

**THE STATE OF NEW HAMPSHIRE**

**BEFORE THE  
PUBLIC UTILITIES COMMISSION**

**DE 19-142**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY  
RATE RECOVERY OF COSTS IN EXCESS OF THE CUMULATIVE REDUCTION  
CAP UNDER THE POWER PURCHASE AGREEMENT WITH  
BERLIN STATION, LLC**

**BERLIN STATION LLC'S MOTION FOR CLARIFICATION AND/OR  
MODIFICATION**

NOW COMES Berlin Station, LLC (“Berlin Station” or the “plant”), pursuant to N.H. Code Admin. Rule Puc 201.05, 203.05, and 203.07 and RSA 365:28, and hereby respectfully requests that the New Hampshire Public Utilities Commission (“Commission”) clarify and/or modify its prior order in the above-referenced matter, Order No. 26,665 (August 11, 2022) (the “Order”). In support of this request, Berlin Station states as follows:

**I. BACKGROUND**

1. Berlin Station is the largest generator of renewable energy in New Hampshire, producing over 500,000 megawatt-hours per year of homegrown, indigenously-sourced power at its state-of-the art biomass facility in Berlin, New Hampshire. With a capacity factor of more than 90%, Burgess reliably generates enough electricity to power 67,000 NH residences – more than 10% of the state’s total homes.

2. Beginning in 2010, Eversource negotiated a power purchase agreement (“PPA”) with Berlin Station’s prior owners to purchase the energy, capacity, and a portion of the

renewable energy certificates produced by Berlin Station. In Order 26,333 (February 18, 2020), the Commission approved an amendment to that PPA.

3. Provisions in the amended PPA under certain market conditions have threatened the financial viability of Berlin Station.

4. On June 24, 2022, the Governor signed into law SB 271 (2022 N.H. Laws, ch. 275:1), which, *inter alia*, directed the Commission to amend certain of its Orders in this Docket, DE 19-142, and Docket DE 10-195, to extend the suspension of the operation of the cap on the cumulative reduction factor under the PPA between Berlin Station and Eversource for an additional period of one year from the date the operation of the cap would have otherwise taken effect under Order No. 25,213, Order No. 26,198 and Order No. 26,333. SB 271 further provided for cost recovery for costs in excess of the cap during the extended suspension period. *See* SB 271 (2022 N.H. Laws, ch. 340:2, I).

5. SB 271 further directed that the plant and its affiliates,

upon request therefor, *make its and their capital and operating cost and profit and loss records available* to the department of energy for investigation and audit, any of which records may be exempt from public disclosure under RSA 91-A:5, IV if reasonably so designated by the plant. *All such records shall also be made available to the Office of the Consumer Advocate.* The department of energy shall conduct an investigation and audit of the plant's costs and revenues and submit a report thereon to the house science, technology, and energy committee and to the senate energy and natural resources committee on or before December 31, 2022.

SB 271 (2022 N.H. Laws, ch. 340.2, II) (emphasis added).

6. In the Order, the Commission sought to implement the General Court's directives established in SB 271 that govern the terms of the PPA between Berlin Station and Eversource.

The Commission specifically “refer[red] to the General Court’s language in [Order No. 26,665] to ensure that [the Commission] effectuate the Legislature’s intent correctly.” Order at 2.

## II. THE ORDER AND REQUEST FOR CLARIFICATION AND/OR MODIFICATION

7. On page 2 of the Order, the Commission incorporated the General Court’s directive that the plant and its affiliates “make their capital and operating cost and profit and loss records available to the New Hampshire Department of Energy (DOE) for investigation and audit, any of which records may be exempt from public disclosure under RSA 91-A:5, IV, if reasonably so designated by the Burgess BioPower plant. All such records shall also be made available to the Office of the Consumer Advocate (OCA).” However, the Commission’s Order went further and provided “that these materials be *filed* with the Commission contemporaneously with the filings made to the DOE and the OCA. RSA 374.4.” (emphasis added). Order No. 26,665 at pages 2-3.

8. Relatedly, on pages 3-4 of the Order, the Commission ordered that “[a]ll such records shall also be *made filed* [sic] to the Office of the Consumer Advocate and the Commission *when filed* with the New Hampshire Department of Energy.” (emphasis added). Berlin Station respectfully contends that SB 271 requires only that the records be “*made available*” and does not direct the “*filing*” of any records with the DOE nor OCA.

9. Following the passage of SB 271, and before the Commission’s issuance of the Order, the plant and DOE entered into discussions regarding the best method of making the confidential business records identified in the legislation available to DOE for the purposes of the audit. As a result of these discussions, Berlin Station and DOE agreed that the plant would make such records available to DOE for physical inspection and review at a designated location

in Concord.<sup>1</sup> Berlin Station has also reached out to the OCA to provide OCA with the same opportunity for review of the records.

10. In reaching its decision regarding how the documents would be made available, DOE and the plant considered such factors as the time, expense, and undue burden of redacting hundreds of confidential records, which the plant would reasonably designate as exempt from public disclosure under RSA 91-A:5, IV, and maintaining the confidentiality of the records.

11. SB 271 requires simply that such records be “made available” to DOE and the OCA, but neither specifies nor dictates the manner in which such records are made to be made available. Had the Legislature intended for the plant to physically produce or file such records, it could have used express language to that effect. The clear intent of the legislation on this issue is three-fold: 1) to afford DOE the opportunity to review documents relevant to conducting its audit; 2) to recognize that the documents necessary to conduct the audit would likely contain the plant’s confidential, commercially sensitive information that would be exempt from disclosure under RSA 91-A; and 3) that the documents also be made available to OCA for review. Berlin Station submits that the method agreed upon with the DOE for physical inspection of the documents is reasonable and consistent with both the express language and intent of SB 271.

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<sup>1</sup> Off-site review of confidential documents is not new to Commission procedures and has been implemented in other dockets, including the original approval of the PPA at issue in this docket, in DE-10-195. Further, upon information and belief, historically, plant audits conducted by the Commission auditors included the physical inspection of confidential records at either the plant or some off-site location, and that no documents, except for the final audit report, were typically filed with or provided to the Commission.

12. Requiring the plant to undergo the time, expense and burden of redacting and filing the documents is unreasonable, particularly since it is not required by the statute.<sup>2</sup>

Accordingly, Berlin Station respectfully requests that the language in its Order set forth above requiring the “*filing*” be clarified and/or modified in light of the plain language of SB 271 and the method by which documents will be made available for review agreed to by the plant and DOE.

13. Consistent with the spirit of the Commission’s Order, the plant will make the documents available for the Commission’s inspection and review in the same manner it has done for the DOE and proposes to do for OCA.

14. The Commission has the authority “to alter, amend, suspend, annul, set aside, or otherwise modify” its prior orders pursuant to RSA 365:28. *Northern Utilities, Inc.*, Order No. 26,510 (August 20, 2021) at page 3. The authority granted under this provision is to be “liberally construed.” *Id.*, citing *Appeal of the Office of the Consumer Advocate*, 134 N.H. 651, 657 (1991); *Meserve v. State*, 119 N.H. 149, 152 (1979).

WHEREFORE, Berlin Station respectfully requests that this honorable Commission:

A. Clarify and/or modify its Order, as requested above; and

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<sup>2</sup> Nor can it credibly be asserted that, if the legislature had intended for Berlin Station to make the documents available in such a manner, it would not have needed to include the provisions calling for the confidential treatment of such records. Any notes taken based on and containing confidential information would be subject to confidentiality and protected by RSA 91-A:5, IV, as would any confidential information contained in any final report.

B. Grant such other and further relief as may be just and proper.

Respectfully Submitted,

BERLIN STATION LLC,  
By its attorneys,

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Dated September 2, 2022

**Certificate of Service**

I hereby certify that a copy of the foregoing Berlin Station LLC's Motion for Clarification and/or Modification was served by electronic mail to the service list in DE 19-142 on September 2, 2022.

By: \_\_\_\_\_  
Carol J. Holahan