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

APPELLANTS' OBJECTION TO PSNH'S MOTION FOR SUMMARY DISMISSAL AND THE CITY OF BERLIN'S MOTION FOR EXPEDITED TREATMENT

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, object to the motion for summary dismissal filed by Public Service Company of New Hampshire ("PSNH"), and the City of Berlin's motion for expedited treatment. Appellants state the following in support of their objections.

1. PSNH's Motion is Contrary to the Policies of Promoting Settlement and Requiring Good Faith in the Negotiation of Agreements.

This court has a long-standing policy of promoting the settlement of claims. *See Halstead v. Murray*, 130 N.H. 560, 564 (1988), *citing McIsaac v. McMurray*, 77 N.H. 466, 471 (1915) ("There can be no question that the law favors settlement of a dispute."). This court has also required good faith in the negotiation of contracts such as settlement agreements. *See Centronics Corp. v. Genicom Corp.*, 132 N.H. 133, 139 (1989)(recognizing duty to negotiate in good faith and collecting cases); *see also id.* at 140-145 (recognizing duty to exercise discretionary contract performance in good faith). PSNH's motion runs contrary to these policies by seeking expedited court action on one of several issues now before the court. Negotiations among and between PSNH, Appellants, and the developers of the Laidlaw facility have been ongoing for months. These negotiations have been personally attended and facilitated

by Governor Lynch, Commissioner of the Department of Resources of Economic Development, George Bald, and professional staff of the Public Utilities Commission, in an effort to preserve the hundreds of North Country jobs provided by Appellants while creating new jobs at the Laidlaw facility in Berlin. Exhibit 1. PSNH filed its motion while negotiations were ongoing and after the parties had agreed to such fundamental power contract terms as price, quantity to be delivered, and length of contract term. In doing so, PSNH explicitly informed the other parties that if the court were to grant its motion "PSNH's offer regarding all agreements in this matter must be deemed withdrawn." Exhibit 2. The two factors motivating most parties to settle are litigation risk and cost avoidance. It would substantially undermine the policies favoring settlement – and one of principal benefits of settlement to the courts – if parties could condition settlement on the right to obtain adjudication of one or more potentially dispositive issues. Settlement makes very little sense if the parties can hold back issues for resolution by the courts, the effect of which may be to defeat the settlement.

Indeed, filing a dispositive motion while settlement discussions are substantially underway is so antithetical to achieving settlement that it is difficult to conclude that the party filing such a motion is negotiating in good faith. This is particularly true where the party need not have raised the potentially dispositive issue by motion to preserve it.

Here, there was no need for PSNH to challenge the Commission's determination that the Appellants have standing by filing a motion for summary dismissal. It could have simply argued the issue in its brief. The fact that the motion was tactical and not compulsory is contrary to PSNH's duty to negotiate in good faith. And while the courts should not attempt to referee the rough and tumble of settlement negotiations, neither should they countenance tactical motions that will vitiate both the impetus for and benefits of settlement.

For these reasons alone PSNH's motion should be denied.

2. The Court Should Not Overturn the Commission's Determination that Appellants Have Standing Using Summary Procedures.

Standing is a factual inquiry to be decided on a case-by-case basis, and by the Commission in the first instance. *Cf. Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 (2011); *Goldstein v. Town of Bedford*, 154 N.H. 393, 395 (2006). The Commission twice found that Appellants have standing in this proceeding. The Commission determined that Appellants have standing, first in Order 25,158 (Exhibit 3), and again in its final order, Order 25,239, after PSNH "renewed" its objection to Appellants' standing. App. II at 136 and 144.[1] This court should not overturn a Commission finding of standing unless it is unsupported by the record or is legally erroneous. *Cf. Golf Course Investors of NH, LLC*, 161 N.H. at 680, *citing Fox v. Town of Greenland*, 151 N.H. 600, 603 (2004); *Feins v. Town of Wilmot*, 154 N.H. 715, 717 (2007). Consequently, the court should not decide this issue based upon motion, but should await certification of the record by the Commission and full briefing.

3. PSNH's Argument That Appellants Have Waived Their Standing As Competitors Is Groundless.

Contrary to PSNH's assertion, Appellants have no intention of "waiving" their standing as competitors, and did not "waive" that ground for standing by pointing out the additional basis for their standing as PSNH ratepayers. Appellants have direct, immediate interests in the outcome of this proceeding, both as competitors of Laidlaw and as ratepayers of PSNH.

PSNH's contention that Appellants have waived their standing as competitors rests upon its assertion that "Appellants' claims now relate entirely to the potential harm to PSNH's default energy service customers from the approval of the PPA." Motion for Summary Dismissal at 3.

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[1] Appellants note that PSNH never filed for rehearing of either the Commission's initial or second determination that Appellants have standing in this proceeding.

In making this assertion, PSNH overlooks the central issue in this appeal – that approval of the PPA, which by its terms ends in 2034, is unlawful because the renewable portfolio requirements that apply to the PPA expire in 2025. RSA 362-F:3. As sellers and potential sellers of New Hampshire renewable energy certificates ("RECs"), Appellants are as directly affected by the determination of this issue as are Laidlaw and PSNH. Moreover, the approval of a multi-year REC purchase agreement with a 75 MW Class I generator that uses biomass will have a substantial effect on the mix of generation resources. Because of the competition for biomass fuel this effect will be felt not only in Class I of the renewable portfolio program, but also in Class III, which was designed to support continued generation at biomass facilities that began operation prior to 2006 or, in other words, designed to maintain Appellants within the mix of renewable generation resources. These are competitive interests that the Commission is expressly required to consider and weigh in proceedings brought pursuant to RSA 362-F:9. Multi-year contracts must be substantially consistent with, among other factors, the efficient and cost-effective realization of the purposes and goals of the renewable portfolio program, electric industry restructuring principles, a reasonable mix of generation resources in light of least cost planning principles, and the promotion of competitive innovations and solutions. *See* RSA 362-F:9, II.

4. Harm to Competitive Interests Confers Standing in Commission Proceedings.

In cases before the Commission, unlike in cases before other administrative bodies, competition may serve as the sole basis for standing, as this court recently held in *Union Telephone Co.*, 160 N.H. 309, 313 and 316 (2010). Although it cites to this case in its motion, PSNH attempts to distinguish the case by arguing that "the property right held by [Union Telephone] embodied by its state-granted franchise was in issue." Motion for Summary

Dismissal at 5 n.5. In fact, Union Telephone did not have an exclusive franchise, due to the recent repeal of RSA 374:22-f and amendment to RSA 374:22-g, which subjected Union Telephone to competition from other exchange carriers. *Union Telephone Co.*, 160 N.H. at 316-17; *see also id.* at 322 ("The current statutory scheme fails to grant Union a legitimate claim of entitlement to an exclusive franchise. As we noted earlier . . . 'all telephone franchise areas . . . shall be nonexclusive.'"). The sole harm to Union Telephone was increased competition, and that was adequate to confer standing.

5. The Harm Caused by the Commission's Approval of the Amended PPA is Particular to Appellants and Confers Standing Upon Them.

Appellants demonstrated below more than the mere introduction of a competitor to the marketplace as a basis for their standing. Appellants have suffered an "injury in fact" because the harm caused by the Commission's approval of the amended PPA affects Appellants more particularly than it does the public, or even other competitors, in general. *See Appeal of Richards*, 134 N.H. 148, 156 (1991) (discussing the injury in fact standard); *see also Goldstein*, 154 N.H. at 394-96 (plaintiff conceded he was not a "person aggrieved" when he admitted he had no interest different from any other citizen). In part because of competition for biomass fuel within their respective fuel procurement areas, Appellants are affected by the Commission's approval of the amended PPA differently and to greater extent than:

- generic fossil fuel electric generators that sell their electricity into the market place,
- other "new" renewable electric generators that sell Class I RECs,[2] which other generators may be fueled with wind, geothermal energy, hydrogen, ocean-derived energy, or methane,
- other "existing" renewable generators that sell Class III RECs, which other generators may be fueled with methane, and even
- other biomass-fueled electric generators that procure their wood outside of the state and outside of Laidlaw's fuel procurement area, regardless whether those generators sell

[2] Indeck Energy-Alexandria LLC was certified as a Class I facility under the Commission's rules.

Class I RECs for compliance in New Hampshire.

Appellants are specially affected by a "wood price adjustment" clause in the amended PPA. This clause requires PSNH to pay Laidlaw more for electricity as the cost of biomass fuel rises (App. II at 101), and therefore allows Laidlaw to pay more for wood in the fuel procurement areas that Laidlaw will soon share with Appellants and to pass through those costs to PSNH and its ratepayers. The Commission's regulatory approval of this provision and its pre-approval allowing PSNH to recover the costs associated with wood price adjustments from its customers places Appellants at an obvious disadvantage when it comes to fuel acquisition and, because biomass fuel procurement markets are all local, disadvantages Appellants in particular.

The cases to which PSNH cites for the proposition that mere competitive harm, alone, does not result in standing, then, are inapposite. As shown above, Appellants demonstrated to the Commission more than a mere introduction of a competitor to the market. Rather, the PPA would introduce a competitor with a substantial, commission-approved advantage. Skewing the wood fuel market to favor one competitor over others is hardly the sort of generic risk one should expect to encounter as a competitor in the market. *Cf. Nautilus of Exeter, Inc. v. Town of Exeter*, 139 N.H. 450, 452 (1995) (increased competition with business without more is insufficient to confer standing in appeal of approval of a site plan). The Commission is charged with administering the State's renewable portfolio program and specifically with considering competitive interests when approving multi-year REC purchase agreements. *See* RSA 362-F:9:, II and Argument 3, above. As a result, PSNH's motion for summary dismissal should be denied.

6. Ratepayers Have Standing To Challenge the Commission's Approval of Cost Recovery.

As commercial ratepayers of PSNH, Appellants are directly and immediately affected by the Commission's pre-approval of cost recovery in this docket. PSNH's claim that Appellants or

any other ratepayers may challenge the prudence of all charges that PSNH incurs during future proceedings under RSA 374-F:3, V(c) cannot be reconciled with the fact that the commission has *already* approved recovery of those costs. Indeed, one of the conditions precedent to the effectiveness of the amended PPA is "a final, nonappealable decision [of the Commission] . . . *approving and allowing for full cost recovery of the rates, terms and conditions of this Agreement.*" App. II at 99. Emphasis supplied. PSNH sought this approval in its petition. App. at 4. The Commission granted PSNH's request in a split decision in which Commissioner Below dissented on the ground that the majority should not have pre-approved cost recovery for REC purchases occurring after 2025. App. at 276 ("I part company with the majority as to whether the commission can *now* obligate PSNH ratepayers to pay for REC purchase obligations under the proposed PPA beyond 2025 as 'prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F . . . through the default service charge' as provided for in RSA 374-F:3, V(c). Having requested and received a determination of full cost recovery in rates here, rather than in the review of a rate plan, PSNH cannot complain that ratepayers have standing to participate in the proceeding.[3]

7. Expedited Treatment Is Not Justified.

Appellants object to the expedited treatment requested by the City of Berlin. The City cannot be said to suffer harm if its payment in lieu of tax agreement does not take effect on September 1. Even if the court were to believe that the City would somehow lose the ability to negotiate a payment in lieu of taxes with Laidlaw after September 1, the City would nonetheless retain the full taxing power granted to it by the State, and may simply value the facility and

[3] Moreover, PSNH's argument that the harm to Appellants as ratepayers is speculative, because Appellants may purchase their electricity from other companies, is specious. A review of the certified record would demonstrate that Appellants are all currently customers of PSNH, and consequently, have standing as PSNH ratepayers.

assess the taxes to which it is entitled. Because there is no immediate or irreparable injury to the City, the City is not entitled to the extraordinary relief of expedited review of PSNH's motion or this appeal.

Accordingly, Appellants respectfully request that the court deny PSNH's motion for summary dismissal and deny the City of Berlin's motion for expedited treatment.

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,
OLSON & GOULD, P.C.

Date: August 11, 2011

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CERTIFICATION

I hereby certify that copies of this objection have this day been forwarded via U.S. Mail, postage prepaid, to Debra Howland, Executive Director & Secretary, NH Public Utilities Commission, 21. S. Fruit St., Suite 10, Concord, NH 03301-2429; Office of the Attorney General, 33 Capitol St., Concord, NH 03301-6397; Robert Bersak, Esq., Public Service Company of New Hampshire, 780 North Commercial Street, P.O. Box 330, Manchester, NH 03105; Wilbur A. Glahn, III, Esq. and Barry Needleman Esq., 900 Elm Street, PO Box 326, Manchester, NH 03105; Suzanne Amidon, Esq. and Edward N. Damon, Esq., NH Public Utilities Commission, 21 S. Fruit St., Suite 10, Concord, NH 03301-2429; Meredith A. Hatfield, Esq., Office of Consumer Advocate, 21 S. Fruit St., Ste. 18, Concord, NH 03301; James Rodier, Esq., Clean Power Development, 1500 A. Lafayette Rd., No. 112, Portsmouth, NH 03801-5918; Keriann Roman, Esq., City of Berlin, Donahue, Tucker & Ciandella PLLC, 225 Water St., 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 St., 6th Floor, Boston, MA 02111.

Dated: August 11, 2011

David J. Shulock, Esq.