

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

Objection of the Office of the Consumer Advocate to
Motion for Clarification and/or Modification of Order No. 26,665

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and tenders its opposition to the motion for Clarification and/or Modification filed on September 2, 2022 by Berlin Station LLC. In support of this request, the OCA states as follows:

On August 11, 2022, the Commission entered Order No. 26,665 in this proceeding, which represents the latest chapter in the longstanding saga of Eversource ratepayers providing guaranteed income, and more often than not subsidies, to the biomass generation facility in Berlin currently known as Berlin Station. Although New Hampshire has long since transitioned to a paradigm in which electric customers are no longer captive customers of any generation facility or generation technology, *see generally* RSA 374-F, Berlin Station has been a noteworthy exception.

In 2011, the Commission approved a 20-year Power Purchase Agreement (“PPA”) between Public Service Company of New Hampshire (now doing business as Eversource) (“Eversource”) and the corporate predecessor to Berlin Station. *See* Order No. 25,213 in Docket No. DE 10-195 (April 18, 2011). The PPA, as subsequently amended, allows Eversource to sell the output of Berlin Station into the regional wholesale electricity markets and, to the extent the sums received via such transactions are less than the price paid by Eversource, to recover the deficit from Eversource’s retail customers in New Hampshire. To ameliorate the effects on ratepayers, at least in part, the PPA as approved by the Commission includes a complicated mechanism known as the “Cumulative Reduction Factor” such that when over-market costs paid by ratepayers exceeds \$100 million at the end of any operating year, “the overage paid above the cap would be credited against contract payments made to Berlin Station for electric power in the following year and customers’ resulting energy service rates would be reduced.” Order No. 26,331 (January 31, 2020) (tab 27) at 2. The idea, in essence, is to cap the ratepayer subsidy at \$100 million.

It has not worked out that way. In 2018, the General Court adopted and the Governor signed Chapter 340 of the 2018 New Hampshire Laws, which included a finding that “continued operation of [Berlin Station] is important to the energy infrastructure of the state . . . and important for the attainment of renewable energy portfolio standard goals of fuel diversity, capacity, and sustainability.” Accordingly, Chapter 240 directed the Commission to amend Order No. 25,213 so as

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.” The Commission did as instructed.

As recounted in Order No. 26,665, the General Court and the Governor acted again in 2022, this time via chapter 275 of the 2022 New Hampshire Laws (commonly referred to as Senate Bill 271). The 2022 legislation directed the Commission to suspend the operation of the cap for yet *another* year, effectively carrying forward a debt owned by Berlin Station to Eversource customers into at least the fall of 2023. This time, however, the legislation added certain additional provisions that are at issue via the pending motion from Berlin Station.

Specifically, paragraph II of section 2 of Senate Bill 271 (2022 N.H. Laws ch. 340:2, II) reads, in its entirety:

The Burgess BioPower plant and its affiliates shall, 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.

In keeping with this explicit directive, Order No. 26,665 directed that the records in question be “filed” with the Department of Energy, the OCA, and the Commission itself. Order No. 26,665 at 2-3.

Via its pending motion, Berlin Station challenges the filing requirement. According to Berlin Station, the statutory directive to “make . . . available” the

facility's financial records means the company can comply with this requirement merely by allowing the Department, the OCA, and the Commission simply to *look at* the records, presumably at such location and upon such terms as Berlin Station finds convenient.

Berlin Station's motion amounts to an invitation for the Commission to ignore the plain language of Senate Bill 271. The statutory gloss offered by Berlin Station would reduce the reference to RSA 91-A:5, IV in Senate Bill 271 to a nullity since, obviously, documents not in the *possession* of an instrumentality of government cannot implicate the referenced exemption in the Right-to-Know Law to the otherwise applicable requirement that government files be open to inspection and copying by the public. "The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009) (citation omitted). The applicable principles of statutory construction "presume that the legislature does not enact unnecessary and duplicative provisions." *Id.* (citation omitted). In other words, when interpreting a statute, the tribunal should "lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." A. Scalia and B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 174 (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1868) at 58).

Anticipating this argument, Berlin Station contends that in referring to RSA 91-A:5, IV the Legislature simply intended to protect from public disclosure “notes taken based on and containing confidential information.” Berlin Station Motion for Clarification and/or Modification at 5 n.2. This transgresses the well-established principle that statutes should not be interpreted so as to reach results that are absurd. See *Petition of Miles*, 2002 WL 4005651 (N.H. Supreme Ct., September 2, 2022) at *2 (“We construe all parts of a statute together to effectuate its overall purpose and to avoid absurd or unjust results”) (citation omitted). In particular, it would be a strained and, indeed, absurd gloss on Senate Bill 271 to infer that the General Court expected each of the affected agencies to review its notes independently to determine which portions might be subject to an RSA 91-A:5, IV disclosure exemption.

A far more reasoned and logical interpretation of Senate Bill 271 would be to conclude that the General Court is requiring Berlin Station to disgorge financial records to the three agencies and, in turn, is expecting those agencies to treat these documents as confidential in their entirety. Such an interpretation also has the virtue of eliminating the problem about which Berlin Station complains so ardently in its motion – the idea that “[r]equiring the plant to undergo the time, expense and burden of redacting and filing the documents” would be unreasonable. Berlin Station Motion at 5. The OCA does not agree that such an exercise would be unreasonable, in the context of the tens of millions of dollars in benefits this private company has claimed from Eversource ratepayers over the years. But, in any event,

the statute explicitly allows Berlin Station to determine that the entire set of records is confidential for purposes of Senate Bill 271; there is a reasonableness standard in the language but no mechanism for questioning the company's determination. Conversely, if the Commission were to adopt the interpretation of SB 271 urged by Berlin Station then, arguably, the OCA as well as the Department and the Commission would be obliged to turn their notes over to Berlin Station for purposes of confidentiality designation. That would be a ridiculous idea.

According to Berlin Station, the Department has acquiesced to Berlin Station's 'inspect on our terms' regime. The OCA has no direct knowledge of that insofar as the Department has not responded to our office's queries about this matter. To the extent the Department has acquiesced it is irrelevant inasmuch as it is for the Commission and not the Department to make binding determination about the meaning of Senate Bill 271.

In taking the positions enumerated in this pleading, the OCA does not in any way question the policy determinations previously made by the General Court and the Commission. There is a long history here of crediting public policy considerations exogenous or tangential to the actual provision of electric service – e.g., the economic viability of the forest products economy in the North Country, the need to maintain active use of the downtown Berlin location that previously housed a pulp mill that was the life of the city, and the relatively modest degree of fuel diversity added to the grid by Berlin Station. Assuming no preemption problems or other constitutional issues, it is not our job to second-guess such public policy

determinations beyond pointing out the ratepayer impacts. But, likewise, we are committed to playing our part to effectuate the determination in Senate Bill 271 that there should be meaningful outside review of Berlin Station's financials so as to assure that the subsidies being provided are truly necessary to the viability of the facility. We respectfully urge the Commission not to undermine that opportunity in the manner urged by Berlin Station.

For the reasons stated above, the Commission should deny the pending motion for clarification or modification and unambiguously direct Berlin Station to comply with Senate Bill 271 by providing to the OCA, the Department, and the Commission such copies of Berlin Station's financial records as to permit the three agencies to conduct the review the General Court directed them to perform.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Deny the motion of Berlin Station, LLC for modification or clarification of Order No. 26,665, and
- B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,



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Certificate of Service

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

A handwritten signature in blue ink, appearing to read "DKreis", written in a cursive style.

Donald M. Kreis