THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2011-0348

Appeal of
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

On Appeal by Petition under RSA 541
from Orders of the
New Hampshire Public Utilities Commission

MOTION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE FOR SUMMARY DISMISSAL

Pursuant to Rule 25 of this Court's Rules, Defendant-Appellee Public Service Company of New Hampshire ("PSNH") moves for summary dismissal of the appeals filed by Appellants 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 (the "Appellants") from orders of the New Hampshire Public Utilities Commission ("PUC").

Appellants have filed two separate appeals dated May 17, 2011 (Docket No. 2011-0348) (PUC Orders 25,192 and 25,213) and July 21, 2011 (also docketed in Docket No. 2011-0348)

(PUC Orders 25,213 and 25,239).[1] The PUC orders denied a challenge to its authority to approve, and then approved, a power purchase agreement ("PPA") between PSNH and Laidlaw Berlin Biopower, LLC ("Laidlaw") pursuant to which PSNH would buy electric power and renewable energy certificates ("RECs")[2] from Laidlaw's proposed Biomass Plant in Berlin, New Hampshire. These appeals challenge the PUC's authority to allow PSNH to enter into a multiyear PPA for the purchase of RECs and to pre-approve the recovery of Renewable Power Supply compliance costs associated with such contracts from PSNH's ratepayers.

Although the substantive legal and factual issues underlying the PUC's orders are complex, this Court need not reach the merits of these appeals. The Court does not have jurisdiction because the Appellants lack standing to bring this appeal based either on alleged harm to them as competitors, *Nautilus of Exeter v. Town of Exeter*, 139 N.H.450 (1995), or as rate payers (*i.e.*, as customers of PSNH's default energy service), RSA 374-F:3, II (supp. 2010) and *Appeal of Stonyfield Farm, Inc.,* 159 N.H. 227 (2009). Accordingly, the appeals should be dismissed.

Appellants moved to intervene in the PUC proceedings relating to the PPA in September 2010. Appendix to May 17th Notice of Appeal at 100. They claimed that as operators or owners of wood-fired small power production facilities, they competed with the proposed Laidlaw plant both in the purchase of biomass fuel and in the sale of "energy and capacity" to PSNH and would thus be "directly affected" by the increased demand for fuel (and presumably higher prices) and the decreased ability to sell their products. *Id.* 102-103. Appellants also asserted at the PUC that as purchasers of "back-up power supply from PSNH" via PSNH's default energy service,

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[1] Appellants requested that the appeals be consolidated and by letter to Appellants' counsel dated July 28, 2011, the Court indicated that is treating the appeals as one docket, *i.e.* Docket No. 2011-348.

[2] *See* RSA 362-F:2, II

approval by the PUC of the cost of recovery of "rates terms and conditions of the PPA" affected them by "directly affecting rates for all of PSNH's customers, including purchase of back-up power supply." *Id.* 103. After objections by PSNH, the PUC permitted intervention finding that the Appellants "are all existing or potential competitors of the proposed Laidlaw facility and thus have interests affected by this proceeding." PUC Order No. 25,158, at 9, 2010 WL 4358360 (NH PUC 2010).

Having sought intervention at the PUC primarily as competitors, Appellants shift gears in this Court. Both Notices of Appeal footnote the claim that the Appellants "all will compete for biomass wood fuel with Laidlaw," and that "[a]ll six.....are PSNH energy service ratepayers." May 17th Notice at 7, fn. 1; July 21st Notice at 9, fn. 1. Yet the issues addressed on appeal and the arguments relating to alleged errors of law by the PUC do not once mention the issue of competition. Instead, the Appellants' claims now relate entirely to the potential harm to PSNH's default energy service customers from the approval of the PPA.[3] The Appellants have thus effectively abandoned their claim for standing as competitors.

Appellants' indecision as to whether they are harmed as competitors or as PSNH default energy service customers may stem from a recognition that harm to competition is insufficient to create standing, and thereby invoke the jurisdiction of this Court. If so, their attempt to acquire standing as default energy service customers is equally unavailing. Any harm they would suffer as default energy service customers would be purely voluntary, and in any event, is not yet ripe.

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[3] The Questions Presented on Appeal all question the PUC's authority to allow the recovery of the cost of those RECs "from ratepayers through 2034" (Questions 1 and 2); the "reasonableness of the costs to be recovered from ratepayers in future" (Question 3); and the alleged harm from the "allowed recovery from PSNH ratepayers of the costs of REC purchases not reasonably necessary for compliance with the annual purchase requirements set forth in [the] statute" (Questions 4 and 5). July 21st Notice at 3-4. Notably, the Appellants do not identify any specific harm that *they* will suffer (as opposed to all ratepayers choosing to purchase PSNH's default energy service.).

In order to have standing to appeal an agency's decision to this Court under RSA 541:3 and 6, Appellants must demonstrate that their rights "may be directly affected by the decision," that is, that they "ha[ve] suffered or will suffer an injury in fact." *Appeal of Stonyfield Farm,* 159 N.H. 227, 231 (2009), citing *Appeal of Richard*, 134 N.H. 148, 154, *cert. denied* 502 U.S. 899 (1991).

Although appearing to have waived any alleged standing as competitors in this appeal, in their Petition to Intervene, Appellants alleged only that if the PPA was approved, they might be required to pay more for biomass fuel or alternatively, would be affected in their ability to sell that fuel or RECs to PSNH. This is simply a contention that they either have a right to prevent additional competitors from entering the market for purchasing biomass, or that they have some unspecified right to prevent competition for sales to PSNH. Neither claim suffices to establish legal "injury in fact." As this Court recognized in *Nautilus v. Exeter*, 139 N.H. at 452, "increased competition with businesses....is insufficient" to entitle a an appellant to standing to appeal an administrative decision, in that case a decision of a zoning board of appeals.[4] "This

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[4] The rule that the allegation of mere harm to a competitor does not confer standing has been widely adopted. *See, e.g., ATC South, Inc. v. Charleston County,* 380 S.C. 191, 197-98 (2008); *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 693 F.2d 733, 747 (8th Cir. 1982) (Missouri law) ("Competitive disadvantage alone does not give rise to standing"); *Earth Movers of Fairbanks, Inc. v. Fairbanks N. Star Borough*, 865 P.2d 741, 745 (Alaska 1993) ("[W]e thus adopt the majority rule and deny standing to a business competitor whose only alleged injury results from competition."); *Gregorio v. Zoning Bd. of Appeals*, 155 Conn. 422, 232 A.2d 330, 333 (1967) ("The fact that the proposed gasoline station would result in competition harmful to the plaintiff's business would not be sufficient to qualify the plaintiff as an aggrieved person."); *Lucky Stores, Inc. v. Board of Appeals*, 270 Md. 513, 312 A.2d 758, 766 (1973) ("[A] person whose sole interest for objecting to the Zoning Board's action is to prevent competition with his established business is not a person aggrieved."); *Circle Lounge & Grille, Inc. v. Board of Appeal*, 324 Mass. 427, 86 N.E.2d 920, 922 (1949) ("We cannot believe that a person is aggrieved . . . merely because a variance, even if improvidently granted, will increase competition in business."); *Copple v. City of Lincoln*, 210 Neb. 504, 315 N.W.2d 628, 630 (1982) ("An increase in business competition is not sufficient to confer standing to challenge a change of zone."); *Paramus Multiplex Corp. v. Hartz Mountain Indus., Inc.*, 236 N.J. Super. 104, 564 A.2d 146, 148 (1987) ("This court holds that increased competition does not . . . of itself confer standing."); *Sun-Brite Car Wash, Inc. v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 515 N.Y.S.2d 418, 422, 508 N.E.2d 130, 134 (1987) ("Sun-Brite lacks standing to seek judicial review because . . . its only substantiated objection was the threat of increased business competition, which is not an interest protected by the zoning laws."); *Swain v. Winnebago County*, 111 Ill.App.2d 458, 250 N.E.2d 439, 444 (1969) ("Neither the fact that parties may suffer reduced incomes or be put out of business by more vigorous or appealing competition, nor the fact that properties on which such businesses are operated would thus depreciate in value, give rise to a standing to sue.");

court is mindful of the fact that injury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy." *Weeks Restaurant Corp. v. City of Dover,* 199 N.H. 541, 545 (1979) quoting *Valley Bank v. State*, 115 N.H. 151, 154, 335 A.2d 652, 653 (1975). *See also Rowe v. Town of Salem*, 119 N.H. 505, 403 A.2d 428 (1979).[5]

Apart from being entirely speculative because no rates have yet been set or imposed under the PPA, Appellants' claimed injury as default energy service customers fails because they may never bear any of the costs of the PPA in their rates. Appellants concede that all costs related to the PPA and to the purchase of RECs by PSNH may only be recovered as part of PSNH's default energy service charge pursuant to RSA 374-F:3,V,(c).[6] May 17th Notice at 18. Yet pursuant to RSA 374-F:3, II (supp. 2010), the Appellants have the right and the ability to entirely avoid PSNH's "default service charge" by choosing another "electricity supplier"[7] for their electric energy and can therefore avoid ever paying any costs of the PPA in their rates. The

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Rockland Hospitality Assocs., LLC v. Paris, 302 A.D.2d 597, 756 N.Y.S.2d 585, 586-87 (2003) ("The only potential injury suggested in the record is an increase in business competition, which is insufficient to confer standing on a party.") While the majority of these cases arise in the zoning context, the standard in those cases (whether a party is "aggrieved" or "adversely affected") is similar as the applicable standard here as set forth in RSA 541-A:32 (party's "rights, duties, privileges, immunities or other substantial interests may be affected") and RSA 541:3 and 6.

[5] *Cf. Union Telephone Company,* 160 N.H. 309 (2010) ("We hold that because Union will face competition in its service area as a result of the PUC's orders, Union has standing to appeal them.") In *Union,* the property right held by the Appellant embodied by its state-granted franchise was in issue. *See Piscataqua River Bridge v. New Hampshire Bridge,* 7 N.H. 35 (1834). In the instant case, the Appellants have no such franchise right; in fact, they are not even public utilities under N.H. law. RSA 362:4-c; RSA 362-A:2. The only competitive harm raised by Appellants here is that faced by free market participants. Likewise, in *New Hampshire Bankers Ass'n v Nelson*, 113 N.H. 127, 129 (1973), cited in *Union,* the Bankers' Association, as a representative of commercial banks, had standing to challenge the issuance of NOW accounts by a savings bank where the ability to offer bank products was determined by bank statutes and thus was similar to protected franchise rights.

[6] PSNH's rates are essentially composed of two components: (i) its default energy service charge *if* a customer chooses to purchase its actual electric energy from PSNH, and (ii) its delivery charges that all customers served by PSNH's system of distribution lines must pay. *See Re Public Service Company of New Hampshire,* Docket No. DE 10-121, Order No. 25,216 (April 29, 2011), *slip op.* at 2. ("Subsequent to Commission approval of the Restructuring Agreement, PSNH continued to recover costs related to the generation and delivery of electricity, but delivery costs were further segmented for ratemaking purposes. Thus, PSNH's customers now pay a distribution charge, a transmission charge and an SCRC. *Additionally, customers purchasing their energy supply from PSNH have paid either a transition service or default service energy charge.*") (Emphasis added.)

[7] RSA 374-F:2, II.

State's electric restructuring statute, RSA Ch. 374-F, allows electric consumers to exercise such choice of electricity supplier. There are nearly *five dozen* such competitive electricity suppliers registered with the PUC under N.H. Admin. Rule Puc Ch. 2000 and listed on the PUC's website.[8] If the Appellants choose not to want to pay for the costs of the PPA once the Laidlaw project is completed, they can purchase their energy from a competitive electricity supplier and avoid all the costs – and hence any "harm" – completely. Put simply, any future harm to the Appellants as default energy service customers of PSNH would be entirely self-inflicted.

Appellants' alleged harm as default energy service customers is also not ripe. They contend that the PUC has effectively divested itself of the power to review future costs, and thus has finally determined that all of the costs of the PPA are prudent and will be subject to recovery as part of PSNH's default energy service rate under RSA 374-F:3,V,(c). July 21st Notice at 22-24. This argument ignores the plain language of RSA 374-F:3,V,(c), which permits the recovery of "prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service." Obviously, no default service charge relating to the PPA has as yet been included in any rates, since the Laidlaw project will not be completed until 2014. At that point, PSNH must seek PUC approval of any costs incurred under the PPA to be included in its default service charges. Appellants can then appear before the PUC to challenge the prudence of any particular costs relating to the PPA. Indeed, if for any reason the Laidlaw facility is never completed, not one penny of costs would ever arise for PUC ratemaking treatment.

Appellants' alleged injury as default energy service customers is therefore "neither immediate nor direct because any such potential injury would arise only through increased rates imposed during a subsequent rate-setting proceeding." *Appeal of Campaign for Ratepayers*

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[8] See http://puc.nh.gov/Consumer/energysuppliers.htm.

Rights, 142 N.H. 629, 632 (1998) (standing denied where ratepayers did not suffer immediate or direct injury as a result of the PUC's decision to allow utility to enter into special contracts with some customers where no increased rates were imposed on ratepayers as part of the proceeding, and any such increase instead would occur, if at all, at a later rate-setting proceeding). By the same rationale, their claim is also not ripe because it "requires further factual development" and is not "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *State v. Fischer*, 152 N.H. 205, 210 (2005) (citations and quotations omitted). PSNH will only recover its prudent costs under the PPA through its default energy rate to the extent those costs are approved in a subsequent, separate proceeding. "Such future harm is insufficient, as a matter of law, to confer standing on petitioners to appeal the PUC's decision." "*Appeal of Stonyfield Farm,* 159 N.H. at 231 (standing denied where potential impact of project on rates could be challenged in subsequent rate proceedings).

Conclusion

Because Appellants failed to demonstrate that they have suffered any injury in fact, this appeal should be summarily dismissed pursuant to Rule 25.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By its attorneys,

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Date: August 1, 2011

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Certificate of Service

I hereby certify that on August 1, 2011, I served the foregoing Motion for Summary Dismissal by mailing two copies thereof by first class mail, postage prepaid, to each of the following counsel of record: David J. Shulock, Esq., Olson & Gould, P.C., 2 Delta Drive, Suite 301, Concord, NH 03301-7426; Debra Howland, Executive Director and Secretary, NH Public Utilities Commission, 21 S. Fruit Street, Suite 10, Concord, NH 03301-2429; Office of the Attorney General, 33 Capitol Street, Concord, NH 03301-6397; Suzanne Amidon, Esq. and Edward N. Damon, Esq., NH Public Utilities Commission, 21 S. Fruit Street, Suite 10, Concord, NH 03301-2429; Meredith A. Hatfield, Esq., Office of Consumer Advocate, 21 S. Fruit Street, Suite 18, Concord, NH 03301; James Rodier, Esq., Clean Power Development, 1500 A. Lafayette Road, No. 112, Portsmouth, NH 03801-5918; Keriann Roman, Esq., City of Berlin, Donahue, Tucker & Ciandella, PLLC, 225 Water Street, Exeter, NH 03833; Christopher Boldt, Esq., City of Berlin, Donahue Tucker & Ciandella PLLC, 104 Congress Street, Suite 304, Portsmouth, NH 03801; Jonathan Edwards, *pro se*, Edrest Properties LLC, P.O. Box 202, Berlin, NH 03570; and to Angela O'Connor, New England Power Generators Association, 141 Tremont Street, 6th Floor, Boston, MA 02111.

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