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 IPP'S MOTION FOR REHEARING

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") pursuant to RSA 541:3 and Puc 203.33, move the Commission for rehearing of the Commission's Order 25,213, Order Granting Conditional Approval (the "Approval Order").

INTRODUCTION

In the Approval Order the Commission found that the power purchase agreement ("PPA") with Laidlaw Berlin BioPower, LLC ("Laidlaw") submitted by Public Service Company of New Hampshire ("PSNH") for authorization and pre-approval of cost recovery was not in the public interest as defined in RSA 362-F:9, II, but that, if the PPA were properly conditioned, it would be substantially consistent with the statutory factors. Approval Order at 79 and 107. The Commission further ordered PSNH to submit a PPA that conforms to the terms of the Approval Order within 30 days. *Id.* at 107.

For the following reasons the Approval Order's conclusion that the conditioned PPA would meet the public interest is unlawful. First, it was error to imply a renewable energy certificate ("REC") purchase obligation in RSA 362-F:3 that extends beyond 2025. *See id.* at 74-76. Based upon this error, the Approval Order erroneously found that

"PSNH could reasonably project that the Class I renewable portfolio requirement for 2025 will continue in effect thereafter unless and until changed." *Id.* at 76. Second, the projection of PSNH's default service needs and purchase requirements contained in the Approval Order is based on the same conclusion, leading to the further error of conditionally approving a PPA that extends beyond the 2025 termination date of the renewable portfolio standard ("RPS") requirements. *See id.* at 79 and 107. Third, the Approval Order projects a REC requirement for PSNH in the early years of the PPA where none exists, by levelizing PSNH's REC purchase requirements over a 20-year period. The Approval Order then requires PSNH to purchase 400,000 RECs per year, more than PSNH requires for compliance during the early years of the PPA. *Id.* at 84-85 and 95. This condition is unlawful because, not only is there no authority to require ratepayers to fund REC purchases beyond the year 2025, when the RPS compliance requirement ends, there is no authority in RSA 362-F to levelize REC percentage requirements even within the remaining term of the RPS program or to require ratepayers to fund purchases in gross excess over the statutory percentages specified in RSA 362-F:3. Lastly, the Approval Order is unlawful because the Commission impermissibly waived its jurisdiction under RSA 365:28 by failing to place conditions on the change in law provisions of the PPA.

I. THE APPROVAL ORDER IS UNLAWFUL, UNJUST AND UNREASONABLE BECAUSE IT DETERMINES THAT THE RPS REC PURCHASE OBLIGATION EXTENDS BEYOND 2025, AUTHORIZES PSNH TO ENTER A REC PURCHASE AGREEMENT WITH A TERM EXTENDING BEYOND 2025, AND ALLOWS PSNH TO RECOVER FROM RATE PAYERS THE COST OF RECS ACQUIRED AFTER 2025.

A plain reading of RSA 362-F:3 demonstrates that, absent further legislative action, the RPS purchase obligation ends in 2025. The statute's legislative history

confirms this plain reading. The Approval Order is unlawful in ruling that a post-2025 REC obligation exists in RSA 362-F:3, in finding that PSNH could reasonably project that the Class I purchase requirement would continue in effect after 2025, in authorizing PSNH to enter a modified PPA with a term extending beyond 2025, and in pre-approving cost recovery for RECs to be purchased after 2025.

A. The Plain Reading of RSA 362-F:3 Demonstrates that, Absent Further Legislative Action, the REC Purchase Obligation Ends in 2025.

The Approval Order erred in concluding that RSA 362-F:3 "does not speak directly to the issue of whether the obligation to obtain and retire certificates [*i.e.*, RECs] persists beyond 2025." *See* Approval Order at 73 and 76. On its face, RSA 362-F:3 speaks directly and unambiguously to this issue.

RSA 362-F:3 creates and describes the extent of the RPS compliance obligation and sets forth the REC purchase obligation for each and every year of the RPS program. RSA 362-F:3 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***." Emphasis supplied. RSA 362-F:3. This language precedes a table of specific years and specific percentages for the four classes of certificates. RSA 362-F:3 creates a purchase obligation only for the years specified in the table, at the percentages specified in the table. Because the table specifies only the years 2008 through 2025, and specifies no year or percentage purchase obligation beyond 2025, the plain and ordinary meaning of RSA 362-F:3 is that there is no certificate purchase obligation beyond 2025.

B. RSA 362-F:3 is Unambiguous With Regard to the End of the REC Purchase Obligation in 2025; Hence, It Was Error to Resort to Legislative History to Hold that a REC Purchase Obligation Exists Beyond That Year. Even so, the Legislative History Conclusively Demonstrates that the REC Purchase Obligation Ends in 2025.

Despite the unambiguous meaning of RSA 362-F:3, the Approval Order engages in a partial review of legislative history to imply an REC purchase obligation that persists beyond the date set in statute. Because there is no ambiguity in RSA 362-F:3, and because the plain meaning of RSA 362-F:3 can be harmonized with the remainder of the statute, it was error to resort to legislative history to interpret the intent of that provision. *Appeal of Verizon New England, Inc.*, 153 N.H. 50, 63 (2005), *citing DeLucca v. DeLucca*, 152 N.H. 100, 103 (2005); *see also Appeal of Public Service Company of New Hampshire*, 125 N.H. 46, 52 (1984); and *Petition of Public Service Co. of N.H.*, 130 N.H. 265, 282-83 (1988). Even assuming, for the sake of argument that an ambiguity exists, the legislative history of RSA 362-F demonstrates that the drafters of the RPS statute specifically intended to *remove* a continuing obligation from the statutory language, not to create one.

The legislative history of the RPS statute involves consideration of two bills, in two separate legislative sessions: 2006 and 2007. Senate Bill 314 was filed in the 2006 legislative session and did not become law. House Bill 873, filed in the 2007 legislative session, was modeled on SB 314 and became RSA 362-F.[1] See Exhibit 1. As originally

[1] According to the prime sponsor of House Bill 873, Rep. Suzanne Harvey:

> RPS is not new to the legislature. Last year I filed a bill in the House to establish a study committee that would look at an RPS for NH. Sen. Fuller Clark and others co-sponsored that bill. The senator sponsored a Senate bill to establish an RPS in the state. I joined others in co-sponsoring that bill.
>
> My study committee bill was the vehicle used in a committee of conference to establish the state Energy Policy Commission chaired by our colleague, Rep. Garrity. The Senate passed Sen. Fuller Clark's bill with an amendment so it could be forwarded to

introduced, Senate Bill 314 required the Commission to "establish a baseline that represents the minimum percentage of load of renewable energy resources that each electricity supplier must provide in year one of the program. The baseline requirement for each provider shall increase by an additional 0.5 percent in each year." Exhibit 2. The 2006 Senate subsequently amended this provision of Senate Bill 314. The version of SB 314 adopted by the Senate specified different percentage requirements, for each and every year of the program, for four different classes of certificates. As with RSA 362-F:3, these requirements were presented in the form of a table. The table in Senate Bill 314, as amended, described the yearly purchase obligation as follows:

	2007	2008	2009	2010	2011	2012	2013	***Thereafter***
Class IA+/or C	0.5%	1%	1%	1%	2%	3%	4%	4%
Class IB	0.01%	0.02%	0.04%	0.08%	0.15%	0.20%	0.30%	0.3%
Class IIA	3%	4%	5%	6%	6%	6%	6%	6%
Class IIB	1%	1.5%	1.5%	1.5%	1.5%	1.5%	1.5%	1.5%

Exhibit 3. Emphasis supplied.

As can be seen from the table, the amended version of Senate Bill 314 would have created an RPS program of indefinite duration by specifying percentage requirements in a column of the table titled, "Thereafter," following the column of percentage requirements for the year 2013. This table would have held the percentages for the year 2013 constant

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the ST&E committee in the House, where it would receive more attention. It did not pass in the House.

Last year's bill has been thoroughly worked over and is a more complete bill. In addition this year, we have an economic impact study from UNH that you've received.

It's important for you to know that there have been numerous stake holder meetings over the last months – this term and last term – to gather input from the various organizations that would be affected by an RPS. The bill's sponsors – along with DES, the PUC and the OEP --- listened to this input, engaged in productive dialogues with the participants, and drafted the bill you have before you.

Exhibit 1 (Written testimony of Rep. Suzanne Harvey before the House Science, Technology, and Energy Committee on March 8, 2007).

into future years. This amended version of Senate Bill 314 was voted inexpedient to legislate by the House. House Journal No. 15 at 2006 (April 26, 2006).

Work on the RPS bill continued over the summer and fall of 2006, with the sponsors of the legislation working with the Commission, the Department of Environmental Services, the Office of Energy and Planning, and ratepayer and industry representatives to reformulate the language of the bill.[2] Robert Scott and Joanne Morin of the Department of Environmental Services took a leadership role in compiling stakeholder input and drafting of the RPS legislation over the course of the 2006 and 2007 legislative sessions.[3]

In the 2007 legislative session, as the drafters "shaped and reshaped and reshaped"[4] House Bill 873, the drafters revised the table containing the RPS purchase obligations contained in Senate Bill 314. In doing so, the drafters specifically removed the "Thereafter" column that would have created a perpetual purchase obligation and

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[2] Exhibit 4, Senate Energy, Environment and Economic Development Committee Hearing Report, April 17, 2007 at 2 (Senator Fuller Clark: ". . . there were fourteen months put into crafting this legislation and many, many meetings with a variety of stakeholders to bring forth a very complex bill that we have before you today.") and at 3 (Representative Harvey: "As the Senator said, we had hours and hours of stakeholder meetings over many, many months. And among the people who participated in that, including the sponsors and other representatives, we had representatives, we had representatives from the utilities, trade association, renewable developers, energy suppliers and environmental groups, plus significant help from DES, the PUC, the Office of Energy Planning, and the Office of Consumer Advocate. So we had a real big cross-section of stakeholders from all different angles coming to say what they would like in the bill, every one was listened to, all input was considered, and we looked at what was the best for the interest of the Granite State.").

[3] Compare Exhibit 5, Senate Energy, Environment and Economic Development Committee Hearing Report, February 14, 2006 at 7 (Senator Fuller Clark: "Who wrote this language? Um, well, it was put together by Joanne Morin and Bob Scott in DES. But we also had, along the way, we've probably had three or four or five different work sessions and we have had different stakeholders suggest language. A lot of it was taken from Rhode Island, some taken from New Jersey, and some taken from Connecticut, folded in to create the bill that you have before you today.") with Exhibit 5, Senate Energy, Environment and Economic Development Committee Hearing Report, April 17 at 1(Senator Fuller Clark: And so I just wanted – and the first part of the hearing testimony will be an explanation for the Committee members from both Joanne Morin, from the Department of DES, who has provided extraordinary leadership as we have shaped and reshaped and reshaped this legislation . . .").

[4] Exhibit 4, Senate Energy, Environment and Economic Development Committee Hearing Report, April 17, 2007 at 1.

replaced it with a column specifying percentage obligations for the years 2015 through 2025, only. Exhibit 6 (House Bill 873 as introduced). This column was amended by the House before being adopted by the Senate. Exhibit 7 (House Bill 873 as amended by the House); *see also* House Journal No. 13 at 1245-1252 (April 5, 2007); *see also* RSA 362-F:3. In debating, amending, and enacting House Bill 873, the legislature never reinserted the "Thereafter" column that was removed from Senate Bill 314, and did not create the continuous purchase obligation that the Approval Order has erroneously read into RSA 362-F:3.

The removal of language creating an RPS program of indefinite duration was purposeful, as demonstrated above, and differentiates the New Hampshire RPS from the RPS programs of other states. As stated by Rep. Harvey:

> Oh, I think that each [state] is different. Every state customizes, number one, what they ... what they will accept as a renewable energy for credit, and also customizes the percentages, ***when they start and where they end, and at what year.***

Emphasis supplied. Exhibit 4 (Senate Energy, Environment and Economic Development Committee Hearing Report, April 17 at 5). According to Rep. Harvey, "our proposed RPS program starts at a baseline percentage of renewables required, starting in 2008 and **goes out to 2025** . . ." Emphasis supplied. *Id.* at 4.

The purposeful intent of this differentiation is confirmed by comparing RSA 362-F to the other state RPS statutes upon which the New Hampshire statute is based. The drafting of Senate Bill 314 was based upon the RPS statutes of Rhode Island, New Jersey, and Connecticut, which were "folded in to create" Senate Bill 314. Exhibit 5 (Senate Energy, Environment and Economic Development Committee Hearing Report, February 14, 2006 at 7). House Bill 873 was "crafted after looking at the successes and

strengths of the other RPS legislation . . . in New England . . . New Jersey and New York . . ." Exhibit 5 (Senate Energy, Environment and Economic Development Committee Hearing Report, April 17, 2007 at 2).

If the drafters of House Bill 873 had intended to create an RPS program of indefinite duration, then the other statutes that these drafters reviewed provided clear examples of how to do so. For example, the drafters of the Rhode Island program used "each year thereafter" language to create a program that continues indefinitely. *See* R. I. Gen. Laws § 39-26-4(a)(v) (2006) ("In 2020 ***and each year thereafter the minimum renewable energy standard established in 2019 shall be maintained*** unless the Commission shall determine that such maintenance is no longer necessary for either amortization of investments in new renewable energy resources for maintaining targets and objectives for renewable energy.") and R. I. Gen. Laws § 39-26-4(5) (2007) (same). Emphasis supplied. The Connecticut legislature used "on or after" language to create a perpetual program. *See* Conn. Gen. Stat. Ann. § 16-245a (1) (2004) ("***On and after*** January 1, 2010, not less than seven per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources . . .") and Conn. Gen. Stat. Ann. § 16-245a (15) (2007) ("***On and after*** January 1, 2020, not less than twenty per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources . . ."). Emphasis supplied. Like the Rhode Island program, the Massachusetts RPS program is also one of indefinite duration, with a proviso that its division of energy resources is empowered by the statutory language to bring an end to the program. The relevant statutory language in Massachusetts states: "Every retail supplier shall provide a

minimum percentage of kilowatt-hours sales to end-use customers in the commonwealth from new renewable energy generating sources according to the following schedule: . . . (ii) an additional one-half of 1 percent of sales each year thereafter until December 31, 2009; ***and (iii) an additional 1 percent of sales every year thereafter until a date determined by the division of energy resources.***" Mass. Gen. L. ch. 25A, § 11F(a) (2007). Emphasis supplied. The New Hampshire statute is clearly and purposefully different from these other programs, both in terms of ending the RPS Compliance obligations in 2025 and in limiting the Commission's authority to an investigatory and advisory function, as opposed to having authority to determine whether and when the REC purchase obligation is to end.

Indeed, it was the Commission's apparent understanding, prior to issuance of the Approval Order that the legislature intended to end the RPS in 2025. Soon after House Bill 873 became law, the Commission opened a rulemaking docket and adopted the Puc 2500 rules to implement the RPS program. The Commission's own rules implement an RPS program that ends in 2025. In its rules, the Commission defines "Portfolio standard" to mean "the minimum renewable energy certificate obligations pursuant to Puc 2503.01." N.H. Code Admin. R. Puc 2502.26. In Puc 2503.01, the Commission states REC purchase requirements only for the years 2008 through 2025. The Commission states criteria pursuant to which the purchase requirements may be modified, but none of the modifications described in the rule would indefinitely extend RPS compliance obligations beyond 2025. N.H. Code Admin. R. Puc 2503.01. Similarly, the Commission published a description of the RPS program and REC purchase requirements on the Commission's website. The Commission's website

describes an RPS program that ends in 2025, one that requires the purchase of RECs by class and by year - but only for the years 2008 through 2025. Exhibit 8.[5] Additionally, the Commission has launched its 2011 investigation of the RPS program, holding its first workshop on March 15, 2011. The Commission Staff asked interested parties to comment on whether the Class I and Class II requirements should be ***extended*** beyond 2025, and published the minutes of the meeting and written comments on the Commission's website. *See e.g.,* Exhibit 9, Minutes of March 15, 2011 RPS Review Workshop.[6]

The Approval Order has effectively added a "Thereafter" column to the table in RSA 362-F:3, and has created the very purchase obligation of indefinite duration that was rejected by the legislature when it refused to enact Senate Bill 314 into law. *See* Approval Order at 108 (Below, *dissenting*). This rewrite of the RPS statute is contrary to its legislative history. As demonstrated above, removal of the "Thereafter" language from RPS legislation was purposeful, with the intent of ending the RPS compliance obligation unless the legislature takes action to continue the RPS program beyond 2025, rather than leaving this policy decision to the Commission to make. The Approval Order errs by, in effect, adding words to the statute that the drafters specifically removed. *See Petition of George*, 1609 N.H. 699, 702 (2010) (intent is not interpreted by adding language that the legislature did not see fit to include). The Commission must, instead, apply the plain meaning of RSA 362-F:3, not authorize REC purchases beyond 2025, and limit its approval of cost recovery from ratepayers to that date, as any other costs are not

[5] http://www.puc.nh.gov/Sustainable%20Energy/Renewable_Portfolio_Standard_Program.htm

[6] http://www.puc.nh.gov/Sustainable%20Energy/RPS/Work%20Session%201%20-%20Minutes%20031511.pdf

costs of compliance with the RPS . RECs purchased beyond 2025 are at the risk of the contracting parties, and these purchases cannot be approved for ratepayer recovery by the Commission. See Argument II, A. below.

C. The Approval Order Erred in Implying a REC Purchase Obligation After 2025, Where the Legislature Expressly Ended the Obligation in 2025 and an End of the REC Purchase Obligation in 2025 Harmonizes with the Remainder of the Statute and Does Not Result in an Absurd or Unjust Result.

The stated purpose of the RPS statute is to "stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities." Approval Order at 74; *see also* RSA 362-F:1. The Approval Order speculates that this goal would be undermined if the REC purchase obligation were to end in 2025, because "[a]s 2025 approaches, the term of a multi-year purchase agreement could become so short that renewable energy projects could not realistically be financed and built." Approval Order at 75.[7] The Approval Order overlooks, however, that the RPS statute is designed to *reach* the percentages stated in RSA 362-F:3 *by* the years stated in that section, not for developers of yet more new generation to enter into twenty-year (as opposed to shorter multi-year) contracts during the latter years of the program. The Commission itself recognized that "the legislative debate [regarding House Bill 873] was conducted in the context of achieving a goal of 25% renewables ***by* 2025** and focused on the trajectory for achieving the Governor's '25 [***by***] **25**' goal." Emphasis supplied. *Id.*

Moreover, the Approval Order reads the multi-year contract provision of the statute, RSA 362-F:9, out of context, and not in harmony with the rest of the statute, and

[7] The Approval Order improperly conflates the RSA 362 F:1 purpose section of the statute with the RSA 362-F:5 directive to take into account "the importance of stable long-term policies" when making recommendations to the legislature under that latter section.

not in harmony with RSA 374-F:3, V(c). The multi-year contract provision in RSA 362-F:9 creates a voluntary process for distribution utilities to obtain pre-approval of prudent RPS compliance costs in their distribution rates under RSA 374-F:3, V(c). *In re: Public Service Company of New Hampshire*, Docket DE 08-077, Order No. 24, 965, 94 NH PUC 209, 218-19 (May 1, 2009). In Order 24,965, the Commission stated:

> We agree with Staff that the reason the statute requires our approval of these multi-year agreements is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service rates. If PSNH had intended to use the agreements "below the line," the Company would not have had to seek the Commission's approval. Therefore, we disagree that PSNH was required to seek approval from the Commission before it could enter into the subject agreements. If for some reason we were to find that the contracts were not in the public interest, PSNH would still be bound by the contracts, but would not be allowed to recover the associated costs from its customers.

Id.

This voluntary review and approval of multi-year contracts applies only to a subset of the parties that are subject to the RPS compliance obligation laid out in RSA 362-F:3, that is, to electric distribution utilities. PSNH and all other parties subject to the RPS purchase obligation remain free to enter into REC contracts of any duration, even those that go beyond 2025, without Commission approval. *See id.* Application of the plain meaning of RSA 362-F:3 and 362-F:9, I, then, would prohibit the Commission only from pre-approving for rate recovery multi-year distribution utility contracts that exceed the extent of the compliance requirements set forth in RSA 362-F:3, meaning that distribution utilities would have to demonstrate the prudence of such speculative purchases after the fact, such as in PSNH's energy service rate proceedings. A distribution utility, like any other retail provider of electricity subject to the statutory REC purchase obligation, must bear the risk of recovering the costs of REC purchases that exceed the statutory RPS compliance requirements. This is not an absurd, unjust, or

irrational result. While the guarantee extended to distribution utilities under RSA 362-F:9, I and RSA 374-F:3, V(c) is limited to the extent of RPS compliance requirements, the distribution utilities are guaranteed to recover their prudent RPS compliance costs.

Further, applying RSA 362-F:3 as written does not, as reasoned by the Approval Order, require the Commission to place a "temporal restriction on multi-year agreements not stated [in RSA 362-F:9, I]." Approval Order at 74-75. Rather, the restriction is explicitly stated in RSA 362-F:9, I: the Commission may only authorize entry into "multi-year purchase agreements . . . for certificates . . . to meet reasonably projected renewable portfolio requirements and default service needs ***to the extent of such requirements.***" RSA 362-F:9, I. Reference to the extent of RPS purchase requirements, as explicitly set forth in RSA 362-F:3 by specific year and percentage, does not constitute reading a temporal restriction into the statute; rather it is giving effect to the plain meaning of the statute as written. Indeed, it is the Approval Order that does injustice to the RSA 362-F wording chosen by the legislature. In addition to effectively adding "Thereafter" language in RSA 362-F:3, the Approval Order implicitly seeks to alter the language of RSA 362-F:9, I, by removing the "extent of such requirements" language and changing "multi-year agreement" into "long-term" or "20-year agreement."

The Approval Order further errs in creating a perpetual RPS requirement based on speculation that applying RSA 362-F:3 as written would make Commission review and reporting in 2025 a meaningless exercise, because such speculation ignores the legislature's selected approach to monitoring and modifying the RPS program. The legislature provided for three different reviews of the RPS program so that the legislature could make adjustments to the percentages if necessary and desirable. *See* RSA 362-F:5.

Read in its entirety, the wording and structure of RSA 362-F:5 evince the intent that the legislature wants to decide for itself whether to extend the RPS compliance obligation beyond 2025, perhaps in 2012, 2019, or 2026, after receiving recommendations from the Commission as to "what if any mid-course corrections are appropriate." *See* Order 25,213 at 112 (Below, *dissenting*).

The legislative history supports this plain reading of the statute.[8] The legislature's selected approach allows the Commission to make recommendations regarding the purchase obligations beginning this year - a full 14 years before the end of the program. If the legislature were not to authorize an extension beyond 2025 following the commission's 2011 review and report, the legislature could authorize such an extension following the commission's 2018 report. Even a review and report by the Commission in November report would allow for action on a bill in early 2026 to require REC purchases in that year, if an extension had not been earlier authorized by the legislature. Hence, the Commission cannot presage the content or usefulness of a review and report to be conducted in 2025 and declare it a meaningless exercise today. Such a conclusion is simply not supported or supportable by the record, or by any reasonable reading of the RPS statute.

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[8] Exhibit 4, Senate Energy, Environment and Economic Development Committee Hearing Report, April 17, 2007 at 7 (Scott: To assure again, that we get the percentages right, how we do this right, as mentioned, there are three required review periods where the Public Utilities Commission is required to open a docket and look at the program and make sure it's doing what we expect it to do; make sure the percentages are correct, make sure the prices make sense for New Hampshire; the costs, if there are any, or the benefits. And that's required at three different times: 2011, 2018 and 2025; and they're required to make recommendations to the General Court. And it's our hope to be – again, we know this is probably not perfect, we want to move ahead; we spent a lot of time on this, and this is our hope to, ok, if we do need to make a correction there's a mechanism in place.") and *id.* at 9 (Morin: The changes that were made were that the percentage for new renewables was increased over time; the percentage had stopped at 2015, it was moved up a little bit sooner, I think by one year, and increasing ***out to 2025***, balanced by PUC reviews to see how the cost of RECs are going and see if this [is] working in the way we thought it would, economically, so that we feel we have sort of a mechanism if it doesn't work as predicted. . . . we did add two more PUC reviews as well; people really thought that was a good mechanism to keep tabs on the bill and be able to adjust it over time."

II. THE APPROVAL ORDER IS UNLAWFUL IN ASSERTING THE JURISDICTIONAL AUTHORITY UNDER RSA 362-F TO APPROVE A CONTRACT WHOSE TERM FOR THE PURCHASE OF RECS AND THE RECOVERY OF THE COSTS OF THOSE RECS FROM RATEPAYERS EXTENDS BEYOND 2025.

"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). Contrary to the limited authority and jurisdiction granted the Commission under 362-F to approve contracts and cost recovery through 2025, the Approval Order indicates the Commission will approve a PPA requiring REC purchases by PSNH beyond 2025 and approve cost recovery of such purchases from ratepayers.

A. The Commission Lacks Jurisdiction and Authority to Authorize and Approve Cost Recovery for REC Purchases Beyond 2025 and the Levelization of the REC Purchase Obligation.

The scope of the Commission's authority to authorize PSNH to enter into a REC purchase contract under RSA 362-F is derived from RSA 362-F:9, I. This is the only statute that permits the Commission to authorize PSNH "to enter into multi-year purchase agreements" for RECs "in conjunction with . . . purchased power agreements," and it only permits the Commission to authorize contracts necessary "to meet reasonably projected renewable portfolio requirements and default service needs *to the extent of such requirements* . . . " RSA 362-F:9, I. Emphasis supplied. RSA 374-F:3, V(c) is the only

statute that permits the Commission to approve the recovery by distribution companies of the cost of such contracts from their ratepayers, and this statute only permits the recovery in rates of "prudently incurred costs arising from *compliance with the renewable portfolio standards* of RSA 362-F . . ." RSA 374-F:3, V(c). Renewable portfolio compliance standards are set forth in RSA 362-F:3, and these RPS compliance standards end in 2025. RSA 362-F:3 and Argument I above. There is no legislative grant of authority or jurisdiction to the Commission to authorize and approve cost recovery for multi-year contracts for REC purchases beyond the extent of the requirements set forth in RSA 362-F:3. Because PSNH's compliance obligation to purchase RECs ends in 2025 under RSA 362-F:3, the Commission lacks authority to approve and provide cost recovery for REC purchases that would occur after that date; hence, the Approval Order is unlawful in asserting the Commission's authority and jurisdiction to approve such a contract.

Likewise, the Commission lacks authority and jurisdiction under RSA 362-F to levelize a projection of PSNH's REC purchase requirements. The Approval Order is unlawful in this regard because it uses the Commission's projection of PSNH's RPS requirements for the 20-year term of the PPA (that is. both pre- and post-2025 REC purchase obligations) levelizes this projection over the twenty-year PPA term, allows PSNH to purchase the levelized annual amount rather than the amount of RECs required to meet the statutory compliance requirement applicable to each year of the contract term, and then binds ratepayers to fund the purchase of RECs not required for compliance with PSNH RPS requirements.

There is no grant of authority to the Commission in RSA 369-F:9 to levelize any REC requirements or projections from year-to-year over a contract term. *Cf.* RSA 362-

A:4 and 18 C.F.R. §292:304(d) (authorizing avoided cost rates to be calculated for a term, thereby authorizing levelized avoided cost rates under the Public Utility Regulatory Policies Act of 1978). Levelizing under the Approval Order only allows PSNH to purchase more RECs in 2014 than are required by RSA 362-F:3, at a detriment to PSNH ratepayers and in violation of RSA 362-F:9, I. Indeed, the plain wording of RSA 362-F:9, I, which permits the approval of multi-year REC purchase contracts only to the extent of RPS compliance requirements, demonstrates a legislative intent to prohibit such levelization. Furthermore, because the excess RECs that PSNH will purchase in the early years of the PPA term are not required for compliance with the RPS requirements set forth in RSA 362-F:3 during those years, the Commission lacks authority and jurisdiction under RSA 374-F:3, V(c) to pre-approve for ratepayer recovery the cost of these excess RECs.

For the reasons stated above, the Approval Order erred in finding that PSNH could reasonably project that the Class I RPS requirement for 2025 will continue in effect thereafter and by authorizing PSNH to purchase RECs on a levelized basis and therefore in excess of its actual RPS compliance requirement.

B. The Commission Lacks Authority and Jurisdiction to Approve Change in Law Provisions in a Contract Under RSA 362-F which Fail to Give Effect to the Commission's Authority under RSA 365:28.

In the Approval Order, the Commission effectively asserts its right to waive, ignore or otherwise not apply the plain meaning of RSA 365:28 to contracts under RSA 362-F and RSA 374-F: V(3). Consequently, for the twenty-year term of the conditioned PPA Articles 1.44, 1.57, 8.1, and 23.1 of the proposed contract will unlawfully insulate Laidlaw and PSNH from legislative changes in the RPS program and prevent the

Commission and future Commissions from revisiting critical terms of its approval, including the number of NH Class I RECs to be purchased, the purchase price for those RECs, and the reasonableness of the amount of the REC price to be recovered from ratepayers in the future, either on the Commission's own motion or in response to any new legislative directives. However, RSA 362-F, 374-F:3, V(c), and 365:28, read in *pari materia,* prohibit the Commission from creating non-modifiable REC purchase requirements and insulating the contracting parties from future legislative action, at ratepayers' expense.

RSA 365:28 grants the Commission broad authority to revisit and "alter, amend, suspend, annul, set aside, or otherwise modify" any of its 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). This was intentional. Whenever the legislature has intended to curtail the Commission's jurisdiction under RSA 365:28, the legislature has done so explicitly.[9] The lack of an explicit repeal or modification of the Commission's jurisdiction under RSA 365:28 demonstrates that the legislature intended to require the Commission to retain its jurisdiction over orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c).

In fact, read in *pari materia,* RSA 362-F, RSA 374-F:3, V(c), and RSA 365:28 bar the Commission from approving any RSA 362-F contract containing terms that 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

[9] *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).

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.

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 the prudently incurred costs of compliance 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. Further, between the commencement of the RPS program and its termination in 2025, 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 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 362-F:9 and RSA 374-F:3, V(c) to respond to any changes in law following such reviews (or otherwise) or to any other circumstances affecting the public interest.

Unlike the RPS programs in other states, New Hampshire did not provide for vesting of statutorily-created REC purchase obligations underlying multi-year REC purchases and recovery of related costs. For example, Massachusetts law provides that "If RPS requirements terminate . . . contracts already executed and approved by the Department will remain in full force and effect." 220 CMR 17:08(3). The New Hampshire legislature could have provided for similar vesting by making an explicit statement similar to the one quoted above, or it could have authorized the Commission to provide for such vesting, but the New Hampshire legislature did not.

The New Hampshire legislature also could have authorized such vesting by qualifying the Commission's jurisdiction under RSA 365:28. Again, the legislature did not. Instead, the New Hampshire legislature left intact the Commission's jurisdiction under RSA 365:28.

The Approval Order seeks to avoid the import of the application of RSA 365:28 by stating that, if the Commission "were to claim unlimited authority to revise contractual obligations such as those contained in the [PPA] after [approving] them, the resulting uncertainty would halt the use of [contracts] for the procurement of power and RECs. Such uncertainty would be harmful to both utilities and their customers, and would ultimately be detrimental to the development of renewable energy facilities in New Hampshire." Order 25,192 at 8; *see also* Approval Order at 17. Notwithstanding that view, RSA 362-F did not repeal RSA 365:28 or RSA 374-F:3, V(c) and enacted no

provision allowing the Commission to waive such authority. Compare footnote 9 and statutes cited therein. As a consequence, these statutes must be read in *pari materia*, and an order approving a contract under RSA 362-F must be reviewable under RSA 365:28 to give full effect to all relevant statutes. Therefore, the Commission lacks jurisdiction and authority to approve RSA 362-F contracts which do not give effect to the Commission's continuing authority and jurisdiction under RSA 365:28.

C. The Commission Lacks Authority to Authorize and Approve Cost Recovery for RECs that are not Required for Compliance with the New Hampshire RPS.

The change in law provisions in the PPA submitted by PSNH require the present approval of the purchase of, and cost recovery for, RECs produced by the Laidlaw power plant notwithstanding any future legislative or regulatory changes that would revise, replace, or displace the New Hampshire RPS program and New Hampshire RECs. *See, e.g.,* PSNH Exhibit 2 at Art. 1.8 (including changes by preemption, displacement or substitution), Art. 1.57 (providing for payment if RSA 362-F is preempted by federal law). These changes in law provisions, which were approved in the Approval Order as acceptable in a compliance contract filing, also require the present approval for the purchase of, and cost recovery for, renewable attributes that do not qualify for compliance with the New Hampshire RPS, at prices that may not be permissible under the New Hampshire RPS, if the statute is amended, repealed, or displaced. *See e.g., id.* at Art 1.44 (NH Class I RECs include RECs that would have been produced regardless of subsequent changes in law and hence may not be Class I RECs) and Art. 1.57 (payment may never drop below the alternative compliance payment amount in effect on the date of the PPA, regardless of subsequent changes in law, including changes that would render

the Laidlaw RECs ineligible for New Hampshire Class I). There is nothing in RSA 362-F:9, I or RSA 374-F:3, V(c) that allows the Commission to authorize the purchase of and approve for cost recovery anything but the costs of compliance with New Hampshire's RPS statute. If the purchase is for something other than compliance with the New Hampshire RPS statute, then the Commission may not pre-approve cost recovery for these items by authorizing entry into the purchase obligation.

For the foregoing reasons, the Wood-Fired IPPs respectfully request rehearing of the Approval Order and ask the Commission to issue an order consistent with the foregoing and applicable to any compliance contract filing to be made in this docket.

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 for Rehearing to be filed electronically and with the Commission and served upon the persons identified on the attached Service List in accordance with N.H. Admin. Code Rules PUC 203.11.

Date: May 17, 2011

David J. Shulock, Esq.