

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

**COMPLAINT OF CLEAN POWER DEVELOPMENT, LLC
AGAINST PUBLIC SERVICE OF NEW HAMPSHIRE
DE 09-067**

**MEMORANDUM OF LAW OF
CLEAN POWER DEVELOPMENT, LLC (CPD)**

Pursuant to Order No. 25,075 (February 24, 2010), Clean Power Development, LLC (CPD) hereby files its Memorandum of Law regarding the nature and extent of Public Service of New Hampshire's (PSNH) duty to negotiate with and contract for power from CPD.

I. Background of This Proceeding

CPD has approached PSNH on numerous occasions since 2006 seeking to negotiate a power purchase agreement ("PPA") with PSNH whereby PSNH would purchase the energy, capacity and renewable energy certificates associated with the output of CPD-owned and operated biomass facilities to be located within PSNH's service territory. A PPA is a prerequisite to moving forward with the financing, construction and eventual operation of the Berlin Facility.

CPD's repeated and diligent efforts to negotiate a PPA with PSNH have been rebuffed by PSNH. In fact, at a meeting with a PSNH senior executive held on December 6, 2006, CPD was told by PSNH that PSNH is only interested in renewable projects it can own and place in its rate base. Related to this, PSNH has frequently proclaimed that it supports legislative efforts to modify current state law in order to allow PSNH to propose additional new renewable energy power generation.

The circumstances underlying CPD's dispute with PSNH came to a full boil on March 14, 2009, when a senior PSNH governmental affairs representative told CPD that "the reason PSNH would never buy power from Clean Power is because of Mel Liston and how he had testified against them in other venues. He's just a bad person and we don't do business with people like him."¹

Faced with this extremely aggravating circumstance, CPD filed a Complaint against PSNH on April 7, 2009. On October 8, 2009, an Order of Notice was issued by the Commission

¹ PSNH has not responded to, much less denied, the factual allegations in Count I of the Complaint.

for purposes of conducting an investigation to determine whether an adjudicative proceeding should be commenced to resolve CPD's Complaint. A prehearing conference on November 3, 2009 to take statements and hear the recommendations of CPD and PSNH.

On February 24, 2010, the Commission issued an Order Commencing Adjudicative Proceeding which required "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." Order No. 25,075 at 2. This date was subsequently extended by Secretarial Letter to April 2, 2010,

II. Issue of Law Identified at Prehearing Conference.

The principal issue identified at the Prehearing Conference on November 3, 2009 was whether "PSNH has a duty to consider in good faith any bona fide offer" from a renewable energy developer under state law. In response to questioning from the bench, CPD unequivocally articulated that PSNH has a duty to consider in good faith any bona fide offer:

CHAIRMAN GETZ: Okay. Well, in talking about the nature and extent of PSNH's legal obligation -- well, if you're turning to that, because I was trying to I was going to try and paraphrase what I understood your position to be.

MR. RODIER: Please.

CHAIRMAN GETZ: Which I'm taking it to be that **the duty here on PSNH is to consider in good faith any bona fide offer**. Is that a fair characterization of the legal argument you're making? I mean, there may be other sources --

MR. RODIER: **Yes**.

CHAIRMAN GETZ: -- for that legal argument, whether it's in just and reasonable rates or least cost planning principles. But that's the fundamental legal duty you're arguing?

MR. RODIER: That's a good way to put it.

CHAIRMAN GETZ: And, then, what you're basically saying, in recounting some of the factual history, is that they breached that duty?

MR. RODIER: Correct.

CHAIRMAN GETZ: Okay.

Transcript (November 3, 2009) at 16. (Emphasis added.)

In contrast, counsel for PSNH appeared to disagree with the legal proposition that PSNH has a duty to consider in good faith any bona fide offer:

CHAIRMAN GETZ: Mr. Bersak, you've been focusing on, and I assume this is all in the context of the nature and extent of PSNH's legal obligation, the things that PSNH is not required to do or the things that are beyond our jurisdiction or beyond, in your position, beyond our authority. But, what is the nature of the duty that PSNH owes here? I've read a number of the documents that have been filed -- well, I've read all the documents, but, in some of the documents filed by PSNH, it didn't seem to me that PSNH was taking a very different position from what I discussed with Mr. Rodier earlier, when I tried to paraphrase Clean Power's position. That at least, in essence, there's at least one duty we're dealing with here, that PSNH should give due consideration to bona fide offers. Do you agree with that formulation? Disagree with that? Because, in some of the documents, it seems that you're taking the position that you have indeed given due consideration.

MR. BERSAK: **Is there a legal obligation that we consider any and every proposal that comes in the door? No, there is no legal obligation to do that. Is there a good business obligation to do that? Yes, there is.**

Id. at 58,59. (Emphasis added.)

Apparently, and not surprisingly, there is clearly a fundamental difference of opinion between CPD and PSNH on whether "PSNH has a duty to consider in good faith any bona fide offer" from a renewable energy developer. PSNH apparently believes that there is a "good business obligation" to do so, but not a legal obligation under state law to give due consideration to a proposal from a renewable energy developer.

The bench made one final attempt to clarify PSNH's position in the following exchange:

CHAIRMAN GETZ: Let me just return again to try to make sure I understand --

MR. BERSAK: Yes, sir.

CHAIRMAN GETZ: -- the arguments. And, I don't want to confuse, you know, forums for deciding the issues, but I think we need to look at some of the sources. And, if I'm going to -- if we're going to look at whether your rates are just and reasonable, if we're going to look at under the -- whether the system under the least cost planning process is adequate, it seems that the argument is that that gives rise to this duty that you're recognizing as a good business practice, but you draw the line at considering it a legal duty. And, I'm having trouble seeing that clear delineation. **If we're going to be getting to the point of someday making conclusions about just and reasonable rates or whether a process is adequate, it seems like you're saying that you can basically, as a legal -- as a business matter, you'll give due consideration to any bona fide offer, as a legal matter, you don't have to give due consideration to bona fide offers.**

MR. BERSAK: Sure. Perhaps if we move away from power purchase agreements, move to something else. We buy lots of things. Suppose we're talking about a bucket truck. Is it required for us to look at every manufacturer of bucket truck in the -- you know, across the globe as a legal obligation, before we can come to this Commission and say "we bought a bucket truck and we want to include it in our rate base." And, is some bucket truck manufacturer going to show up and say "Well, they didn't look at mine. I'm going to

file a complaint against them, because they didn't look at mine. Mine might have been more economical."

CHAIRMAN GETZ: So, is it a timing issue then that it's more -- and your position is, after the fact, we could conclude that the expense for the bucket truck was unreasonable, because you just -- you picked one vendor and paid them more than the going market, is that the --

MR. BERSAK: The question is, "**Did we use a reasonable business process in choosing, you know, the place where we were going to spend our money or spend customers' money? Did we use a process that makes logical sense?" Not everything requires a competitive process.**

Id. at 69, 70. (Emphasis added.)

Accordingly, it appears that, on November 3, 2009, PSNH believed that it is required to use a "reasonable business process" in dealing with renewable energy developers. PSNH's concept of a "reasonable business process" would not necessarily encompass a "competitive process." PSNH would employ a "reasonable business process" in determining which renewable energy developer it would do business with and under what circumstances.

III. PSNH's Obligations under New Hampshire Law²

CPD contends that PSNH has a legal duty to consider in good faith any bona fide offer from a renewable developer. PSNH contends that there is only an obligation to "use a reasonable business process" which would not necessarily encompass a "competitive process," and most certainly would not encompass a legal obligation to give due consideration to each and every proposal from renewable energy developers.

PSNH's position is unlawful. "The ratemaking process fixes rates that when charged to customers will satisfy a utility's revenue requirement." Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 633 (1986). The formula used to calculate a utility's revenue requirement, for purposes of fixing rates, includes the utility's "allowed operating expenses." Id. "The revenue requirement permits the utility to recover from its customers operating expenses (like labor, fuel and maintenance costs) that it has prudently incurred in providing service that directly benefits the utility's customers." Id. (Emphasis added.)

Accordingly, PSNH must act in a prudent manner when dealing with dealing with renewable energy developers or risk a disallowance of cost-recovery in a subsequent rate case.

² CPD does not contend, nor has it ever contended, that PSNH has any obligation to enter into a long-term contract under the Limited Electrical Energy Producers Act.

PSNH would have the burden of proving that its actions were prudent by a preponderance of the evidence. See, Puc 203.25.

Moreover, in addition to its obligation to act prudently, PSNH has an affirmative, obligation to comply with New Hampshire's Least Cost Energy Planning statute, RSA 378:37 et. seq. PSNH has the obligation under RSA 378:37 and 38 "to develop and implement an integrated resource plan that satisfies customer energy service needs at the lowest overall cost consistent with maintaining supply reliability." Order No. 24,945, DE 07-108 (February 27, 2009) at 12. RSA 378:39 requires the Commission to evaluate an electric utility's proposed integrated least cost resource plan in order to "evaluate the adequacy of [the] utility's planning process." Pursuant to RSA 378:39, renewable energy sources have priority over of all other energy sources. The Commission may not order a change to PSNH's rates unless the Commission has reviewed and approved the least cost plan. See RSA 378:40

In summary, PSNH has the obligation to act prudently or suffer the consequences in a subsequent rate case. Moreover, PSNH also has the prospective, affirmative obligation to develop and implement an adequate least cost plan, and to give renewable projects preference over conventional energy sources.

In its most recent Order pertaining to PSNH's Least Cost Plan, the Commission set out a very detailed prescription for evaluation of supply-side options;

Ranking of Supply-side Resource Options. As market CO2 emissions costs are internalized in 2009 there is less of a need to develop a ranking process that treats environmental impacts separately from revenue requirements. In its next LCIRP filing, PSNH's ranking of supply-side options shall be based upon a revenue requirements analysis. However, PSNH is directed to prepare a sensitivity analysis of supply-side resource options using a reasonable forecast of the full cost of CO2 using climate sustainability targets for CO2, as discussed in paragraph 3 above concerning the Total Resource Cost Test for Demand-Side Measures, to help understand how full internalization of potential CO2 costs might change the ranking of options. Fuel diversity, price stability, transmission stability, and statewide or local economic benefit may be used as tie breakers in the ranking analysis. The inclusion of forward capacity market credits in the revenue requirements calculation eliminates the need to consider availability at system peak as an independent criterion in the ranking process. In order to rank projects that serve different purposes or differ in size, the ranking process will be based on the ratio of net revenue requirements to market purchases for each option, with both quantities expressed in net present value terms.

Order No. 24,945, DE 07-108 (February 27, 2009) at 15.

How, one would ask, can an adequate least cost plan be developed and implemented if PSNH arrogates unto itself the decision on which renewable developers it is going to deal with, regardless of the costs and benefits to its ratepayers? Moreover, how, as a practical matter, would the Commission ever be able to scrutinize PSNH's conduct without knowing what options were not even considered by PSNH?

Indeed, PSNH has previously made representations to the Commission that, contrary to its contentions on November 3, indicate that PSNH understands that it has a legal duty to consider in good faith any bona fide offer from a renewable developer. At a hearing held at the Commission on February 5, 2009 in Docket No. DE -08-077, a PSNH witness testified 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:

Q. All right. So, the door is always open to talk, and it could be indexed, it could be a fixed rate, and each project is evaluated on its own?

A. Yes.

Q. But nobody is in or out just because of who they are?

A. No.

Transcript, DE 08-07, February 5, 2009.

Beyond this, PSNH counsel further represented in a memorandum to the Commission on February 19, 2009 in the same proceeding that PSNH does not establish any pre-conditions for negotiations with third party developers of renewable energy resources and all are treated "evenly and fairly."

PSNH's legal arguments in this proceeding are patently inconsistent with its representations made to the Commission in DE 08-077. Having belatedly recognized that its blow-off of CPD in March of 2009 was patently inconsistent with its representations to the Commission one month earlier, PSNH now seeks to change the rules of the game by now insisting that it must only "use a reasonable business process." Apparently, PSNH believes blowing-off CPD "because of Mel Liston and how he had testified against them in other venues" is PSNH's idea of "reasonable business judgment."

IV. Section 210 of the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C.A. Section 824a-3

Section 292.303(a) of the Federal Energy Regulatory Commission's (FERC) regulations implementing Section 210 of PURP A requires an electric utility to purchase energy and capacity made available by a QF directly or indirectly interconnected with the electric utility (the "Mandatory Purchase Requirement). Section 292.304(d) of the Commission's regulations allows QFs to: (1) provide energy on an "as available" basis; or (2) provide energy or capacity pursuant to a "legally enforceable obligation," i.e., a long-term contract or an order issued by the applicable state regulatory authority imposing a purchase obligation over a specified term. The rates for "as available" purchases are based on the "purchasing utility's avoided costs calculated at the time of delivery. For purchases governed by contract or other legally enforceable obligations, QFs have the option to sell energy and capacity at the utility's avoided costs calculated at either: (1) the time of delivery; or (2) the time the obligation is incurred.

On October 9, 2009, the NHPUC issued an Order of Notice which, inter alia, stated the following:

On April 14, 2009, pursuant to RSA 365:2, the Commission issued a secretarial letter directing PSNH to answer the charges in CPD's complaint. PSNH filed its answer to the complaint on April 28, 2009 denying any wrongdoing and stating that it had not violated RSA 362-F:1 or RSA 378:37 through 39. PSNH said that CPD had not made a *bona fide* offer of contract terms when it approached PSNH regarding the CPD facility. In addition, PSNH pointed out that there is no requirement in New Hampshire for any market participant, including a utility, to enter into a long-term power purchase agreement with any merchant generator. PSNH said that if a generator is a "qualifying facility" within the meaning of the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. §2601-2645) and the federal rules implementing PURPA (18 CFR 292), PSNH would be required to purchase the output at the short-term avoided cost rate approved by the Commission in PSNH's restructuring docket. See Docket No. 99-099, *PSNH Proposed Restructuring Settlement*, 85 NH PUC 567, Order No. 23,549 (September 8, 2000).

Order of Notice, NHPUC Docket No. DE 09-067 (October 9, 2009) (Emphasis added).

In direct contrast with its position in New Hampshire that there is no mandatory power purchase obligation under federal law, PSNH's filing with the FERC on January 10, 2010 in Docket No. QM10-4-000 seeks authorization to terminate the mandatory power purchase obligation pursuant to a "legally enforceable obligation," specifically, a long-term contract or an

order issued by the applicable state regulatory authority imposing a purchase obligation over a specified term.³

If PSNH had disclosed to CPD and the Commission that such a mandatory obligation still existed, CPD would have made every effort to obtain a long-term contract from PSNH for a facility in Berlin.⁴

Indeed, on March 18, 2010, FERC issued an Order ruling that two New York utilities must continue to purchase the excess output of a 40Mw cogeneration plant owned and operated by Cornell University. Order Granting in Part and Denying in Part the Application to Terminate Purchase Obligation, Docket No. QM10-3-000 (March 18, 2010).⁵ This situation is very similar to CPD's plan to construct, own and operate a biomass facility located in Berlin, New Hampshire which will generate electricity and steam through the combustion of whole tree chips. Normal net generation will usually be in the 15 to 22mw gross output range based upon variable thermal load during combined heat and power operation.

V. Conclusion

PSNH has the obligation to act prudently or suffer the consequences in a subsequent rate case. Moreover, PSNH also has the prospective, affirmative obligation to develop and implement an adequate least cost plan, and to give renewable projects preference over conventional energy sources. Moreover, PSNH's legal arguments in this proceeding are patently inconsistent with its representations made to the Commission in DE 08-077. PSNH should be estopped from now contending that it has no legal duty to consider in good faith any bona fide offer from a renewable developer.

If PSNH had disclosed to CPD and the Commission that a mandatory obligation to purchased still existed under Federal law, CPD would have made every effort to obtain a long-term contract from PSNH for a facility in Berlin. Accordingly, CPD has been substantially harmed by the manner in which PSNH handled this matter.

³ CPD has filed a Petition to Intervene in this proceeding at FERC and has protested PSNH's proposal to terminate the mandatory power purchase obligation pursuant to a "legally enforceable obligation."

⁴ CPD would have sized its Berlin project for less than 20 MW, if necessary to qualify for a long-term contract.

⁵ As members of the NYISO, NYSEG and RG&E had asked FERC on December 18, 2009 to terminate their obligations to enter into new power purchase arrangements or contracts for energy or capacity from large qualifying facilities.

Dated: April 2, 2010

Respectfully submitted,
CLEAN POWER DEVELOPMENT, LLC

By its Attorney,


/s/ James T. Rodier

1500A Lafayette Road, No. 112
Portsmouth, NH 03801-5918
603-559-9987