

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket No. DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Power Purchase Agreement with
Laidlaw Berlin BioPower, LLC

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
OBJECTION
TO
WOOD-FIRED IPPs' MOTION FOR REHEARING**

Pursuant to Rule Puc §203.07(f), Public Service Company of New Hampshire ("PSNH") hereby objects to the Wood-Fired IPPs' Motion for Rehearing dated May 17, 2011. By that Motion, the Wood-Fired IPPs request that the Commission grant rehearing of its decision in Order No. 25,213.

PSNH objects to the Motion, as it does not allege sufficient good reason for rehearing or reconsideration; therefore it should be denied. RSA 541:3.

In support of this Objection, PSNH says the following:

I. Introduction

Although the Wood-Fired IPPs' Motion for Rehearing totals 149 pages (including cover letter and exhibits), it merely rehashes issues and arguments that the Commission has already considered. When boiled down, the Motion's various arguments are grounded in three claims:

1. The Legislature enacted a Renewable Portfolio Standard law, RSA Chapter 362-F, which ramps up to the requirement that in 2025, 23.8% of the electricity used

in the state come from renewable sources, then, in 2026, that requirement completely disappears (the “2025 Issue”);

2. Parties to a Commission-approved agreement are never entitled to finality, because RSA 365:28 provides the Commission with unlimited authority to alter, amend, suspend, annul, set aside, or otherwise modify any Order (the “Unlimited Authority Issue”); and
3. The Commission lacks authority and jurisdiction under RSA 362-F to levelize a projection of PSNH's REC purchase requirements

The first two these claims were previously carefully reviewed and considered by the Commission in its Order No. 25,213, “Order Granting Conditional Approval” dated April 18, 2011, whereby it conditionally approved the Power Purchase Agreement submitted for review by PSNH, as well as in Order No. 25,192, “Order on Pending Motions” dated January 14, 2011.

The last claim is legally incorrect, as RSA 362-F:9 expressly recognizes that there may be different ways to “approach” implementation of the Renewable Portfolio Standard requirements. The Commission was granted authority to review and approve multi-year purchase agreements with renewable energy sources “if it finds such agreements or such an approach, as may be conditioned by the commission, to be in the public interest.”

II. Discussion

a. The Law

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *see O’Loughlin v. N.H. Personnel Comm’n*, 117 N.H. 999, 1004 (1977), or by identifying specific matters that were “overlooked or mistakenly conceived” by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *See Connecticut Valley Electric Co.*, Order No. 24,189, 88 NH PUC 355, 356 (2003);

Comcast Phone of New Hampshire, Order No. 24,958 (April 21, 2009); and *Public Service Co. of New Hampshire*, Order No. 25,168 (November 12, 2010, issued earlier in this docket).

b. The Facts

A careful review of the Motion reveals that the first two grounds enumerated above forth for reconsideration have been previously raised repeatedly by the Wood-Fired IPPs and are mere reformulations of the Wood-Fired IPPs' previous arguments. These issues have also been addressed repeatedly by the Commission in Order No. 25,192 and/or Order No. 25,213.

The Wood-Fired IPPs merely reiterate previous claims that were set forth in their Motion to Dismiss dated December 13, 2010 (and docketed on December 15, 2010).¹ PSNH duly responded to that prior Motion to Dismiss by the filing of its "Objection to the Wood-Fired IPPs' Motion to Dismiss" dated December 23, 2010. PSNH refers the Commission to that prior Objection, and seeks leave to incorporate by reference the contents thereof in this instant Objection.

Moreover, the Wood-Fired IPPs further raised and addressed the issues contained in the instant Motion for Rehearing when they filed their "Reply to PSNH's Objection to Wood-Fired IPPs' Motion to Dismiss" dated January 6, 2011.²

The Wood-Fired IPPs again raised both the 2025 Issue and the Unlimited Authority Issue in their "Closing Statement" dated February 14, 2011.³

¹ "[T]here is no requirement for the purchase of RECs after 2025 in RSA 362-F, and the Commission cannot approve cost recovery . . . for non-existent REC purchase obligations." Wood-Fired IPPs' Motion to Dismiss, p. 2 (December 13, 2010). "[R]ead in *pari materia*, RSA 362-F, 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." *Id.*

² "[T]here is no such renewable portfolio requirement after 2025," and "[t]here simply can be no 'compliance' with a requirement, and no recovery for any such 'compliance' when there is no requirement to be complied with." Wood-Fired IPPs' Reply to PSNH's Objection to Wood-Fired IPPs' Motion to Dismiss, pp. 2-3 (January 6, 2011). "[A]n order approving a PPA must be subsequently reviewable under RSA 365:28 to give full effect to all statutes." *Id.* at 4.

³ "After 2025, there is no requirement for a utility to 'project.'" Wood-Fired IPPs' Closing Statement, p. 1 (February 14, 2011). "RPS statute does not permit . . . the Commission to obligate PSNH ratepayers to make secure, never changing subsidy payments through 2025, divorced from legislation changes or Commission review under 365:28." *Id.* at 4.

The Wood-Fired IPPs raised the very same issues in a previous “Motion for Rehearing” dated February 14, 2011.⁴ (PSNH filed an “Objection to Wood IPPs’ Motion for Rehearing” on February 16, 2011, refers the Commission to that prior Objection, and seeks leave to incorporate by reference the contents thereof in this instant Objection.)

Thus, the issues contained in the instant Motion for Rehearing have been raised by the Wood-Fired IPPs in at least four other filings in this proceeding over the course of five months.

The Commission initially dealt with these issues in its “Order on Pending Motions,” Order No. 25,192 dated January 14, 2011. In Order 25,192, the Commission denied the Wood-Fired IPPs’ Motion to Dismiss. With respect to the Unlimited Authority Issue, the Commission held:

[W]e disagree with the Wood-Fired IPPs’ argument regarding the interplay of RSA 365:28 and RSA 362-F:9. If we were to claim unlimited authority to revise contractual obligations such as those contained in the PPA after we approved them, the resulting uncertainty would halt the use of PPAs 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.

Id. In fact, the Wood-Fired IPPs’ Motion at p. 20 refers back to this very Commission holding. The instant Motion presents no new evidence, nor does it identify any matters that were overlooked or mistakenly conceived by the Commission in its decision in Order No. 25,192. In Order No. 25,213, the Commission noted, “In Order No. 25,192, we rejected the Wood-Fired IPPs’ argument regarding the change in law provisions of the PPA and RSA 365:28. We find no ‘good reason,’ *see* RSA 541:1, to change our prior ruling. The Wood-Fired IPPs merely reassert their prior arguments and request a different outcome.” Order No. 25,213 at 71. Yet again, in the instant Motion the Wood-Fired IPPs have presented no “good reason” for rehearing, and they merely reassert their prior arguments and request a different outcome. The Commission need not waste its time and resources considering the Wood-Fired IPPs’ fifth bite at the apple.

⁴ “[The Commission lacks the authority to grant] the approval of REC purchases and ratepayer payments for [] RECs beyond 2025.” Wood-Fired IPPs’ Motion for Rehearing, p. 2 (February 14, 2011). “[T]he Commission lacks the power [under RSA 365:28] to approve contract provisions that have the effect of preventing the Commission from revisiting its order approving a PPA” *Id.* at 3.

With respect to the 2025 Issue, the Commission initially held that “The existence of contractual terms that may conflict with statutory requirements or authority is not a basis for dismissal before the facts and arguments in the case are fully developed, rather it is a factor to be considered in our public interest review of the PPA, especially in light of the conditioning authority granted to the Commission under RSA 362-F:9, I.” Order No. 25,192, *slip op.* at 8. The Commission follows that finding with a carefully considered five page discussion of the 2025 Issue in its Order No. 25,213. The Wood-Fired IPPs’ Motion fails to provide any new evidence regarding the 2025 Issue that could not have been presented in the underlying proceeding. Nor have the Wood-Fired IPPs identified specific matters that were “overlooked or mistakenly conceived” by the deciding tribunal - - given that the Wood-Fired IPPs presented no testimony during this proceeding, the lack of “overlooked or mistakenly conceived” facts is not surprising. To the extent that the Commission deems it necessary to consider the very same legal arguments contained in the Wood-Fired IPPs’ original Motion to Dismiss, PSNH respectfully requests the Commission to consider the matters set forth in the “Objection of Public Service Company of New Hampshire to Wood-Fired IPPs’ Motion to Dismiss” dated December 23, 2010, which is incorporated herein by reference.

Further and importantly, we note that in constructing its latest argument around the 2025 Issue, the Wood-Fired IPPs charge the Commission with incorrectly construing RSA 362-F:3 as affirmatively incorporating Class I resource requirements beyond 2025. While we think such a statutory construction would be persuasive if made, the Commission need not, and did not, go so far as to definitively construe the statute. Rather, the Commission simply found that given the internal structure of RSA 362-F and the Legislature’s periodic review of the statute to reflect on gathered experience with the statutory program⁵, “PSNH could *reasonably project* that the Class I renewable portfolio requirement for 2025 will continue in effect thereafter unless and until changed.” Order

⁵ As the Commission noted in its Order, the Legislature has provided for periodic Commission and Legislative reviews of the RPS program (in 2011, 2018 and 2025). *See* RSA 362-F:5. The Legislature may clarify and refine the statutory program based on real-world experience over time. In the interim the Commission must reasonably interpret the RPS program in a manner that is consistent with the purpose of the statute to “stimulate investment in low emission renewable energy technologies in . . . New Hampshire . . . at new facilities” and the express Legislative recognition of the “importance of stable long-term [RPS] policies.” *See* RSA 362-F:5 and Order No. 25,213 at 74.

No. 25,213 at 76 (emphasis added). That projection is perfectly in line with RSA 362-F:9, which grants the Commission the authority to approve PSNH's request to enter into the 20-year PPA in order to meet the "reasonably projected renewable portfolio requirements and default service needs to the extent of such [reasonably projected] requirements," so long as the PPA is in the public interest. PSNH's rational post-2025 projection, taken together with (i) the practical needs for a long term year PPA to secure new Class I resources between now and 2025, and (ii) the Commission's imposed PPA conditions, produce a PPA that meets the public interest standard of RSA 362-F:9.

The Wood-Fired IPPs' claim that the Commission lacked authority and jurisdiction under RSA 362-F to levelize a projection of PSNH's REC purchase requirements is legally incorrect. The purpose of the state's Renewable Portfolio Standard, as set forth in RSA 362-F:1, is to stimulate investment in renewable energy generation. The Wood-Fired IPPs suggest that the RPS law defines a narrowly and precisely defined opportunity for this state's utilities to enter into PPAs that further the purpose of the RPS law. The Wood-Fired IPPs are mistaken in that regard.

RSA 362-F:9 anticipated that PPAs intended to implement the RPS law's requirements needed flexibility. Thus, that law notes that the law's requirements as implemented by PPAs may be approved by the Commission "if it finds such agreements or such an approach, as may be conditioned by the commission, to be in the public interest." The Commission determined that an appropriate methodology to meet the law's public interest requirement was to set a certain level of REC purchases over the life of the PPA. That determination by the Commission was deemed to be an approach that was in the public interest to meet reasonably projected RPS needs over the long-term. The RPS law does not require that such reasonably projected RPS needs be done on a day-by-day, month-by-month, year-by-year, or decade-by-decade basis. The Commission has the power to carry into effect the provisions of RSA Title XXXIV, which includes the RPS law in RSA Chapter 362-F, as part of its general supervisory authority granted by RSA 374:3.

c. Standing

PSNH reiterates its objection to the granting of intervenor status to the Wood-Fired IPPs, for the reasons set forth in its “Objection of Public Service Company of New Hampshire to Petitions to Intervene” dated September 28, 2010, which is incorporated herein by reference.

III. Conclusion

The Wood-Fired IPPs have failed to meet the requirement for rehearing set forth in RSA 541:3 that “good reason for the rehearing be stated in the motion.” The Wood-Fired IPPs’ Motion contains the classic reassertion of prior arguments with a request for a different outcome on one hand, and a mischaracterization of the governing law on the other hand.

For the reasons set forth herein, the Commission should sustain its original decision in Order No. 25,192, deny the Wood-Fired IPPs’ Motion for Rehearing, and reverse its prior approval of intervenor status for the Wood-Fired IPPs.

Respectfully submitted this 24th day of May, 2011.

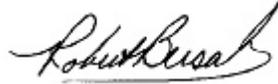
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By:  _____

Robert A. Bersak
Assistant Secretary and Assistant General Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
603-634-3355
bersara@PSNH.com

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2011, I served an electronic copy of this filing with each person identified on the Commission's service list for this docket pursuant to Rule Puc 203.02(a).



Robert A. Bersak
Assistant Secretary and Assistant General Counsel
780 North Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330

(603) 634-3355
bersara@psnh.com