

STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

In re: Petition for Approval of Power Purchase Agreement) Docket No. DE 10-195
with Laidlaw Berlin BioPower, LLC)

**WOOD-FIRED IPPS'
MOTION TO DISMISS**

Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (collectively the "Wood-Fired IPPs") move to dismiss the Petition for Approval of Power Purchase Agreement between Public Service Company of New Hampshire and Laidlaw Berlin BioPower, LLC ("Laidlaw") because the Commission lacks authority to grant the relief that PSNH seeks. The Wood-Fired IPPs state the following in support of their motion:

INTRODUCTION

1. Public Service Company of New Hampshire ("PSNH") has petitioned the Commission pursuant to RSA 362-F:9 for approval of a 20-year long-term contract with Laidlaw for the purchase of New Hampshire Class I renewable energy certificates ("RECs") in conjunction with the purchase of energy and capacity (the "PPA"). PSNH also seeks approval of the "full cost recovery of the rates, terms and conditions of the PPA"¹ which includes the determination and purchase of, and the payment for New Hampshire Class I RECs on the terms and conditions as set forth in the PPA.

2. For the reasons discussed below, a plain reading of unambiguous terms of the PPA, RSA chapter 362-F (the "RPS statute"), RSA 374-F:3, V(c) and RSA 365:28 mandate that

¹ PSNH Petition at 2; *see also* Article 4.1.3 of the PPA.

the Commission dismiss PSNH's petition as a matter of law. *New Hampshire Water Resources Council v. Steels Pond Hydro, Inc.*, 151 N.H. 214, 215 (2004) (the meaning of a contract is a matter of law for the Supreme Court to ultimately determine); *Town of Acworth v. Fall Mt. Reg'l Sch. Dist.*, 151 N.H. 399, 401 (2004) (statutory interpretation involves a question of law and is reviewed by the Supreme Court *de novo*). The Commission must dismiss PSNH's petition, because approval of the terms and conditions of the PPA exceed the Commission's authority under RSA 362-F:9, I for the following reasons: (1) there is no requirement for the purchase of RECs after 2025 in RSA 362-F, and the Commission cannot approve cost recovery under RSA 362-F or RSA 374-F:3, V(c) for non-existent REC purchase obligations under the PPA; (2) the Commission may not usurp the legislature's prerogative to end or otherwise modify the RPS requirement in 2025 by imposing a contractual obligation on ratepayers to purchase RECs after 2025; and (3) read in *pari materia*, RSA 362-F:9, RSA 374-F:3, V(c), and RSA 365:28 prohibit the Commission from approving the PPA's change in law provisions that operate to prevent the Commission from subsequently reexamining critical elements of the PPA such as the number of RECs required to be purchased, the price and the amount of the REC price to be recovered from PSNH ratepayers in the future.

ARGUMENT

3. "The [Commission] is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982). The Commission's power to authorize PSNH to enter into a multi-year purchase agreement for RECs in conjunction with a power purchase agreement "is limited to the authority specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision."

Cf. Id. (applied to sale of stock and bonds). The scope of the Commission's authority to authorize PSNH to enter into the PPA is derived from RSA 362-F:9, I. This statute only permits the Commission to authorize PSNH "to enter into multi-year purchase agreements" for RECs "in conjunction with . . . purchased power agreements . . . to meet reasonably projected renewable portfolio requirements and default service needs *to the extent of such requirements* . . ." RSA 362-F:9, I. Emphasis supplied.

I. UNDER RSA 362-F, RPS REQUIREMENTS END IN 2025, AND THE COMMISSION HAS NO AUTHORITY TO APPROVE A CONTRACT FOR THE PURCHASE OF RECS THAT EXTENDS BEYOND THAT DATE OR TO APPROVE COST RECOVERY FOR RECS TO BE PURCHASED POST-2025.

4. The Commission lacks authority to approve the PPA because the term of the PPA (and hence the REC purchase obligation) extends beyond the end of the RPS program. The PPA has a 20-year term commencing on the In-Service Date. PPA at 7, Article 2.1. The PPA provides for an In-Service date as early as June 1, 2014, and as late as December 31, 2014, unless extended for reasons specified in the PPA. PPA at 18, Article 12.3.2. The 20-year term of the PPA will therefore end in 2034 or later. However, the RPS program, and the requirement that PSNH purchase Class I RECs ends in 2025. RSA 362-F:3.

5. The duration of the RPS program is set forth in RSA 362-F:3, titled "Minimum Electric Renewable Portfolio Standards." That provision states, "*For each year specified in the table below*, each provider of electricity shall obtain and retire certificates sufficient in number and class type to meet or exceed the following percentages of total megawatt-hours of electricity supplied by the provider to its end-use customers *that year*. . ." RSA 362-F:3. Emphasis supplied. The table provides the percentages and class types only for the years 2008 through 2025. *Id.* Neither the wording of the provision nor the table creates a purchase requirement for

the years 2026 and beyond. *Id.* Without further legislative action, the RPS program and PSNH's renewable portfolio requirements end December 31, 2025.

6. It is clear from a plain reading of the RPS statute that the legislature did not intend to empower the Commission to authorize multi-year REC contracts that extend beyond the year 2025. First, in RSA 362-F:9, I, the legislature was careful to limit permissible authorization of REC contracts to the "extent" of "renewable portfolio requirements." These requirements are set forth in RSA 362-F:3, and by clear statutory language, extend only through the year 2025. Second, the legislature reserved to itself the authority to increase, decrease, or eliminate the Class I purchase requirements in years 2026 and beyond. The legislature did so by creating a requirement in RSA-F:3 that extends only until 2025, while limiting the Commission to making recommendations to the legislature as to what should occur after that time. Whether a purchase obligation will exist after 2025, the classes to which it will apply, and at what levels, are matters of legislative prerogative. This distribution of authority is set forth in RSA 362-F:5, titled "Commission Review and Report."

7. Because the PPA obligates PSNH to purchase RECs for approximately nine years after 2025, when the RPS program ends and the purchase requirement ceases to exist, the terms and conditions of the PPA exceed PSNH's renewable portfolio requirements in absolute statutory terms. Consequently, the Commission lacks authority under RSA 362-F to authorize PSNH to enter into the PPA and to approve PSNH's request for cost recovery for a non-existent REC obligation.

8. Furthermore, the Commission lacks authority under RSA 374-F:3, V(c) to approve, as prudently incurred, any cost recovery for a non-existent REC obligation extending

beyond the RSA 362-F statutory limit of 2025. *See* RSA 374-F:3, V(c) (recovery in default service rate limited to prudently incurred costs of *compliance*)

II. THE COMMISSION MAY NOT LEGISLATE AN EXTENSION OF THE RPS PROGRAM BY APPROVING THE PRIVATE CONTRACTUAL TERMS OF THE PPA.

9. The legislature reserved for itself the question whether ratepayers will be obligated to fund an RPS program after 2025, *see* RSA 362-F:3, and limited the Commission's role to one of making recommendations for legislative action. *See* 362-F:5. The Commission may not, by approving a private contract (*i.e.* the PPA), extend the RPS program and ratepayer responsibility for that program beyond 2025. If the Commission were to do so, the Commission would be arrogating power that the legislature has reserved for itself.

10. The role of the Commission with regard to RPS requirements post 2025 is set forth in RSA 362-F:5. Under RSA 362-F:5, the Commission is required to review the RPS program three times, and report its findings and any recommendations to the legislature by November 1, 2011, 2018, and 2025. The Commission is to include in its reports any recommendations for legislative action that the Commission may have with regard to changes in class requirements or other aspects of the program. RSA 362-F:5. Ultimately, however, it is the legislature that will decide whether the RPS program and its requirements will continue, and if so, in what form.

11. Authorizing PSNH to enter into the PPA with its term that extends beyond 2025 and obligating PSNH's ratepayers to bear the expense of REC purchases would extend the RPS by fiat. The Commission would, in effect, be usurping the legislature's authority to decide whether the RPS program will extend beyond 2025. Nothing in RSA 362-F empowers the Commission to do so.

III. THE COMMISSION MAY NOT APPROVE THE REC CHANGE IN LAW PROVISIONS OF THE PPA OR, BY PPA APPROVAL, PRECLUDE ITSELF FROM REVIEWING REC COST RECOVERY IN THE FUTURE, BECAUSE TO DO SO WOULD ABROGATE THE COMMISSION'S CONTINUING JURISDICTION UNDER RSA 365:28.

12. For the 20-year term of the PPA, Articles 1.44, 1.57, 8.1, and 23.1 will protect Laidlaw from legislative mandates and prevent the Commission from revisiting critical terms of the PPA, including the number of NH Class I RECs to be purchased, the purchase price for those RECs, and the amount of the REC price to be recovered from ratepayers in the future.² Approval of these provisions will abrogate the Commission's authority by insulating PSNH and Laidlaw from the Commission's continuing obligation to protect the public interest under RSA 365:28. As demonstrated below, abrogation of legislative prerogative and the Commission's authority is the clear purpose and intent of these change in law provisions, at least with regard to the term, the amount, and the minimum pricing of the REC purchase obligation.

13. The PPA defines a change in law to mean "that any applicable law, rule, or regulation is changed (whether directly or indirectly by pre-emption, displacement or substitution) or any new applicable law, rule, or regulation is enacted or promulgated subsequent to the Effective Date." PPA at 2, Article 1.8.

14. Article 23.1 of the PPA states the consequences of a change in law as follows:

If, during the Term, a Change in Law occurs or any of the ISO-NE Documents are changed, resulting in elimination of or a material adverse affect upon a material right or obligation of a Party, then ***unless such Change in Law is otherwise specifically addressed herein***, the Parties will negotiate in good faith in an attempt to amend this Agreement to incorporate such changes as they mutually deem necessary to reflect the Change in Law or the change in any ISO-NE Documents. The intent of the Parties is that any such amendment reflects, as closely as possible, the intent and substance of the economic bargain before the Change in Law or the change in any ISO-NE Documents. If the Parties are

² See PSNH Petition at 2; and Article 4.1.3 of the PPA.

unable to reach agreement on such an amendment, the Parties agree to resolve the matter pursuant to the terms of Article 25 of this Agreement.

PPA at 26, Article 23.1. Emphasis supplied.

15. Changes in law related to the REC purchase obligation are "otherwise specifically addressed" in the PPA. Articles 1.44 and 1.57 make it clear that changes in law will not subject the REC purchase obligation to any decrease in amount or reduction in price from that existing in 362-F as of the PPA effective date of June 8, 2010. These change in law provisions instead create a minimum purchase requirement and a minimum floor base price *regardless* of changes in law.

16. The operation of Article 1.44 sets the minimum number of NH Class I RECs to be purchased over the 20-year term regardless of changes in the RPS requirements. That article defines "NH Class I Renewable Energy Credits" or "NH Class I RECs" as "REC[s] produced *or, in the event of a Change of Law that would have been produced*, by the Facility pursuant to its qualification as a renewable energy source as defined in the NH Class I Renewable Statutes at NH RSA § 362-F, *as in effect on the Effective Date, and regardless of any subsequent Change in Law.*" PPA at 5, Article 1.44. Emphasis supplied. As a result of this definition, the minimum number of NH Class I RECs that the Facility produces and that PSNH is obligated to purchase at ratepayer expense will be determined for the 20-year term with reference to RPS requirements as those requirements existed as of June 8, 2010, (*see* PPA at 1, preamble) regardless of any legislative change to those requirements. Under a plain reading of the PPA, this would include changes in Class I eligibility requirements and even repeal.

17. Articles 1.57 and 6.1.2(c) set the minimum floor base price for RECs over the 20-year term regardless of changes in the RPS requirements. Article 1.57 defines "Renewable Products Payment" as:

the alternative compliance payment schedule set forth under NH RSA § 362-F for RECs produced by NH Class I Renewables, as adjusted from time to time, *provided* that if there is a Change in Law with respect to NH RSA § 362-F and/or the New Hampshire statute is pre-empted by later federal law, Parties will use good faith efforts to revise the Renewable Products Payment to conform to the value of any replacement payment available following such Change in Law, consistent with the provisions of Section 23 of this Agreement; and *provided further, that for the term hereof, the Renewable Products Payment shall not be less than the alternative compliance payment schedule (including future adjustments) set forth under NH RSA § 362-F for RECs produced by NH Class I Renewables as in effect on the date hereof.*

PPA at 6, Article 1.57. Emphasis supplied.

18. This provision prohibits any changes to the base floor price that fall below the ACP under the version of RSA 362-F and its ACP schedule in effect on June 8, 2010, while providing Laidlaw with the financial benefit of any change in law that might increase the price of RECs. The initial ACP amount is set forth in RSA 362-F:10, II. The amount escalates each year at the rate of change in the Consumer Price Index under RSA 362-F:10, III. From this initial ACP and the statutory escalation methodology, one can determine what the ACP will be, or would have been in any year even if there is a subsequent change in law. It will never change throughout the term, even if RSA 362-F were to be repealed.

19. Article 4.1.3 of the PPA requires the NHPUC to issue a final, non-appealable order approving and allowing full cost recovery of the rates, terms, and conditions of the PPA.

20. Read in *pari materia*, RSA 362-F, RSA 374-F:3, V(c), and RSA 365:28 bar the Commission from approving the PPA because under the terms of the PPA such approval would abrogate the Commission's jurisdiction under RSA 365:28. RSA 362-F and RSA 365:28 both govern the Commission's jurisdiction over orders concerning REC purchase agreements while

RSA 374-F:3, V(c) governs cost recovery. These three provisions therefore must be read in *pari materia*. See *Petition of Public Service Company of New Hampshire*, 130 N.H. 265, 273-74 (1988) (reading "anti-CWIP" and "emergency rate" statutes in *pari materia* to prevent the Commission from authorizing emergency rates to ameliorate a financial crisis that PSNH claimed arose from the anti-CWIP law). Statutes that deal with similar subject matter should be construed so that they do not contradict each other where reasonably possible, so that they lead to reasonable results and effectuate the legislative purpose of the statutes. *Id.* at 273.

21. RSA 362-F, RSA 374-F:3, V(c), and RSA 365:28 do not contradict each other, are not ambiguous, and are readily harmonized. RSA 362-F:9 empowers the Commission to issue orders authorizing electric distribution companies to enter into multi-year REC purchase agreements. RSA 374-F:3, V(c) allows for recovery of prudently incurred costs of complying with the RPS statute. RSA 365:28 grants the Commission continuing jurisdiction over orders issued pursuant to these provisions and the ability to revisit and "alter, amend, suspend, annul, set aside, or otherwise modify" those orders. Nothing in the RPS statute or RSA 374-F:3, V(c) explicitly modifies or repeals the Commission's jurisdiction under RSA 365:28 over the orders it issues pursuant to RSA 362-F:9 and RSA 374-F:3, V(c). Whenever the legislature intended to curtail the Commission's jurisdiction under RSA 365:28, the legislature has done so explicitly.³ The lack of an explicit repeal or modification demonstrates that the legislature intended to require the Commission to retain its RSA 365:28 jurisdiction over orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c).

³ See, e.g., RSA 369-B:3, II and III (revoking the commission's general authority under RSA 365:28 to rescind, alter, or amend its orders or requirements thereof with regard to rate reduction bond financing); RSA 362-C:6 (prohibiting the commission from altering, amending, suspending, annulling, setting aside or otherwise modifying its approval of the restructuring of PSNH); and RSA 362-C:7 (same with regard to commission approvals of certain rate plans for the New Hampshire Electric Cooperative).

22. Further, as discussed above, between the commencement of the RPS program and its end, the legislature reserved to itself at least three opportunities to change or eliminate RPS requirements after receiving reports and recommendations from the Commission. RSA 362-F:5. These reviews are to occur in 2011, in 2018, and again in 2025, immediately before the RPS program is currently set to end, *id.* with legislative action or inaction to occur in the 2012, 2019 and 2026 legislative sessions. *See Id.* RSA 365:28, which was not repealed or limited by the enactment of the RPS statute, works in harmony with RSA 362-F:5 and 374-F:3, V(c) by permitting the Commission to revisit its orders issued pursuant to RSA 365-F:9 and RSA 374-F:3, V(c) to respond to these changes in law or other circumstances affecting the public interest.

23. RSA 362-F:9 empowers the Commission to authorize PSNH to enter into multi-year agreements while RSA 374-F:3, V(c) authorizes cost recovery. Read in *pari materia* with RSA 365:28, however, neither empowers PSNH to insulate its shareholders and counterparties from legislative adjustments to, or elimination of, the RPS program at ratepayers' expense for a 20-year period.

24. In fact, three key features of the RPS statute and RSA 365:28, read in *pari materia*, protect ratepayers with regard to expenditures under contracts like the PPA. First, the legislature did not extend renewable portfolio requirements past 2025. RSA 362-F:3. This time frame allows for multi-year contracts while providing rate-payers with the protection of an end point until more is known about the success of the program as currently structured. Second, the legislature intends to periodically revisit the program's requirements until 2025. RSA 362-F:5. This provision makes clear that the legislature intends to consider adjustments to program requirements to respond to changes in circumstances and accumulated knowledge concerning the success or failure of the program. Third, the legislature only authorized multi-year REC

agreements to the extent of PSNH's portfolio requirement needs. RSA 362-F:9, I. The obvious intent of this provision is to prevent the Commission from authorizing PSNH to obligate its ratepayers to terms, conditions, and contracts extending beyond the obligations imposed by the legislature itself. Last, the legislature left the Commission's authority to alter and amend its orders intact, thereby allowing the Commission to revisit its orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c) in order to respond to changes in circumstance and legislative changes in the RPS law.

25. The Commission may not, through the approval of private, contractual change in law provisions, voluntarily waive its authority under RSA 365:28 to modify its orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c). Consequently, the Commission must dismiss PSNH's petition.


WHEREFORE, for the foregoing reasons, the Wood-Fired IPPs respectfully request that the Commission dismiss PSNH's petition and grant such other relief as the Commission deems just and proper. Because this motion is dispositive in effect, and because this docket is on an accelerated schedule, a timely decision by the Commission in the Wood-Fired IPPs favor will save staff, the Office of Consumer Advocate, and the parties from expending resources preparing for hearing. The Wood-Fired IPPs request that the Commission act on the motion at its earliest opportunity after objections are filed.

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER, INC.,
PINETREE POWER-TAMWORTH, INC.,
SPRINGFIELD POWER LLC,
DG WHITEFIELD, LLC d/b/a WHITEFIELD POWER &
LIGHT COMPANY, and
INDECK ENERGY-ALEXANDRIA, LLC

By Their Attorneys,

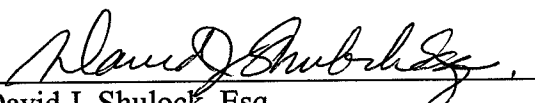
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Motion to Dismiss to be filed electronically and via U.S. Mail, first class to the Commission and electronically, or by U.S. Mail, first class, to the persons identified on the attached Service List in accordance with N.H. Admin. Code Rules PUC 203.11(a).

Date: December 13, 2010


David J. Shulock, Esq.