STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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

Order Granting Conditional Approval

O R D E R N O. 25,213

April 18, 2011

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I. PROCEDURAL HISTORY

On July 26, 2010, Public Service Company of New Hampshire (PSNH or the Company) filed a petition for approval of a Power Purchase Agreement (PPA) with Laidlaw Berlin BioPower, LLC (Laidlaw) for the acquisition of energy, capacity, and renewable energy certificates (RECs). With its petition, PSNH filed the supporting testimony of: Gary A. Long, President of PSNH; Terrance J. Large, Director of Business Planning and Customer Support Services for PSNH; Richard C. Labrecque, Manager of Supplemental Energy Sources for the Company; and Dr. Lisa K. Shapiro, an economist consulting with PSNH. PSNH also filed a motion for confidential treatment of pricing information in the PPA and for portions of Mr. Labrecque's testimony, which discussed the pricing terms.

On August 3, 2010, the Office of Consumer Advocate (OCA) filed notice of its intent to participate in this docket on behalf of residential utility consumers consistent with RSA 363:28. On August 17, 2010, Laidlaw filed a petition to intervene and motion for expedited consideration. Concord Steam filed a petition to intervene on September 3, 2010.[1] Petitions to intervene were filed on September 24, 2010 by Clean Power Development (CPD); Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy - Alexandria, LLC (collectively, the Wood Independent Power Producers (Wood IPPs)); Edrest Properties, LLC (Edrest), and the City of Berlin. The New England Power Generators Association, Inc. (NEPGA) filed a petition to intervene on September 28, 2010. PSNH and Laidlaw objected to all petitions to intervene, with the exception of the City of Berlin's petition.

On September 1, 2010, the Commission issued an order of notice establishing a prehearing conference for September 29, 2010, to be followed by a technical session. The prehearing conference was held as scheduled, during which the Commission granted all pending petitions for intervention.

On October 1, 2010, Staff filed a report following the prehearing conference that contained a proposed procedural schedule and an agreement among the parties regarding discovery matters. Staff requested that the Commission approve the proposed procedural schedule and the parties' agreement on discovery and, because discovery was underway, requested a ruling on PSNH's motion for confidential treatment. On October 15, 2010, the Commission issued a prehearing conference order (Order No. 25,158) that approved Staff's proposed expedited procedural schedule and the agreed-upon process for discovery, ruled on

[1] Concord Steam filed a notice of withdrawal on January 21, 2011. The Commission granted the request at the beginning of the afternoon portion of the first day of hearings held on January 24, 2011, under the same conditions as that of the Laidlaw withdrawal, which was approved in Order No. 25,171 on November 17, 2010.

related objections and motions to compel, and denied PSNH's motion for confidential treatment except insofar as it related to the value of property to be protected by title insurance. The Commission also denied a request made during the hearing by CPD to take administrative notice of the Site Evaluation Committee's (SEC) record in its review of Laidlaw's petition to build the biomass facility. In response to Order No. 25,158, on October 19, 2010, PSNH filed a letter with the Commission stating that PSNH and Laidlaw would be determining an appropriate course of action in light of "the Commission's unprecedented denial of confidentiality for the Laidlaw PPA." PSNH disagreed with the Commission's characterization of the testimony of Gary Long, stating that the Commission misinterpreted the testimony.

On October 21, 2010, Laidlaw filed a motion for confidential treatment of its financial pro forma produced in response to Staff's data requests. The pro forma was Laidlaw's business plan/financial model showing projected revenue and expenses for the Laidlaw project. Concord Steam filed an objection to Laidlaw's request of confidential treatment on October 22, 2010. The Wood IPPs filed an objection to the motion on October 28, 2010. Laidlaw filed a response to Concord Steam's objection on October 27, 2010. The Commission granted Laidlaw's request for confidential treatment of the pro forma by secretarial letter dated October 27, 2010.

Also on October 21, 2010, Concord Steam and the Wood IPPs jointly filed a motion to continue the procedural schedule during the 30-day period in which PSNH or other parties may request a rehearing of Order No. 25,158. Staff filed a letter in support of the motion to continue the procedural schedule on October 22, 2010. On October 27, 2010, Laidlaw objected to the joint motion, the City of Berlin concurred with Laidlaw's objection, and the Wood IPPs responded to Laidlaw's objection. CPD filed a letter on November 4, 2010, in support of keeping the procedural schedule on track. By secretarial letter dated October 27, 2010, the Commission extended the deadline for discovery requests and responses from all parties, but

ruled that it would not suspend the procedural schedule and that further adjustments to the schedule would be addressed as needed over the course of the docket.

On October 22, 2010, PSNH filed a motion for rehearing of Order No. 25,158 (October 15, 2010). In particular, PSNH requested that the Commission reconsider its denials of confidential treatment and the issuance of a protective order for certain confidential, commercial, or financial information contained in the PPA. The Wood IPPs and Concord Steam filed objections to PSNH's motion on October 29, 2010. The Commission issued Order No. 25,168 on November 12, 2010, denying PSNH's motion for rehearing. The order discussed the balancing test applied by the Commission in determining whether ratepayers and the public will be better served by granting PSNH's request for confidential treatment of the terms of the PPA or by public disclosure of the terms. The Commission affirmed its decision made in Order No. 25,158, stating that "[t]he circumstances before us . . . tip the balance towards disclosure."

On October 28, 2010, Laidlaw filed a notice of withdrawal. Concord Steam objected to Laidlaw's request on October 29, 2010. The objection contained a request that if the Commission allowed Laidlaw to withdraw, all data responses from Laidlaw to Staff should be stricken from the record and none of the documents or information provided by Laidlaw should be used by PSNH or any party in support of PSNH's petition. On November 5, 2010, the Wood IPPs filed an objection to Laidlaw's withdrawal notice and requested that the Commission compel Laidlaw's continued participation in this docket. PSNH objected to the Wood IPPs' objection and motion to compel on November 5, 2010, and to Concord Steam's objection and motion to strike on November 8, 2010. On November 9, 2010, Laidlaw filed a letter in support of PSNH's objection to the Wood IPPs' objection.

Concord Steam also filed on October 29, 2010, motions to compel Laidlaw and PSNH to respond to data requests served upon them by Concord Steam. The Wood IPPs also filed

motions to compel PSNH (on October 29 and November 4, 2010) and Laidlaw (on November 2, 2010) to respond to data requests. PSNH filed objections to Concord Steam's and the Wood IPPs' motions to compel on November 5, 2010. On November 15, 2010, the Wood IPPs again filed a motion to compel PSNH to provide discovery responses, and PSNH filed its objection on November 18, 2010. The Wood IPPs, on November 17, 2010, filed a response to PSNH's November 5, 2010 objection to its motion to compel. Also on November 17, 2010, the Commission issued a secretarial letter designating F. Anne Ross, the Commission's General Counsel, to hear the parties' arguments, report the facts and make recommendations to the Commission concerning the disposition of the motions on discovery. The letter also scheduled a discovery conference on November 19, 2010, for the purpose of achieving a negotiated resolution of the various discovery disputes.

On November 19, 2010, PSNH filed a motion for confidential treatment of Staff data request numbers 1-17, 1-18, 5-4, and 5-6. On November 23, 2010, Concord Steam objected to PSNH's motion for confidential treatment. On November 22, 2010, General Counsel Ross filed a letter detailing the agreements reached among the parties regarding the discovery matters brought up at the discovery conference held on November 19, 2010. On November 24, 2010, the Commission issued Order No. 25,174 ruling on outstanding motions for confidential treatment and objections thereto, and ordering that "the scope of discovery shall be limited as agreed upon by the parties" as outlined in General Counsel Ross's letter. On December 8, 2010, pursuant to Commission Orders No. 25,158 (October 15, 2010) and 25,168 (November 12, 2010), PSNH filed unredacted copies of the testimony of Richard C. Labrecque and the PPA.

On November 2, 2010, Concord Steam filed a motion to dismiss or summarily deny the application of PSNH. PSNH objected to Concord Steam's motion on November 4, 2010.

On November 9, 2010, Concord Steam filed a motion to continue the procedural schedule. PSNH filed an objection to Concord Steam's motion to continue on November 10, 2010.

On November 17, 2010, the Commission issued Order No. 25,171, ruling on pending motions. The order 1) permitted Laidlaw to withdraw from the docket, granted Concord Steam's motion to strike all evidence provided by Laidlaw to any party in this docket, and instructed the parties to refrain from using such information as a basis for testimony or other evidence in this docket, rendering moot all motions to compel discovery from Laidlaw; and 2) denied Concord Steam's motion to dismiss.

On November 18, 2010, Mel Liston of CPD filed a statement, accompanied by a letter that indicated that the statement should be treated as a public comment pursuant to Puc Rule 203.18, and that CPD has not determined whether it will file testimony in this proceeding. The Wood IPPs responded and objected to the statement on December 2, 2010, and on December 13, 2010, CPD responded to the Wood IPPs' objection.

On December 15, 2010, the Wood IPPs filed a motion to dismiss, stating "the Commission lacks authority to grant the relief that PSNH seeks." On December 23, 2010, PSNH filed an objection to the Wood IPPs' motion to dismiss, and on January 10, 2011, the Wood IPPs filed a response to PSNH's objection.

Between December 17 and 20, 2010, the following entities submitted pre-filed testimony: Concord Steam by Mark E. Saltsman, Robert J. Berti/James C. Dammann, and John Dalton; the OCA by Kenneth E. Traum; the City of Berlin by George E. Sansoucy; and Staff by Thomas C. Frantz and George R. McCluskey. On December 22, 2010, PSNH filed a motion to strike Concord Steam's testimony by Mark E. Saltsman and the joint testimony of Robert J. Berti and James C. Dammann. Edrest and Concord Steam filed objections to PSNH's motion to strike on

December 27 and 28, 2010, respectively. On January 7, 2011, PSNH filed a motion to rescind the grant of intervenor status to Concord Steam or, in the alternative, to strike certain testimony submitted by Concord Steam and/or compel Concord Steam to respond to discovery requests. The City of Berlin filed a motion for confidential treatment of data responses to the Wood IPPs on January 12, 2011, and filed its concurrence with PSNH's motion to rescind on January 14, 2011. Also on January 14, 2011, CPD filed a joinder in support of PSNH's motions to rescind and to compel discovery. Concord Steam filed a motion for confidential treatment of its response to a PSNH data on January 18, 2011, and its objection to PSNH's motion to rescind and motion to compel on January 19, 2011. PSNH filed a response to the objection on January 19, 2011. Rebuttal testimony was filed on January 19 and 20, 2011, by the following: PSNH by Gary A. Long, Terrance J. Large, and Richard C. Labrecque, and by Lisa K. Shapiro, Ph. D., the City of Berlin by George E. Sansoucy; and Concord Steam by Mark E. Saltsman. On January 20, 2011 the OCA filed revised direct testimony of Kenneth Traum.[2]

On January 14, 2011, the Commission issued Order No. 25,192, ruling on pending motions. The Commission granted the motion by the Wood IPPs to strike the statement of Mel Liston filed by CPD (December 2, 2010), affording CPD the opportunity to make a closing statement, and denied the Wood IPPs' motion to dismiss PSNH's petition (December 15, 2010). The Commission also denied PSNH's motion to strike portions of Concord66 Steam's testimony (December 22, 2010).

On January 21, 2011, the following occurred: Concord Steam filed a notice of withdrawal. The City of Berlin filed a motion to designate George McCluskey as a staff advocate under RSA 363:32, alleging that in view of the "strong positions" taken by Mr.

[2] In addition to the pre-filed testimony, approximately 85 public comments were filed between August 5, 2010, and March 3, 2011.

McCluskey in his pre-filed testimony on behalf of Staff, the City of Berlin believed that he would be unable to "fairly and neutrally" advise the Commission in this proceeding. The Commission issued a secretarial letter addressing these two matters. Regarding the designation of Mr. McCluskey, the Commission determined that the standard for mandatory designation under RSA 363:32, I had not been met; however, because this is a particularly controversial case and of significant consequence within the meaning of RSA 363:32, II, it would enhance the public's confidence in the fundamental fairness of this proceeding to designate Mr. McCluskey as a staff advocate. Regarding the notice of withdrawal filed by Concord Steam, the Commission stated that it would allow time at the hearing for parties to be heard regarding the issue.

During the first day of hearing, on January 24, 2011, the Commission heard argument regarding Concord Steam's notice to withdraw from the proceeding. The Commission allowed Concord Steam to withdraw from the proceeding and ordered all testimony, responses to data requests, and other information provided by Concord Steam in the course of the proceeding to be struck from the record. Hearing Transcript of January 24, 2011 (Afternoon) (1/24/11 PM Tr.) at 4.

On the same day, the OCA filed a motion *in limine* to strike certain portions of the testimony of George Sansoucy submitted on behalf of the City of Berlin.[3] The Commission heard argument regarding the OCA's motion to strike and the Commission granted the motion to strike in part. *Id*. at 10. In a secretarial letter dated January 28, 2011, the Commission issued a final ruling on the OCA motion. In the secretarial letter, the Commission granted in part and denied in part the OCA motion to strike and disposed of the City of Berlin's motion for rehearing.

[3] The OCA filed a revised motion to strike on January 27, 2011 to correct typographical errors in its original motion.

Hearings were held on January 24, 25, and 26, and February 1, 8, and 9, 2011. During the hearings, the Commission made rulings on various motions and requests and received public comment by James C. Dammann, who had been engaged by Concord Steam until it withdrew its participation in the proceeding. Edrest filed a closing statement by email on February 9, 2011. The following filed post-hearing written closing statements on February 14, 2011: PSNH, Wood IPPs, City of Berlin, CPD, the OCA, and Staff. Additionally, on February 14, 2011, the Wood IPPs filed a motion for rehearing. PSNH filed an objection to the Wood IPPs' motion on February 16, 2011.

On March 7, 2011, CPD filed a motion to strike a letter sent by Indeck Energy – Alexandria, LLC (Indeck) (one of the Wood IPPs) directly to Commissioners Getz , Below, and Ignatius (but not to any party to this matter) and originally docketed in this proceeding as a public comment on March 1, 2011. CPD argued that because Indeck was a full party intervenor in the docket, it may not file a public comment, and cited to Order No. 25,192 granting the motion of the Wood IPPs to strike the public statement made by Mel Liston of CPD. Indeck withdrew its comments on March 10, 2011.

On March 14, 2011, Edrest filed a communication with the Commission regarding changes proposed by Laidlaw to the ownership structure and original structure submitted to the SEC in a filing dated March 9, 2011. PSNH objected to the e-mail communication on March 15, 2011.

II. SUMMARY OF THE POWER PURCHASE AGREEMENT

The PPA is an agreement between PSNH and Laidlaw as Seller for PSNH's purchase from Laidlaw of 100% of the Products,[4] including Energy, Capacity, and New Hampshire Class I RECs, produced by a new biomass Facility to be constructed in Berlin, New Hampshire. As set

[4] The capitalized terms in this section of the Order are based on the PPA definitions in Article 1.

forth in Appendix A, the Facility will be designed to have a net electric output at standard conditions of approximately 64 megawatts (MW) (winter) and 61 MW (summer).[5] The PPA is binding on the parties as of the Effective Date, June 8, 2010, and remains in effect for 20 years from the In-Service Date, as defined in the PPA. Section 2.1.

The Facility is expected to utilize Biomass Fuel, defined in section 1.5, as its primary fuel and will be designed and operated as a NH Class I renewable energy source. The PPA contemplates that the Facility will acquire and maintain the status of a "qualifying facility" pursuant to 18 C.F.R. Part 292 for the duration of the PPA. Section 3.3. [6]

Numerous definitions applicable to the PPA are set forth in Article 1. For example, Capacity is defined in section 1.7 as MWs of capacity that (i) has obtained a capacity supply obligation as a result of participation and clearing in an ISO-NE administered forward capacity auction, reconfiguration capacity auction or any successor auction, marketplace, or agreement and (ii) as such, is receiving compensation pursuant to this capacity supply obligation by ISO-NE via the ISO-NE settlement process.[7]

Under section 1.8, Change in Law means that any applicable law, rule, or regulation is changed (whether directly or indirectly by pre-emption, displacement or substitution) or any new applicable law, rule, or regulation is enacted or promulgated subsequent to the Effective Date.

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[5] The Company explained at hearing that the term "standard conditions" means normal, steady-state operation of the unit. 1/25/11 Tr. at 117. PSNH stated that there are seasonal differences in atmospheric conditions that affect efficiency of the unit. *Id.* The Company further explained that summer months are June, July, August and September, with winter months being the other 8 months of the year. *Id.* at 118.

[6] PSNH explained at hearing that wholesale power transactions are within FERC jurisdiction under the Federal Power Act and this requirement allows the Commission to have jurisdiction over the PPA. 1/25/11 Tr. at 101-102. PSNH provided a further explanation of section 3.3 in PSNH Exhibit 12, which provided a response to Record Request RR-002. PSNH stated in that response that the purpose of this requirement is to ensure that the Facility maintains the exemptions provided under FERC's PURPA regulations at 18 CFR 292.602. PSNH also stated that since the Facility is too large to qualify for the regulatory exemptions from the Federal Power Act provided under 18 CFR 292.601, the PPA will have to be filed as a FERC tariff. PSNH further said that the Commission's authority to amend the PPA, see Article 24 of the PPA, would be governed by the Federal Power Act and FERC regulations.

[7] According to PSNH, this definition protects PSNH's customers from paying for non-qualified capacity with no real value within ISO-NE's forward capacity market (FCM) structure. PSNH Exh. 5 at 6.

Energy is defined in section 1.15. The In-Service Date is the date on which Laidlaw declares the Facility to be in service and the Facility is capable of regular commercial operation with a predictable daily dispatch.[8] Section 1.25. The Interest Rate for purposes of the PPA is the prime lending interest rate as published from time to time in the *Wall Street Journal* plus 2%. Section 1.28. NH Class I RECs are defined as RECs produced or, in the event of a Change of Law that would have been produced, by the Facility pursuant to its qualification as a renewable energy source as defined in 362-F on the Effective Date and regardless of any subsequent Change in Law. Section 1.44. Under section 1.57, Renewable Products Payment means the alternative compliance payment (ACP)[9] schedule set forth in RSA 362-F for Class I RECs, as adjusted from time to time, provided that if there is a Change of Law with respect to RSA 362-F, the Renewable Products Payment may be adjusted consistent with the section 23 Change in Law provision and provided further that the Renewable Products Payment shall not be less than the Class I ACP payment schedule, including future adjustments, in effect on the date of the PPA.

The Products to be purchased by PSNH are defined as (i) any electrical product or service that is recognized and compensated pursuant to the ISO-NE Tariff from time to time, including but not limited to Energy, Capacity, Ancillary Services, and (ii) any Renewable Products.

[8] The original "Scheduled Operation Date" is June 1, 2014. Section 5.2. At hearing, PSNH stated that although Laidlaw had not notified PSNH of any change to the June 1, 2014 date, the Company expected operation of the Facility to begin in the second quarter of 2013 based on information presented to the SEC. 1/24/11 AM Tr. at 114, 116. As to the difference between the expected operation date and the Scheduled Operation Date, PSNH stated that the two dates were different based on the PPA provisions that referred to the two terms. *Id*. at 115. PSNH also conceded that the Scheduled Operation Date could be different than June 1, 2014 based on the operation of the PPA. *Id* at 117.

[9] ACPs are paid into the renewable energy fund by electricity providers in lieu of meeting the renewable portfolio requirements. RSA 362-F:10,II.

Section 1.49. Renewable Products are RECs as defined in section 1.54[10] and other Environmental Attributes as defined in section 1.16. Section 1.56.

Under section 2.4, if ownership or operating control of the Facility is transferred to a third party, Laidlaw will require the transferee to assume all of Laidlaw's rights and obligations under the PPA.

PSNH's obligation to purchase the Products is contingent on satisfaction of several conditions, e.g., execution of a FERC approved Interconnection Agreement; evidence of governmental approvals to commence commercial generation of the Products, including certification to produce New Hampshire Class I RECs; a final, non-appealable Commission decision "approving and allowing for full cost recovery of the rates, terms and conditions" of the PPA; and the execution of the Purchase Option Agreement (POA) attached to the PPA as of the In-Service Date, to be recorded, and furnishing of a title insurance policy in connection with the POA. Section 4.1.[11]

Pricing and payment terms for the Products in effect before the In-Service Date and after the execution of the Interconnection Agreement are set forth in section 6.1.1. Pricing and payment terms for the Products after the In-Service Date are set forth in section 6.1.2 and 6.1.3. Capacity is priced as follows: for the first five years, the price is $4.25 per kilowatt (kW) month;

[10] RECs include not only New Hampshire Class I RECs but also any other Renewable Energy Certificates that can be used to transfer rights to Environmental Attributes produced by the Facility under any Renewable Portfolio Standard (RPS), i.e., RSA 362-F and any other similar law, regulation or order. See section 1.55.

[11] At hearing PSNH stated that if it wants to exercise the POA in 20 years, there would be some form of proceeding before the Commission since the transaction could affect rates. 1/25/11 Tr. at 97-98; see also PSNH Exh. 5 at 11 (proceeding would be required in any scenario to ensure that the net economic benefits associated with the POA would be returned to customers). In PSNH Exh. 13, which responded to Record Request 003, the Company stated generally that "PSNH anticipates that [Commission] approval would authorize PSNH to administer routine matters under the [PPA] without further approval by the Commission. However, to the extent that there are material discretionary actions under the PPA (such as transfer of the Right to First Refusal), PSNH's actions regarding such discretionary actions would be subject to traditional Commission oversight to ensure the prudence of the Company's actions." Regarding the Company's authority for automatic cost recovery of any expenditure made pursuant to Article 8, PSNH indicated that the Commission would have authority to review any resulting rate changes. 1/25/11 Tr. at 114-115.

thereafter the price for Capacity is increased by $0.15 per kW-month for each of the final fifteen years. Section 6.1.2(b). However, any payments for Capacity prior to June 2014 are paid in accordance with section 6.1.1(b). Payment for the purchase of New Hampshire Class I RECs is based on a formula tied to the ACP schedule set forth under RSA 362-F for Class I RECs. Thus, during the first five years after the In-Service Date, payment for New Hampshire Class I RECs is the product of 80% of the Renewable Products Payment times the number of NH Class I RECs delivered. During the second five years, the price is based on 75% of the Renewable Products Payment; during the next five years, the price decreases to 70% of the Renewable Products Payment; and finally, during the final five years of the PPA, the price decreases further to 50% of the Renewable Products Payment. Section 6.1.2(c).[12]

Payment for all other Products (primarily, for Energy) is determined by multiplying the Adjusted Base Price in Dollars per megawatt-hour (MWh) by the hourly quantity of delivered Energy. The Adjusted Base Price is determined by a formula that starts with a Base Price of $83/MWh. In each subsequent calendar quarter following the In-Service Date, the Base Price will be adjusted to incorporate a Wood Price Adjustment (WPA). The WPA reflects the difference between the actual average price per ton that PSNH paid for biomass fuel at the

[12] At hearing, PSNH elaborated on how the Renewable Products Payment might or might not be affected by certain future events. PSNH said that even if RSA 362-F is repealed and there is no New Hampshire Class I REC requirement, the value of the Environmental Attributes would still go to PSNH's customers and the PPA pricing would continue to be based on the New Hampshire ACP as it currently exists. 1/24/11 PM Tr. at 44, 46-49. In addition, if the Facility is no longer eligible to produce New Hampshire Class I RECs as a result of a future change to RSA 362-F and the Facility is decertified as a generator of New Hampshire Class I RECs, the Company stated it would, consistent with the Article 23 provision that addresses the intent to preserve the value for both parties in the event of a Change in Law, continue to purchase the Environmental Attributes on the same pricing terms. *Id*. at 37-40, 47-48, 52-53. For example, if a federal RPS law were to preempt the New Hampshire RPS law, PSNH said it would realize the greater value but the payment would stay the same. *Id*. at 46. Moreover, if the ACP schedule for a Class I obligation were substantially changed or repealed in the future, the payment would stay the same under the PPA. *Id*. at 53-54. On the other hand, the annual adjustments to the ACP rates, see RSA 362-F:10, III (inflation adjustments), are not a Change in Law and therefore Laidlaw would get the benefit of an escalation in the rate. *Id*. at 46. As to the question of whether under the PPA the amount of New Hampshire Class I RECs available to be purchased under the PPA would be affected by a Change in Law, PSNH stated that the impact would be addressed pursuant to section 23.1 and that the intent of the parties is that any amendment negotiated because of a Change in Law would have to reflect as closely as possible the intent and the substance of the economic bargain before the Change in Law. *Id*. at 50-52; see also Wood IPPs Exh. 12.

Northern Wood Power Project (Schiller Station)[13] in the immediately preceding quarter and the base wood price of $34 per ton. The difference in $/ton, whether positive or negative, will then be converted into a $/MWh adjustment using a multiplier of 1.8 tons per MWh. The final energy price payable in the invoice period will be the Base Price, as adjusted by the WPA. Section 6.1.2.

Section 6.1.3 provides for a Cumulative Reduction adjustment[14] that could serve to reduce the purchase price of the Facility in accordance with the POA.[15] The CRF is designed to calculate and track any Energy payments that differ from the ISO-NE spot market energy price. For each MWh of Energy delivered under the PPA, a negative or positive adjustment will be determined. When the Adjusted Base Price exceeds the ISO-NE Day Ahead hourly Locational Marginal Price (LMP) at the Delivery Point, the hourly negative adjustment will equal the delivered MWh multiplied by the difference between the LMP and the Adjusted Base Price. Similarly, when the Adjusted Base Price is less than the LMP, the hourly positive adjustment will equal the delivered MWh multiplied by the difference between the LMP minus the Adjusted Base Price. These negative and positive adjustments will be continuously aggregated over the 20 years of the PPA and if, at the termination of the PPA, the aggregate balance is negative, that balance will be the CRF for the purpose of reducing the purchase price of the Facility as

[13] Although the Energy payment reflects actual Schiller Station wood prices, PSNH stated that benchmarking the price of wood fuel to an "index price" at Schiller Station, a regulated utility plant, is a positive aspect of the PPA because the Commission reviews the prudence of the Schiller Station wood purchases. 1/24/11 PM Tr. at 60. The Company explained that if the Commission were to find that PSNH was imprudent in its Schiller Station wood purchases, the Company would respond by changing its practices and that would change the going-forward price for the PPA. *Id.* at 62.

[14] This Cumulative Reduction adjustment is variously referred to in the record as the Cumulative Reduction factor, account, fund or mechanism. For consistency and brevity in this order, it is referred to simply as the CRF.

[15] PSNH stated that the POA might provide value to PSNH's customers in several ways. Depending on the future regulatory structure of the electric utility industry as it relates to PSNH, PSNH could operate the Facility as part of a portfolio of regulated generation assets providing energy service to customers or operate the Facility as a merchant plant and sell the output into the markets. PSNH could also transfer the option for a price to an Affiliate or third party under section 7.2.1. PSNH Exh. 5 at 11.

provided in the POA. If the aggregate balance is positive, meaning that over the term of the PPA customers did not pay over-market prices, the CRF will have no further effect.

Article 7 provides PSNH with a Right of First Refusal and the exclusive right to purchase the Facility in accordance with the POA. Under the Right of First Refusal, section 7.1, if Laidlaw proposes to sell all or any part of the Facility pursuant to a bona fide offer from a third party, PSNH would have the ability to match that third party's offer and purchase the Facility on similar terms.[16] In its prefiled testimony and at hearing, PSNH said that this right is transferable to a PSNH affiliate. PSNH Exhibit (Exh.) 5, prefiled testimony of Richard C. Labrecque, at 12, lines 10-11 and 1/25/11 Tr. at 132, line 1. The POA gives PSNH the exclusive right, but not the obligation, to purchase the Facility at the conclusion of the 20 year term. Section 7.2.1. Upon notice to Laidlaw, PSNH may transfer this option to an Affiliate or third party.

Under section 8.1, Laidlaw is responsible for all costs of qualifying the Facility to participate in the ISO-New England markets and other programs designed to document or provide for the sale and transfer of the Products established by any of the New England States or the federal government. In addition, upon notice from PSNH, Laidlaw must make commercially reasonable efforts to apply to other programs for the purpose of increasing the value of the Products to PSNH; this obligation is subject to two provisos, first, that this obligation does not require Laidlaw to pursue litigation or assume new capital or operational obligations and, second, that if a Change in Law would require Laidlaw to incur costs in order to continue to produce RECs or other Environmental Attributes or deliver them to PSNH, then, at PSNH's

[16] In PSNH Exh. 11, PSNH stated that this section applies when Laidlaw desires to sell any of its interests in the Facility, including any associated interests or rights in the Site, other than in a sale/leaseback arrangement or similar financing. PSNH said the right of first refusal would not extend to ownership/lessor interests; rather this right pertains to the sale of Laidlaw's leasehold interests in the Facility and the Site, i.e., the right to operate the Facility, over its first 20 years of operation. By contrast, the POA provides a first priority right to purchase the Facility and Site free of *all* other interests after 20 years, even if the right of first refusal had earlier been exercised.

option and as long as PSNH agrees to compensate Laidlaw for such costs, Laidlaw will take such actions.[17]

Section 9.1 requires Laidlaw to construct, operate and maintain the Facility using Good Industry Practices as defined in section 1.24. Section 23.1 states that if a Change In Law occurs or any of the ISO-NE Documents, as defined in section 1.31, are changed which affects a material right or obligation of the Parties, they will negotiate in good faith in an attempt to amend the PPA with the intent that any such amendment "reflects, as closely as possible, the intent and substance of the economic bargain" before the Change in Law or change to the ISO-NE Documents.

The general provision regarding assignment of PPA rights and obligations, section 17.1 provides that the rights and obligations of the Parties to the PPA may not be assigned without the written consent of the other Party, which consent will not be unreasonably withheld or delayed. This provision does not apply to Article 7 or to two special cases described in sections 17.2 (PSNH's right to assign to a regulated affiliated New Hampshire electricity distribution company) and 17.3 (Laidlaw's right to assign for purposes of financing).

Article 24 relates to certain FERC and Commission actions in respect to the PPA. Section 24.2 states that "[i]t is the intention of the Parties that any authority of FERC or the [Commission] to change this Agreement shall be strictly limited to that authority which applies when the Parties have irrevocably waived their right to seek to have FERC or the [Commission] change any term of this Agreement."[18] Under section 24.3, the standard of review by FERC

[17] For example, under this provision, PSNH stated that if there was a Change in Law requiring the installation of additional emissions equipment for the Facility to continue to produce New Hampshire Class I RECs, the Company would decide whether to require Laidlaw to make requisite capital improvements to continue to qualify the project for New Hampshire Class I REC production. 1/24/11 PM Tr. at 33-35.

[18] At hearing, PSNH said that the intent of Article 24.2 is that the parties themselves will not seek the change and will waive their rights to do so. 1/24/11 P.M. Tr. at 78.

expressed as the "public interest" application of the "just and reasonable" standard established by the so-called *Sierra-Mobile* doctrine.

Article 25 governs dispute resolution. It provides for disputes to be resolved first by negotiation, then by mediation, and then, except in cases where the dispute is subject to Commission or FERC jurisdiction, by arbitration.

Under section 26.7, to be valid, material amendments of the PPA that are agreed-upon by both parties must be approved by the Commission.

Appendix B to the PPA sets forth the form of the POA. The Parties to the POA are PSNH, Laidlaw, and PJPD Holdings, LLC, the Facility Site Owner.[19]

The Option Exercise period commences on the day after the 20th anniversary of the In-Service Date and extends for 120 days thereafter; if PSNH exercises the option, the closing of the transfer is to occur no later than 180 days after PSNH exercises the option. POA sections 2(a) and (b). The purchase price for the Facility Assets is their fair market value, assuming they are sold free and clear of financing liens, less any positive Cumulative Reduction value. POA section 4(a).[20] If the Parties to the POA are unable to agree upon the fair market valuation, the POA provides a process for establishing the valuation by qualified independent appraisers. POA section 4(b). PSNH and the Site Owner will each select two qualified independent commercial appraisers. The highest and lowest valuations will be discarded and the remaining two

[19] PSNH said that, to its knowledge, the ownership of the Facility had not been assigned to another party. 1/25/11 Tr. at 90. According to PSNH, PJPD Holdings, LLC and Laidlaw are both subsidiaries of a new entity referred to as NewCo. *Id*. On March 9, 2011, after the conclusion of the hearings in this docket, Laidlaw and Berlin Station, LLC filed with the Site Evaluation Committee a joint request for transfer and amendment of the certificate of site and facility issued by the SEC. The filing reflects a corporate reorganization required by lenders to the project. According to the filing, if approved, NewCo Energy, LLC, the same entity presented at the hearings to the SEC Subcommittee, will remain at the top of the corporate structure but a new corporate entity, Berlin Station, LLC, will be formed to replace both PJPD Holdings, LLC and Laidlaw Berlin BioPower, LLC. *See* SEC Docket No. 2011-01 (http://www.nhsec.nh.gov/2011-01/index.htm). PSNH said that if the POA is not executed and recorded at the registry of deeds, the PPA becomes null and void. 1/25/11 Tr. at 91.

[20] Because a net negative Cumulative Reduction adjustment reduces the purchase price of the Facility under section 6.1.3, the Commission understands this provision to mean that a net negative Cumulative Reduction adjustment is actually added to fair market value in order to achieve the reduction.

valuations will be averaged to determine a binding fair market value of the Facility Assets. Laidlaw and the Facility Site Owner must provide PSNH with a title insurance policy in the amount of $47 million insuring PSNH's interest in the POA free of liens and encumbrances as of the Effective Date.[21] POA section 7(a). All secured lending arrangements, mortgages, leaseholds and other liens and encumbrances on the Facility Site and Facility Assets as of the Effective Date must be discharged or fully subordinated to PSNH's rights under the POA. POA section 7(b). At the closing of the purchase option, Laidlaw and the Facility Site Owner must transfer the Facility Assets and all personal and intangible property with respect to the Facility and Facility Site as necessary for conveying good title to PSNH free, with certain exceptions, from liens and encumbrances; Facility Assets are to be transferred on an "as is" basis without warranties as to physical condition. POA section 8. Section 13 of the POA provides a dispute resolution procedure that is generally similar to that provided in the PPA. A memorandum of the POA, attached to the POA as Exhibit B, is recordable in the Coos Registry of Deeds. POA section 15.

At hearing, PSNH introduced PSNH Exh. 9-Rev. 1. Exh. 9-Rev. 1 describes five changes to the PPA offered by Laidlaw. According to PSNH, the changes reflect Laidlaw's reaction to the criticisms of certain parts of the PPA. *See* 1/24/11 AM Tr. at 55. Although PSNH stated it is fully prepared to go forward with the PPA as filed and does not recommend that the PPA be changed, it said that these changes were acceptable to the Company and Laidlaw if they were made conditions to Commission approval. 1/26/11 AM Tr. at 91-94, 102. PSNH stated that the changes are independent and not conditioned on each other. *Id.* at 94. The proffered changes are as follows.

[21] Pursuant to section 7(c), PSNH may obtain an owner's title policy at its expense.

1. CONTRACT QUANTITY--for the purposes of the PPA, the project size will not exceed 67.5 MW net.

2. INTEREST ON CUMULATIVE REDUCTION ACCOUNT-- the account will accumulate interest at an annual rate equal to the prime lending rate plus two percent (consistent with the PPA definition of Interest Rate).

3. EXCESS RECS--For each calendar year during the PPA Term, PSNH will determine the amount of any NH Class I RECs purchased from Seller (either in that calendar year or purchased in earlier years and banked, and released in such calendar year) in excess of the difference between (i) the minimum requirement of PSNH to obtain and retire NH Class I RECs pursuant to RSA 362-F (or any successor requirement) applicable to such calendar year and, (ii) all NH Class I RECs available to PSNH from the Lempster PPA and Smith Hydro (or released from banking) in such year ("Excess NH Class I RECs'). For each Excess NH Class I REC, PSNH will determine the difference between (i) the price it paid Seller for such Excess NH Class I REC, and (ii) any value realized by PSNH through the resale or other disposition of such Excess Class I REC (the "Net Value"). The Net Value, positive or negative, will be added to the continuous calculation of the Cumulative Reduction provided for in Section 6.1.3(a) of the PPA. PSNH will provide documentation reasonably necessary to verify such calculations.

4. BASE ENERGY PRICE-- The "Base Price" will be lowered from $83 to $75.80/MWh and a related change to the WPA is that the $34/ton price will be lowered to $30/ton.

5. WOOD PRICE FACTOR-- the established 1.8 tons/MWh WPA factor will be lowered to 1.6 tons/MWh.

According to PSNH, the contract quantity cap in item 1 would be a clarification and limitation to Exhibit A attached to the PPA. *Id.* at 92. PSNH stated that item 3 addressed the concern that, under the PPA, PSNH would be purchasing RECs in excess of its requirements under the Renewable Portfolio Standard (RPS, RSA Chapter 362-F). *Id.* at 93. PSNH explained that to the extent PSNH has an excess amount of RECs, the Company would realize some value from the sale of excess RECs into the market. *Id.* To the extent that the value realized is less than the price paid by customers under the PPA, the difference would be reconciled and applied to the CRF throughout the term of the PPA. *Id.* Item 4 is a reconfiguration of the formula that is in the WPA mechanism; according to the Company by itself it does not change any pricing. *Id.*

Finally, PSNH stated that item 5 would change the negotiated wood price adjustment factor to 1.6 tons/MWh, in lieu of the 1.8 tons/MWh factor in the originally filed PPA. *Id.* at 93-94.

III. POSITIONS OF THE PARTIES AND STAFF

A. PSNH

In PSNH's direct pre-filed testimony, Mr. Long presented the PPA and Mr. Labreque explained certain of its terms. PSNH Exh. 1, prefiled testimony of Gary A. Long and PSNH Exh. 5, prefiled testimony of Richard C. Labrecque. Mr. Labrecque said that the renewable products to be purchased by PSNH under the PPA include NH Class I RECs, but that PSNH is also entitled to any other environmental attribute, applicable now or in the future, related to the project, including certain credits, certificates, benefits, emission offsets, allowances, etc. PSNH Exh. 5 at 2. Mr. Labrecque explained that the PPA included this flexibility so that if RSA 362-F is amended, replaced or superseded by new legislation, including a Federal RPS program, PSNH's customers would continue to receive the benefits associated with purchases from the project. *Id*. at 3.

Mr. Labrecque explained that the WPA component of the energy price was developed because the parties were concerned that the cost of biomass fuel delivered to the project could vary over the 20 year term of the PPA. He said without the WPA, Laidlaw could be faced with increasing fuel costs and declining operating margins or even losses, perhaps to the extent that production would have to cease, which could pose an insurmountable barrier to Laidlaw to obtain financing for the project. *Id.* at 4. Similarly, if wood prices declined during the term of the PPA, PSNH customers would have to pay higher prices for purchases from the project without the WPA; thus, according to Mr. Labrecque, the WPA addresses the risk to both parties. *Id*. at 4-5. Further, he stated that the prices were indexed to biomass fuel at Schiller Station to link the WPA to an index under the full procurement control of PSNH and regulated by the

Commission. As to the 1.8 conversion factor which is part of the WPA, Mr. Labrecque said that it gives Laidlaw the incentive to operate as efficiently as possible while protecting PSNH's customers from inefficient operation. *Id*. at 5. Regarding the PPA REC prices, Mr. Labrecque said that they declined over time to produce increasing value to PSNH's customers over time while providing the developer with a predictable revenue stream. *Id.* at 7.

According to Mr. Labrecque, the CRF is a unique and important feature of the PPA that is essential to PSNH in order to protect customers from unknown future market energy prices. PSNH included this feature to protect its customers from the potential of paying over-market energy prices over the term of the PPA. By using the CRF to offset the purchase price of the project at the end of the PPA, PSNH customers will have the opportunity to recapture the over-market payments, if any, made during the PPA term over a subsequent time frame.

Mr. Labrecque stated that, pursuant to the Public Utilities Regulatory Policy Act (PURPA), PSNH was required to purchase the output of "qualifying facilities" from developers at a price known as "avoided cost." He recounted that many developers elected to use a long-term forecasted avoided cost as the basis for their payments under rate orders issued by the Commission which far exceeded PSNH's actual avoided costs and resulted in significant over-market payments to the developers. Then, at the termination of the PURPA rate orders, there was no opportunity for PSNH's customers to recapture those over-market payments. He maintained that the PPA provides PSNH's customers with the opportunity to receive value to offset any over-market payments following its termination. *Id*. at 8-9.

Mr. Labrecque opined that at the end of the PPA term it is possible the project will have significant value as a provider of economic, renewable, low-emission base load energy and capacity. *Id*. at 10. He stated that the POA provides PSNH with the ability to purchase the project either at the assessed value or at a discount when considering the CRF, a benefit which

could be passed on to the Company's customers. Mr. Labrecque further opined that PSNH's ability to transfer this right to an assignee ensures that this benefit will be available regardless of PSNH's own ability to purchase the project at that time. *Id.* at 11.

Mr. Large provided testimony on behalf of PSNH regarding how the PPA fits in with PSNH's overall power portfolio and its renewable energy resource needs and matters related to compliance with RSA 362-F. PSNH Exh. 4, prefiled testimony of Terrence J. Large. He stated that the output of its owned generation assets in conjunction with power purchases from a number of independent power producer facilities in New Hampshire do not fully satisfy the projected energy requirements of its customers and thus the power from the Laidlaw project is needed. According to Mr. Large, PSNH relied on forecasts included in its least cost integrated resource plan filed in Docket No. DE 07-108, which showed that it would need to purchase 4-5 million MWh of energy annually, between 900 and 1,000 MW of capacity, and more than 250,000 Class I RECs from qualified resources. He also noted that in the DE 07-108 filing it proposed to add at least one 50 MW biomass plant to its portfolio of assets as one means to close the gap between anticipated need and supply. PSNH Exh. 4 at 3-4.

According to Mr. Large, PSNH recognizes that as a result of the downturn in the economy, PSNH's sales have not met forecasted levels and, subsequent to the DE 07-108 filing, PSNH has experienced a substantial increase in the number of customers electing to take energy service from a competitive supplier. *Id.* at 4. He mentioned that approximately 30% of its total distribution service load was then currently being supplied by competitive suppliers. According to him, although these factors have reduced its near term need to obtain energy, capacity and RECs from the market, a gap still exists. For 2014, the energy gap between resources and supply is projected to range from 1,100,000 to 3,746,000 MWh per year and the capacity gap is projected to range from 401 to 1,073 MWs, depending on the particular forecast of customer

sales and migration to competitive retail suppliers. Also for 2014, PSNH projected a need for an additional 224,000 to 355,000 Class I RECs, increasing to between 942,000 and 1,397,000 by 2025. Annually, PSNH expects the PPA to produce over 484,000 MWh[22] of energy and associated RECs and provide approximately 65 MWs of capacity. *Id.* at 4-5.

Mr. Large argued that the PPA is consistent with RSA Chapter 362-F and will help the Company to comply with the statute. He affirmed that the Laidlaw facility is being designed to qualify as a Class I renewable resource and stated that the PPA is consistent with the five public interest factors set forth in RSA 362-F:9, II. Regarding the first factor, consistency with the efficient and cost-effective realization of the purposes and goals of the RPS law, he said that the Company employed a direct negotiation process with Laidlaw in order to bring this PPA to the Commission for approval in a timely manner. He stated that PSNH reviewed the benefits and goals of renewable power generation set forth in RSA 362-F:1, including the provision of fuel diversity to the state and New England through the use of local renewable resources that lowers regional dependence on fossil fuels. For example, he stated that a 65 MW wood-fired base load facility will reduce the need for reliance on the same amount of fossil fueled resources. Mr. Large also maintained that the 20-year PPA term will help provide price stability, especially since the pricing is not dependent on the cost of fossil fuel. Finally, he pointed out that Laidlaw will make a significant investment in New Hampshire during construction, and will provide jobs once the unit is operational. *Id.* at 5-8.

As to the second factor, consistency with the restructuring policy principles of RSA 374-F:3, Mr. Large pointed out that subsection V(f) calls for utilities to offer a renewable energy

[22] The initial filing incorrectly stated production of the project to be 474,000 MWh on an annual basis. *See* 1/25/11 Tr. at 48.

source default service[23] option. He stated that the PPA supports efforts that develop the market for renewable power; further, the Laidlaw project will adhere to the subsection IX principle that "over the long term, increased use of cost effective renewable energy technologies can have significant environmental, economic and security benefits." Finally, in PSNH's view, subsection VIII's encouragement of environmental protection and long term environmental sustainability is satisfied because the Laidlaw facility will emit very little or none of the four pollutants, sulfur dioxide, NOx, mercury, and CO_2,[24] that are the subject of the New Hampshire Clean Power Act. *Id.* at 8-9.

The third factor is the extent to which PSNH's multi-year procurements "are likely to create a reasonable mix of resources, in combination with the [Company's] overall energy and capacity portfolio, in light of the energy policy set forth in RSA 378:37[25] and [PSNH's] integrated least cost resource plan pursuant to RSA 378:37-41, if applicable, or a portfolio management strategy for default service procurement that balances potential benefits and risks to default service customers." As to this factor, Mr. Large described the positive impact of the Laidlaw project on the diversification of PSNH's resource portfolio and, in particular, the extent to which market purchases of energy and capacity will be displaced by purchases under the PPA in 2014. In addition, he maintained that the Laidlaw project will add fuel diversity to New Hampshire's and New England's generation energy and capacity resources through the use of local, renewable biomass fuels, improve air quality, public health, and lessen the risks of climate

[23] In PSNH's tariffs, default service is called energy service.

[24] More specifically, PSNH stated that it expected that the Laidlaw facility will not be required to obtain CO_2 allowances under the Regional Greenhouse Gas Initiative.

[25] RSA 378:37 states that "it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; the protection of the safety and health of the citizens, the physical environment of the state, and the future supplies of nonrenewable resources; and consideration of the financial stability of the state's utilities."

change, positively impact energy security and, assuming that Laidlaw manages the forest biomass resource in a sustainable way, enhance the region's energy independence. *Id.* at 10-14.

As to the fourth factor, the extent to which PSNH's procurement is conducted in a manner that is administratively efficient and promotes market-driven competitive innovations and solutions, Mr. Large pointed to Laidlaw's use of an existing power boiler and its infrastructure, in an area of the State long known for employing biomass resources for industrial use, in combination with newer emission controlling technologies, as being a solution to a market-driven need for renewable energy. He also alluded to the potential development of local community combined heat and power installations, such as has been considered by the City of Berlin or the supply of process steam or hot water to the paper mills still operating in the region. *Id.* at 14.

The fifth factor, economic development and environmental benefits for New Hampshire, was the subject of further testimony provided by Dr. Lisa K. Shapiro, a consultant for PSNH, regarding economic benefits, and specifically, the jobs, economic output (sales), value-added (gross state product), household earnings and tax revenues resulting from the construction and operation of the Laidlaw project. PSNH Exh. 6, prefiled testimony of Dr. Lisa K. Shapiro. Based on information Laidlaw submitted to the SEC and her use of the federal government's RIMS II modeling system, she concluded that the Laidlaw project will provide significant economic benefits to an economically depressed area of the state of New Hampshire by supporting approximately 470 average annual New Hampshire jobs during the construction of the project, and once the project is operational, 40 direct jobs at the plant, and about 200 additional indirect and induced jobs, many of which will be in the logging and related industries. PSNH Exh. 6 at 18. While she recognized that many of the economic benefits of the project are

likely to be concentrated in the North Country, she opined that statewide economic benefits would also accrue. *Id.* at 9, 16.

In the joint pre-filed rebuttal testimony of Messrs. Long, Large, and Labrecque, PSNH argued that the OCA's and Staff's forecasts of energy prices, which indicated that the PPA energy prices were over-market, were necessarily inaccurate because no one knows what the future day ahead or real time energy prices will be. PSNH maintained that it does not forecast energy prices. PSNH Exh. 7, rebuttal testimony of Long, Large and Labrecque, at 3. PSNH also complained that the OCA's and Staff's conclusions were based on a hypothetical financial analysis prepared by PSNH to assess the PPA economics. *Id.* at 3. PSNH stressed the inherent unreliability of forecasts, stating that modest changes in a market price scenario can greatly affect the conclusions to be drawn from the forecast. *Id.* at 4. PSNH provided Attachment PSNH Rebuttal 2 purporting to show that, using historic price data from the period 2003 to the present, the PPA's pricing mechanism would be more stable and less volatile than the wholesale market, and produces prices that on average would have been essentially at market. *Id.* at 4-5. PSNH encouraged the Commission to focus instead on the extent to which the PPA: (i) avoids past mistakes and limits potential negative outcomes to customers while preserving potential positive outcomes; (ii) fairly balances risks between the developer and customers; (iii) is consistent with State energy policy; and (iv) provides portfolio risk management benefits to PSNH customers by adding fuel diversity and renewable power at a known discount to the ACP.

As to capacity price forecasts, PSNH asserted that Staff's prefiled testimony indicated that the PPA price is less than the projected capacity prices developed by Levitan and Associates, a consultant for PSNH, resulting in customer savings of over $40 million over the term of the PPA. *Id.* at 7. Referring to Staff's testimony that gas-fired units are the marginal units in New England, PSNH maintained that since they are not recovering any capital costs through energy

market prices, the capacity markets must rise to levels that fully support new unit construction costs and in such a scenario, the PPA is expected to result in considerable savings for its customers. *Id.* at 8.

PSNH contested Staff's assessment of the wood price adjustment provision in the PPA and the validity of Staff's wood price projections. PSNH also argued that it is a mistake to focus on long term price projections rather than PPA design features that keep pricing closely tied to reality over the long term. *Id.* at 8-11.

PSNH defended the CRF, arguing that it provided a solution to the problem of developing a contract with enough certainty in the revenue stream during the 20-year financing term to allow the project to be financed and built, but that also protects customers from enriching the developer via excessively high energy payments, while simultaneously providing the possibility for those customers to benefit from potential below-market energy pricing under the PPA. *Id.* at 12. According to PSNH, at the end of the PPA term, if customers have cumulatively paid above-market energy prices, the CRF value can be considered an insurance fund to be used as a credit toward the purchase of the plant. PSNH pointed out that that fund need not be used by PSNH because PSNH can sell both the POA and the insurance fund value to someone else, and pass the sales proceeds back to customers. *Id.* at 13. PSNH asserted that due to financing concerns, it did not believe that a real time energy price tracking provision would allow the project to be built. In short, PSNH concluded that the PPA is its best attempt to balance myriad public interests, from protecting customers from the problems of the original IPP rate orders to allowing a financeable project to be developed that would both produce renewable energy and provide extensive economic benefits to the state. *Id.* at 14.

PSNH complained that Staff's and the OCA's positions imposed too many requirements and conditions and "over-constrained the solution space" to such an extent that they eliminate

any solution at all. *Id.* at 15. PSNH maintained that Staff and the OCA were wrong to hypothesize that the Laidlaw facility may have no value after 20 years. PSNH said that although it does not guarantee that the Laidlaw facility will operate after 20 years, its experience indicates that it will do so. *Id.* at 17-18. As to the OCA's claim that the PPA does not provide a match between the customers who pay the costs of the PPA and those who receive the benefits, PSNH stated that such matching never occurs in a cost-based regulated utility setting. PSNH also denied the validity of Staff's position that the CRF may be inconsistent with the "used and useful" principle and the OCA's position that the restructuring law must be amended to allow the CRF. PSNH contended that the "used and useful" provision in RSA 378:28 and the anti-construction work in progress (CWIP) provision in RSA 378:30-a are not applicable because the value accumulated via the CRF throughout the term of the PPA is not being added to rate base and the Company will not earn a return on it. As to the OCA's argument that the restructuring law must be amended to allow the CRF, PSNH contended that the value of the CRF can accrue to customers even if the Company cannot and does not ultimately purchase the facility. *Id.* at 20.

PSNH contended that Staff's and the OCA's conclusions regarding the prices for Class I RECs under the PPA are flawed. *Id.* at 21-23. As to Staff's reliance on REC price projections in a study prepared by Synapse Energy Economics (Synapse) in 2007 and updated in 2009, the Company questioned the accuracy of the REC price projections since even the short-term projections in the study turned out to be incorrect and Staff had to make adjustments to the projections. Similarly, PSNH questioned the OCA's assumption that future REC prices would always be equal to 30% of the ACP. *Id.* at 21. PSNH argued generally that long term market forecasts should not play a significant role in evaluating the PPA. Stating that "[p]resumably, the ACPs were created as an appropriate benchmark price that would create the necessary incentive for renewable resource construction," PSNH pointed out that all REC purchases under

the PPA are at a discount to the ACPs set forth in RSA 362-F. According to PSNH, Staff and the OCA fixated on the cost of the PPA compared to flawed REC market projections when they should have considered the discount relative to the ACP and State policy. PSNH further argued that Staff and OCA overlooked the supply versus demand balance that will play out in the REC market in the coming years. *Id.* at 22. According to PSNH, Attachment 6 to its rebuttal testimony indicates that growth in demand for RECs will outpace growth in supply, even under the most aggressive construction scenario, an imbalance that will result in market prices approaching the ACP. *Id.* at 22-23.

PSNH claimed that Staff erred in concluding that the PPA will generate excess Class I RECs. First, PSNH stated that Staff's position is inconsistent with Order No. 24,327 (order accepting proposed risk sharing mechanism regarding Schiller Station). Second, PSNH argued without elaboration that the 31% customer migration rate assumed by Staff in its projections could go up, down or stay the same. *Id.* at 23. PSNH also argued that for an economically sized biomass plant to be built, it may produce more RECs in the early years than PSNH might need but the alternative is either not to have any new renewable generation built, or to build more costly, inefficiently sized plants based on REC needs alone, a bad policymaking choice that would be inconsistent with the RPS law's public interest factor, see RSA 362-F:9,II(a), of the "efficient and cost-effective realization of the purposes and goals of this chapter." *Id.* at 24.

PSNH also questioned the usefulness of cash flow and return on equity (ROE) analysis performed by Staff. *Id.* at 25. PSNH stated that it reviewed some basic financial information provided by Laidlaw early in the negotiation process to help determine if the project was financially feasible and to negotiate PPA prices about 10% less than the initial set. *Id.* PSNH disputed Staff's assumption that an 11% ROE for the Laidlaw project is appropriate in light of

the risks for which a merchant plant such as the Laidlaw facility would need to be compensated through a higher ROE. *Id.* at 26.

PSNH defended the use of bilateral negotiations with Laidlaw, rather than conducting a competitive bid, RFP process. PSNH stated that the Lempster Wind project, which the Commission approved, could not have been developed through a competitive bidding process. *Id.* at 27. As to the two proposed biomass plants that made offers to PSNH, PSNH observed that one is not in PSNH's service territory and one would be very near the proposed Laidlaw facility. According to PSNH, neither offer was superior to the PPA. *Id.* at 28. Finally, PSNH denied that the PPA is inconsistent with certain of the restructuring policy principles in RSA 374-F:3 that Staff had mentioned in its analysis of the RSA 362-F:9 public interest factors. *Id.* at 29-31. In conclusion, PSNH warned that if the Commission rejects the PPA, new renewable generation will be built in other states and PSNH will be the price taker from those facilities, sending its customers' dollars to support economic development elsewhere. *Id.* at 36.

In her rebuttal testimony on behalf of PSNH, Dr. Shapiro argued that Thomas Frantz's testimony was based on three flawed assumptions: (i) he relies on George McCluskey's estimate of total above-market costs of the PPA, (ii) he assumes that the economic harm from the alleged above-market costs outweigh the economic benefits, and (iii) he does not take account of all the economic benefits of the Laidlaw project. PSNH Exh. 8, rebuttal testimony of Shapiro, at 1. Dr. Shapiro stated that PSNH disagrees with Mr. Frantz's assumption that the annual cost of the PPA is $26 million in above-market costs to PSNH's customers and she disagreed with his conclusion that the economic harm from a $26 million hypothetical rate increase would outweigh the economic benefit from the PPA. *Id.* at 2-3. She argued that, even assuming Mr. Frantz's flawed assumption of above-market costs raising rates from what they would otherwise be, the PPA still provides net economic development benefits to the state. In addition, she described additional

economic benefits associated with the Laidlaw project that she did not include in her RIMS II modeling. She maintained these benefits would increase the RIMS II estimates she reported in her direct testimony and are directly relevant to assessing the economic development benefits of the PPA.

At hearing, the Wood IPPs asked PSNH whether the Company was permitted under law to purchase a generation facility. PSNH said it could purchase a facility but questioned whether it could be included as a rate based facility that serves customers under default service. 1/24/11 AM Tr. at 132.

In connection with the WPA, the Wood IPPs asked PSNH whether, between the Laidlaw facility and the Schiller Station, PSNH would need approximately 1,250,000 tons of wood. PSNH said that sounded right and testified that the ratio is about 750,000 tons at Laidlaw and 500,000 tons at Schiller Station. 1/24/11 PM Tr. at 55-56. The Wood IPPs inquired whether PSNH had done any analysis as to whether Laidlaw would be competing with Schiller Station for wood, and PSNH said it had not done that analysis. *Id*. at 56. The Wood IPPs asked whether PSNH had conducted any projections, analyses, or sensitivity studies as to whether a new 75-megawatt facility will raise the wood price at Schiller Station, and PSNH said it had not done that analysis. *Id*. at 57. Similarly, the Wood IPPs asked if the wood prices at Schiller Station rise and the wood prices at Laidlaw decline, would the WPA operate to increase the energy price at the Laidlaw facility even with the reduction of fuel costs. PSNH said that whether the wood price at Schiller Station went up or down, the WPA would make a comparable adjustment to the Laidlaw pricing. *Id*. at 59-60.

The OCA asked whether PSNH believed that the POA was constructed to survive a Laidlaw bankruptcy. PSNH testified in response that the intent is to protect PSNH's interests in the POA against all other investors or parties that have an interest in Laidlaw by giving PSNH a

priority to other such interests. 1/25/11 Tr. at 42-43. The OCA asked whether Laidlaw's lenders were aware of PSNH's priority position in the use of the CRF and PSNH stated that its understanding is that the lenders are fully aware of that term. *Id*. at 43. PSNH further explained that PSNH required a title insurance policy to secure its right and that the parties negotiated such insurance in the amount of $47 million. In response to further questions, PSNH said that since the amount in the CRF will not be known for some time, it cannot be known whether the $47 million of title insurance is sufficient to protect ratepayers' interests in the account. *Id.* at 44. Staff asked PSNH whether the PPA allowed Laidlaw to expand the size of the facility and PSNH responded that the Company didn't believe so, although Laidlaw might argue the point. *Id*. at 119. Staff then inquired whether, if Laidlaw expands the output of the facility above the level set out in Appendix A, whether PSNH assumed it had an obligation to purchase all of the incremental products as a result of such expansion. *Id*. at 120-121. PSNH said it hesitated to respond because the Company viewed the project as very valuable and that it may want the project to be larger. Nonetheless, PSNH said it would be guided by the PPA and what is in Appendix A. Staff then asked if PSNH would seek Commission approval for cost recovery of any additional incremental purchases resulting from an expanded project. PSNH responded by saying that, if the Company thought it had value, the Company might argue that it would be a material change that had to come before the Commission. *Id*. at 120.

Regarding PSNH Exh. 9-Rev. 1, PSNH said that item 1 regarding contract quantity adds clarity. 1/26/11 AM Tr. at 95. PSNH also testified that, if the project is capable of producing power economically and the prices of the contract are below market, it would be to customers' advantage to have as much production as they could from the project; in response to a question from the Wood IPPs, however, PSNH said the Company did not know whether that would be the case. *Id*. at 105.

Regarding the question of whether the second item, interest on the CRF, is favorable to customers, PSNH responded that the result could work out either way. *Id.* at 95-96. According to PSNH, in the early years of the PPA, interest could work to the advantage of customers while in later years it could work against customers, depending on future market prices. *Id.* Regardless, PSNH said it makes sense to include interest to recognize the time value of money. *Id*. at 96. As to the merits of item 3, Excess RECs, PSNH said that it is a way to protect customers in the event that actual REC market prices are lower than the PPA REC prices but it would disadvantage them if it goes the other way. PSNH said that item 3 would also address the issue regarding the statutory requirements for RECs after 2025. 1/26/11 PM Tr. at 10.

According to PSNH, item 4 regarding the base price of energy, by itself does not change any pricing though it does reconfigure the PPA closer to current market prices. 1/26/11 AM Tr. at 93. Finally, regarding item 5, the wood price conversion factor, PSNH stated that overall, the 1.6 multiplier would be better for customers. *Id.* at 97.

In its closing statement, PSNH contended that the PPA protects customers against the potential for a wide range of possible outcomes[26] by having a fixed base energy charge, an adjustment for fuel based on an index that is within the Commission's regulatory jurisdiction, and a means to capture accumulated over-market energy costs and ultimately return that value to customers, while also providing that if accumulated prices are below market customers will receive the benefit of the below market prices. PSNH Closing Statement at 1. PSNH contended that virtually nothing is being built to meet the increasing demand for renewable energy resources caused by the escalating RPS standards and load growth and that ISO-NE predicts that even if 40% of the projects in the ISO-NE queue are developed, the region's need for RECs will

[26] PSNH cited Staff Ex. 14 for the proposition that, depending upon which set of numbers is used, the results of market predictions vary significantly, from a $300 million net benefit to customers to a $300 million detriment.

outstrip supply by 2013. The result, according to PSNH, is that when demand surpasses supply, as will soon occur, the price of REC compliance in the marketplace will escalate until it hits the ACP limit.

PSNH suggested that the REC pricing under the PPA is reasonable because it allows PSNH to buy RECs at a fraction of the ACP price, in ever decreasing percentages as the gap between supply of and demand for RECs widens. PSNH also mentioned testimony before the Massachusetts Department of Public Utilities that would tend to support the value of the PPA as a hedge against exposure to REC price increases, thereby reducing ratepayer costs versus paying the ACP. PSNH further argued that the OCA's analysis of REC pricing relied on the untenable assumption that the price of RECs will remain at 30% of the ACP for the term of the PPA.

Citing Attachment PSNH Rebuttal 2 [to PSNH Exh. 7], PSNH Exh. 19 and Staff Exh. 16, PSNH also contended that the evidence shows that the cost of wood fuel has demonstrated less volatility than market energy prices in the recent past, thus providing a hedge against price volatility or increasing fuel costs and achieving one of the important purposes of RSA 362-F as expressed in section 1. On the question of capacity pricing, PSNH stated that Attachment GRM-14 to Staff Exh. 1, prefiled testimony of George R. McCluskey, appears to present a nominal savings of over $40 million in capacity value over the life of the PPA. *Id*. at 2.

PSNH charged that Staff's testimony was tainted by myriad credibility issues due to inaccuracies and inconsistencies and that many "red herrings" have been thrown into this proceeding. As to Staff's and OCA's argument that a competitive solicitation process is superior to the bilateral negotiation process used by PSNH to develop the PPA, PSNH contended that Connecticut's Project 150 process is a competitive process that has been an utter failure because renewable projects cannot obtain financing and therefore none has been built in five years. *Id*. at 3.

PSNH said that Staff's recommendations for changes to the PPA would produce a deal that will not be financed and a project that will not be built. According to PSNH, its solution for untying the Gordian knot caused by the necessity to have a financeable PPA, while also protecting customers from unduly enriching the developer is the CRF mechanism, which protects customers by having a recorded real property purchase option interest and a lien on the facility that has priority over every other creditors and a title insurance policy. PSNH stated that, although the CRF mechanism was characterized by the Staff Advocate as insufficient, the City of Berlin's witness testified that the fair market value of the facility in 20 years may be upwards of $130 million, which would provide a substantial cushion against the risk of over-market energy prices. PSNH further complained that Staff provided no basis for testimony that the Laidlaw facility would have little value in the future, other than that the value would be influenced by future events. *Id*. at 4.

According to PSNH, one of the biggest problems with Staff's testimony was a mathematical error in computing the cost of RECs.[27] In cross-examination of Staff, PSNH questioned the "Adjusted Synapse Market REC Projection" on Attachment GRM 13 to Staff Exh. 1 for 2014 of $42.10. 2/9/11 Tr. at 78. PSNH stated in its closing that if Staff had correctly adjusted the 2014 REC price to account for its 30% lower initial energy price, consistent with Synapse's methodology, the "Adjusted Synapse Market REC Projection" for 2014 would be $54.55, a price higher than the PPA's 2014 REC price of $53.80. PSNH maintained that this error in Staff's analysis affects every REC number and every REC conclusion in the Staff's

[27] PSNH stated that Staff's REC pricing was based on data from the Synapse report, which in turn relied on a REC premium above projected energy market revenues needed to meet the cost-of-new-entry for a new facility. Although Staff had agreed that if the energy price drops, the cost-of-new-entry does not, PSNH stated that when Staff adjusted the Synapse REC projections to account for a 30% lower energy price, Staff failed to appropriately increase the REC price as necessary to make up the difference to reach the cost-of-new-entry.

testimony, thus clouding and undermining Staff's recommendations and Staff's testimony regarding the economic effects of the Laidlaw project. *Id*. at 5.

PSNH reiterated one benefit of the Laidlaw project touted by the City of Berlin, the location of the facility on a contaminated brownfield site. PSNH stated that turning "brown to green" is in the best interest of all residents of New Hampshire especially when "green dollars" can be turned into jobs and opportunities at the same time. On this last point, PSNH referred to Dr. Shapiro's testimony that the Laidlaw facility will provide significant economic benefits to an economically depressed area of the state by supporting 470 average annual New Hampshire jobs during the construction of the project and, once operational, 40 direct jobs at the plant and about 200 additional indirect and induced jobs, many of which will be in the logging and related industries. According to PSNH, those figures do not include the additional 65 possible jobs announced recently for the business that has announced its intention to locate on the site, and its additional indirect and induced jobs. *Id*. at 5. PSNH concluded its closing statement by stating that the PPA: is a good deal; is financeable and innovative; took extensive negotiations to complete; and provides unprecedented protections for customers. PSNH further stated that the deal will keep energy and investment dollars in the state to benefit its economy and create hundreds of jobs, as the Legislature intended. PSNH warned that this deal is the best one available for meeting the state's RPS law and there will not likely be another one if this PPA is not approved. *Id*. at 6.

In response to the Wood IPPs' motion for rehearing of Order No. 25,192, PSNH objected to the motion and observed that the Wood IPPs simply reassert the arguments contained in their motion to dismiss. PSNH argued that the Wood IPPs' motion for rehearing should be denied due to its failure to identify new evidence or specific matters that were overlooked or mistakenly

conceived in Order No. 25,192. Finally, PSNH incorporated by reference its arguments in its prior objection to the Wood IPPs' motion to dismiss.

B. City of Berlin

The City of Berlin supports approval of the PPA. Mr. Sansoucy's pre-filed direct testimony primarily related to the economic benefits of the PPA. The testimony was offered to support the decisions and proposals made by PSNH regarding the proposed PPA and urged the Commission to view the contract in the long term based on the projected benefits to the City, the North Country, ratepayers and the State. City of Berlin GES Exh. 1, prefiled testimony of George E. Sansoucy, at 2.

According to Mr. Sansoucy, the Laidlaw project would reduce the overall tax burden in the City of Berlin from an approximate current tax rate of $31.70 to an approximate tax rate of $26.25, or a reduction of 17 percent. Mr. Sansoucy said that the reduction in taxes will lift the value of all property in the community. He further maintained that the purchase of water and use of the sewer system by the project would substantially reduce the water and sewer bills to the rest of the residents in the City, again increasing the value of properties in the communities using City sewer and water. *Id*. at 4.

Mr. Sansoucy opined that the PPA is silent on the ability of Laidlaw to expand the facility. He stated that the infrastructure and the labor capabilities of the North Country will enable Laidlaw to expand the facilities or supplement the generation on the site. *Id*. at 5. He asserted that the site was sufficiently large to support the project plus additional construction, pollution control devices, alternative types of generation utilizing natural gas in the region, the potential to use waste heat and steam for wood gasification, pellet manufacturing facilities, and/or industrial co-located development, or to provide heat, hot water, and steam to the Cascade

Mill in Gorham. *Id*. at 5-6. Mr. Sansoucy said that these are unique, credible, and positive aspects of the PPA which may not be found in other locations of the State. *Id*. at 6.

Mr. Sansoucy testified that the City supports the PPA and the infrastructure upgrades necessary to support the project. *Id*. at 8-9. In terms of the cost of the PPA, Mr. Sansoucy opined without elaboration that there are long term high gas price, high capacity price and/or carbon cap and trade scenarios for which the PPA would provide significant risk mitigation and benefits to the state, potentially saving ratepayers up to $300 million over 20 years. *Id*. at 9.

Mr. Sansoucy explained that the City would benefit from the project through leveraged loan funds in the amount of approximately $4.5 million, which would be available to the community for the wood industry and economic development. He also stated that while the market may be stressed in the short term, the City believes the Laidlaw project may prove to be of significant future benefit as a number of power plants in New England may potentially close over the next ten years. *Id*. at 11.

The City of Berlin filed rebuttal testimony of Mr. Sansoucy and redacted the rebuttal testimony pursuant to the Commission's decision to grant in part the OCA's motion *in limine* to strike certain portions of the testimony.[28] In his rebuttal testimony, Mr. Sansoucy discussed the available capacity for New England as measured by ISO-NE. He posited a number of assumptions regarding reserve margin and annual growth, and concluded that New England will hit its reserve limits in 2014 at which time new capacity will have to be added. City of Berlin GES Exh. 3, rebuttal testimony of Sansoucy, at 13. According to Mr. Sansoucy, any new capacity that must be built and added to the system in 2016 will cost approximately $150 per megawatt-year or $12.50 per kilowatt-month, which he stated is the replacement cost in current dollars of a combustion turbine. *Id*. Mr. Sansoucy testified that a number of plants are

[28] See the January 28, 2011 secretarial letter regarding the OCA's motion to strike.

considering closure or are being put into cold storage, posing a risk of leaving the ISO-NE region in a capacity shortfall. *Id*. at 16. According to Mr. Sansoucy, using information in Ventyx's nominal dollar Fall 2010 capacity projections attached to his testimony as Exhibit 9, the 2033 New England capacity prices are anticipated to be $154 per kilowatt year. *Id.*

Mr. Sansoucy criticized the OCA and Staff for only considering the short term energy market in analyzing the project. *Id*. at 18. He argued that compliance with RSA 362-F "is not going to occur if every analysis and every proposal brought to the Commission is scrutinized on short-term immediate technical considerations and price signals." *Id.*

Mr. Sansoucy opined that it is more likely than not that the energy prices proposed in the PPA will be a good deal for ratepayers. *Id*. at 19. He said that, as the recession fades and with the lack of new power plants in New England, it is more likely that the availability of power from external ties will also tighten, placing more pressure on the existing capacity and fuel infrastructure in New England to produce its own electricity, setting the stage for escalating energy prices, volatility and excess reliance on combustion turbines, oil-fueled generation plants and other high cost measures. *Id*. at 22. He opined that the price forecast in the PPA is "a good bet and a good deal for the ratepayers under a number of scenarios which could or are likely to occur over the next 20 years." *Id.* He predicted that there will be considerable volatility in electricity prices and macro issues with natural gas prices, which are presently very low, will increase the price of electricity in New England. *Id.* at 23, 27, 30. Mr. Sansoucy opined that it is more likely than not that federal carbon legislation will be enacted during the term of the PPA, *id.* at 31, and he argued that the PPA could, under a "carbon constrained environment," prove to be valuable even though it has been negotiated in a time of unprecedented de-escalation of electricity pricing. *Id.* In addition, he maintained that the PPA is an excellent hedge against this type of environment. *Id.* Similarly, Mr. Sansoucy claimed that the REC prices in the PPA are "a

good deal and a good bet for the ratepayers of PSNH." *Id*. at 34. He stated that a significant amount of new generation will be required to create enough Class I RECs to meet New England's legal requirements (*Id.* at 32-33) and he asserted that demand will outstrip supply and REC pricing could immediately go to the "default penalty ceiling" sometime between 2015 and 2020. *Id*. at 38. In addition to beneficial PPA REC pricing, he claimed that if carbon legislation is enacted, the PPA could save ratepayers approximately $300 million in energy and capacity costs over the PPA term based on numbers and calculations contained in Exhibit 10 attached to his testimony. *Id.* at 33-34, 42.

Mr. Sansoucy criticized the analyses of the OCA and Staff because they did not provide the Commission with any fundamental analysis of the potential price repercussions of not constructing the project and not having enough RECs to satisfy PSNH's need. *Id*. He also criticized Staff's direct testimony on numerous grounds. *Id.* at 36-48. For example, he disputed statements of Staff that PSNH could have conducted a solicitation with multiple suppliers of RECs to get the best price. *Id.* He also disagreed with Staff's comparison of the Laidlaw project with Lempster Wind. *Id*. at 39. Finally, Mr. Sansoucy discounted Staff's comparison of Laidlaw prices with those offered by CPD and Concord Steam, distinguishing the project's "shovel-ready" characteristics and the fact that CPD's proposed "steam host," without which there could be no CPD plant, had filed for bankruptcy. *Id*. at 41.

Mr. Sansoucy also stated that Staff had overlooked a number of risks borne by Laidlaw. He said that Laidlaw's high debt to equity ratio assumes the limited availability of equity and a higher rate of return on equity required to finance the project. *Id*. at 43. Further, Mr. Sansoucy said that Laidlaw continued to have construction risk, a 20-year fixed operation and maintenance cost risk and regulatory risk. *Id*. at 44. Mr. Sansoucy also expressed disagreement with the discount rate proffered by Staff. *Id*. He also disagreed with Staff that the Commission should

look at the project and the PPA in terms of its consistency with PSNH's most recent least cost integrated resource plan. *Id*. at 47. In his view, least cost planning and the development of new Class I RECs are mutually exclusive. *Id.*

In its closing statement, the City of Berlin argued the project is the type of investment contemplated by RSA 362-F, particularly because the project would produce Class I RECs. City of Berlin Closing at 1-2. The City reiterated the environmental benefits of the project and stated that approval of the PPA will allow the site for the plant to be reused to meet the State's current and future energy needs and long-term renewable energy goals while at the same time increasing jobs in the North Country and increasing tax revenues in the City of Berlin and Coos County. The City argued that the PPA "is a win for the State, the City and the ratepayers." *Id*. at 3.

The City pointed to Staff Exh. 14 as proof that, depending on which variables are used, the PPA could turn out to be under-market by between $336 million and $391 million. *Id.* at 3. The City complained that Staff and OCA gave too little weight to the differences between a wood facility and a wind facility. According to the City, the Ventyx REC prices are based on wind facilities.

The City challenged Staff's price forecasts on a number of grounds: Staff assumed that there is a low probability of carbon legislation during the PPA term despite the fact that the 2010 Ventyx report, Staff Exhibit 12C, states only that carbon legislation is not expected in the next two years; Staff ignored the fact, alleged by the City to be true, that the Ventyx report contained an alternative model with carbon, entitled "Fall 2010 Federal Legislation Case"; Staff incorrectly interpreted the Ventyx REC prices as including a Production Tax Credit; Staff did not recognize that the numbers in Ventyx Table 5-1 were in 2010 dollars and not adjusted for inflation; and Staff ignored OCA testimony showing that current REC auction prices had increased. The City argued that had Staff correctly done the calculations, they would have agreed with Mr. Sansoucy

that the Ventyx figures are almost identical to the PPA REC prices. *Id.* at 4. According to the City, Ventyx confirms that more renewable capacity will be needed in the future and Ventyx suggests that demand requirements will result in increased energy and capacity prices resulting in a decline in future REC prices. *Id.* at 5.

The City of Berlin concluded by stating that the Commission can and should approve the PPA as presented (or if conditions are deemed needed, then with the conditions proposed in PSNH Exh. 9-Rev. 1) so that the project can remain financeable. *Id*. at 6.

C. Clean Power Development

At the outset of this docket, CPD stated it had a complaint that was pending before the Commission in Docket No. DE 09-067 which raised issues related to PSNH's unwillingness to discuss a power purchase agreement with CPD for a biomass plant in Berlin called the Berlin Clean Power Facility. CPD petition to intervene at 2.

On the first day of the hearing, CPD made a statement indicating that NewCo Energy, LLC, the 100 percent owner of Laidlaw, and Gestamp Biotermica (Gestamp) are discussing forming a relationship to work together to develop biomass energy projects in New Hampshire and New England. CPD said that Gestamp indirectly owns 100% of CPD. 1/24/11 Tr. AM at 51-52.

In its closing statement, CPD urged the Commission to expedite its consideration of the issues in this proceeding. CPD stated that it has worked in the community for four years and has seen firsthand the support that exists for the Laidlaw project. CPD claimed it must await a decision in this docket prior to further analysis on the status of other projects within its development portfolio and prior to establishing a strategy toward the development of new projects. CPD asserted that the handling of the numerous issues and concerns involved in

crafting of the PPA by PSNH has been undertaken with concern for ratepayers as well as the needs of the developer.

CPD further stated that if the Commission approves a revised PPA agreement with substantial modifications, the result could be that the project may not be financially strong enough to move forward. CPD referred to Mr. Long's testimony which indicated that in order for a merchant developer to obtain project financing, the investment banking community needs certainty regarding revenues over a period of years. CPD argued that adjustments to the PPA create risk that the project would not be financeable and therefore not built.

CPD asserted that the prices to be paid by PSNH under the PPA are very similar to the prices proposed by CPD to PSNH. According to CPD, the prices contained in the PPA appear to be in line with the prices that would be necessary for any biomass plant to be built in New Hampshire.

CPD stated that although the prices to be paid by PSNH are greater than the current market price of electricity, if natural gas prices return to the levels they were at just 2 ½ years ago, the prices under the PPA would become less than the prevailing market price of electricity. CPD said that no one knows exactly how long it will take for natural gas prices to return to their previous levels, but they are very likely return to 2008 levels at some point.

CPD concluded by stating that the CRF will very likely zero out any above-market payments made by PSNH over the term of the PPA and that any well-built biomass plant such as the one proposed by Laidlaw is very likely to have a substantial residual value after the 20-year term of the PPA. CPD said that it feels the Commission can find that this project should be granted a PPA as it is in the public interest. CPD Closing Statement at 1.

D. Edrest Properties

Edrest opposes the Commission's approval of the PPA. In its closing statement, Edrest expressed concern about the impact of the Laidlaw plan on the quality of life in Berlin, the value of the city's assets which are negatively impacted by this plant, the impact to tourism and the cost of power. Edrest said that it was also concerned about the extent of liquidation harvesting and forest mismanagement that has occurred around Berlin. Edrest pointed out that state law introduced into the record by PSNH seems to mandate the protection of New Hampshire forests as much as the protection of a forest-based economy. According to Edrest, Schiller Station and the Laidlaw facility could potentially form a monopoly that most certainly will lead to significantly high wood prices, especially if the whole tree is used when there is not enough junk wood available. Edrest also expressed concern that existing Class III REC facilities are being treated as "third rate citizens locked in the confines of the bottom level of the titanic" and the State and PSNH are not supporting them. Based on its 25 years in the real estate business, Edrest said that the mill property at the proposed Laidlaw site had resulted in low real estate prices for nearby properties. According to Edrest, the price of some two-family homes is the same as the price in 1975 and some of the properties are currently selling for $50,000. Further, Edrest observed that, because Berlin's housing stock is urban and situated close to the mill, there is a significant risk of fire in the city. In addition, Edrest stated that Berlin has depreciation zones surrounding the mill and that the mill is currently negatively impacting the value of many properties, by as much as 10 to 20% of assessed value depending on location. According to Edrest, Laidlaw's positive impact to the tax base in Berlin will be at the expense of hundreds of people living and trying to capitalize on home ownership under the shadow of a 300 foot stack.

Finally, Edrest noted that the cost of power would add $3.50 to the monthly electric bill of PSNH ratepayers according to Staff's analysis. Edrest said that for the low income residents

living in its properties, although the additional expense may or may not break them financially, most of the residents won't be alive at the end of the 20 year term of the PPA to enjoy the supposed windfall of ratepayer savings PSNH predicted. Edrest Closing Statement at 1.

E. Wood IPPs

In their closing statement, the Wood IPPs requested that the Commission deny PSNH's petition in its entirety or, in the alternative, condition its approval in accordance with the law as further discussed in its closing statement and in their separately-filed pleadings in connection with their motion for rehearing. They stated that their comments are directed at legal requirements but are also equally applicable to the public interests standards of cost-effectiveness and efficient and competitive procurement.

According to the Wood IPPs, RSA 362-F:9, I and RSA 374-F:3, V(c) empower the Commission to authorize entry into, and to grant recovery for the prudently incurred costs of, contracts for certificates that are necessary for a distribution utility to meet its reasonably projected New Hampshire RPS requirements and default service needs to the extent of those requirements. The Wood IPPs argued that the Commission may only authorize entry into a contract that is designed to meet a reasonable projection of the purchasing utility's New Hampshire RPS compliance need as a function of the utility's reasonably projected default service load and the percentage compliance requirements explicitly set forth in RSA 362-F:3 and the Commission may only pre-approve prudently incurred costs incurred in meeting that compliance need. Wood IPPs' Closing at 1.

The Wood IPPs argued that RSA 362-F:9, I and RSA 374-F:3, V(c) contain limitations that present four hurdles that PSNH must, but did not, clear in order to obtain approval of the PPA. First, the Wood IPPs claimed that the term of the PPA extends beyond 2025, the last year for which there is a statutory requirement to purchase RECs under the NH RPS program. The

Wood IPPs argued that, after 2025, there is no requirement for utilities to project. The Wood IPPs claimed that a distribution utility may not require its ratepayers to bear the risk of an assumption that the legislature will extend the RPS requirements beyond 2025. *Id*. at 1. According to the Wood IPPs , that risk must be borne by the utility or the developer and the Commission has no authority under RSA 362-F:9, I to place such risk on ratepayers. *Id*. at 1-2.

Second, the Wood IPPs contend that the PPA must meet a reasonable projection. The Wood IPPs argued that PSNH failed to make a reasonable projection of its renewable portfolio requirements and default service needs for the period through 2025 and any projections at all for the PPA term extending past 2025. The Wood IPPs further argued that PSNH failed to meet its burden to make reasonable projections through 2034. *Id*. at 2.

The Wood IPPs maintained that the third statutory hurdle in RSA 362-F:9, I is that, apart from the "2025 issue," any projection must be limited to the percentage requirements set forth in RSA 362-F:3. The Wood IPPs asserted that although a utility may exceed the statutory requirements in any one of the years listed in RSA 362-F:3,the plain wording of RSA 362-F:9, I prevents the Commission from authorizing entry into a multi-year contract where the utility will exceed those minimum statutory requirements and place the associated costs in rates. *Id*. at 2. The Wood IPPs further argued that this is a fundamental rate-payer protection built into the explicit wording of the multi-year contract provision of the statute which the Commission may not ignore. *Id*. at 3.

The Wood IPPs contended that, according to the evidence, PSNH would be purchasing nearly one half million RECs per year at the very outset, a very different situation than in the Lempster Wind docket, DE 08-077, where the small number of excess RECs could be banked or hedged on a short term basis against spikes in demand. The Wood IPPs maintained that the limitations in RSA 362-F:9, I forbid the kind of speculation and arbitrage at ratepayer risk

contemplated for the environmental attributes to be purchased under the PPA. According to the Wood IPPs, the statutes' multi-year contracting provisions are for purposes of compliance with the N.H. RPS requirements and nothing more. *Id*. at 3. As an example, the Wood IPPs argued that is why the limitations appear in RSA 362-F:9, I rather than among the factors to be balanced under RSA 362-F:9, II. The Wood IPPs claimed that the limits are threshold protections against improvident and excessive long-term contracting and public policy determinations by the legislature that the Commission may not overturn in its balancing of interests under RSA 362-F:9, II. *Id*.

The Wood IPPs further asserted that although the Commission is not authorized to approve PPAs that force ratepayers to bear the cost of meeting RPS requirements that do not exist, the PPA's Change in Law provisions do just that. *Id*. The Wood IPPs stated that the New Hampshire statute, unlike the program in Massachusetts, does not provide for the continuing validity of REC contracts or orders approving the pass through of costs in the event of changes of law. The Wood IPPs argued that the statute does not permit PSNH, Laidlaw, or the Commission, to obligate PSNH ratepayers to make never changing subsidy payments through 2025, without regard to legislative changes or Commission review under RSA 365:28, and further does not allow PSNH and Laidlaw to obligate ratepayers to pay any subsidy after 2025. *Id.* at 4.

According to the Wood IPPs, the fourth hurdle stems from RSA 374-F:3, V(c). They argued that this statute requires PSNH to demonstrate not only that the costs associated with the PPA are necessary to comply with percentage requirements but also that the details of the transaction do not exhibit inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest as generally defined. The Wood IPPs argued that although PSNH is required, at a minimum, to show the PPA rates are reasonable and cost-effective for

ratepayers in comparison to alternatives in the market, PSNH failed to provide the information to allow the Commission to make the necessary findings. *Id*. Further, the Wood IPPs complained that PSNH did not conduct a competitive solicitation to determine market pricing and that PSNH ignored other ways to determine cost-effectiveness and reasonableness of the PPA pricing despite the availability of forecasts and other price-comparison tools. *Id*. at 4-5.

The Wood IPPs argued that PSNH's claim that market uncertainties are resolved through the CRF is baseless. *Id*. at 5. In their view, the CRF is an illusory protection. They argued that PSNH has ignored the extent of market overpayments, which could range from $330 million to $550 million over the 20 year term according to conservative market forecasts, and stated that the CRF does not create an absolute payment requirement that would bring overpayments within a reasonable approximation of the market over the long term. The Wood IPPs pointed out that the CRF does not compensate ratepayers for the time value of money and does not account for overpayments for RECs or capacity. According to the Wood IPPs, PSNH did not introduce evidence that the fair market value of the Laidlaw facility will even approach this amount in 20 years. The Wood IPPs pointed out that PSNH itself stated that the fair market value will be determined by market conditions at the time that the POA is exercised, and that the Company cannot predict those conditions 20 years in advance. *Id.*

The Wood IPPs maintained that OCA and Staff, when using the scant information provided by PSNH, showed that the PPA is not cost effective, the rates are not reasonable and PSNH's decision to shun every single method for determining the reasonableness of long-term pricing was not prudent. *Id*. at 6.

Finally, the Wood IPPs argued that the Commission should not approve the WPA clause of the PPA. They argued that testimony demonstrated that Laidlaw is able to manage its own fuel risk and does not require a WPA. The Wood IPPs stated that Laidlaw will be able to

manage its costs through its wood procurement contracts and loans directed at bringing new local fuel providers into business. According to the Wood IPPs, there is no connection between the cost of wood fuel at Schiller Station and the cost of wood fuel to be paid at the Laidlaw facility, and thus, there is little connection between the WPA and its purpose of compensating Laidlaw for changes in its fuel costs. The Wood IPPs said that PSNH had not demonstrated a need for this WPA for a facility of Laidlaw's size and location. The Wood IPPs argued that the adjustment is another risk of private generation that is passed onto the ratepayers. *Id*. at 6.

In their motion for rehearing, the Wood IPPs reiterated the three arguments they made in their underlying motion to dismiss, namely, (1) the Commission lacks authority under RSA 362-F to approve a power purchase agreement which extends beyond 2025, (2) such approval would be an arrogation of the Commission's legislative authority, and (3) approval of the PPA with Laidlaw's Change in Law provision amounts to an impermissible waiver of the Commission's jurisdiction to modify its own orders pursuant to RSA 365:28. The Wood IPPs further incorporated by reference the arguments made in their earlier motion to dismiss. The Wood IPPs refined their arguments on these three points by focusing on the Commission's approval of PSNH's recovery of the costs of the PPA in default service rates.

F. OCA

In its closing statement, the OCA stated that the record had insufficient evidence for the Commission to determine that, over the period of the proposed PPA, it will meet PSNH's reasonably projected needs for RECs and default service, a determination required by RSA 362-F:9, I. According to the OCA, PSNH admitted that for some portion of the 20-year PPA term, REC purchases under the PPA will be greater than the Company's need. PSNH also testified that the PPA would require default service ratepayers to purchase all of the RECs produced by

the Laidlaw plant regardless of default service customers' need for those RECs and regardless of whether lower cost RECs might be available to the Company.

The OCA claimed that, to merit Commission approval of the proposed PPA, PSNH must satisfy its burden of proving that the PPA is consistent with the public interest, with or without conditions imposed by the Commission, and that PSNH failed to meet its burden. OCA Closing Statement at 1. The OCA also noted that none of the criteria in RSA 362-F:9, II, by which the Commission must evaluate a long-term PPA for the purchase of RECs, state that the PPA must make the renewable project "financeable" for a private developer. The OCA further pointed out that the statute does not elevate economic development and environmental benefits above other factors, including the "cost effective realization" of the RPS goals, as well as the requirements of the Least Cost Integrated Resource Planning (LCIRP) statute. *Id*. at 2. The OCA recommended that the Commission reject the PPA as proposed because of the 20-year term of the PPA, the over-market costs that result from the proposed pricing terms which would be paid by PSNH's default service customers, and the right of first refusal to purchase the plant. OCA Exh. 1, prefiled testimony of Kenneth E Traum, at 1-2. The OCA contended that the basic flaw in the PPA is the uncompensated risk that it creates for default service customers of PSNH. The OCA argued that, although it did not attempt to predict exactly how much over-market the PPA would be, the risk that the PPA could be over-market is too high, even compared with the purported public interest benefits of the PPA. OCA Closing Statement at 3. The OCA said that the structure of the PPA and the PPA's fixed prices make it far too risky for customers and creates the real possibility that customers will not be compensated for that risk. *Id*. at 3-4.

The OCA calculated that over the 20-year term of the PPA, the over-market payments for energy, capacity and RECs could exceed $400 million. The OCA explained that its analysis is conservative because it assumed net output of 58 MWs and a capacity factor of 86 percent

instead of the 61-64 MWs contained in Appendix A to the PPA. OCA Exh. 1 at 7-8. The OCA said that another factor making its analysis conservative was its use of PSNH's base energy price. To calculate its base energy price, PSNH assumed a 2011 market energy price of $59.99 per MWh and projected the later years to grow from that price, so that in 2014 PSNH's base case market energy price is $66.63 per MWh. However, in PSNH's 2011 default service docket, the Company used $45.10 per MWh as the market figure for 2011, which is $14.89 per MWh less than the price used in PSNH's base case for purposes of calculating the over-market costs of the PPA. If this difference were built into the market price for the term of the contract, the OCA said that the result would be additional over-market payments of $130 million. *Id*. at 8.

With respect to the WPA mechanism, which is a factor in the calculation of energy prices, the OCA expressed concern that the WPA was based on the prices that PSNH pays at its own Schiller Station rather than on a true market-based price. According to the OCA, setting the WPA on the wood price paid at Schiller Station could put upward pressure on wood prices, which would impact the costs passed on to ratepayers for energy produced at both plants. *Id*. at 11.

The OCA also opined that, using PSNH's projections the price for capacity in the PPA appeared to be above-market in the first six years, and below-market for the remaining fourteen years, that trend may not hold for the entire 20-year term of the PPA. *Id*. at 4-5. In reviewing the REC prices, the OCA noted that, in PSNH's most recent default service case (Docket No. DE 10-257), PSNH said that it was forecasting a market price of $18.45 for Class I RECs for 2011. *Id*. at 5-6.

In addition, the OCA calculated that, under the PPA, PSNH's default service customers would pay approximately $276 million over-market for RECs. *Id*. at 6. The OCA noted that the 2010 and 2011 Class I REC prices approximated 30% of the ACP amount for Class I RECs

while, in contrast, the PPA set the payment for RECs at 80% of the ACP for 2014. *Id*. Assuming that the market price for Class I RECs in 2014 (the first year of the contract) would continue to approximate 30% of the ACP amount, the OCA calculated that the over-market REC costs in the first year alone would be $14 million. The OCA said that for PSNH to lock into REC purchases at a time when there are high levels of large customer migration increases the risk that the PPA will result in the purchase of RECs that PSNH may not even need. *Id*. at 7. Finally, the OCA contends that the proposed PPA extends to 2034, beyond what it considers the statutory mandate which sets renewable portfolio requirements until 2025. The OCA opined that there is a risk that the RPS statute could be amended or repealed, which could make the RECs potentially worthless to customers who would be locked into paying for them. *Id*. at 14.

The OCA also provided comments on the CRF. The OCA characterized the CRF as a "hypothetical benefit" that would accrue to future PSNH ratepayers only if PSNH seeks to purchase the plant, the purchase is to be found in the interest of ratepayers under a future regulatory regime, and the value of the plant exceeds the value of the CRF. The OCA testified that the CRF does not obviate the fact that ratepayers are likely to pay hundreds of millions of dollars in over-market energy costs under the PPA as it is currently structured over the 20-year term. *Id*. at 10.

The OCA argued that the cumulative reduction factor is a deferral that may not provide future ratepayers with a benefit commensurate to the risk involved. The OCA observed that if the plant is worth less than the balance of the CRF, ratepayers may never receive value for over-market payments. OCA Closing Statement at 2. The OCA maintained that the allocation of over-market amounts to the CRF constitutes an unlawful pre-payment of funds toward the future purchase of the Laidlaw plant. *Id*. The OCA noted that the CRF applied only to over-market payments for energy, not to those for capacity or RECs, and is only intended to reduce the

potential purchase price of the plant. OCA Exh. 1 at 9. The OCA pointed out that no interest would be provided to customers on the CRF, which it calculated to be approximately $4.7 million. *Id*. at 9-10. Finally, the OCA maintained that the restructuring law will have to be changed for ratepayers to receive the benefit of the CRF because PSNH does not have the legal authority to purchase the plant. *Id*. at 10.

The 20-year term of the PPA also concerned the OCA. The OCA noted that PSNH testified that the old QF rate orders resulted in more than $2 billion in over-market costs for customers. Referring to PSNH's testimony, the OCA noted that those rate orders illustrate why fixed-cost long-term contracts are generally not in the best interest of customers. The OCA said that this PPA must be considered in the context of significant migration of large customers that PSNH is experiencing due to low market prices and its management of its energy service portfolio. *Id*. at 11-12. The OCA asserts that PSNH's reported level of migration means that an increasingly smaller group of default service customers will have to pay the above-market costs of the PPA under PSNH's proposal, and that fewer RECs may be needed to satisfy an obligation that will shrink as the default service load drops. According to the OCA, in addition to paying over-market prices for the Laidlaw RECs, PSNH will buy RECs that it may not need to satisfy its REC obligations. *Id*. at 13.

Furthermore, the OCA expressed concern that it is possible under the PPA for Laidlaw to expand the facility, which would increase the amount of over-market payments by default service customers and generally make the PPA more costly and more risky for default service customers. *Id*. The OCA also commented on PSNH's failure to take advantage of offers from other renewable energy producers that could be at lower costs than Laidlaw. *Id.*

According to the OCA, it is clear that the principles of least cost planning in RSA 378:38 do apply to any proposed PPA. The OCA asserted that PSNH must act prudently on behalf of

ratepayers when complying with the RPS law, and must seek to do so in a manner that results in just and reasonable rates. OCA Closing Statement at 2.

The OCA criticized PSNH's argument that RSA 362-F:3 required a utility to "meet or exceed" the RPS requirements for support of the premise that the Company may knowingly purchase more RECs than it needs. The OCA said that PSNH's interpretation of the statute is not reasonable. According to the OCA, the word "exceed" does not give a utility license to knowingly purchase unnecessary RECs, the costs of which will be passed on to default service ratepayers. The OCA argued that a utility must prudently seek to comply with the RPS law at the least possible cost, consistent with general ratemaking principles, including those set forth in RSA 374-F as well as the least cost planning principles in RSA 378:37 *et seq*. *Id*. at 3.

The OCA also challenged PSNH's interpretation of the Schiller Modification Joint Motion and Order in DE 03-166 (Schiller Order). Observing that PSNH had testified that it believes it must sell Schiller Station RECs even if such sale results in a loss for ratepayers, OCA asserted that PSNH's interpretation of the Schiller Order is inconsistent with the intent of the Order and with the Company's duty to provide electric service at just and reasonable rates, and in accordance with RSA 378 and least cost planning principles. OCA argued that, if Schiller Station RECs are available for PSNH's default service customers because they are no longer eligible in another state's RPS, or because they are worth less in other jurisdictions than PSNH pays for RECs in New Hampshire, the Company must use the Schiller Station RECs to meet its NH RPS requirements. According to the OCA, to do otherwise would be economically irrational, as well as imprudent. *Id*.

According to the OCA, the fact that a project may result in significant economic benefit to an area or sector of the state is certainly one consideration under the RPS law but it is only one of five factors that must be considered within the context of underlying principles of ratemaking

and utility regulation. Referring to RSA 362-F:9, II, the OCA asserted that PSNH failed to support any conclusion that, when balanced with the remaining policy considerations, including the "efficient and cost effective realization of the purposes and goals of [the RPS law]", this PPA is in the public interest. The OCA contended that PSNH also failed to support the conclusion that a PPA that allowed it to own additional generation is consistent with the restructuring principles of RSA 374-F:3 or that the pricing terms of the PPA, which are not tied temporally or otherwise to market pricing, promote "market driven competitive innovations and solutions." *Id*. at 5.

The OCA noted that PSNH offered potential modifications of the PPA in PSNH Exhibit 9-Rev. 1. In the OCA's view, those provisions do not reduce the risk that ratepayers could significantly overpay for energy and RECs over the term of the PPA. According to the OCA, simply adding over-market payments for RECs to the CRF, or accruing interest on the CRF, does not sufficiently compensate ratepayers for the high risk of overpayment. The OCA asserted that the proposals could result in an even greater balance in the CRF, which could significantly exceed the fair market value of the plant if PSNH exercises its option to purchase the Laidlaw facility. In such an event, the ratepayers would lose every additional dollar accounted for in the CRF. *Id*. at 4.

The OCA said that, if the PPA is "necessary" in order to obtain financing for the plant, PSNH may want to pursue a legislative change. The OCA noted that only the Legislature is empowered to further incent renewable generation options in New Hampshire and to the extent PSNH finds the present structure unworkable, it can seek clarification from the Legislature. The OCA disagreed that PSNH needed the PPA approved to meet its REC requirements. *Id*. at 4. The OCA pointed out that ratepayers are indifferent as to how a utility acquires Class I RECs.

Id. at 4-5. The OCA also suggested that PSNH can comply with the RPS by purchasing from other Class I (non-wood) renewable facilities or by making ACPs. *Id*. at 5.

Finally, the OCA pointed out that the SEC denied Laidlaw's request to release confidential information from its docket to the OCA and Staff, including "sealed" transcripts of its hearings. The OCA requested that the Commission give no weight to the partially disclosed record of the SEC's proceedings in making its public interest determination. *Id*. at 6.

G. Staff

Staff filed the direct testimony of George R. McCluskey and Thomas C. Frantz. Mr. McCluskey's testimony provided an analysis of whether the PPA is in the public interest pursuant to the criteria set forth in RSA 362-F:9. Mr. Frantz's testimony addressed whether the PPA provided economic development benefits for New Hampshire as set forth in RSA 362-F:9, II(e).

Mr. McCluskey stated that since each of the PPA products can be purchased in existing organized markets, PSNH does not need the output of the facility in the sense that if the PPA was not approved it would fail to supply the loads of its customers and fail to meet its RPS obligations. Mr. McCluskey said that, even so, PSNH is generally able to use energy, capacity or RECs that are priced below what it would otherwise pay in the market. In his view, the question of need should begin with the question of whether the products are priced competitively; if they are, the next question he would ask is whether PSNH is physically able to utilize all the products offered to it, and if they are not, then PSNH's need for the output is constrained. Staff Exh. 1 at 3-4.

Mr. McCluskey estimated that the starting bundled PPA price for energy, capacity, and RECs is $143.50 per MWh in 2014, rising to $183.60 per MWh in the last year of the PPA. According to Mr. McCluskey, the levelized PPA bundled price is about $162 per MWh, which is

approximately twice the level of PSNH's current default service rate, which includes its total energy, capacity, and REC costs, when expressed on a MWh basis. In his calculations, Mr. McCluskey said he used a capacity factor of 87.5 % whereas PSNH used an 85% capacity factor. *Id.* at 6. Overall, Mr. McCluskey estimated that PSNH would pay Laidlaw approximately $1.6 billion, and possibly more, for the project's products over the term of the contract, with about one-third of the payments going toward the purchase of Class I RECs. *Id*. at 7.

Mr. McCluskey said that the additional revenue stream provided by REC payments to developers of renewable energy resources was expected to make it economically feasible for renewable resources to compete with conventional generating units. In his view, the REC price in an efficient market would always approach the uneconomic variable cost of renewable generation. He stated that under the PPA, the REC payments total approximately three-quarters the total cost of wood fuel, which suggested to him that wood is either a very uneconomic fuel for electricity generation or the negotiated prices are too high and would over stimulate biomass investment if they were made generally available. *Id.* at 10. Further, he expressed concern regarding section 5.1 of the PPA requiring PSNH to purchase all the output of the facility. He maintained that the above-market prices under the PPA may encourage Laidlaw to increase the output of the facility, resulting in PSNH paying for the incremental products at the PPA prices. *Id.* at 11. According to Mr. McCluskey, the absence of a definition in the Appendix A description of the facility for the terms "winter," "summer," and "standard conditions" and the vagueness of the word "approximately" created significant opportunities for future disagreements over the project's output. *Id*. at 12.

Mr. McCluskey further argued that section 5.1 is inconsistent with PSNH's Class I REC obligation under RSA 362-F for two reasons. First, the cost of "lost RECs" will be inappropriately borne by customers. *Id.* at 12-13. Second, when account is taken of the Class I

RECs already under contract to PSNH and the Class I RECs produced by Schiller Station, PSNH does not need to acquire additional Class I RECs until 2016 and even after 2016, the RECs delivered by Laidlaw will exceed PSNH's estimated need through 2023 based on an assumed migration rate of 31%. Mr. McCluskey contended that these facts conflict with the plain meaning of RSA 362-F:9, I which authorizes multi-year purchase agreements to acquire RECS "to meet reasonably projected renewable portfolio requirements." *Id*. at 13. He estimated that over the first 10 years of the PPA PSNH will be required to purchase from Laidlaw over 3 million RECs that it does not expect to need, which represents approximately one third of the RECs produced by the facility. Finally, Mr. McCluskey stated that, if the Wood IPPs are correct in arguing that there is no legal requirement for the purchase of RECs after 2025, PSNH will have taken on the very significant cost risk that the legislature will not extend the RPS beyond 2025, assuming that the Commission has authority to approve cost recovery of a non-existent REC obligation. Mr. McCluskey agreed that PSNH will likely be able to sell excess RECs to other buyers but not at the over-market prices paid for them. *Id*. at 14. He concluded that PSNH has committed to purchase more RECs from Laidlaw than it is likely to need during the term of the PPA, resulting in unnecessary additional costs for PSNH customers. *Id*. at 15.

As to the WPA provision of the PPA, Mr. McCluskey maintained that, in order to have a dollar-for-dollar pass-through of the cost associated with a change in the price of wood, the conversion factor would have to be 1.55 tons/MWh. He argued that since the PPA uses a conversion factor of 1.8 tons/MWh, the WPA will allow Laidlaw to collect through the WPA more than the actual incremental cost if wood prices rise above $34/ton. He estimated that Laidlaw would collect an additional $113,000 per year for every dollar increase in the price of wood as a result of the use of a 1.8 tons/MWh conversion factor. *Id*. at 16.

Mr. McCluskey disagreed with PSNH's assertion that the CRF would protect customers from paying PPA prices that exceed the market price. He said that PSNH is obligated to pay the PPA prices whether those prices are above-or below-market energy prices. In addition, Mr. McCluskey noted that the PPA contained no provision for the above-market payments to accumulate interest on the CRF balance. According to Mr. McCluskey, not accumulating interest is a detriment to customers and a benefit to PSNH because it requires PSNH to make a larger investment to acquire the facility and a consequent higher return on rate base. *Id*. at 19.

Further, Mr. McCluskey opined that there is a good chance that the facility will have little value after the PPA ends and that in a circumstance where the fair market value is low compared to the CRF balance, customers will not get back the full value of their over-market payments. At the end of the PPA term, he said the value of the facility will depend on whether it can effectively compete with the marginal generating units in the region, which are typically those fueled by natural gas, and on whether New Hampshire's RPS law continues in effect and if so whether REC market prices are high or low. *Id*. at 20. Finally, Mr. McCluskey argued that the CRF effectively aggregates over-market energy payments, and assuming that PSNH places PSNH's investment into rate base at the end of the PPA term by the exercise of the PPA, the CRF mechanism would allow PSNH to recover the costs of the project contrary to the ratemaking principle that prevents utilities from collecting through rates costs for investments that are not yet included in rate base. *Id*. at 21.

Mr. McCluskey testified that, based on the results of certain cost effectiveness tests he considered, the PPA is not a cost-effective means of acquiring the products that it is proposing to purchase from Laidlaw. *Id*. at 41 and 22 *et seq*. He noted that PSNH did not conduct a competitive solicitation for the products the Company proposes to purchase from Laidlaw. Absent competitive bids, he stated that PSNH had three options for determining whether the

negotiated PPA prices represent the best possible outcome for customers: comparison of the PPA prices with other comparable projects for the same products, comparison of those prices with market price projections, and financial analysis to determine whether the PPA produce a reasonable return for investors. *Id.* at 22. He noted that PSNH said it was not directly influenced by the price of other renewable projects in its negotiations with Laidlaw, even though PSNH had negotiated an agreement with the Lempster wind project for the purchase of energy, capacity, and RECs. According to Mr. McCluskey, the levelized price of comparable products under the Lempster agreement was about half the price PSNH has negotiated with Laidlaw. *Id*. at 24. Mr. McCluskey also stated that PSNH had received two unsolicited long term offers from CPD and Concord Steam, both of which offered more favorable prices than those contained in the Laidlaw PPA.[29] *Id*. at 25; *see also* Staff Closing Statement at 2.

Mr. McCluskey noted that PSNH had performed some market price projections in 2008, which indicated that on average the PPA energy prices were expected to be about 18% higher than the projections, and he criticized PSNH's failure to update these projections in the PPA to reflect current market conditions at the time of the filing. According to Mr. McCluskey, natural gas prices, the primary driver of wholesale energy prices, have fallen such that PPA energy prices had become about 30% higher than the market forecast. *Id*. at 25-26. PSNH did not review a long term forecast of REC prices to benchmark the PPA REC prices, *Id.* at 26, but Mr. McCluskey's REC price forecast, which is based on certain adjustments to data in a 2009 report prepared by Synapse on behalf of a group of New England gas and electric utilities, indicated future REC prices from a low of approximately $5 to a high of approximately $53 that contrast with PPA REC prices that vary from a low of approximately $49 to a high of $67. *Id.* at 28. Mr.

[29] He also stated that four existing biomass facilities had submitted offers but because of the circumstances in which the offers were made, he discounted their value as a measure of the reasonableness of the PPA prices. Staff Exhibit 1 at 25.

McCluskey stated he was unable to comment on the capacity prices due to insufficient time for review though he noted that over the 20 year PPA term, PSNH believes that PPA capacity prices are about 55% lower than projections developed by Errichetti and Levitan. *Id.*

Mr. McCluskey stated that PSNH's initial financial analysis indicated that net income from the Laidlaw project to NewCo would total $590 million compared to an assumed capital cost for the facility of only $96 million. *Id.* at 30, 31. Even though these sums are in nominal dollars, he opined that the initial set of product prices was very lucrative for NewCo.[30] He further maintained that most of the $550 million in REC revenues would go to the bottom line. *Id.* at 30. Mr. McCluskey argued that, based on the limited risks Laidlaw faces, an appropriate cost of equity for the Laidlaw project would be approximately 11% and he estimated that customers will pay approximately $160 million more in present value terms under the Laidlaw contract than if PSNH were to include in its rate base. *Id.* at 35. Based on his assumptions, Mr. McCluskey concluded that the equity returns for NewCo, net of annual interest and loan repayment and using the final PPA prices, are well outside the range of returns that developers of merchant power plants in the United States could reasonably expect. *Id.* at 37, 39-40.

Mr. McCluskey maintained that the PPA is inconsistent with RSA 362-F:9, I because it obligates PSNH to purchase substantially more RECs than it needs to meet its projected REC requirements. He also concluded that the PPA fails to meet the public interest test, applying the criteria in RSA 362-F:9, II. *Id.* at 40. Regarding the first criterion, efficiency and cost effectiveness, he argued that the negotiation process was not efficient and that the PPA is uneconomic based on all of the standard cost-effectiveness tests.

[30] He said that PSNH ultimately agreed to a set of product prices that produce about 10% less revenue for Laidlaw than the initial set of prices. *Id.* at 35.

Regarding whether the PPA is consistent with the restructuring policy principles of RSA 374-F:3, Mr. McCluskey said that the PPA was consistent with some of the principles and inconsistent with others. *Id.* at 42-45. He argued that the PPA is inconsistent with the requirement that generation services be subject to market competition and minimal economic regulation. For example, he said that Laidlaw would be shielded from market price and fuel price risks that are defining characteristics of merchant power plants. *Id*. at 42. In addition, he argued that because PSNH is proposing to collect the costs of the PPA from default service customers, the PPA becomes subject to the principle that such service be procured from the competitive market. Because PSNH did not issue a competitive solicitation for the products it proposes to purchase from Laidlaw or base the PPA prices on market prices, Mr. McCluskey said that the PPA is not consistent with RSA 374-F:3(V)(c). *Id.* at 43. He concluded that the PPA is not consistent with the principle that default service be designed to minimize customer risk, not unduly harm the development of competitive markets, and mitigate against price volatility without creating new deferred costs, referring to RSA 374-F:3(V)(e). *Id*. According to Mr. McCluskey, the use of fixed prices in the PPA shifts the market price risk for all three products from Laidlaw to PSNH's customers. Further, the PPA is detrimental to the development of a competitive market because it unfairly protects Laidlaw from the risks of market competition. Finally, while the pricing in the PPA reduces price volatility experienced by PSNH's default service customers, Mr. McCluskey argued that suppression of price volatility is achieved by requiring those same customers to bear significant above-market costs. *Id*. at 44.

Mr. McCluskey also said that the PPA is contrary to least cost planning principles as set forth in RSA 378:37 because pricing products over-market results in cost increases and higher rates for customers. *Id*. at 45. He also found the PPA to be contrary to the fourth statutory

criterion regarding administrative efficiency and the promotion of market-driven competitive innovation.

Mr. McCluskey concluded his testimony with five recommendations for the conditional approval of the PPA as follows: 1) eliminate the CRF and make the POA conditional on PSNH having the legal authority to acquire new generation; 2) base the PPA energy prices on hourly ISO-NE spot market energy prices with a floor to address volatility and financing concerns; 3) base the PPA capacity prices on the actual price realized in the ISO-NE's forward capacity market; 4) adjust the PPA REC prices such that NewCo is provided a reasonable opportunity to earn a reasonable return on its investment, taking into account the risks under the amended PPA; 5) amend the PPA such that PSNH is obligated to purchase no more RECs than needed to meet its RPS obligations; and 6) establish a specific output level for the facility expressed in MW above which PSNH would have no obligation to purchase. *Id*. at 47.

Mr. Frantz's testimony addressed the fifth public interest criterion in RSA 362-F:9, II and the economic impacts of the proposed project in particular. He recommended that the Commission take administrative notice of the Laidlaw proceeding before the SEC as to the environmental impact of the project. Staff Exh. 2, prefiled testimony of Thomas C. Frantz, at 2.

Mr. Frantz described the input-output (I/O) models that are commonly used to estimate the effects of a change in one sector of the economy on other sectors of the economy. Mr. Frantz explained that I/O analysis is based on the simple economic fact that a large proportion of economic activity, whether at the national, state or local level, is devoted to the production of intermediate goods and services that are ultimately required to meet the demand for final goods and services. Staff Exh. 2 at 2. Mr. Frantz said that RIMS II model used by Dr. Shapiro is the most commonly used I/O model for assessing the effects of small changes on a regional economy. Mr. Frantz explained that Dr. Shapiro used information Laidlaw provided to the SEC

as the basis for her economic analysis and the affected area for her study was the entire State. *Id*. at 4. He said that her estimate of 470 total jobs created is based on Laidlaw expending $70 million into the local economy during the 32 months it expects to build the project. *Id*. at 4-5. Mr. Frantz cautioned that, while the I/O models can be quite useful, they rely on a number of key assumptions and the violation of any one of the key assumptions could adversely affect the results of the model. In addition, the smaller the economic region, the more likely it is that the assumptions will be violated. *Id* at 5.

Mr. Frantz disagreed that the PPA would produce the economic benefits described by Dr. Shapiro because Dr. Shapiro makes no provision for the fact the PPA prices are over-market and will result in higher default service costs passed along to PSNH's energy service customers if approved by the Commission. *Id.* at 6. According to Mr. Frantz, if Mr. McCluskey's calculation of the over-market costs of the PPA, approximately $55 per MWh or an annual over- market cost of $26 million, are correct, the perceived economic benefits of the project are not benefits at all, but costs borne by PSNH ratepayers taking default service from PSNH, as well as indirectly by New Hampshire's businesses and households based on the inter-dependencies of the economy.[31] Mr. Frantz opined that creating a subsidy for this or any other project doesn't create wealth for the economy as a whole, it simply transfers wealth. *Id*. at 6.

In addition, Mr. Frantz said that another issue is the unknown effect of the project on other biomass generators currently operating in New Hampshire, especially those located closest to Berlin. If as a result of the PPA, one or more of those facilities were to close, Mr. Frantz asserted that the overall benefits of the projects would be further reduced. *Id*. at 7. Mr. Frantz

[31] According to Mr. Frantz, assuming that the PPA results in over-market costs of between $50 and $60 per MWh per year, an economic study performed in 2008 by Dr. Gittell, as cited by Dr. Shapiro, would indicate that a $10 million increase in electric rates would decrease Gross State Product by almost $5 million and reduce employment by approximately 65 jobs. Staff Exh. 2 at 7-8.

testified that the greater the above-market cost of the PPA, the more deleterious the economic impact of the State as a whole. He concluded by stating that he could not recommend that the Commission approve the PPA as filed. *Id*. at 8.

At hearing Mr. Frantz testified that he had no reason to believe that Laidlaw's direct economic impacts as used by Dr. Shapiro in her testimony were inaccurately stated. 2/9/11 Tr. at 93. He further testified that he had no reason to disagree with Dr. Shapiro's conclusion that the net economic benefits of the Laidlaw development more than offset negative impacts from the increase in rates above-market that he described in his testimony, other than the assumptions that went into her analysis. *Id.* at 93-94.

In its closing statement, Staff stated that once the PPA is approved, its terms would be incorporated into a FERC-jurisdictional tariff so the Commission should carefully review the PPA terms. Staff contended that PSNH had not met its burden to show that the PPA is necessary to meet reasonably projected REC requirements and default service needs, or that the PPA is in the public interest. Staff argued that the PPA is grossly over-priced. In particular, Staff maintained that although PSNH performed certain tests of cost effectiveness, they do not show that the PPA is cost effective. Staff Closing Statement at 1. Staff further complained that PSNH now denies that the tests have much value and relies instead on the "structure" of the PPA including the CRF and POA to support its case for approval of the PPA. *Id.* at 1-2. Moreover, Staff reiterated the results of Mr. McCluskey's assessment of the three cost effectiveness tests referred to in direct testimony. As to the first test, evidence that compared the PPA prices with prices for other renewable projects, Staff argued that PSNH could have received the same products that it is purchasing from Laidlaw from Concord Steam's and CPD's biomass projects at prices representing discounts of 12.6% and 8.5%, respectively, compared to the PPA. He said the cost savings of those discounts would be substantial as would a similar discount for

purchases from wind power resources based on an agreement such as the one with Lempster Wind. According to Staff, its second test, a comparison of the PPA energy and REC prices to long term market forecasts, showed that PSNH could pay Laidlaw $285 million in over-market energy costs and $280 million in over- market REC costs over the 20 year PPA term.

Staff further argued that the Ventyx forecast relied upon by the City of Berlin showed that at PPA prices PSNH will pay approximately $334 million more than if the products were purchased at Ventyx market forecast prices. *Id.* at 2. Finally, Staff said that its cash-flow analysis showed that after tax and after debt service returns to investors ranged from 60% to 106%, which are well outside a reasonable return for developers of merchant plants. Finally, under its base case analysis of the impact of the PPA on the 2014 energy service rate, Staff contended that the resulting rate impacts of the PPA are unacceptable, increasing the average residential customer energy service bill by $3.50 per month for the average residential customer, a 5% increase in the energy service bill. *Id*. at 3.

In addition, Staff argued that, because the PPA requires PSNH to purchase 100% of the project's Class I RECs, the Company would be purchasing more than its "reasonably projected renewable portfolio requirements" as specified in RSA 362-F:9, I. *Id*. at 4. Staff disagreed with PSNH's assertion that it must sell Schiller Station RECs to meet the requirements of the risk-sharing mechanism approved in that docket and urged the Commission to require PSNH to include the Class I RECs produced by the Schiller Station in its determination of the REC requirement whenever the PPA REC price exceeds the REC market price. *Id* at 4-5.

Staff also contended that the CRF does not add value to the PPA. Staff pointed to Staff Exhibit 16 as proof that had the PPA energy pricing formula been in effect during the 2007-2010 period, the PPA energy prices would have exceeded the average market prices, including in 2008 when market energy prices reached an all time high due to high natural gas prices. Staff argued

that the best that customers can hope to receive after 20 years is the sum of their nominal above-market energy payments. Of greater concern, according to Staff, is that customers will actually receive less than the sum of their nominal energy payments if the fair market value of the project turns out to be below the balance in the CRF at the end of the PPA's term, a strong possibility in Staff's view. Staff urged the Commission to reject the CRF and replace it with energy prices based on hourly ISO-NE spot market energy prices with a floor price to address volatility and financing concerns. *Id.* at 5.

Staff stated that the estimated economic effects of the PPA depend in large part on the project's effect on biomass prices and the amount of biomass purchased regionally. *Id.* Even though there is some uncertainty about those matters, Staff acknowledged that the project will have local economic benefits. Staff maintained, however, that the Commission should not allow the local benefits to over-ride the costly effects of the over-market payments on the general body of PSNH's customers. *Id*. at 5-6.

Staff asserted that the adjustments proposed in PSNH's Exh. 9-Rev. 1 fall short of addressing Staff's concerns regarding the high cost of the products and recommended that all the changes be rejected with the exception of item 2 to provide for the accrual of interest to the CRF. With regard to items 4 and 5 Staff said that under these adjustments to the Base Price and Wood Price Factor, the 1.8 conversion factor would be changed to 1.6, but only for deviations from the proposed new base fuel price of $30/ton. Staff argued that because the proposal uses the 1.8 conversion factor to set the new Base Price to $30/MWh, the item offers very little value to ratepayers. Staff also argued that increasing the project size to 67 MW would increase total revenue to Laidlaw by over $100 million, thereby increasing Laidlaw's net income.

Regarding item 2, the proposal to add interest to the CRF, Staff said the offer does not resolve its greater concern of capping recoupment of the above-market energy payments at the

value of the project at the end of the PPA term. Finally, Staff argued that the proposed addition of over-market REC values to the CRF, item 3, exacerbates Staff's concern about the value of the CRF. *Id*. at 6.

IV. COMMISSION ANALYSIS

A. Summary

The twenty-year PPA between PSNH and Laidlaw submitted in this proceeding pursuant to RSA 362-F:9 is not in the public interest as filed. Nonetheless, with conditions detailed below to satisfy the public interest, we approve the PPA and petition filed by PSNH. With regard to the PPA as filed, the evidence is persuasive that the base energy price is too high in the early years and the risk is great that over the term of the agreement customers will pay well over market prices for energy. With respect to the CRF, which is intended to mitigate the risk of over-market energy prices to customers, the mechanism is something of an improvement over the situation that existed with PSNH's past QF rate orders but, in its current form and with the filed prices, the protection is too limited and too remote. The evidence is also persuasive that the capacity price is too high in 2014 and 2015, the first and second years of the agreement, although reasonable over the remainder of the term. Similarly, the evidence is persuasive that the REC price to be paid as a percentage of the ACP is too high in the early years of the agreement, although reasonable over the remainder of the term. In addition, the volume of RECs purchased over the term is significantly higher than PSNH's reasonably projected renewable portfolio requirements over the term of the agreement. Furthermore, while the agreement would provide economic development benefits in and around the City of Berlin, as filed those benefits do not outweigh the considerable costs to PSNH's hundreds of thousands of other residential and business customers throughout the state. We discuss in detail below the evidence presented in this proceeding and explain the reasoning behind our conclusions. Finally, as

authorized by statute, we set forth the conditions necessary for us to find the agreement in the public interest and allow this project to move forward.

B. Background

Pursuant to RSA 362-F:9, we are asked to approve a multi-year agreement between PSNH and Laidlaw for PSNH's purchase of 100% of the energy, capacity and New Hampshire Class I RECs, produced by a new biomass facility. The facility will operate by converting the boiler of the now shuttered Burgess Mill in Berlin. PSNH's entry into the agreement is premised on our approving and allowing "full cost recovery of the rates, terms and conditions" of the PPA. The energy, capacity and REC purchases under the PPA would commence in 2014[32], the expected in service date of the facility, and continue for 20 years thereafter (that is, until 2034). PSNH proposes to recover PPA-related costs, which could be as much as $2 billion over the term of the PPA, through its default service rate. The Commission may authorize electric distribution companies to enter into multi-year purchase agreements with renewable energy sources for RECs

> ….in conjunction with or independent of purchased power agreements from such sources, to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements, if it finds such agreements or such an approach, as may be conditioned by the commission, to be in the public interest. RSA 362-F:9, I.

In determining the public interest, the Commission must find that the proposal is, on balance, substantially consistent with the following factors:

(a) The efficient and cost-effective realization of the purposes and goals of [RSA Ch. 362-F];

(b) The restructuring policy principles of RSA 374-F:3;

[32] Although the plant is currently expected to begin operation in 2014, we note that the actual In-Service Date and, hence, the effective date of the PPA is uncertain. In regard to the pricing terms we set forth *infra*, we adopt the definition of an "operating year" as defined in Section 1.45 of the PPA. In various instances in our analysis, certain pricing terms may be mentioned in connection with calendar year references. For purposes of clarification, the pricing terms for energy and capacity are intended to follow the "operating year" concept. With regard to RECs, the percentage of the ACP to be paid will also apply to operating years, while the ACP itself will change relative to calendar years.

(c) The extent to which such multi-year procurements are likely to create a reasonable mix of resources, in combination with the company's overall energy and capacity portfolio, in light of the energy policy set forth in RSA 378:37 and either the distribution company's integrated least cost resource plan pursuant to RSA 378:37-41, if applicable, or a portfolio management strategy for default service procurement that balances potential benefits and risks to default service customers;

(d) The extent to which such procurement is conducted in a manner that is administratively efficient and promotes market-driven competitive innovations and solutions; and

(e) Economic development and environmental benefits for New Hampshire. RSA 362-F:9, II(a)-(e)

C. Threshold Legal Issues

At the outset, we address a number of legal arguments raised in this proceeding. The Wood IPPs challenge the Commission's authority to approve the PPA and to provide for ratepayer recovery of the costs incurred under the PPA. Among other things, they contend that PSNH's obligation to purchase RECs does not persist after 2025 and they argue that the Commission may not approve contract provisions that would prevent a future Commission from altering prior orders under RSA 365:28. In addition, the OCA asserts that the CRF and the POA would violate RSA 378:30-a, while Staff contends that these provisions would violate the "used and useful" principle found in RSA 378:27 and 28. The OCA further contends that PSNH does not have the authority to directly purchase the Laidlaw facility.

1. Motion to Dismiss and Motion for Rehearing

Order No. 25,192 denied the Wood IPPs' motion to dismiss PSNH's petition for approval of the PPA. The Wood IPPs' motion for rehearing incorporated by reference their previously filed motion to dismiss. As framed in the motion for rehearing, the Commission lacks authority under RSA 362-F:9, I and RSA 374-F:3, V(c)[33] to allow PSNH's entry into the PPA and to provide

[33] In relevant part, RSA 374-F:3, V(c) provides that "[a]ny prudently incurred costs arising from compliance with the renewable portfolio standards of RSA 362-F for default service or purchased power agreements shall be recovered through the default service charge."

for recovery of the costs associated with the PPA through default service rates when the term of the PPA extends beyond 2025. The Wood IPPs argue that approval of the PPA would be an arrogation of legislative authority. Further, the Wood IPPs contend that the Commission lacks the statutory authority under RSA 365:28, which allows the Commission to alter its orders, to approve a PPA with change of law provisions that, according to the Wood IPPs, effectively prevents the Commission from revisiting its order approving the PPA and approving the pass-through of the associated costs.

In Order No. 25,192, we denied the Wood IPPs' motion to dismiss. The standard for ruling on such motions requires assuming all assertions made by the moving party are true and determining whether the requested relief may be granted. Decisions on motions to dismiss are made before a full factual record is developed. We pointed out in connection with our ruling that the Commission may condition its approval of the PPA and thus alter the operation of the PPA as well as PSNH's cost recovery under the PPA. While our ruling in Order No. 25,192 was, in procedural terms, preliminary, we do not conclude that it was incorrect.

a. Alteration of Commission Orders

In Order No. 25,192, we rejected the Wood 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. RSA 365:28 grants the Commission broad discretion in determining whether to alter its orders, but the Commission has never construed that grant of authority as a limitation on its authority to approve long term contracts. The Wood IPPs position would put every contract approved by the Commission at risk of being upended by a future Commission. The Wood IPPs cite no support for their position and we find no basis to adopt it for purposes of this case. Accordingly, we deny it.

b. Post 2025 Obligation

In their closing statement the Wood IPPs argue that:

> The Commission may only authorize entry into a contract that is designed to meet a reasonable projection of the purchasing utility's New Hampshire RPS compliance need as a function of the utility's reasonably projected default service load and the percentage compliance requirements explicitly set forth in RSA 362-F:3, and the Commission may only pre-approve prudently incurred costs incurred in meeting that compliance need. Wood IPPs Closing at 1.

The Wood IPPs maintain that under RSA 362-F:3 there is no REC requirement for a utility after 2025. *Id.* at 1-2. The Wood IPPs conclude that even if a distribution utility assumes that the Legislature will require utilities to purchase RECs after 2025, the distribution utility may not require its ratepayers to bear the risk of that assumption and the Commission has no authority under RSA 362-F:9, I to place such risk on ratepayers. According to the Wood IPPs, that risk must be borne by the utility or the developer.

PSNH, on the other hand, maintains that under RSA 362-F:3, the Class I REC standard for 2025 continues into the future unless changed. 1/25/11 Tr. at 46. According to PSNH, it does not make sense, from a business or legislative point of view, that the REC requirement would “hit a cliff” and go to zero in 2026 because that would essentially mean that renewable generation resources are not wanted when just the opposite was intended. PSNH further maintains that because RSA 362-F:3 contains a minimum RPS standard, it would be incongruous for the Legislature to provide, in effect that "[t]he minimum is this, and you can exceed this minimum, but we're going to make the minimum zero in 2026." Finally, according to PSNH, Item 3 of PSNH Exh. 9-Rev. 1 addresses the possibility that there might not be a requirement after 2025. PSNH also stated that a legislative change could be sought if the law is ambiguous and cannot otherwise be clarified. 1/26/11 PM Tr. at 40-41.

The minimum electric renewable portfolio standards are set forth in RSA 362-F:3:

> [f]or 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, except to the extent that the provider makes payments to the renewable energy fund under RSA 362-F:10, II:
>
> | | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2025 |
> |---|---|---|---|---|---|---|---|---|---|
> | Class I | 0.0% | 0.5% | 1% | 2% | 3% | 4% | 5% | 6% | 16% (*) |
>
> . . .
> *Class I increases an additional one percent per year from 2015 through 2025.[34] . . .

On its face, RSA 362-F:3 does not specify the renewable portfolio percentages that would apply after 2025. Nor does RSA 362-F:9 limit the allowable term for a "multi-year purchase agreement" to meet RPS obligations. At the same time, RSA 362-F:5 requires that in 2011, 2018 and 2025 the Commission review the RPS program "in light of the purposes of this chapter and with due consideration of the importance of stable long-term policies," and report to the Legislature findings and recommendations on a number of issues, including "*increasing* the requirements relative to classes I and II beyond 2025" (emphasis added). RSA 362-F:5, IV.

In order to determine whether the Legislature intended that the obligation to obtain and retire certificates persists beyond 2025, we apply the principles of statutory interpretation employed by the New Hampshire Supreme Court. Inasmuch as RSA 362-F:3 does not contain an express RPS standard for the years after 2025, we are obliged to look elsewhere in RSA Chapter 362-F and to consider the words and phrases used, not in isolation, but rather within the context of the statute as a whole. *State v. Seymour*, No. 2009-678, 2011 WL 76770 at page 2 (N.H. March 1, 2011); *Petition of George*, 160 N.H. 699, 702 (2010); *Appeal of Pennichuck Water Works*, 160 N.H. 18, 27 (2010). We endeavor to give effect to the provisions of all parts

[34] In any year, if an electric service provider obtains and retires fewer RECs for a renewable energy class than the REC requirement calculated with reference to the specified percentages, the provider is obligated to pay an alternative compliance payment calculated with reference to the provisions of RSA 362-F:10, II-III.

of the statute, *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009), and we construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd, illogical or unjust result or a result that would nullify to an appreciable extent the purpose of the statute. *In re Alex C.*, 13 A.3d 347, 350 (N.H. 2010); *Appeal of Johnson*, 13 A.3d 315, 318 (N.H. 2011); *Nashua School Dist. v. State*, 140 N.H. 457, 458 (1995). In addition, to the extent reasonably possible, we "construe the various statutory provisions harmoniously." *Nashua School Dist. v. State*, *supra* at 459.

We look first to the purpose of the statute:

> Renewable energy generation technologies can provide fuel diversity to the state and New England generation supply through use of local renewable fuels and resources that serve to displace and thereby lower regional dependence on fossil fuels. This has the potential to lower and stabilize future energy costs by reducing exposure to rising and volatile fossil fuel prices. The use of renewable energy technologies and fuels can also help to keep energy and investment dollars in the state to benefit our own economy. In addition, employing low emission forms of such technologies can reduce the amount of greenhouse gases, nitrogen oxides, and particulate matter emissions transported into New Hampshire and also generated in the state, thereby improving air quality and public health, and mitigating against the risks of climate change. It is therefore in the public interest to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities. RSA 362-F:1.

We must respect the purpose of the statute to "stimulate investment in low emission renewable energy generation 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. The meaning and effect of these provisions are substantially undermined if we interpret the statute to mean that the Legislature, in enacting RSA 362-F in 2007, intended for the RPS program and the obligations of electric utilities thereunder to come to an abrupt halt in 2025. As 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. In addition, such an

interpretation would require reading into RSA 362-F:9, I a temporal restriction on multi-year agreements not stated therein, which would be inconsistent with the principle that statutes be interpreted as written without considering what the Legislature might have said and without adding language that the Legislature did not see fit to include. *State v. Seymour, supra*; *In re Alex C., supra*.

Most persuasive as to legislative intent are the provisions in RSA 362-F:5 requiring Commission review of the RPS program in 2025 and reporting to the Legislature. If the Legislature intended that the obligations of electric utilities to obtain and retire certificates terminated in 2025, Commission review and reporting in 2025 would be a meaningless exercise. At the very least, it would be an illogical result to terminate the obligation given the stated purpose of the statute. Of special significance in RSA 362-F:5, moreover, is the phrasing of subsection IV, which requires the Commission to make a recommendation for a change to the class requirements relative to "increasing" the Class I and II percentages beyond 2025. The Commission is not instructed to make a recommendation concerning extending, reestablishing or lowering the Class I and II obligation to obtain and retire certificates but only to make a recommendation concerning increasing the level of the obligation. Similarly, subsection III talks of the "addition" of a thermal energy component and subsection V talks of the "introduction" of new classes; these and other subsections lead the reader to conclude that there is an ongoing obligation to obtain certificates and not that the program was intended to terminate in the absence of action by the Legislature. Consequently, the logical interpretation of the relevant statutory language is that the Class I and II percentages set forth for 2025 persist after 2025, subject to the prospect of the Legislature increasing the percentages based on the Commission's report and recommendation.

Inasmuch as RSA 362-F does not speak directly to the issue of whether the obligation to obtain and retire certificates persists beyond 2025, we look also to legislative history for guidance. *In re Juvenile 2005-212*, 154 N.H. 763, 765 (2007); *Hull v. Grafton County*, 160 N.H. 818, 824 (2010). We have not found legislative history dispositive on the specific issue, but we do observe certain statements, which suggest that the legislative debate 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 x 25" goal.

In her opening statement, Senator Martha Fuller Clark, one of the sponsors of HB 873, which created the RPS requirement, explained that the legislation "clearly fits in with the Governor's ["25 x 25"] plan to have us move our energy availability, in terms of generation, to come from . . . renewable resources." Senate Energy, Environment and Economic Development Committee Hearing Report, April 17, 2007, at 2. Prime sponsor Representative Suzanne Harvey then explained that the "RPS program starts at a baseline percentage of renewable required, starting in 2008, and goes out to 2025, going up in percent where we reach almost 24 percent of our energy coming from renewable." *Id*. at 4. There is nothing in the legislative history to suggest a legislative intent to terminate the obligation to obtain and retire certificates in 2025. Rather, there are references to the Commission reviews in 2011, 2018, and 2025 to make sure that the statute is doing what is expected, *Id*. at 7 (Department of Environmental Services Air Resources Director Robert Scott), and the recognition "that there may be the need to review this legislation in the future and make some changes or adjustments." *Id.* at 3 (Senator Fuller Clark). These statements are consistent with the view that the program and the percentage obligations set forth for 2025 persist unless and until the Legislature expressly acts to the contrary.

In conclusion, we find that PSNH could reasonably project that the Class I renewable portfolio requirement for 2025 will continue in effect thereafter unless and until changed. Such

an interpretation would achieve the greatest harmony in reconciling the statutory provisions. *In the Matter of Aldrich*, 156 N.H. 33, 35 (2007); *Soraghan v. Mt. Cranmore Ski Resort, Inc.*, 152 N.H. 399, 405 (2005).

2. RSA 378:27 and 28, 378:30-a, and Restructuring Law

The OCA asserted that because there is no matching of the customers who pay the over-market costs and those who benefit by the exercise of the POA, the CRF is akin to allowing construction work in progress (CWIP) in rates, *see* 2/1/11 Tr. at 141 and OCA Exh. 1 at 18. Under RSA 378:30-a, CWIP costs may not be allowed as an expense for ratemaking purposes until the construction project is actually providing service to customers. In addition, Staff argued that the CRF is contrary to the "used and useful" principle (*see* RSA 378:27-28) because, under the CRF, over-market payments are recovered through rates before the acquisition of the facility. 2/8/11 AM Tr. at 19-22; *see also* Staff Exh. 1 at 21-22. At hearing, Mr. McCluskey stated that the proposal to have customers pre-fund the purchase of the facility through payment of over-market energy costs violates the used and useful principle because customers would not receive any useful service from the asset until the end of the PPA term. *Id.* at 21.

The used and useful principle acts as a prohibition on what assets are included in rate base; even so, the Commission has discretion to decide what assets are "used and useful" under RSA 378:27 and 28. *Legislative Utilities Consumer Council v. Public Service Company of New Hampshire*, 119 NH 332, 343-344 (1979). Because we do not decide today whether the facility will or can be included in rate base or what its value in rate base should be, the used and useful principle is not implicated by the decision we make.

The statutory CWIP prohibition is related to but separate from the prohibition inherent in the used and useful principle. The anti-CWIP statute prohibits, among other things, the inclusion of CWIP in rate base and thus limits the Commission's discretion as a matter of law. *See*

Petition of Public Service Company of New Hampshire, 130 NH 265, 273-274 (1988). We do not view recovery from ratepayers of over-market costs as being equivalent to paying for CWIP or as contrary to a matching principle as a matter of law. Instead, the proper inquiry as to whether over-market costs should be allowed and, if so, to what extent, relates to the statutory public interest factors, addressed below.

The OCA also argued in its pre-filed direct testimony that under the State's restructuring law, PSNH does not have the legal authority to purchase the facility and, therefore, the law must be changed in order for customers to get any benefits from the CRF.[35] OCA Exh. 1 at 10. At hearing, however, the OCA witness conceded that if PSNH gets value from selling its rights under the POA and the CRF and never owns the plant, there would be no need to change the law. 2/1/11 Tr. at 180-181. We agree that because PSNH has the right under section 7.2.1 of the PPA to assign the POA and CRF for value to a PSNH affiliate or a third party, PSNH's exercise of the POA is not the only way for its customers to realize value from the CRF. Although PSNH's authority to exercise the POA and purchase the plant depends in part on the law in effect at the time of exercise, we do not conclude that the current restructuring law is a legal bar to approval of the PPA and the CRF.

D. Statutory Requirements and Factors

We next consider whether the PPA, either as currently proposed or as modified in accordance with the options listed in PSNH Exh 9-Rev. 1: (i) meets the reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements as provided in RSA 362-F:9, I, and (ii) is, on balance, substantially consistent with the factors set forth in RSA 362-F:9, II. We must consider these factors because PSNH has requested approval

[35] At hearing, Mr. Long testified that the Company can purchase a generating facility and the issue is whether the facility can be included in rate base serving default service customers. 1/24/11 AM Tr. at 132.

of full ratepayer recovery of the costs of the rates, terms and conditions of the PPA. *See also Public Service Company of New Hampshire*, Order No. 24,965 at 17-18 (May 1, 2009) (Commission approval of the Company's agreement with Lempster Wind, LLC allowed PSNH to recover the prudently incurred costs of the agreement in its default service rates).

As explained below, the PPA meets PSNH's reasonably projected default service needs in terms of the amounts of the production of energy and capacity, but the amount of REC purchases to be made under the PPA exceeds PSNH's reasonably projected Class I REC requirements. The PPA, as currently proposed or with the modifications described in PSNH Exh. 9-Rev. 1, is not, on balance, substantially consistent with the factors set forth in RSA 362-F:9, II but, if properly conditioned, is substantially consistent with the statutory factors.

1. Renewable Portfolio Requirements and Default Service Needs

The Commission may approve a multi-year agreement for renewable energy and RECs if, among other things, the Commission finds the agreement meets the Company's "reasonably projected renewable portfolio requirements and default service needs…" RSA 362-F:9, I. The Wood IPPs argue in their post-hearing closing statement that PSNH failed to make a reasonable projection of its renewable portfolio requirements and default service needs for the period up to and including 2025 and did not make any projection of its renewable portfolio requirements and default service needs for the period 2025-2034 and thus did not meet its burden of proof. The Wood IPPs further maintain that no such projections are found in the record. Wood IPPs Closing Statement at 2. Staff argues as well that, as the petitioning party, PSNH has the burden of proof. Staff Closing Statement at 1. Staff focuses its argument on the projections of PSNH's renewable portfolio requirements. Staff Closing Statement at 3-5. Staff maintains that when the Class I RECs already under contract to PSNH and the Class I RECs produced by Schiller Station are taken into account, PSNH does not need to acquire additional RECs until 2016 to meet its

reasonably projected requirement. Staff points out that the PPA obligates PSNH to purchase all of the RECs produced by the facility as soon as it is operational which, Staff believes, could be as early as 2013. Staff contends that even after 2016, the RECs delivered by Laidlaw will exceed PSNH's "reasonably projected" requirement through 2023, assuming the rate of customer migration does not fall below the level just prior to the Company's filing. Staff asserts that during the first 10 years of the PPA, PSNH will purchase from Laidlaw 3 million more RECs than are needed to meet its RPS Class I obligation, a result that in its view will be very costly and not consistent with RSA 362-F:9, I.[36]

We find that there is sufficient evidence in the record for us to reach a conclusion regarding a reasonable projection of PSNH's Class I renewable portfolio requirement under RSA 362-F:9, I against which to weigh the REC obligations under the PPA. In so doing, we must estimate PSNH's default service needs.

a. Default Service Needs

Default service needs refer to the utility's need to supply its default service customers with power, i.e., energy and capacity, primarily. We first estimate the projected default service load, based on a delivery sales forecast, adjusted to reflect the "migration" of certain PSNH delivery service customers who elect to purchase their energy from competitive, third party suppliers and use PSNH for the delivery of electricity only. Next, we take into account the generation resources that PSNH owns or has under contract. Finally, we compare the projected energy load to the estimated energy and capacity purchases under the PPA.

Regarding the capacity needs of PSNH's default service customers, Wood IPPs Exh. 1 at 8 indicates that under all the scenarios presented, the PPA is not likely to result in any excess

[36] Staff contends that unlike the Lempster agreement, which provided for the sale of RECs to PSNH at favorable prices, the REC prices under the PPA are substantially above expected future market prices for Class I RECs and therefore PSNH is unlikely to be able to resell those RECs at compensatory prices.

capacity. As to default service needs, we accept the total of PSNH's delivery sales forecasts for the years 2010 through 2025, *see* Wood IPPs Exh. 1 at 9. To this we apply PSNH's growth rate of 0.5% for subsequent years.

We then apply a 31% migration rate to determine the default service load after migration of those customers who elect to buy energy from competitive suppliers. We find that 31% is reasonable, as it is based on data provided by PSNH and relied on by other parties in developing their testimony. In its initial filing, PSNH stated that the migration rate was approximately 30%. PSNH Exh. 4 at 4. In its pre-filed rebuttal testimony, PSNH stated that, as of July 2010, the migration rate being experienced was 31%. PSNH Exh. 7 at 24. PSNH criticized Staff's assumption that the migration level would continue to be 31% but offered no basis to conclude that the level would drop. Indeed, hearing testimony revealed that the migration levels had increased in the last quarter of 2010. According to a quarterly report recently filed with the Commission by PSNH, the actual migration rate was close to 35% in October, 34% in November, and 32% in December, 2010. 2/8/11 AM Tr. at 29. The City of Berlin's witness testified that, in his view, customer migration has peaked and will not continue to increase because the largest customers have already left and the cost to serve remaining customers is too great for competitive suppliers to be interested, 2/1/11 Tr. at 133-134. We do not conclude that these short-term fluctuations and projections are necessarily more representative of future conditions than the 31% migration rate and we thus accept 31% migration rate as reasonable for purposes of this case.

We rely on Wood IPPs Exh. 1 at 7, to estimate the amount of generation PSNH owns and that already under contract. The Wood IPPs' data was for 2014 and 2015; we assume for purposes of this order that PSNH will continue to own or have under contract this level of output for the years 2016 through 2034.

The projected output of the Facility depends on certain assumptions regarding the Facility's size and capacity factor, that is, how efficiently it operates over time. The record contains numerous permutations on these points, but the bulk of the testimony and cross examination focused on a plant of 63 MW net output with 80% capacity factor and a plant of 67.5 MW with 87.5% capacity factor. The lower assumptions produce 441,504 MWh per year or approximately 8,830,000 MWh over the 20 year term; the higher assumptions produce 517,388 MWh per year, or approximately 10,350,000 MWh over the 20 year term.

The resulting calculations for the period 2014-2034 are:

Total delivery sales	171,000,000 MWh
Energy service load with 31% migration	118,000,000 MWh
PSNH's owned/contracted generation	96,600,000 MWh
PSNH's need for energy before Laidlaw	21,400,000 MWh
Output at 63 MW/80% capacity factor	8,830,000 MWh
Output at 67.5 MW/87.5% capacity factor	10,350,000 MWh

Under either set of assumptions regarding output, PSNH needs to acquire significant amounts of energy from other sources. The PPA does not require PSNH to purchase energy in excess of its needs over the entire 2014-2034 period; nor does it require purchase of excess energy in any one year during this period. Accordingly, we find that the amount of PSNH's energy purchases under the PPA meets reasonably projected default service needs during the time the PPA is in effect.

b. Renewable Portfolio Requirements

We are also required to assess whether the Class I REC purchases to be made under the PPA "meet reasonably projected renewable portfolio requirements" which necessitates a similar analysis.[37] The projection starts with a forecast of PSNH's delivery service sales over the period

[37] For the projections, we rely on the following exhibits: Wood IPPs Exhibit 1 and Exhibit GRM-6 attached to Staff member George R. McCluskey's pre-filed direct testimony, Staff Exh. 1.

of time during which REC purchases are expected to be made under the PPA. Because renewable portfolio requirements are based on the total megawatt-hours of electricity supplied by PSNH to its end-use customers, pursuant to RSA 362-F:3, the delivery service sales must again be reduced to reflect 31% migration of PSNH delivery service customers who obtain energy from competitive third party suppliers. We multiply the projected MWhs of electricity to be supplied by PSNH to its default service customers in each of the forecast years by the Class I percentage specified in the table for each year to reach Class I REC requirements year by year as well as the total over the 20-year period.

We then account for the RECs otherwise available to PSNH to satisfy its RPS obligations. There are three sources of Class I RECs now available to PSNH: the Lempster Wind facility under a PPA with PSNH and the Smith Hydro and Schiller Station biomass facilities, both of which are owned by PSNH.

The parties disagree as to whether Class I RECs produced by PSNH's Schiller Station can be used to satisfy PSNH's Class I REC obligation. PSNH asserts that the RECs produced by Schiller Station cannot be used because the Commission, in *Public Service Company of New Hampshire*, Order No. 24,327 (May 14, 2004), approved a risk sharing mechanism[38] that, in its view, requires PSNH to sell the Schiller Station RECs to other market participants. PSNH Exh. 7 at 23-24; 1/24/11 AM Tr. at 85-86; 1/25/11 Tr. at 50-51 (Schiller Station RECs cannot be used for compliance with New Hampshire law until 2020, the end of the 15 year risk sharing mechanism); 1/26/11 AM Tr. at 64-67. The OCA and Staff disagree with PSNH's interpretation of Order No. 24,327, arguing that Schiller Station RECs are available to PSNH to meet New

[38] This mechanism provided a means for allocating, as between PSNH and ratepayers, the risks and rewards associated with the Schiller Stations incremental costs and incremental revenues. Order No. 24,327 was issued in response to a motion to reconsider Order No. 24,276 (February 6, 2004).

Hampshire Class I obligations at any time. 2/1/11 Tr. at 145-147; OCA Closing Statement at 3; 2/8/11 AM Tr. at 27-29; Staff Closing Statement at 4-5.

PSNH incorrectly interprets Order No. 24,327. The order does not require PSNH to sell the Schiller Station RECs to other market participants under all circumstances. Such a requirement is not an express term of the risk sharing mechanism and in fact the retention and retirement of the Schiller Station RECs is consistent with the express provision requiring "the sum of all incremental revenues, credits and cost avoidances achieved by PSNH, from all sources" to be included in the project's "annual incremental total revenue." Replacing a Class I REC that PSNH might have to purchase from Laidlaw under the PPA with one from Schiller Station is one type of "cost avoidance." *See* 2/1/11 Tr. at 146-147. Notably, although the mechanism expressly provided certain exclusions from "annual incremental total revenue," the cost avoidances from the use of Schiller Station Class I RECs are not among them. We thus regard the Schiller Station RECs as being available to satisfy PSNH's Class I renewable portfolio requirements.

In determining whether the Class I REC purchases to be made under the PPA "meet reasonably projected renewable portfolio requirements," there need not be an exact match in each year of the PPA between the Class I RECs expected to be produced by the Laidlaw facility and PSNH's unsatisfied renewable portfolio requirement. Doing so would not be realistic, as the REC requirement ramps up over time but a new facility brings on a large influx of renewable generation at the moment it becomes operational. REC agreements that limit purchases to the REC requirement for each particular year would make financing of these projects difficult and could, in effect, deter desirable renewable energy generation projects from being approved and built, a result that we find contrary to legislative intent. Instead, we view the REC requirement in the context of the 20-year period covered by the PPA.

To determine whether the PPA "meets" PSNH's Class I renewable portfolio requirements, then, the remaining REC obligation must be compared to the estimated Class I RECs produced by Laidlaw and which, under the PPA, must be purchased by PSNH. The number of RECs produced by the Facility depends upon its output, and we again look to the record, which focused primarily on a plant of 63 MW with 80% capacity factor, and a plant of 67.5 MW with 87.5% capacity factor.

The resulting calculations for the period 2014-2034 are:

Total delivery sales	171,000,000 MWh
Energy service load with 31% migration	118,000,000 MWh
Total Class I RECs needed	15,140,000 RECs
PSNH's Class I RECs from owned/contract generation	7,180,000 RECs
PSNH's need for Class I RECs before Laidlaw	7,960,000 RECs
Class I RECs produced at 63 MW/80% capacity factor	8,830,000 RECs
Class I RECs produced at 67.5 MW/87.5% capacity factor	10,350,000 RECs

Under either set of assumptions as to output, the Class I RECs produced by the Laidlaw facility will be substantially in "excess" of PSNH's Class I REC obligation: 870,000 excess at the lower output and 2,390,000 excess at the higher output.[39]

2. Public Interest Factors

In assessing the provisions of the PPA against the statutory public interest factors set forth in RSA 362-F:9,II, we look at contract specifics as well as the overall proposal, in order to evaluate whether the PPA as a whole complies with the statute. We need not give equal weight to each of the five factors, nor are we required to balance the factors in the same way as we did in *Public Service Company of New Hampshire*, Order No. 24,965 (2009) (approving Lempster Wind, LLC power purchase agreement) and *Public Service Company of New Hampshire*, Order No. 24,839 (2008) (approving Pinetree Power, Inc. and Pinetree Power-Tamworth, Inc. power

[39] The questions of what is an acceptable REC output for ratepayer recovery and a specific determination of the amount of "excess" Class I RECs are separate questions which we take up later on in our analysis.

purchase agreements). The energy and REC production from the Laidlaw facility will be much larger, the contract term longer, and the potential for ratepayer harm greater than was the case with the power purchase agreements we approved in those dockets. We find, as explained below that, on balance and subject to the conditions described in Section E., the PPA is substantially consistent with the following factors.

a. The efficient and cost-effective realization of the purposes and goals of RSA 362-F

This provision focuses on whether the proposed PPA efficiently and cost-effectively realizes the *purposes and goals* of the RPS statute; ultimately it is a balancing test that requires a weighing of the benefits of the PPA against its costs. We agree with PSNH and City of Berlin that the PPA efficiently realizes the statute's goals in that it provides fuel diversity to the generation supply through use of local renewable fuels and resources that serve to displace and lower regional dependence on fossil fuels, one of the goals stated in RSA 362-F:1. We also agree that the PPA, like other renewable resource projects, has the potential to act as a hedge against volatile fossil fuel prices, another goal set forth in the statute. Further, use of biomass technology will bring environmental and public health benefits to the state, as called for in RSA 362-F:1 while supporting the statutory goal of keeping "energy and investment dollars in the state to benefit our own economy."

The significant question for us is whether the PPA is a cost-effective way of serving these goals, given the potential for high contractual prices relative to the market. We conclude that, as filed, the agreement's energy price, capacity price in early years, REC price, and number of RECs PSNH must purchase pose too great a risk to PSNH's default service customers. Thus, we cannot find that the PPA as filed is a cost-effective means to achieve the statute's purposes. With the conditions set forth herein, however, the PPA would meet this test.

b. The restructuring policy principles of RSA 374-F:3

The PPA is consistent with the following restructuring policy principles set forth at RSA 374-F:3, notably system reliability (subsection I), open access to the transmission system (IV), environmental improvement (VIII), and increased commitment to renewable energy (IX). Many of the principles are not directly relevant to the PPA, such as customer choice (II), unbundling (III), energy efficiency(X), stranded costs (XII), regionalism (XIII), the Commission's processes (XIV) and competition timetable (XV). To the extent they are tangentially related, the PPA is certainly consistent with them.

The restructuring principles that raise greater concern are those implicated by the high rates contained in the PPA: benefits accruing to all customers (VI) and near term rate relief (XI).[40] The PPA raises the potential for significant rate increases relative to what they would be in future years without the PPA. Because all costs of the PPA are to be borne by default service customers alone, pursuant to RSA 362-F, there is potential that the rate consequences of the PPA as filed will encourage more customers to seek competitive supply, if the PPA prices are over-market, leaving the default service customers with an ever growing burden. We are not persuaded that the CRF provides adequate protection against these risks. The PPA as filed, therefore, is inconsistent with the restructuring principles of benefits to all customers and near term rate relief. With the conditions described in Section E, however, the PPA would be consistent with these principles.

c. The extent to which such multi-year procurements are likely to create a reasonable mix of resources, in combination with the company's overall energy and capacity portfolio, in light of the energy policy set forth in RSA 378:37 and either the distribution company's integrated least cost resource plan pursuant to RSA 378:37-41, if applicable, or a portfolio

[40] The principles addressing market forces in procuring default service (V) and full and fair competition (VII) are addressed at section D. 2(d) below.

management strategy for default service procurement that balances potential benefits and risks to default service customers

The focus of this provision is the extent to which the PPA is likely to create a mix of resources "in combination with the company's overall energy and capacity portfolio" and "in light of the energy policy set forth in RSA 378:37." PSNH's owned resources include the Merrimack coal units, the Newington oil unit, the Schiller Station coal and wood units, and several hydroelectric units. PSNH also purchases energy and capacity from hydroelectric, wood-fired and wind generators and from the market to meet its default service requirements. The addition of what will be the largest wood-fired facility in New Hampshire to PSNH's energy and capacity portfolio, which is largely dependent on fossil plants, serves the goal of energy diversity.

New Hampshire energy policy pursuant to RSA 378:37 is "to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; the protection of the safety and health of the citizens, the physical environment of the state, and the future supplies of nonrenewable resources; and consideration of the financial stability of the state's utilities." We find that the PPA is consistent with this policy insofar as it concerns the reliability and diversity of energy sources, safety and health, the physical environment, future supplies of nonrenewable resources and the financial stability of the state's utilities. We also find that the PPA is consistent with the Company's least cost plan, which expressly provides for the negotiation of a purchase power agreement under certain circumstances. As discussed below, however, the pricing provisions of the PPA as filed are not the lowest reasonable cost and our approval of the PPA is conditioned on changes to pricing terms that will render the PPA consistent with state energy policy.

d. The extent to which such procurement is conducted in a manner that is administratively efficient and promotes market-driven competitive innovations and solutions

The focus of this provision is administrative efficiency and promotion of competitive solutions. In Order No. 24,965 (May 1, 2009) in Docket No. DE 08-077, concerning PSNH's purchase power agreement with the Lempster wind facility, the Commission concluded that RSA 363-F:9 does not mandate the use of a Request for Proposals to acquire power and found the Lempster agreement, which was the product of negotiations between PSNH and Lempster Wind, LLC, to be consistent with RSA 362-F:9, II,(d). Similarly, we find the PPA in this proceeding, insofar as it is a product of negotiations between the parties, to be consistent with the statute. We note as well that, to the extent the PPA results in the use of an existing boiler and provides a vehicle for the development of community combined heat and power installations, it promotes efficient and innovative solutions.

e. Economic development and environmental benefits for New Hampshire

In addition to the environmental benefits for New Hampshire discussed above in connection with RSA 362-F:9, II(b) and (c), as the City of Berlin noted, the Laidlaw project will revitalize a shuttered mill in downtown Berlin. We find that cleaning and managing an industrial site that is now abandoned constitutes an environmental as well as an economic benefit of the project. The evidence also demonstrates that the PPA is likely to bring economic development benefits to Berlin and surrounding local areas, particularly in the form of direct, indirect and induced jobs. Edrest contested this point by citing potential harms from the Laidlaw project, including negative impacts on the value of city assets, tourism and existing Class III REC facilities, and the risk of fire but we find the evidence offered by the economic expert testifying on behalf of PSNH, together with that presented by the City of Berlin, to be more persuasive. The evidence is less clear regarding significant economic development benefits to the rest of

New Hampshire, particularly in light of the risk to PSNH's default service ratepayers statewide under the PPA as filed.

The risks to ratepayers are a function of over-market PPA pricing and REC volumes that are too high. As filed, the costs of the PPA outweigh the economic development and environmental benefits of the project. However, in light of conditions we impose that reduce ratepayer exposure to over-market pricing and unneeded REC purchases, the PPA is consistent with this factor.

E. Conclusions and Conditions

The essential pricing terms of the PPA as filed, i.e., the prices for energy, capacity, and RECs are not reasonable based on the evidence presented. Furthermore, the open-ended obligation to purchase RECs exceeds PSNH's reasonably projected needs while the absence of a ceiling on the facility's output poses additional risks for ratepayers. Weighing and balancing the costs of the PPA as filed, which could be as much as $2 billion over the term of the PPA, against its benefits, we conclude that the costs to PSNH's hundreds of thousands of residential and business default service customers throughout the state outweigh the environmental and economic development benefits. Accordingly we are unable to find that the PPA as filed is in the public interest. We would, however, approve a modified PPA complying with certain conditions that mitigate risk to PSNH's default service customers and reduce total payments to approximately $1.3 billion over the term of the PPA. We explain below our decisions on the terms of the PPA and set forth the conditions relevant to those terms.

1. Base Energy Price

We find that the PPA base energy price of $83 per MWh is too high in the early years and the risk is great that, over the term of the PPA, customers will pay well above market prices for energy. PSNH did not vouch for the reasonableness of the PPA base energy price by offering

forecasts or projections of market energy prices, though it did prepare an energy price analysis in 2008 for the purpose of evaluating the POA. That analysis included a market energy price projection of $66.63 per MWh for 2014. Staff Exh. 1 at 25-26.

PSNH relied on the structure of the PPA, and the CRF and POA in particular, to protect customers from the risk of over-market energy payments. Staff, on the other hand, provided a long-term market energy price projection that assumed $53.12 per MWh for 2014, the first year of the PPA. Attachment GRM-12 to Staff Exh. 1.[41] The consultant for the City of Berlin prepared his testimony relying in part on a Ventyx Fall 2010 Power Reference Case/Electricity and Fuel Price Outlook energy price forecast for the Northeast Region, [42] which included an average annual market energy clearing price, in constant 2010 dollars, for the Northeast market area for 2014 which, in nominal dollars, is close to Staff's energy price projection. Staff Exh.12C, Table B-4.[43] We find these forecasts of near-term market energy prices to be a good indicator of the market in the short term, against which to assess the reasonableness of the base Energy price.

Item 4 of PSNH Exh. 9-Rev. 1 sets forth a base energy price of $75.80 per MWh, which is the product of a calculation employing a $30 per ton base wood fuel price, down from $34, and a wood price conversion factor of 1.6, down from 1.8, after the initial year. We find that lowering the base wood fuel price per ton from $34 as set forth in the PPA to $30, as identified in PSNH Exh. 9-Rev. 1, is reasonable and we condition our approval of the PPA on its adoption. This more closely approximates the current price of wood at Schiller Station. 1/24/11 AM Tr. at 94. We also find that lowering the wood price conversion factor from 1.8 to 1.6, as indicated in

[41] Staff's projections were based on the same approach PSNH used in its 2009 analysis, i.e., NYMEX forward energy and natural gas prices. 2/8/11 AM Tr. at 31.
[42] We note that the City of Berlin's witness, using a selection of forecasts of different vintages and from different sources, was able to construct a case that the PPA could, under certain circumstances, be under-market.
[43] The figures in Table B-4 are based on 2010 constant dollars. This conclusion remains accurate even assuming a reasonable inflation rate of 2.5%.

PSNH Exh. 9-Rev. 1, is reasonable,[44] but, in order to be consistent, a 1.6 conversion factor should also be used to establish the initial base energy price. We find that the resulting base energy price of $69.80, which represents a 16% reduction from the base energy price of $83 per ton set forth in the PPA, is just and reasonable over time inasmuch as it comports with long-term forecasts in the record. We condition our approval of the PPA on its adoption and use of the 1.6 conversion factor going forward.

The OCA and the Wood IPPs both argued that the Commission should reject the WPA mechanism that is part of the energy pricing provision set forth in section 6.1.2 of the PPA. The OCA argued that the WPA is not a true market-based price because it relies on the prices paid by just one buyer in the market, PSNH, for use at its Schiller Station. The OCA also expressed concern that a WPA based on Schiller Station prices could put upward pressure on wood prices generally and increase costs of energy at both Schiller Station and the Laidlaw facility. OCA Exh. 1 at 11. The Wood IPPs similarly contended that there is no connection between the cost of fuel at Schiller Station and the cost of wood fuel at the Laidlaw facility and, therefore, little connection between the WPA and its purpose of compensating Laidlaw for changes in its fuel costs. The Wood IPPs maintained that Laidlaw is able to manage its own fuel risk and does not need the WPA. Wood IPPs Closing Statement at 6.

Fuel adjustment provisions are commonplace in the energy utility business. While the WPA may not track wood prices actually paid at the Laidlaw facility, it is a reasonable proxy inasmuch as the wood market "basket" from which wood for both Schiller Station and the Laidlaw facility are drawn are reasonably proximate and potentially overlapping. In addition, the wood prices paid by PSNH at Schiller Station are subject to the full procurement control of

[44] Staff stated that the 1.8 conversion factor does not accurately reflect the operating characteristics of the facility. 2/1/11 Tr. at 227.

PSNH under the Commission's general supervision. Consequently, we accept the use of the WPA in calculating the energy price. Because the WPA insulates Laidlaw from a certain level of risk it also serves as an additional basis for our reduction to the base energy price.

We further find that the CRF, which is intended to mitigate the risk of over-market energy prices to default service customers, is an improvement over the situation that existed with PSNH's past QF rate orders but, in its current form and with the filed prices, nevertheless provides protection to PSNH's default service customers that is too limited and too remote. The fair market value of the facility at the time the purchase option may be exercised acts as a cap on the value of net over-market energy costs paid by PSNH's default service customers to be returned to them through the CRF. The risk to PSNH's default service customers is that if the amount of over-market payments in the fund is greater than the fair market value of the facility, customers would not in fact realize the full benefit intended to be captured by the CRF. Item 3 of PSNH Exh. 9-Rev. 1, which would include the net value of "Excess NH Class I RECs" in the calculation of the CRF, does not adequately mitigate this risk.

PSNH did not present any projection of what the fair market value might be and acknowledged that the fair market value at the end of the 20-year term could turn out to be zero, *see* 1/24/11 AM Tr. at 82-83, although PSNH thought that very unlikely. *Id.* at 138. PSNH pointed to future conditions in the energy markets, the facility's value as a renewable generator, and its capacity factor as being important determinants of fair market value. *Id.* at 135-136. It is clear that the future state of competition in the electricity generation markets and legislative developments regarding environmental attributes and carbon reductions will have an important bearing on fair market value. Staff Exh. 1 at 20. Other factors such as the future level of taxation of the facility and its physical condition could also affect its fair market value. In Section 6 below we describe a condition that builds on the CRF as proposed.

2. Capacity Prices

PSNH had available long term capacity price projections prepared by David Errichetti, an employee of a Northeast Utilities affiliate, and Levitan and Associates, a consultant on the Company's behalf during its negotiations with Laidlaw, that indicated a projected capacity price based on Forward Capacity Market auctions of $2.95 per kW-month. Attachment GRM-14 to Staff Exh. 1. We find these forecasts of near term market capacity prices to be a good indicator of the market prices for capacity against which to assess the reasonableness of the capacity price in 2014 and 2015.

We find that the PPA capacity prices are reasonable over time but that $4.25 per kW-month in 2014 and 2015 set forth in the PPA is too high, in light of testimony regarding the ISO-NE Forward Capacity Market auctions. Accordingly, we find it reasonable to condition our approval of the PPA by requiring that the capacity prices be lowered to $2.95 per kW-month for the first two years following the In-Service Date.

3. REC Prices

The REC prices in the PPA, which are discounted from the ACP, are reasonable over time, but a discount to 80% of the ACP in 2014 and 2015 is not supported by the evidence. Paying 80% of the ACP results in an estimated NH Class I REC price of $67.29 in 2014 and $68.97 in 2015.[45] These prices are much higher than the current market price for NH Class I RECs of approximately $20 per REC. *See* OCA Exh. 1 at 5-6 and Attachments KET 5,6, and 7; *see also* 1/24/11 PM Tr. at 28 and Wood IPPs Exh. 17. If one escalates that $20 price by 2.5% per year through the year 2015, as PSNH did in October 2010 in Docket No. DE 08-103 (*see* Wood IPPs Exh. 17), the PPA REC prices for 2014 and 2015 are still much higher than

[45] These figures are derived by applying the PPA discount to the 2010 New Hampshire Class I ACP of $60.93, see www.puc.nh.gov/Sustainable%20Energy/Renewable_Portfolio_Standard_Program.htm and OCA pre-filed direct testimony at 5, inflated by 2.5% per year for four and five years.

anticipated near term market prices. While we accept that, all else being equal, New Hampshire Class I REC prices may increase in the future due to supply and demand conditions in the REC markets, the PPA REC pricing for 2014 and 2015 is, nevertheless, unreasonable.

Accordingly, we condition our approval of the PPA on an adjustment of the schedule of proposed discounts such that the payment will be 50% of the ACP in years 1 and 2, followed by five years at 80%, five years at 75%, five years at 70%, and the last three years at 50%. We are not persuaded that New Hampshire Class I REC prices will be significantly above current market amounts for some time, hence our decision with respect to years 1 and 2. However, it is reasonable to conclude from the record that REC prices will tend toward the ACP over time and, in that context, the discounts from the ACP proposed in the PPA after the first two years are reasonable and redound to the benefit of ratepayers.

4. REC Volume

As discussed *supra,* PSNH's reasonably projected Class I REC requirement is 7,960,000, or approximately 8 million certificates, over the 20-year term of the PPA. Given the increasing REC obligation over time, in the early years of the agreement the RECs generated by the project will be in excess of the statutory requirement while in the later years the RECs generated by the project will be less than the statutory requirement. We find that it is in the public interest pursuant to RSA 362-F:9 to approve a multi-year purchase agreement that levelizes the REC purchase requirement over time. Accordingly, we condition our approval on establishment of the annual REC purchase obligation at a ceiling of 400,000 certificates, which we derive by dividing the 8 million total certificates needed by the 20-year term of the PPA. Additional RECs produced by Laidlaw could be purchased by any entity requiring RECs, at market prices or pursuant to a separate contract that Laidlaw might negotiate with a buyer.

5. Energy Output

The PPA as filed is effectively an outputs contract that requires PSNH to purchase the entire output that Laidlaw generates. While the PPA sets forth summer and winter capacity ratings, it does not expressly limit the output PSNH must purchase. In order to limit ratepayer exposure, we find it reasonable to specify PSNH's annual obligation to purchase energy.

We accept the maximum net contract quantity set forth in PSNH Exh. 9-Rev. 1 of 67.5 MW. As for the capacity factor, there were a number of figures used in the record, ranging most often from 80% to 87.5%, for purposes of various calculations. Of course, over time the capacity factor will be determined by actual results and it would not be unexpected to see a capacity factor in excess of 90% at times. It is not our purpose to forecast an actual capacity factor but to select a capacity factor for purposes of setting the ceiling on the annual energy output that PSNH is obliged to purchase from Laidlaw under the PPA. The 85% capacity factor used by PSNH in various analyses of the PPA[46] is within the range of the capacity factors used by the analysts in this proceeding and is reasonable to adopt for these purposes. A net capacity of 67.5 MW and a capacity factor of 85% would yield energy production of 517,388 MWh per year. Given the likely variations in net output and capacity factor under actual operating conditions, and to constrain the potential impact on ratepayers, we condition approval of the PPA on an annual output purchase obligation of 500,000 MWh. Additional output could be purchased by any market participant, at market prices or pursuant to a separate contract that Laidlaw might negotiate with a buyer.

[46] Large pre-filed direct testimony at 5,13; Staff Exh. 7, Attachments 3-7; and OCA Exh.1, Attachment KET-15, Bates page 45, line entitled, "Annual Energy Production (MWh) 85% CF".

6. Cumulative Reduction Factor

As discussed above, the CRF is a step in the right direction in terms of mitigating risk to customers and seeking to avoid the situation that occurred with rate orders approved by the Commission in the 1980s, which resulted in PSNH customers paying rates over two decades that were more than $1 billion over market prices, but the protection is too limited and too remote as proposed. In addition to the conditions relative to energy, capacity and REC prices, and limitations on the quantity of energy and RECs that PSNH is required to purchase, we find it necessary to impose an additional condition, one that reasonably assures that PSNH's customers will receive, through the CRF under Article 6.1.3 of the PPA, the value of the facility anticipated through PSNH's purchase option under Article 7 of the PPA.

As discussed during the hearings, the level of CRF at the end of year 20 could be greater than the fair market value of the facility at that time, in which case PSNH customers would not be fully "compensated" under PSNH's approach for the over-market payments over the term of the agreement. To better protect the interests of customers, we will cap the level of the CRF on a cumulative annual basis at $100 million, a level that reasonably compares to testimony in the record as to the potential future value of the facility.[47] To the extent that the accumulated account exceeds $100 million in any year, the overage will be credited against the energy price paid in the following year. This mechanism has the salutary impact of reducing risk to customers over time in the event PPA prices are well above market prices by effectively matching the level of the CRF to a prospective value of the facility. Further, through this mechanism customers would see the benefit of mid-course or late-course downward adjustments in the energy price if it turns out that the PPA is significantly over-market.

[47] At hearing a range of future values of the Facility was discussed, from the possibility of no value, *see* 1/24/11 AM Tr. at 82-83, to $120-$135 million depending on the capacity rating assumed, *see* 2/1/11 Tr. at 21-22.

7. Retention of Commission Jurisdiction

According to PSNH, the PPA is a wholesale power agreement subject to FERC jurisdiction and will be filed as a FERC tariff. PSNH also requests a Commission decision "approving and allowing for full cost recovery of the rates, terms and conditions" of the PPA. This raises the question of the extent to which such full cost recovery by PSNH would be self executing and beyond the authority of the Commission to regulate in the future. PSNH has stated that Commission approval of the PPA would authorize PSNH to administer routine matters under the PPA without further approval by the Commission. Nonetheless, PSNH has assured us that to the extent there are material discretionary actions to be taken by PSNH in performing under the PPA, such as PSNH's exercise or transfer of the POA, transfer of the CRF, transfer of the Right of First Refusal,[48] or incurrence of expenditures under Article 8 of the PPA, PSNH's actions regarding such discretionary actions would remain subject to traditional Commission oversight to ensure the prudence of the Company's actions. *See also* RSA 374-F:3,V(c) (acknowledging recovery of *prudently incurred* costs regarding purchased power agreements through the default service charge). To avoid doubt about whether PSNH's assurance on these points is enforceable, we require as a condition of our approval that the PPA be revised to add a provision that expressly recognizes the Commission's retention of such traditional regulatory authority in such circumstances.

8. Identification of substituted parties to the PPA and POA

The new Laidlaw-related entities proposed to be substituted for the parties currently identified in the PPA should, of course, be correctly identified in a revised PPA, as appropriate.

[48] PSNH's exercise of the Right of First Refusal would be a similar discretionary act that requires the Commission's approval.

F. Pending Procedural Issues

1. Copyright and Confidentiality Issues Regarding Publications Used by Mr. Sansoucy

During the course of the hearings, there was debate over the proper treatment of two publications involving market protections relied on by City of Berlin witness George E. Sansoucy. The two publications are "Power Reference Case, Electricity & Fuel Price Outlook, Northeast Region, Fall 2010" by Ventyx Advisors and "Natural Gas Price Outlook" by Energy Solutions, Inc. After protracted debate, the documents were distributed to the Commission, parties and Staff but under restrictions requested by the City of Berlin based on copyright concerns, such as numbered copies to be returned at the conclusion of the proceeding and a prohibition against photocopying. The data and portions of the text of the Ventyx Fall 2010 study, which was marked for identification as Staff Exhibit 12C, was the subject of both written and oral testimony for which counsel for the City of Berlin did not request a sealed record.

At the close of the hearings, the OCA objected to the confidential treatment accorded Staff Exhibit 12C. The OCA argued that to the extent confidentiality might have been appropriate at the start, it appeared to have been waived by extensive excerpts of the report put into the public record. 2/9/11 Tr. at 144-145. Counsel to the City of Berlin argued that the excerpts in no way constituted a waiver of confidentiality, as he understood that the material was under copyright restrictions and could not be publicly disseminated in full. 2/9/11 Tr. at 150. The Commission instructed the parties and Staff to see if agreement could be reached on this issue, 2/9/11 Tr. at 145, but no resolution was reported.

In order to address whether Staff Exhibit 12C should be treated as a confidential document, it must be clear what is being requested, as in our view the request for confidential treatment is a misnomer, at least as it applies to Commission practice. The City of Berlin stated

that copyright restrictions were its concern, and that it was bound by terms imposed by the publisher not to disseminate the materials without permission. Though the City of Berlin suggested it was working to gain permission for release of the documents, counsel for the City could only relate that he believed his witness placed telephone calls, perhaps a week earlier and that in the past he understood such requests were not successful. 1/25/11 Tr. at 30-31. Though he continued to refer to a need for confidential treatment, counsel for the City of Berlin stated that the data and text within the report were not confidential, it was only the copyright restrictions that were of concern. 2/9/11 Tr. at 160.

We find that the use of the materials in written and oral testimony was appropriate and, because the City is not seeking to have the transcript records sealed, the OCA's request that the material not be deemed confidential is moot. Though we are not redacting the document or transcript references to the document, we will continue to protect the Ventyx report from public dissemination by prohibiting the photocopying of the report or posting it on our website. Further, to the extent that copies remain in the possession of parties, Staff or the Commission, they shall not be copied or further disseminated. To the extent parties have agreed to return copies to the City of Berlin, they shall do so at the conclusion of all appeals of this matter. Of course, one copy will remain in the Commission's official files. We will not, however, grant the City of Berlin's request that we block the public from reading the full report at the Commission. 2/9/11 Tr. at 160. Any person who seeks to come to the Commission and read any or all of the report is free to do so.

2. Confidentiality Issue Regarding Mr. Sansoucy's Files

Counsel for the City of Berlin requested confidential treatment of the personal files used by City of Berlin witness Mr. Sansoucy in preparing his testimony, which had been requested in discovery propounded by the Wood IPPs. We took the request under advisement. 1/24/11 AM

Tr. at 38. Because the files were never produced for *in camera* review, were not introduced as exhibits and were not referred to in cross-examination, the request is moot.

3. Motion to Strike Portions of Testimony of Mr. Sansoucy

At the start of the hearings, the OCA noted that it filed that morning a Motion to Strike significant portions of the rebuttal testimony of Mr. Sansoucy, City of Berlin GES Exh. 3, as in the OCA's view the testimony was not proper rebuttal and it had not been able to do discovery on the information contained, as the procedural schedule did not allow for discovery on rebuttal testimony. The Wood IPPs and Staff concurred in the OCA request; Staff offered that if the Commission were to allow the testimony, the parties and Staff would need a delay in the hearing to undertake discovery on Mr. Sansoucy's assertions. 1/24/11 AM Tr. at 43. PSNH argued that the testimony was perhaps duplicative of issues covered in Mr. Sansoucy's direct testimony but nevertheless was fair rebuttal and should be allowed. 1/24/11 AM Tr. at 45-46. Berlin also asserted that the testimony was proper rebuttal. 1/24/11 AM Tr. at 47.

The information requested to be stricken included Mr. Sansoucy's testimony supplementing his views regarding siting of the Laidlaw project, his critique of Staff's testimony regarding capacity markets, issues he believed the OCA and Staff should have addressed regarding energy pricing, his analysis of certain studies on natural gas and electric markets, his views regarding REC prices and obligations in the PPA, his view regarding the CRF, and his position on the intended output of the plant. After arguments, we took the matter under advisement and after a recess granted the Motion, with the exception of item 12E regarding natural gas and electric markets, which we held in abeyance pending further consideration. 1/24/11 PM Tr. at 8-10.

Our decision to strike the testimony delineated by the OCA was based on our need to adhere to a fair standard of conduct for all participants, and avoid unfair advantage or surprise by

a party who deviates from the process set forth at the outset of the proceeding. We further note that the proceeding was considerably delayed and made more contentious by Mr. Sansoucy's decision to include information in his rebuttal that was essentially direct testimony. Were he someone unfamiliar with the Commission's hearing process, the error might have been understandable and a remedy might have been crafted. Mr. Sansoucy holds himself out to be an expert in the state and federal energy regulatory issues, with experience in numerous jurisdictions. *See* Resume of Mr. Sansoucy, City of Berlin GES Exh. 2. In light of his years of participation before this Commission and similar regulatory bodies, it is unacceptable to allow Mr. Sansoucy to file what is effectively direct testimony, after the opportunity to put that testimony to the discovery process. For that reason we struck the testimony as detailed in the Motion of the OCA.

Item 12E, which we held in abeyance, addressed Mr. Sansoucy's opinions regarding natural gas and electric markets. As the hearing progressed, the issue of the future of electric and gas markets was a significant issue, and there was considerable discussion regarding the assumptions made by Mr. Sansoucy, Staff and PSNH regarding electric and gas market futures. Though the record would have been far clearer and the proceedings less contentious if Mr. Sansoucy had introduced these issues in a timely fashion, we nevertheless will allow the pages in question to be admitted because they are relevant and because there was an opportunity to explore them during hearing.

4. Requests to Take Administrative Notice

There were four requests that the Commission take "administrative notice" of certain documents during the course of this docket. Administrative notice, also referred to as official or judicial notice is governed by RSA 541-A:33, V and VI as well as N.H. Admin. Rule, Puc 203.27. The Commission took the requests under advisement.

Administrative notice is a tool that a tribunal may use to make a proceeding more efficient, by allowing certain facts, records or official codes to be made part of the record without requiring a witness to authenticate the information. The example often given is the fact that water freezes at 32 degrees F; if noticed, a party need not call a scientist to testify to the point at which water freezes, it simply becomes a fact on which the tribunal may rely. Notice of facts of this sort are authorized by RSA 541-A:33, V(c) and Puc 203.27(a)(3). The requests for administrative notice in this case, however, fall under Puc 203.27(a)(2) which requires us to take administrative notice when a party presents "the relevant portion of the record of the proceedings before the commission." We take the four requests in turn.

OCA had asked that the Commission take administrative notice of the SEC docket on the Laidlaw project, Docket No. 2009-02 though noted that it had been denied access to the confidential portions of that docket. 2/9/11 Tr. at 154. In its closing, the OCA specifically asked that the Commission not take administrative notice of the SEC proceedings because of its limited access to the record. OCA Closing Statement at 6. The SEC is a separate and distinct entity and thus we have no authority to take administrative notice of that docket, as the statute authorizes notice of "the record of proceedings before the agency." *See* RSA 541-A:33, V(b). Our rule is similar. Thus, we deny the request to take administrative notice of the SEC docket.

The OCA asked that the Commission take administrative notice of the proceedings in DE 08-077 regarding the PPA between PSNH and the Lempster wind project. 2/9/11 Tr. at 154. Counsel to the City of Berlin questioned the relevance of the docket, as Lempster was a wind and not a biomass project, but did not actually oppose the request. 2/9/11 Tr. at 155. The OCA has not asked us to take notice of a particular exhibit or portion of the record, as required by our rule, but rather to effectively admit the entire Lempster docket into this one. We find no requirement

to do so under our rules and no efficiency gained in admitting the entirety of the Lempster docket as an exhibit in this case. We therefore deny the request.

The OCA also asked that the Commission take administrative notice of the proceedings in DE 03-166, the docket in which the Commission approved PSNH's conversion of Schiller Station to biomass. 2/9/11 Tr. at 155. Again, the request is not for a particular portion of the docket but the entire file. For the reasons cited above, we deny the request.

Commission Staff suggested that the Commission may want to take administrative notice of a report prepared by Synapse entitled Avoided Energy Supply Costs in New England, 2009 Report. The report was referenced in these proceedings, and small portions were excerpted, though the full report was never introduced into evidence. The full report was made an exhibit in Docket DE 09-137 regarding distributed energy resources. 2/9/11 Tr. at 153. We find that the Synapse report constitutes a relevant portion of the record of another Commission proceeding and administrative efficiency is gained by noticing it in this docket. Pursuant to Puc 203.27(a)(2), we will take administrative notice of the Synapse Report.

5. Admissibility of Exhibits

There were challenges to the admissibility of three documents that had been marked for identification and discussed through the course of the hearings.

The OCA opposed the admission of City of Berlin Exhibit 3 attachment 11,[49] which is a table created by Mr. Sansoucy entitled Laidlaw Berlin Biopower PPA and Market Price Forecast. The OCA challenged the admission of the table on two grounds: it was late filed (revising a previous table) and Mr. Sansoucy testified he could no longer locate the data used to create the

[49] The page is variously referred to as City of Berlin Exhibit 10 (the heading Mr. Sansoucy typed at the top of the page), Exhibit 10 Revised (the handwritten heading the City of Berlin added to the top of the page), Exhibit 11, as a new table marked Exhibit 10 had been created by Mr. Sansoucy which was not the same as the initial Exhibit 10 or Exhibit 10 Revised. None of them, however, are exhibits, but rather are attachments to Mr. Sansoucy's rebuttal testimony, which is City of Berlin GES Exh. 3.

document and thus couldn't fully explain the calculations. The Wood IPPs and Staff supported the request. The City of Berlin conceded that the underlying data was not available but argued that the document should be admitted though the weight given it may be lessened as a result. PSNH stated that, in this and all challenges to exhibits, it was best to let everything into the record. 2/9/11 Tr. at 147-152.

We share the concerns of the OCA, Staff and the Wood IPPs regarding this document. The opportunity for meaningful cross-examination of a document is critical; without the ability to probe the basis for a witness's conclusions, particularly on complex matters such as these, there is no reason for submission of a document. Mr. Sansoucy has testified before numerous tribunals and should understand the need to demonstrate the sources and assumptions used in his calculations. Because he could not locate the data on which he developed attachment 11, we find the document provides no value and thus will not admit it into the record.

The OCA also opposed admission of Staff Exhibit 13C, which consists of Ventyx tables for certain market pricing for Fall 2009 and Spring 2010. The OCA argued that the tables are presented on a stand-alone basis, with no text to explain the assumptions contained therein. Staff concurred in the request, noting that it marked the document for identification but did not believe it should be introduced. 2/9/11 Tr. at 144-145. We have admitted similar evidence into the record but, without a witness who can set forth the assumptions that led to the results, there is a valid claim about the appropriate weight to be accorded such evidence. Thus, we will admit Staff Exhibit 13C and accord it the weight appropriate under the circumstances.

Staff objected to the admission of certain testimony of PSNH witness Dr. Shapiro regarding the news account that an unnamed business would likely locate at the Laidlaw project site, as well as a reprint from the *Berlin Daily Sun* regarding this company's plans, marked for identification as PSNH Exhibit 10. 2/9/11 Tr. at 142. Staff argued that there had been no

opportunity to probe the implications of the announcement or Dr. Shapiro's opinions regarding the announcement as the account contained little factual information. The OCA was not opposed to the *Berlin Daily Sun* article being admitted, though given little weight; the OCA supported Staff's request that Dr. Shapiro's testimony on this point be stricken. 2/9/11 Tr. at 143. We find no basis to block admission of the news account or Dr. Shapiro's testimony regarding the announcement. We recognize that the article cannot be relied upon as a guarantee that a new company will in fact operate on the site, but consider it relevant that at least one company may be considering locating next to the Laidlaw plant. The Staff request to strike portions of Dr. Shapiro's oral testimony and block admissibility of PSNH Exhibit 10 is denied.

6. Edrest Request to Reopen Record

On March 14, 2011, after the close of the record, Edrest filed a letter suggesting that the Commission should reopen the record and allow further discovery regarding the "ownership structure" of the Laidlaw project, Laidlaw's intention to expand the Project's capacity by "adding 5 MW" and plans to replace a used turbine with a new one. According to Edrest, the Commission should assess the revenue impacts to Laidlaw, inquire whether Laidlaw "has offered a newly structured price pertinent to the PPA" and explore whether the new turbine will result in the project having greater value at the end of the 20 years.

PSNH objected on March 15, 2011, noting that the possibility of a corporate reorganization and an increase in capacity were known and addressed during the Commission's hearings and do not warrant additional discovery. In addition, according to PSNH, Laidlaw's plan to purchase a new steam turbine rather than use the old one does not impact the Commission's analysis of the PPA.

We agree with PSNH that these issues do not warrant reopening of the Commission record. The capacity of the facility is relevant to consideration of the PPA but the potential 75

MW gross (67.5 MW net) output was explored in the hearings and is discussed in this order. Though corporate restructuring of the project was known to the Commission, it is not relevant to our determination as to whether the PPA is in the public interest. Further, while a new rather than used steam turbine may change the economics of the facility, our evaluation of the PPA is based on the public interest factors set forth in RSA 362-F:9, which do not include assessing the capital or operating costs of a renewable generation facility. Edrest's request to reopen the record, therefore, is denied.

Based upon the foregoing, it is hereby

ORDERED, that the PPA as filed is not in the public interest; and it is

FURTHER ORDERED, that, the PPA is approved on the condition that PSNH files a revised PPA complying with the terms set forth herein within 30 days of this order.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of April, 2011.

Thomas B. Getz
Chairman

Amy L. Ignatius
Commissioner

Attested by:

Lori A. Davis
Assistant Secretary

PUBLIC UTILITIES COMMISSION

DE 10-195

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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

Order Granting Conditional Approval

Partial Dissenting and Concurring Opinion of Commissioner Below

While I largely agree with the analysis and conclusions of the Commission majority in this case, I respectfully dissent with regard the interpretation of RSA 362-F:3 and their conclusion that the percentage compliance obligation set forth in that statute persists beyond 2025, as well as the condition imposed by the majority with regard to the CRF. The majority has the Commission effectively inserting into RSA 362-F:3 the word "thereafter" for years beyond 2025, a word the legislature did not see fit to include. I cannot conclude that such a word needs to be written into the statute by the Commission in order to avoid an absurd, unjust, or illogical result when reading the statute as a whole.

The New Hampshire Supreme Court has recently summarized the applicable standard of statutory interpretation in its slip opinion in State of New Hampshire v. Horace W. Seymour, III, decided February 23, 2011, at p. 3:

> Resolving this issue requires that we engage in statutory interpretation, which presents a question of law that we review de novo. Petition of George, 160 N.H. 699, 702 (2010). When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. In re Alex C., 161 N.H. ___, ___ (decided November 30, 2010). Moreover, we do not consider the words and phrases in isolation, but rather within the context of the statute as a whole. Id.

The majority recognizes that "[o]n its face, RSA 362-F:3 does not specify renewable portfolio percentages that would apply after 2025." The plain and ordinary meaning of the words used in RSA 362-F:3 do not indicate any RPS compliance obligation beyond the year 2025. In relevant part RSA 362-F:3, "Minimum Electric Renewable Portfolio Standards," states: "[f]or 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, ..." That lead-in description of the fundamental compliance obligation under this chapter is followed by a table with columns for years 2008 through 2015 and a column for 2025. Below the column headers are percentages for the four class types. A footnote in the table covers the years between 2015 and 2025 not shown as separate columns: "Class I increases an additional one percent per year from 2015 through 2025. Classes II-IV remain at the same percentages from 2015 ***through 2025***" (*emphasis added).*

The plain language of this statute does not specify any year beyond 2025. While the Class I obligation percentage increases each year through 2025, the percentages for Classes II-IV level out in 2015 and the table footnote states that they "remain at the same percentages . . . through 2025." If the legislature had intended these obligations to persist after 2025 they might have labeled the last column, "2025," as "2025 and thereafter" or they might have added phrases in the footnote to the effect "and remain at the same percentages for each year thereafter," but they did not. The legislators who sponsored and introduced HB 873 in 2007, which created RSA 362-F, who were also sponsors of SB 314 in 2006, a predecessor bill to create an RPS that passed the Senate but not the House, namely Sen. Fuller Clark, Sen. Bragdon, and Rep. Harvey, did not choose to add another column after the last compliance year and percentages specified, simply labeled "thereafter," as the Senate had done just 10 months earlier when they amended

and passed SB 314 in 2006. *See* Senate Journal, March 9, 2006, at 159. Furthermore, three other New England states that had RPS requirements for new renewable resources in their statutes at the start of 2007, when HB 873 was introduced, explicitly dealt with the duration of the compliance obligation, such as by using the words "and each year thereafter,"[50] yet the New Hampshire legislature did not specify any compliance obligation beyond 2025. It is not for the Commission to, in effect, add words to the statute that the legislature did not see fit to include.

The New Hampshire Supreme Court has repeatedly stated that "[u]nless we find that the statutory language is ambiguous, we need not look to legislative intent." *Appeal of Verizon New England, Inc.*, 153 N.H. 50, 63 (2005) *citing DeLucca v. DeLucca*, 152 N.H. 100, 103 (2005), s*ee 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). The majority looks to the statute as a whole to find ambiguity and conclude that it is logical to interpret the statute as a whole as creating a compliance obligation that persists after 2025 at the 2025 percentages. I do not disagree that it would be logical, and supportive of "stable long-term policies," as well as, arguably, better public policy, to have the 2025 compliance obligations persist indefinitely. That doesn't mean, however, that the purposes of the statute can't be realized or that an absurd,

[50] The relevant Rhode Island law in effect at the beginning of 2007 stated in relevant part: "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 or for maintaining targets and objectives for renewable energy." R.I. Gen. Laws § 39-26-4(5) (2007). The relevant Massachusetts law in effect in 2007 provided in relevant part: "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 per cent of sales each year thereafter until December 31, 2009; and (iii) an additional 1 per cent of sales ***every year thereafter*** until a date determined by the division of energy resources." Mass. Gen. L. ch. 25A, §11F(a), (2007, effective until July 2, 2008). The relevant Connecticut law in effect in 2007 stated in relevant part: "On ***and after*** January 1, 2020, not less than twenty per cent of the total output or services of any such supplier of distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources. Conn. Gen. Stat. Ann. § 16-245a (15) (2007). (*Emphasis* added in each citation.) Maine first enacted an RPS for new renewable resources during its 2007 legislative session. Vermont did not, and still does not, have a comparable RPS statute.

illogical, or unjust consequence would result from reading the plain language of RSA 362-F:3 as not creating an RPS compliance obligation beyond 2025.

There are any number of reasons why legislators may have decided to punt the question of what the RPS requirements should be after 2025 to a later determination by the legislature. Some may have felt that renewable resources would be more cost competitive with conventional or non-renewable electric generation by 2025 and would not need the RPS policy support beyond that date. Others may have not wanted to create ratepayer obligations to pay a premium for renewable resources more than 18 years out into the future. Most probably did not think about it. The sponsors may have dropped reference to years after 2025 to broaden initial support for the bill. I agree with the majority that the legislative history is not dispositive. They cite to words of the prime sponsor of HB 873, Rep. Harvey, at the hearing on the bill in the Senate. Parsed to its relevant essence her testimony was that "our proposed RPS program . . . goes out to 2025,"[51] supporting the view that the statute does not create a compliance obligation beyond 2025.

The reference to "due consideration of the importance of stable long-term policies" is not in the purpose statement of the chapter (RSA 362-F:1) but rather in RSA 362-F:5, "Commission Review and Report," where the Commission is directed to review "the class requirements in RSA 362-F:3 and other aspects of the electric renewable portfolio standard program established by the chapter" and to "make a report of its findings to the general court by November 1, 2011, 2018, and 2025, respectively, including any recommendations for changes to the class requirements or other aspects of the . . . program." In light of the purposes of the "chapter and with due consideration of the importance of stable long-term policies" the commission is directed to review nine specific issues, including:

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

> II. The class requirements of all sources in light of existing and expected market conditions; . . .
>
> IV. Increasing the class requirements relative to classes I and II beyond 2025;
>
> V. The possible introduction of any new classes such as an energy efficiency class or the consolidation of existing ones;
>
> VI. The timeframe and manner in which new renewable class I and II sources might transition to and be treated as existing renewable sources and if appropriate, how corresponding portfolio standards of new and existing sources might be adjusted;
>
> VII. The experience with and an evaluation of the benefits and risks of using multi-year purchase agreements for certificates, along with purchased power, relative to meeting the purposes and goals of this chapter at the least cost to consumers and in consideration of the restructuring policy principles of RSA 374-F:3; . . .

While the language of paragraph IV, "[i]ncreasing the class requirement relative to classes I and II beyond 2025," hints at the idea that these requirements might otherwise persist at 2025 levels beyond 2025, read as a whole, RSA 362-F:5 makes clear that the legislature, in its enactment of the RPS statute, wants the opportunity to decide for itself, informed by a review and recommendations by the Commission, what, if any, mid-course corrections are appropriate to the RPS statute, starting with the Commission's mandated review this year, a full 14 years before 2025.[52]

I concur with the majority that the express language of RSA 362-F:9, especially in light of RSA 369-B:3, IV(b), does not constrain the Commission from approving multi-year power purchase agreements that may extend beyond 2025. 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), in light of the plain language of RSA 362-F:3, or at least its

[52] DES Air Resources Director testified at the Senate hearing on HB 873: "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 cost, 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. . . . again, we know this is probably not perfect." *Id.* at 7.

acknowledged ambiguity. To resolve this threshold issue I would either transfer the question of law, as to whether there is a compliance obligation under RSA 362-F that persists after 2025, to the New Hampshire Supreme Court for a decision pursuant to RSA 365:20, or condition the recovery of such costs on a future determination as to whether there is an actual RPS compliance obligation beyond 2025, either under current law, or under the RPS statute as it may be amended by the legislature to clarify this issue.

With regard to the CRF, while I think the proposed condition, to require credits back to PSNH and it ratepayers for accumulated net over-market payments that exceed $100 million, is generally reasonable, I am concerned that the resulting uncertainty, as to whether the Laidlaw plant may be able to continue to operate in the black and cover its debt service under some future scenarios, may create an insurmountable obstacle to securing financing for the project. I would add a further provision to this condition that in the event such credits would create persistent negative cash flow for Laidlaw, they would have the option of seeking, through a Commission proceeding, a minimum revenue at cost of service on a going forward basis, like a conventionally rate base regulated generation source.

Finally, I note that in light of recent migration rates and the risk of increased migration of default service load if PSNH's default service costs end up being even higher compared with competitive providers than they have been over the past year, the condition limiting the quantity of RECs to be purchased at the prices set under the PPA is reasonable. This condition, however, would not be needed, and the compliance obligation going forward would be much more predictable, if the legislature choose to put the RPS compliance obligation on electric distribution companies, recovered through the distribution charge, instead of placing it on electricity suppliers, recovered through default service or competitive energy supply rates, as the current statute does.

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