STATE OF NEW HAMPSHIRE
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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

WOOD-FIRED IPPS' REPLY TO PSNH'S OBJECTION TO 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") filed a motion to dismiss PSNH's petition on December 13, 2010. Settlement discussions are scheduled for January 14, 2011. Settlement discussions will benefit from a determination of the legal issues raised in the Wood-Fired IPPs' motion to dismiss. It is vital to meaningful settlement for the parties to understand whether they are negotiating contract modifications that are within the Commission's power to authorize. To aid the Commission in making its determination, the Wood-Fired IPPs reply to the December 23, 2010 objection filed by Public Service Company of New Hampshire ("PSNH") as follows:

1. **The Commission Must Dismiss the PSNH Petition Because PSNH Concedes That RPS Purchase Requirements End in 2025.**

PSNH concedes that RPS purchase requirements under RSA 362-F:3 end in 2025, absent some future legislative action. As stated by PSNH, "[i]f the legislature decides not to extend the RPS beyond 2025, the concomitant renewable portfolio standard purchase obligations would indeed end, notwithstanding the continuance of contractual obligations entered into by PSNH . . ." Obj. at 9. Because RSA 369-F:9, I grants the New Hampshire Public Utilities Commission ("Commission") jurisdiction to authorize REC contracts only to the extent of the RPS

requirements, and RSA 374-F:3, V(c) allows for recovery only of the costs of compliance with established RPS requirements, the Commission must dismiss PSNH's petition.

2. PSNH's Statutory Construction Arguments Do Not Refute That The RPS Ends In 2025.

PSNH's statutory construction arguments regarding RSA 362-F:9 are unpersuasive. First, PSNH argues that the phrase "to the extent of such requirements" contained in RSA 362-F:9, I modifies the phrase "default service needs" instead of the phrase "renewable portfolio requirements." Obj. at 7. This argument is an attempt to create an ambiguity where no ambiguity exists. The phrase "to the extent of such *requirements*" clearly modifies the previous phrase "renewable portfolio *requirements*." It would simply make no sense for the legislature to have used the two different words "needs" and "requirements" to describe default service needs. Instead, the legislature can be presumed to have used the same word "requirements" twice in the same sentence to describe the same subject -- renewable portfolio requirements.

Second, PSNH argues that, even if the phrase "to the extent of such requirements" modifies the phrase "renewable portfolio requirements" and those requirements extend only through 2025, PSNH may gamble that purchase requirements would not "totally disappear after 2025" and that it may make "[a] reasonable projection . . . that the [renewable portfolio] requirement would continue at the same, or higher minimum levels after 2025." Obj. at 7-8. This argument is nonsensical because, by statute, a reasonable projection of renewable portfolio requirements is limited to the extent of such requirements, and there is no such renewable portfolio requirement after 2025. Moreover, this argument fails when RSA 362-F:9, I is read in *pari materia* with RSA 374-F:3, V(c), which limits recovery to prudently incurred costs of *compliance* with renewable portfolio requirements. There simply can be no "compliance" with a

requirement, and no recovery for any such "compliance," when there is no requirement to be complied with. The renewable portfolio standard compliance requirements are set forth in RSA 362-F:3, and PSNH has conceded that these requirements terminate at the end of 2025.

Third, PSNH argues that the legislature would have included the words "until 2025" in RSA 362-F:9, I if the legislature had intended to disallow Commission authorization of REC purchase obligations beyond the expiration of the RPS requirement. The Commission, however, can only abide by the plain words that the legislature did include, and may not ignore them. *In re: Heinrich and Curotto*, 160 N.H. 650, 654 (2010). The phrase that limits the Commission's authority here is "to the extent of such requirements," which references the statutory renewable portfolio requirements in RSA 362-F:3, as these are the only renewable portfolio requirements contained in the statute. Because of this limitation, the Commission lacks authority to approve the PPA and must dismiss PSNH's petition.

Fourth, PSNH argues that the legislature "would not have described the law's requirements as the *Minimum* Electric Renewable Portfolio Standards, with an obligation for electricity providers to *meet or exceed* the requisite percentages" if the Commission could not authorize entry into a REC purchase obligation that extends beyond 2025. Obj. at 8. PSNH, however, fails to acknowledge that the requisite percentages in the quoted section actually exist only for the years 2008 through 2025 under RSA 362-F:3; there simply are no requisite percentages to exceed after 2025.

3. <u>The RPS Statute Does Not Repeal The Commission's Authority Under RSA 365:28</u>.

PSNH's claim that the Commission's continuing "authority to set-aside, alter, or amend the contract would likely make any agreement unfinanceable, contrary to the intent of the RPS law" is incorrect and misses the point. Simply stated as a matter of law, and as more fully set

forth in the Wood-Fired IPPs' motion, RSA 362-F did not repeal RSA 365:28 or RSA 374-F:3, V(c). As a consequence, these statutes must be read in *pari materia*, and an order approving a PPA must be subsequently reviewable under RSA 365:28 to give full effect to all statutes. The REC change in law provisions of the Laidlaw PPA have the effect of precluding the Commission from exercising this review with regard to its order in this docket. This is impermissible. Private contracting parties do not have the ability to alter the Commission's statutory jurisdiction, and neither does the Commission.

Because the PSNH petition asks the Commission to voluntarily relinquish its jurisdiction under RSA 365:28 with regard to REC purchases under the Laidlaw PPA, the Commission lacks authority to approve the PPA, and must dismiss PSNH's petition.

4. <u>The Filed Rate Doctrine is Inapplicable to REC Sales</u>.

PSNH's claim that the Commission's continuing jurisdiction under RSA 365:28 runs afoul of the federal "filed rate doctrine" is incorrect because that doctrine does not apply to RECs. The Wood-Fired IPPs' motion relates only to the change-in-law provisions of the PPA that define PSNH's purchase obligation for NH Class I RECs, a "product" that, unlike certain energy and capacity sales, is entirely State jurisdictional. The filed rate doctrine applies only to matters that are within the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). RECs are not FERC jurisdictional.

Section 201(b) of the Federal Power Act provides the FERC with regulatory jurisdiction over the "sale of *electric energy* at wholesale in interstate commerce." 16 U.S.C. §824(b) (emphasis supplied). FERC has expressly recognized that "RECs are separate commodities from the capacity and energy produced by [renewable energy generators]. If a state chooses to create these separate commodities, they are not compensation for capacity and energy" but represent

additional compensation for "environmental externalities." *California Public Utilities Commission; Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company*, 133 FERC ¶61,059 at P31 (October 21, 2010) (citing *American Ref-Fuel*, 105 FERC ¶61,004 at P23 (2003)). Because RECs are tradable commodities separate from electric energy and capacity that are created to satisfy State-imposed renewable energy policy mandates, REC sales provisions do not represent FERC jurisdictional rates or terms of service subject to the filed rate doctrine. PSNH's argument regarding the effect of the filed rate doctrine on the Commission's continuing jurisdiction over the PPA under RSA 365:28 therefore is inapposite and should be rejected.

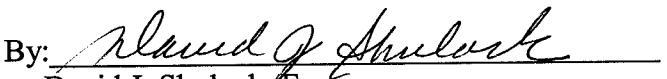
WHEREFORE, the Wood-Fired IPPs respectfully request that the Commission dismiss PSNH's petition, and that the Commission issue its order as soon as possible to aid settlement discussions scheduled for January 14, 2011.

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,

BROWN, OLSON & GOULD, P.C.

By: 

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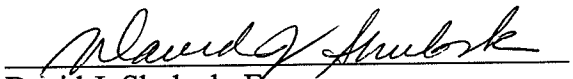
CERTIFICATE OF SERVICE

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: January 6, 2011



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