

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

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

**CPD'S SUPPLEMENTAL MEMORANDUM OF LAW  
IN LIGHT OF FERC ORDER, 131 FERC ¶ 61,027.**

Pursuant to the Secretarial letter dated August 17, 2010, Clean Power Development, LLC (CPD) hereby files its Supplemental Memorandum of Law in light of FERC Order, 131 FERC ¶ 61,027.

**I. INTRODUCTION**

On April 7, 2009, CPD filed a complaint against PSNH with the New Hampshire Public Utilities Commission (NHPUC) claiming that PSNH refused to enter into negotiations to purchase the energy, capacity and renewable energy certificates (RECs) associated with the output a 29-megawatt biomass-fueled combined heat and power energy facility CPD plans to build in Berlin, New Hampshire. The Complaint was docketed as NHPUC DE 09-067.

PSNH has denied that it has a long-term power purchase obligation under PURPA:

There simply is no requirement for PSNH, or any other utility or potential purchaser, to enter into long-term power purchase negotiations with CPD or any other generator.

However, if a generator is a Public Utility Regulatory Policies Act of 1978 ("PURPA," 16 U.S.Code Sections 2601-2645) "qualifying facility" under the FERC's implementing regulations (18 Code of Federal Regulations, Part 292), for the foreseeable future PSNH will continue to comply with the traditional PURPA requirement to purchase the output from such a "QF" at the short-term avoided cost rate approved by the NHPUC. By NHPUC Order No. 23,549, that rate has been set to be equal to the market price for sales into the ISO-New England power exchange, adjusted for line losses, wheeling costs, and administrative costs. PSNH reserves the right to withdraw from this PURPA QF purchase obligation at any time, following application to and approval from FERC.

Letter from Robert A. Bersak, Esq. to Mel Liston (March 16, 2009.)

Similarly, in its Response to CPD's Complaint, PSNH stated the following:

There is no requirement in New Hampshire for any market participant – be it a utility, an unregulated marketer, or an end user -- to enter into a long-term power purchase agreement with any merchant generator. CPD has the legal right and ability to interconnect to the transmission grid and arrange for the sale of its plant's output to utilities, competitive suppliers, or end-users inside, or even outside, New England.

Moreover, if it meets PURPA requirements, CPD can assert rights as a qualifying facility to require PSNH to purchase the output from its CPD Berlin facility pursuant to the pricing approved by the Commission in Docket No. DE 09-099.

PSNH Response to CPD Complaint (April 28, 2009) at 3.

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

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).

Accordingly, based upon PSNH’s own assertions, the NHPUC understood prior to the November 3, 2009 hearing, that PSNH’s position under PURPA was that it was not required to enter into a long-term power purchase obligation and that PSNH would only be required to purchase the output at the short-term avoided cost rate. However, at the hearing on November 3, 2009, PSNH acknowledged that it did indeed have a long-term power purchase obligation under PURPA. PSNH counsel issued the following warning:

... if developers in New Hampshire are now seeking to implement PURPA rights that they believe that they have in a manner different than that which was agreed upon in their settling -- I mean, in the restructuring Settlement Agreement and approved by this Commission, and if they choose to ignore the host utility and jump back to PSNH, then we'll return to the wild, wild days of the 1980's, and we'll be fighting PURPA all over again. And, we will go to FERC and we will make a filing, and it will be years of delay while it gets decided.

Transcript, NHPUC DE 09-067 (November 3, 2009) at 82.

As a consequence of the oral arguments heard by the NHPUC in this proceeding on November 3, 2009, and in direct contrast with its position in New Hampshire that there is no mandatory power long-term purchase obligation under federal law, PSNH filed with the FERC on January 7, 2010 an “Application of Public Service Company of New Hampshire for Authorization to Terminate the Mandatory Power Purchase Obligation from Qualifying Facilities

with Net Generating Capacity of Five Megawatts or Greater.” That filing was docketed by the FERC as Docket No. QM10-4-000. CPD filed a Protest on February 3, 2010 contending that “PSNH’s representations to the NHPUC that there is no requirement for it to enter into a long-term power purchase agreement with CPD are patently inconsistent with the filing before the Commission in this proceeding.” CPD contended that the Commission, at a minimum, should not terminate PSNH’s mandatory power purchase obligation with respect to any CPD facility.<sup>1</sup>

On April 15, 2010, FERC issued an “Order Granting in Part and Denying in Part the Application to Terminate Mandatory Purchase Obligation. 131 FERC ¶61,027. More specifically, the FERC Order stated:

PSNH’s application is granted in part, and PSNH is relieved on a service territory-wide basis of the requirement to enter into new power purchase obligations or contracts with QFs that have a net capacity in excess of 20 MW effective January 7, 2010 **(with the exception of any contract or legally enforceable obligation that results from the New Hampshire Commission’s action on Clean Power’s petition).**

Order at 9. (Emphasis added.)

On April 19, 2010, CPD filed a Motion for Leave to Supplement Memorandum of Law with respect to the impact of FERC’s Order on the proceedings here in New Hampshire in DE 09-067. The Commission granted CPD’s request and established May 19, 2010 as the deadline for all parties to submit supplemental memorandum of law relating to issues raised by the FERC decision. PSNH filed a Motion for Clarification and/or Rehearing in this proceeding on May 14, 2009. Subsequently, in a Secretarial letter dated August 17, 2010, the Commission established September 20, 2010 as the deadline to submit supplemental memorandum of law relating to issues raised by the FERC decision.

## **II. IMPACT OF FERC’S ORDER ON THIS PROCEEDING.**

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

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<sup>1</sup> “QF’s that believe that some other sort of state proceeding has created a legally enforceable obligation under state law may argue their claim before the Commission... A QF may argue that an obligation or contract is pending approval as provided by state law in any proceeding seeking termination of the purchase obligation...” Order No. 688-A at pp. 138-140.

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.

As noted above, FERC's Order in Docket No. QM10-4-000 does not relieve PSNH of the requirement to enter into a power purchase obligation or contract with CPD's Berlin Project if a contract or other legally enforceable obligation is imposed upon PSNH by the NHPUC. The crux of PSNH's Motion for Rehearing at FERC is that CPD has not initiated a State PURPA proceeding, and therefore the Commission's Order was in error by grandfathering CPD and excluding it from the termination Order.

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. 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).

### **III. CONCLUSION**

As noted at length above, prior to November 3, 2009, PSNH has strenuously contended before the NHPUC that it was not required to enter into a long-term power purchase obligation under PURPA and that PSNH would only be required to purchase CPD's output at the short-term avoided cost rate. It was not until the oral arguments before the NHPUC on November 3, 2009, that it became apparent that PSNH did indeed have such an obligation.

Assuming that PSNH continues to refuse to discuss a power purchase agreement with CPD, PSNH's obligation would be to comply with the terms of any rate order issued by this Commission creating a legally enforceable obligation under PURPA mandating the purchase of the output from CPD's proposed biomass facility at avoided cost rates. CPD intends to initiate a State PURPA proceeding with the NHPUC in the near future seeking such a rate order pursuant to the procedure set out in Docket No. DE 83-62.

There is little doubt that PSNH will continue to contend that CPD did not initiate a State PURPA proceeding prior to its filing with FERC on January 7, 2010 and therefore it is not entitled to a rate order pursuant to the procedure set out in Docket No. DE 83-62. However, the NHPUC should find that CPD was simply relying at the time on PSNH's statements that it was not required to enter into a long-term power purchase obligation under PURPA and that PSNH would only be required to purchase CPD's output at the short-term avoided cost rate.

September 20, 2010

Respectfully submitted,  
CLEAN POWER DEVELOPMENT, LLC  
by   
/s/ James T. Rodier  
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CERTIFICATION

I have sent a copy of this filing to the Parties on the Service List in this proceeding.

/s/ James T. Rodier

