

**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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Docket #: 09-067-1      Printed: October 15, 2010

**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.**

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

	)	<b>Docket Nos. QM10-4-000</b>
<b>Public Service Company of New Hampshire</b>	)	<b>QM10-4-001</b>
	)	<b>QM10-4-002</b>
	)	<b>QM10-4-003</b>
	)	<b>QM10-4-004</b>

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE’S MOTION TO SUPPLEMENT  
PENDING MOTION FOR CLARIFICATION AND/OR REHEARING**

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713, of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), Northeast Utilities Service Company (“NUSCO”), on behalf of Public Service Company of New Hampshire (“PSNH”), respectfully moves to supplement its May 14, 2010 Motion for Clarification and/or Rehearing (“Motion”) of the Commission’s *Order Granting in Part and Denying in Part the Application to Terminate Mandatory Purchase Obligation* issued on April 15, 2010 in the above-referenced docket (the “Order”).<sup>1</sup>

Specifically, PSNH requests that Clean Power Development, LLC’s (“CPD”) *Supplemental Memorandum of Law in Light of FERC Order, 131 FERC ¶ 61,027* (“Supplemental Memo,” attached as Exhibit A), which was filed with the New Hampshire Public Utilities Commission (“NHPUC”) in Docket No. DE 09-067 on September 20, 2010, be made part of the record in this proceeding. As discussed below, CPD’s Supplemental Memo will assist the Commission in addressing the issues presented in PSNH’s Motion. Since CPD did not file the Supplemental Memo until after PSNH filed its Motion, good cause exists for the Commission to grant this Motion to Supplement.

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<sup>1</sup> *Public Service Company of New Hampshire*, 131 F.E.R.C. ¶ 61,027 (2010).

## I. BACKGROUND

On January 7, 2010, pursuant to Section 210(m) of the Public Utility Regulatory Policies Act (“PURPA”), PSNH submitted its Application for Authorization to Terminate the Mandatory Power Purchase Obligation from QFs with Net Generating Capacity of 5 MW or Greater (the “Application”). In response to PSNH’s Application, CPD filed a Motion to Intervene and Protest.<sup>2</sup>

The Commission issued the *Order* on April 15, 2010, granting PSNH’s request to terminate its Mandatory Purchase Obligation on a service territory-wide basis for qualifying cogeneration and small power production facilities (“QFs”) with net capacities in excess of 20 megawatts (“MW”), effective January 7, 2010, and denying without prejudice PSNH’s request for QFs with net capacities of 5 MW through 20 MW.<sup>3</sup> Further, the Commission stated that CPD had initiated a state PURPA proceeding with the NHPUC before PSNH filed the Application with the Commission and, as a result, held pursuant to 18 C.F.R. § 292.314 (2009), that “any contract or legally enforceable obligation that results from” that proceeding “will be grandfathered and not subject to [the] termination order.”<sup>4</sup>

On May 14, 2010, PSNH filed its Motion requesting that the Commission grant clarification of or, in the alternative, rehearing as to whether CPD had initiated a state PURPA proceeding prior to PSNH’s filing of its Application with the Commission. On June 11, 2010, the Commission issued an *Order Granting Rehearing for Further Consideration* in this docket, which is still pending.

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<sup>2</sup> See *Id.* at P 10.

<sup>3</sup> *Id.* at P 18, 22.

<sup>4</sup> *Id.* at P 24.

## II. MOTION TO SUPPLEMENT

Provided that good cause exists, the Commission allows the filing of supplemental rehearing material after the statutory deadline for rehearing has passed, particularly when the supplement does not seek to introduce any new arguments or issues not set forth in the original request for rehearing. *See, e.g., Fraser Papers, Inc.*, 78 F.E.R.C. ¶ 61,346 (1997) (“[W]e allow the filing of supplemental rehearing material where the statutory deadline has been met by the filing of whatever request for rehearing can be prepared within the 30-day deadline and good cause is shown.”); *Portland Natural Gas Transmission System*, 80 F.E.R.C. ¶ 61,134 (1997) (Commission accepted supplement to rehearing request that did not raise new issues “in the interest of compiling a more complete record upon which to make a decision.”); *Algonquin Gas Transmission Co.*, 104 F.E.R.C. ¶ 61,118 (2003) (Commission accepted supplement to rehearing request because it aided the Commission in the resolution of the issues).

Good cause exists to grant this Motion to Supplement. As stated above, PSNH’s Motion sought clarification and/or rehearing from the Commission as to whether CPD initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to PSNH filing its Application with the Commission. On the fourth page of its September 20, 2010 Supplemental Memo filed with the NHPUC, CPD implicitly admits that it has not yet initiated a state PURPA proceeding by stating that it *intends to do so* in the near future: “CPD intends to initiate a State PURPA proceeding with the NHPUC in the near future seeking a rate order pursuant to the procedure set out in Docket No. DE 83-92.”<sup>5</sup>

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<sup>5</sup> CPD’s Supplemental Memorandum of Law In Light of FERC Order, 131 F.E.R.C. ¶ 61,027, *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE 09-067 (Sept. 20, 2010)(emphasis added).

CPD's statement directly addresses the issue of whether CPD had initiated a state PURPA proceeding prior to PSNH filing its Application. Thus, the Supplemental Memo will aid the Commission in resolving the issues raised by PSNH's Motion. Moreover, because CPD's implicit admission supports the arguments PSNH previously raised in the Motion, neither this motion nor the Supplemental Memo seek to introduce any new arguments or issues. Further, it was impossible for PSNH to include the Supplemental Memo as an exhibit to its Motion because CPD had not yet filed the Memo with the NHPUC. Therefore, acceptance of the Supplemental Memo will ensure a complete record upon which the Commission can base its decision.<sup>6</sup>

As the Commission has allowed the filing of supplements to requests for rehearing under similar circumstances,<sup>7</sup> good cause exists for granting this Motion to Supplement.

### **III. CONCLUSION**

For the foregoing reasons, PSNH respectfully requests that the Commission grant this Motion to Supplement and accept the Supplemental Memo for its consideration and inclusion in the record in this proceeding.

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<sup>6</sup> See *El Paso Natural Gas Co.*, 82 F.E.R.C. ¶ 61,337 (1998).

<sup>7</sup> See *Portland Natural Gas Transmission System*, 80 F.E.R.C. ¶ 61,134 (1997); *Pacific Gas and Electric Co.*, 106 F.E.R.C. ¶ 61,303 (2004).

Respectfully submitted,

NORTHEAST UTILITIES SERVICE COMPANY AND  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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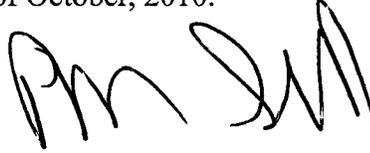
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Counsel for Northeast Utilities Service Company and  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding

Dated at Hartford, Connecticut this 12th day of October, 2010.



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# **EXHIBIT A**

Clean Power Development, LLC's *Supplemental Memorandum of Law*  
*in Light of FERC Order, 131 FERC ¶ 61,027*

**James T. Rodier, Esq.**  
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September 20, 2010

Debra A. Howland  
Executive Director and Secretary  
State of New Hampshire  
Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429



**COMPLAINT OF CLEAN POWER DEVELOPMENT, LLC**  
**AGAINST PUBLIC SERVICE OF NEW HAMPSHIRE**  
**Docket No. DE 09-067**

Dear Ms. Howland:

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

Sincerely,

**/s/James T. Rodier**

A handwritten signature in cursive script that reads "James T. Rodier" followed by a stylized flourish.

NHPUC SEP20'10 PM 2:46

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

*James T. Rodier/cap*

/s/ James T. Rodier

James T. Rodier, Esq.

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Portsmouth, NH 03801-5918

603-559-9987

CERTIFICATION

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

/s/ James T. Rodier

*James T. Rodier/cap*