements if higher value can be obtained by selling the RECs into other New England markets:

Q. So, I guess the way we leave it is that, if you can get more for these REC’s in Maine, Massachusetts, Rhode Island, or Connecticut, or even Vermont now, I guess, or New York, that’s what you’re going to do with these RECs.

A. (Witness nodding affirmatively.)

Transcript (February 5, 2009) at 25.

This ruling is erroneous as a matter of law. The language of RSA 362-F:9, I is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.” Green Crow Corp. v. Town of New Ipswich, 164-165, N.H. (2008) (“We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history, consider what the legislature might have said, or add words not included in the statute.”)

The Commission’s interpretation of RSA 362-F:9, I is erroneous because it added words not included in the statute to allow the sale of “excess” REC’s. In any event, PSNH may well sell all of the RECs. This is far different from a mere sale of “excess” REC’s

The plain and ordinary meaning of the words used in the statute require the Lempster REC’s to be devoted to meeting “reasonably projected renewable portfolio requirements.” Such a reading would be consistent with “the intent of the legislature as expressed in the words of [the] statute.” Appeal of Public Service Co., 141 N.H. 13, 17 (1996).

**B. PSNH was required to seek authority from the Commission to enter into the contracts.**

In the Order, the Commission ruled that

...the reason the statute requires our approval of these multi-year agreements is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service rates. If PSNH had intended to use the agreements “below the line,” the Company would not

have had to seek the Commission's approval. Therefore, we disagree that PSNH was required to seek approval from the Commission before it could enter into the subject agreements.

Order at 17, 18. (Emphasis supplied.)

The Order expressly states that Commission "approval" is not needed by PSNH to enter into the agreements. The Order only states that "approval" is needed to allow the utility to recover its costs in energy service rates.

RSA 362-F:9, I provides that "the Commission may authorize an electric distribution company to enter into multi-year purchase agreements." To "authorize" is to "empower." Merriam-Webster Online Dictionary. 2009 (Emphasis supplied).<sup>3</sup> To "approve" means to "accept as satisfactory" or to "ratify." Id. Pursuant to RSA 362-F:9, I, PSNH needed the Commission to empower it to enter the agreements, not merely to ratify its actions after the fact.

**C. PSNH would not have been entitled to use the agreements "below the line" without Commission approval**

In its order, the Commission also ruled that "if PSNH had intended to use the agreements "below the line," it would not have had to seek the Commission's approval." This appears to reflect PSNH's testimony during the hearing:

Q: Okay. And did you say, if it's not approved, you're going to take it below the line?

A. We have no choice. We cannot use it for our customers, because it would not be approved by the Commission. That's my understanding.

Transcript (February 5, 2009) at 21.

Implicit in the Commission's ruling is the premise that a public utility is free to do anything it wants to do so long as it does not seek recovery of the costs from ratepayers. This is erroneous as a matter of law.

Although no legal authority was provided by the Commission for its ruling, presumably the Commission had in mind the Supreme Court's ruling in Appeal of Public Service Company of New Hampshire, 122 N.H. 1062, 1066:

This court has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use.

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<sup>3</sup> <http://www.merriam-webster.com/dictionary/authorize>

Appeal of Public Service Company of New Hampshire, 122 N.H. 1062, 1066 (1982). (Emphasis added.)

Freedom acknowledges that PSNH has the management discretion to assemble a default service supply portfolio that is subject only to the Commission's after-the-fact analysis of whether the resulting costs charged to customers are actual, prudent and reasonable, subject to the mandate that “[d]efault service should be procured through the competitive market.” RSA-F:3(c). However, this is not the same as saying that PSNH can enter into any contract it wants so long as it does not seek recovery from ratepayers.

PSNH is a public utility under New Hampshire law. See, RSA 362:2. As such, it has devoted its private business to a public use. Appeal of Public Service Company of New Hampshire, supra. The public utilities commission is a specialized state agency with technical expertise in the field of public utilities and is vested by the NH Legislature with “plenary authority” over PSNH. Order No. 24,614 (April 13, 2006), at 7. RSA 347:3 endows the PUC with “general supervision of all public utilities ... so far as necessary’ to effectuate the Commission’s various enabling statutes.” Additionally, RSA 374:4 delegates to the PUC both the “power” and the “duty, to keep informed as to all public utilities in the state.”

As a regulated utility, if PSNH wants to enter an agreement for use “below the line,” it needs authorization from the Commission to do so. Otherwise, would the Commission look the other way if PSNH conducts a wholesale marketing operation out of Manchester offices utilizing PSNH employees, resources, information and credit? Similarly, would the Commission be helpless if PSNH decides obtain a CEP license from Massachusetts and sell to NSTAR’s customers?

**D. The Commission’s finding that the energy floor price is set “at a price level that is significantly discounted from current market energy prices” is unreasonable and contrary to the evidence.**

In the Order, the Commission found that “the inclusion of this pricing term [the energy floor price], while providing income protection to Lempster Wind, does so at a price level that is significantly discounted from current market energy prices.” Transcript (February 5, 2009) at 17 (Emphasis added.). This finding is contrary to the evidence and unreasonable.

The record evidence is as follows. PSNH testified that the forward price for a flat block of energy would be about 6 cents per kwh:

Oh, okay. This is, I mean, this is my area. All I can say is, I mean, I had a conversation with Mr. Lebreque this morning and he told me he would expect, if you went out and bought power for the year, you’d pay slightly under \$60, \$59 for flat, \$58, \$59, something like that. That’s what--

Transcript (February 5, 2009) at 32, 33.

Moreover, PSNH's estimated forward prices were compared to the values shown on the ICAP Energy quote sheet. The ICAP Energy quotes (which PSNH was familiar with) were lower than Mr. Lebreque's estimates.

Additionally, the Commission should refer to the ISO-NE Monthly Market Operations Report for March 2009.<sup>4</sup> Table 4.1.1 (All Hours, March 2009) indicates that the average real-time NH load zone LMP for March 2009 was \$39.63 per Mwh, or less than 4 cents per Kwh. It is inconceivable that the floor price in the Lempster contract is less than 4 cents per kwh. There is no reason why the Commission should not take administrative notice pursuant to Puc 203.27 of the publicly available facts pertaining to "current market energy prices."

Accordingly, the Commission's finding that the energy floor price is set "at a price level that is significantly discounted from current market energy prices" is contrary to the evidence and unreasonable.

The Commission also found that "Freedom's bare assertion that PSNH customers will pay "higher bills" as a result of these agreements is not supported by the evidence." Order at 18 (Emphasis supplied).

In its closing statement, Freedom made the following contention based upon the foregoing evidence:

During 2009, PSNH customers are likely to pay higher bills if the Commission authorizes PSNH to enter into the Lempster Agreements. However, this is not to say that purchases would be uneconomic over the 15-year deal term should energy costs return to the levels which prevailed in the first half of 2008.

The evidence supports Freedom's assertion that customers are likely to pay higher bills during 2009. This is not a "bare" assertion.

**E. The Commission's statement in the Order "that PSNH's interest in keeping pricing terms confidential implies that it will be applying a "litmus test" or somehow acting unfairly in negotiating REC purchase agreements" is contrary to the record and should be stricken from the Order.**

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<sup>4</sup> ([http://www.iso-ne.com/markets/mkt\\_anlys\\_rpts/mnly\\_mktops\\_rpts/2009/2009\\_03\\_monthly\\_market\\_report.pdf](http://www.iso-ne.com/markets/mkt_anlys_rpts/mnly_mktops_rpts/2009/2009_03_monthly_market_report.pdf))

In the Order, the Commission stated that “we do not find that PSNH’s interest in keeping pricing terms confidential implies that it will be applying a “litmus test” or somehow acting unfairly in negotiating REC purchase agreements.” Order at 18.

This finding is unreasonable because it misconstrues an issue in the proceedings. The issue presented by Freedom was in its closing statement was the follows:

PSNH further testified under cross-examination that PSNH has an open door policy for all renewable resource developers and that all proposals of any kind would be considered in good faith and treated strictly on their merits. There are no litmus tests. According to PSNH, “nobody would be in or out because of who they are.”

The issue raised by Freedom has nothing to do with “keeping pricing terms confidential.” Therefore this finding should be stricken from the Order.

**E. The Commission’s Order does not comply with the requirements of RSA 378:41.**

RSA 378:41 requires that

“[a]ny proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission.”

The Commission’s Order is unlawful because it does not comply with the requirements of RSA 378:41 which require a reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the Commission. There is no such reference in the Order.

WHEREFORE, for all of the foregoing reasons, Freedom Partners, LLC respectfully requests the Commission to:

- A. Reconsider its Order in this proceeding; and
- B. Grant such other and further relief as may be just and equitable.

Respectfully submitted,  
FREEDOM PARTNERS, LLC

By its Attorney  
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Dated: May 19, 2009

CERTIFICATION OF SERVICE

Pursuant to Rules Puc 203.02(2) and Puc 203.11, I have served copy of this petition on each person identified on the commission's service list for this docket.

**/s/ James T. Rodier**