

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 19-142

**Opposition of the Office of the Consumer Advocate to Motion for Approval of First
Amendment to Amended and Restated Power Purchase Agreement**

NOW COMES the Office of the Consumer Advocate (“OCA”), a party in this docket, and respectfully interposes its objection to the motion filed on November 19, 2019 by Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) for approval of an amendment to PSNH’s power purchase agreement with Berlin Station, LLC. In support of this objection the OCA states as follows:

PSNH has tendered for Commission approval pursuant to RSA 374:57 the utility’s First Amendment to the Amended and Restated Power Purchase Agreement, entered into with Berlin Station on November 19, 2019.¹ RSA 374:57 requires each electric utility that enters into an agreement of this type, with a duration of more than one year, to furnish a copy to the Commission. The statute

¹ For purposes of clarity, the Amended and Restated Power Purchase Agreement is referred to in this pleading as “the PPA” and the Amendment entered into by PSNH and Berlin Station on November 19, 2019 as “the Amendment.”

further provides that “[t]he commission may disallow, in whole or part, any amounts paid by such utility under any such agreement if it finds that the utility’s decision to enter into the transaction was unreasonable and not in the public interest.” The PPA, as amended on November 19, is unreasonable and not in the public interest. The Commission should therefore disallow amounts paid under the agreement to the extent they would cause PSNH customers to pay sums in excess of the \$100 million cap (the so-called “cap on the cumulative reduction factor” limiting rate recovery of contract costs in excess of prevailing wholesale market prices) imposed by the Commission in Order No. 25,213 (April 18, 2011) conditionally approving the original 20-year PPA between PSNH and the corporate predecessor to Berlin Station.

As PSNH notes in its motion, the General Court in 2018 enacted Senate Bill 577, signed into law by Governor Sununu as Chapter 340 of the 2018 New Hampshire Laws. In relevant part, Senate Bill 577 required the Commission to amend a particular page of Order No. 25,213 “to suspend the operation of the cap on the cumulative reduction factor . . . for a period of 3 years from the date the operation of the cap would have otherwise taken effect.” 2018 N.H. Laws Ch. 340:2, I. The Commission in due course reopened the underlying docket (DE 10-195) and complied with the General Court’s instructions via Order No. 26,198 (December 5, 2018). While the Commission agreed with the OCA that “there are potential constitutional issues raised by SB577,” the commissioners deferred review of this question, and the directive in SB 577 that Berlin Station turn over certain books

and records to the Commission for inspection upon request, until the development of a more substantial record and review of an amended PPA. *Id.* at 8-9. That time is upon us. .

The Commission opened the instant docket on August 30, 2019, in light of information suggesting that PSNH was approaching the \$100 million cap on ratepayer-funded over-market payments to Berlin Station. At a prehearing conference conducted on September 24, 2019, PSNH indicated that it was “likely” the \$100 million cap had been reached, that any additional payment of over-market costs by PSNH would require an amendment to the PPA, that PSNH would not agree to any such amendment unless it provided for recovery of over-market costs from its retail customers, that PSNH and Berlin Station were in negotiations to amend their PPA, and that any such amendment would have to be submitted to the Commission for its approval. Tr. 9/24/19 at 6-8.

For the reasons previously stated by the OCA in DE 10-195, *see* OCA Motion for Determinations as a Matter of Law (September 18, 2018), incorporated herein by reference, to the extent PSNH ratepayers are liable for costs beyond the \$100 million cap it is a violation of the contract clauses of both the U.S. and New Hampshire constitutions. Essentially, such a result would deprive Eversource customers of the benefit of the Commission-approved bargain they struck in the 2015 PSNH Restructuring and Rate Stabilization Agreement as approved in Docket Nos. DE 11-250 and DE 14-238. The Commission should, to the extent PSNH ratepayers are liable for costs beyond the \$100 million cap, reject the Amendment

as “unreasonable” and “not in the public interest” pursuant to RSA 374:57 because rate recovery in violation of constitutional provisions clearly meets this standard for disapproval.

Alternatively, to the extent that an amendment to the PPA can obviate a constitutional violation, the Commission should require such safeguards as PPA terms. It is not clear whether the Amendment now pending before the Commission will ultimately have such an effect. Although the Amendment does indeed suspend the operation of the cap on the cumulative reduction factor, the \$100 million cap itself remains in place. Specifically, the Amendment simply adds “beginning with the Operating Year ending on November 30, 2022,” to the existing phrase “if at the end of any Operating Year other than the last Operating Year during the Term, there exists a Cumulative Reduction in excess of One Hundred Million Dollars (\$100,000,000) such excess (“Excess Cumulative Reduction”) will be credited against amounts otherwise due for Energy delivered to PSNH during the subsequent Operating Year until such Excess Cumulative Reduction is eliminated.”

Amendment at 2. “At a hearing in Docket No. DE 19-108, [Eversource] confirmed that approximately \$3.5 million in over-market costs accrue to the CRF account each month and that the account had reached \$95.155 million at the end of June 2019.” Order of Notice at 2. So, in approximately August 2019 the Excess Cumulative Reduction began to accrue and will continue to do so under the Amendment without credits to invoices until November 30, 2022.

It appears to the OCA that to the extent there is over-market recovery imposed on PSNH ratepayers for power purchased from Berlin Station from December 1, 2019 to November 30, 2022, Berlin Station will be obliged pursuant to the amended PPA to reimburse PSNH, and PSNH will be obliged to credit its customers, for this entire amount on a monthly basis during the following 12-month period (i.e., December 1, 2022 to November 30, 2023). Although PSNH accompanied its motion with written testimony of witness Frederick B. White, he is silent on the effect of this language from the Amendment.

The Commission should conduct an evidentiary hearing, preceded by an opportunity for discovery, to ascertain with absolute clarity the intent of PSNH and Berlin Station with respect to this contract language. If the intent is truly to kick this rate recovery can down the road for three years, the public interest would require further amendment to the PPA to require Berlin Station to provide some kind of surety or other financial guarantee such that the Commission could be confident the ratepayers would truly be made whole upon the reimposition of the \$100 million cap as of December 1, 2022.

In addition, as previously stated by the OCA, the Commission must exercise its right and responsibility, set forth in Paragraph II of Section 2 of Senate Bill 577, to obtain Berlin Station's "cost and profitability" records. This provision states that Berlin Station must produce these records, on a confidential basis, "upon request." The OCA hereby reiterates, that pursuant to RSA 363:28, VI the OCA is entitled to a copy of such confidential documents upon their submission to the Commission.

The records are necessary in order for the Commission to establish the additional safeguards that need to be amended to the PPA to protect ratepayers. Depending on what the 'cost and profitability' records show the Commission may determine that the PPA Amendment should include provisions such as: a moratorium on distribution to shareholders until funds sufficient to repay the Excess Cumulative Reduction are set aside; the requirement that certain amounts of excess cashflow be set aside specifically for pay back of the Excess Cumulative Reduction in 2022; assurance that no excessive salaries or other unwarranted expenses are precluding the ability of the company to pay the Excess Cumulative Reduction in 2022.

Berlin Station opposed such action in DE 10-195 on the ground that any information in such records would be irrelevant to the Commission's determination. This is incorrect. The financial records Berlin Station must furnish to the Commission will be highly probative of whether the proposed amendment meets the RSA 374:57 approval standard. If, for example, the records suggest that Berlin Station is unlikely to be in a position to meet its obligations to reimburse over-market payments beginning in December 2022, the case for Amendment approval is seriously undermined. There is more than one way to effectuate the cap suspension required by Senate Bill 577. In these circumstances, a failure to order Berlin Station to disgorge the financial records requested by the OCA would amount to ignoring the plain language of the General Court's directive in Paragraph II of Section 2 of the Bill.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Deny the motion of Public Service Company of New Hampshire for approval of its proposed amendment to its power purchase agreement with Berlin Station, LLC, or, in the alternative
- B. Set this matter for an evidentiary hearing, preceded by an appropriate opportunity for the OCA and Commission Staff to conduct discovery, and
- C. Direct Berlin Station, LLC to furnish the Commission and the OCA with the “cost and profitability records” referenced in Paragraph II of Section 1 of Chapter 340 of the 2018 New Hampshire Laws, and
- D. Grant any other such relief as it deems appropriate.

Sincerely,



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November 26, 2019

Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission’s service list for this docket.



D. Maurice Kreis