

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. _____

Appeal of
Bridgewater Power Company, L.P., Pinetree Power, Inc.,
Pinetree Power-Tamworth, Inc., Springfield Power LLC,
DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and
Indeck Energy-Alexandria, LLC

APPEAL BY PETITION PURSUANT TO RSA 541:6
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)

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Complete Case Title and Docket Number in Administrative Agency

*Petition for Approval of Purchased Power Agreement
with Laidlaw Berlin BioPower, LLC
New Hampshire Public Utilities Commission Docket No. DE 10-195*

- A. Names of Parties Seeking Review
Bridgewater Power Company, L.P., Pinetree Power, Inc.,
Pinetree Power-Tamworth, Inc., Springfield Power LLC,
DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and
Indeck Energy-Alexandria, LLC (collectively, the “Appellants”)

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B. Administrative Agency's Orders and Findings Sought to be Reviewed

1. New Hampshire Public Utilities Commission Order No. 25,192 (January 14, 2011) (App. at 137).
2. New Hampshire Public Utilities Commission Order No. 25,213 (April 18, 2011) (App. at 165).

C. Questions Presented for Review

1. Did the Commission err as a matter of law when it determined that the Commission could proceed under RSA 362-F:9 and RSA 374-F:3, V(c) to approve a contract whose terms would waive or preclude the exercise of the Commission's continuing jurisdiction and authority under RSA 365:28 and when it determined that it need not apply 365:28 to contracts filed for approval under RSA 362-F:9 and for cost recovery under RSA 374-F:3, V(c)?

2. Did the Commission err as a matter of law when it failed to grant a motion to dismiss that contested the Commission's jurisdiction and authority to approve a contract that facially exceeds the Commission's authority to approve under both RSA 362-F and RSA 374-F where the RSA 362-F renewable energy certificate purchase requirement ends in 2025, but the contract obligates PSNH to buy and its ratepayers to pay for RECs through 2034?

D. Constitutional Provision, Statute, Ordinance, Regulation, Rule, or Other Legal Authority Involved in the Case

N.H. RSA 362-F:1, *et seq.*

N.H. RSA 365:28

N.H. RSA 374-F:3, V(c)

The text of the foregoing provisions is set forth verbatim in the appendix on pages 278 through 294.

E. Provisions of Insurance Policies, Contracts, or Other Documents Involved in the Case

Petition for Approval of Purchased Power Agreement with Laidlaw Berlin BioPower, LLC (“Petition”) (July 26, 2010) (App. at 1)

Purchased Power Agreement between Public Service Company of New Hampshire and Laidlaw Berlin BioPower, LLC (“PPA”) (June 18, 2010) (App. at 15)

Petition to Intervene of Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (September 24, 2010) (App. at 100)

Wood-Fired IPPs’ Motion to Dismiss (December 13, 2010) (App. at 107)

Objection of Public Service Company of New Hampshire to Wood-Fired IPPs’ Motion to Dismiss (December 23, 2010) (App. at 119).

Wood-Fired IPPs’ Reply to PSNH’s Objection to Wood-Fired IPPs’ Motion to Dismiss (January 6, 2011) (App. at 131)

Public Utilities Commission Oder No. 25,192 (January 14, 2011) (App. at 137)

Wood-Fired IPPs’ Motion for Rehearing (February 14, 2011) (App. at 150)

PSNH’S Objection to Wood-Fired IPPs’ Motion for Rehearing (February 16, 2011) (App. at 155).

Wood-Fired IPPs’ Closing Statement (February 14, 2011) (App. at 158)

Public Utilities Commission Order No. 25,213 (April 18, 2011) (App. at 165)

F. Statement of the Case

This is an appeal from a Public Utilities Commission (“Commission”) proceeding under 362-F, New Hampshire’s renewable portfolio standard (“RPS”) statute. In that proceeding, Public Service Company of New Hampshire (“PSNH”) sought approval of and cost recovery from its customers for payments to be made

under a 20-year long, \$2 billion contract for the purchase of renewable energy certificates (“RECs”) and power. *Cf.* RSA 362-F:3 and Order 25,213 at 69. App. at 233. The term of this proposed contract exceeds the term of the RPS REC purchase requirement created by RSA 362-F:3 by nine years. This appeal concerns issues that were raised in a motion to dismiss filed by Appellants on December 13, 2010.

RSA 362-F, New Hampshire’s Renewable Portfolio Standard

New Hampshire’s RPS statute, RSA 362-F, is designed to encourage and support the generation of electricity using renewable fuels and technologies. The RPS statute does so by creating a demand for a regulatory product referred to as “renewable energy certificates” or “RECs.” Eligible generators are issued one REC for each megawatt-hour of electricity that they produce. RECs are separately alienable from electric energy and provide renewable generators with income in addition to the income derived from energy sales.

The RPS statute creates a demand for RECs by requiring each retail seller of electricity operating in the state to obtain and retire RECs sufficient in number and class type to meet or exceed statutorily specified amounts based on the percentage of total megawatt-hours of electricity supplied by the retail seller of electricity to its end-use customers on an annual basis. The percentage purchase requirements for each year in which a REC compliance obligation exists are set forth in a table in RSA 362-F:3. The table lists the years 2008 through 2025 and an applicable percentage purchase requirement for each class, for each of those years.

Regulated electric distribution utilities, a subset of retail electricity sellers, may recover the costs of compliance with RPS requirements from their customers or

ratepayers by including those costs in their customer rates. Whether the cost of REC purchases may be recovered in customer rates is normally determined after-the-fact in energy service rate proceedings.

Distribution utilities may seek authorization from the Commission to enter into multi-year contracts to purchase RECs to obtain pre-approval of the recovery of associated costs. The Commission may grant such approval, limited to the extent of the renewable portfolio requirements. Cost recovery in customer rates is likewise limited to prudently incurred costs of compliance with renewable portfolio requirements. The Commission has previously held that the purpose of its authorization of multi-year REC purchase contracts is to allow a distribution utility to collect its prudently incurred costs from its customers. *In re Public Service Company of New Hampshire*, Docket DE 08-077, Order No. 24,965, 94 NH PUC 209, 218-19 (May 1, 2009).

Procedural And Factual Background

On July 26, 2010, PSNH filed a “Petition for Approval of Purchased Power Agreement with Laidlaw Berlin BioPower, LLC” (the “Petition”), and supporting pre-filed testimony of Gary A. Long, Terrence Large, and Richard LaBrecque. App. at 1. PSNH’s power purchase agreement (“PPA”) with Laidlaw Berlin BioPower, LLC (“Laidlaw”) was attached as an exhibit to Mr. Long’s testimony. App. at 15. Laidlaw proposes to construct a wood-fired energy facility that would be eligible to receive New Hampshire Class I RECs. App. at 69 and 72. As filed, the Laidlaw PPA requires PSNH to purchase 100% of the energy, capacity, and RECs produced by Laidlaw’s generation facility for a 20-year period, beginning in 2014 and ending in

2034. App. at 85-86 and 233. As a condition prerequisite to PSNH's obligation to begin purchasing products under the PPA, including RECs, the PPA requires PSNH to receive from the Commission a final, non-appealable decision allowing for full cost recovery of the rates, terms and conditions of the PPA. App. at 22. Accordingly, PSNH's Petition seeks authority to enter into the Laidlaw PPA and a prospective determination that it will recover all costs associated with the PPA over its 20-year term from PSNHs' energy service ratepayers under RSA 362-F:9 and RSA 374-F:3, V(c). App. at 3-4.

Appellants¹ filed a motion to dismiss the Petition prior to the merits hearing, (App. at 107), raising three arguments challenging the Commission's jurisdiction and authority to award the relief requested by PSNH: the Commission could not approve contract provisions that would effect a waiver or otherwise preclude the Commission's subsequent exercise of its continuing jurisdiction under RSA 365:28; the Commission could not approve a REC purchase contract that extends beyond the end of the statutory REC purchase obligation; and the Commission could not extend a statutory program that ends in 2025 by allowing PSNH to purchase RECs and to recover the costs in customer rates.

In Order 25,192, the Commission denied Appellant's motion to dismiss and indicated that it would proceed to a hearing on the merits. In so doing, the Commission addressed only one of the three underlying legal arguments related to the

¹ Appellants are six independent generators of electricity that operate wood-fueled generation facilities in New Hampshire. All six appellants are PSNH energy service ratepayers. All will compete for biomass wood fuel with Laidlaw under a complicated wood price adjustment mechanism contained in the Laidlaw PPA that ties energy prices paid to Laidlaw to wood-fuel prices paid by PSNH. Appellants are variously eligible to receive New Hampshire Class I, New Hampshire Class III, and Connecticut Class I RECs and either seek to sell these certificates to PSNH or compete with PSNH, and potentially, Laidlaw for the sale of these RECs to others. App. at 100-106.

Commission's jurisdiction and authority. The issue the Commission addressed was whether it could approve contractual provisions that require the Commission to waive or have the effect of precluding it from exercising its jurisdiction and authority under RSA 365:28 to subsequently review and potentially alter its orders in this case. App. at 144. One purpose and effect of the challenged contract provisions, once approved by the Commission, is to guarantee Laidlaw that PSNH will continue to purchase and pay for RECs at a guaranteed price, even if those RECs no longer qualify for compliance with the New Hampshire RPS statute, even if the legislature modifies the RPS program to decrease the cost of the program to ratepayers, and even if the legislature repeals the statute and the RPS program in its entirety. A second purpose and effect of the challenged provisions, once approved by the Commission, is to guarantee PSNH that it can continue to collect the costs associated with the PPA from its energy service ratepayers, even if the costs are not compliance costs authorized to be recovered under RSA 374-F:3, V(c). PSNH and Laidlaw effectively would be insulated from changes to current law at the expense of ratepayers, a result that the legislature did not intend when it enacted RSA 362-F and amended RSA 374-F:3, V(c).

With regard to the remaining two underlying issues related to the Commission's jurisdiction and authority, the Commission held that it could proceed to adjudicate any petition for approval of a contract when the petition is "properly filed" and decide whether to dismiss, in this case, after six days of hearings including direct and cross-examination, and after review of evidence and argument regardless of any conflicts with statute, especially given that the Commission has authority to

condition its eventual approval. App. at 143-44. Appellants moved for rehearing of all issues, arguing in part that the Commission should not proceed without addressing the underlying basic legal issues addressing authority, because the Commission could not cure its initial lack of jurisdiction and authority to grant approval of a PPA that exceeds the statutory REC purchase term by placing conditions on its approval. App. at 150-54.

After hearings were held on the merits, the Commission issued Order 25,213, which denied Appellants' motion for rehearing with regard to the RSA 365:28 issues based solely upon the arguments raised in pleadings. App. at 235. With regard to the remaining two issues relating to the termination of the RPS REC purchase obligation in 2025 and cost recovery for purchases beyond that date, the Commission implied an RPS REC purchase obligation into RSA 362-F:3 that is never-ending. App. At 240. In so doing, the Commission relied upon evidence and argument placed in the record after Appellants filed their motion for rehearing and also upon arguments and legislative history not raised by any party. App. at 236-40. Contrary to its reasoning in Order 25,192, the Commission did not address whether placing conditions on its approval could cure an initial lack of jurisdiction and authority. Furthermore, Order 25,213 granted conditional approval of the PPA, and directed PSNH to file a PPA conforming to Order No. 25,213 within 30 days of the date of that order. App. at 271.

Appellants have filed a motion for rehearing of Order No. 25,213 regarding the Commission's interpretation of the New Hampshire RPS compliance obligation, as well as other issues which the Commission addressed for the first time in Order 25,213.

G. Jurisdictional Basis For Appeal

The court has jurisdiction over this appeal pursuant to RSA 541:6.

As discussed in the statement of the case, the Commission denied Appellants' motion for rehearing of Order 25,192 relating to the Commission's waiver of jurisdiction under RSA 365:28 in Order 25,213. The Commission did not address in Order 25,213 whether it was lawful for the Commission to proceed without first addressing issues relating to its jurisdiction or lawful to proceed based on the assumption that it could condition its approval. This appeal addresses these issues.

Implicit in Appellants' argument that the Commission lacked jurisdiction and authority to proceed is the fact that the RPS REC purchase obligation in RSA 362-F:3 ends in 2025. When it eventually addressed the issue of the end of RPS requirements in 2025 in Order 25,213, the Commission relied upon evidence and argument introduced after Appellants filed their first motion for rehearing and arguments raised, by the Commission itself, for the first time in Order 25,213. This appeal addresses that issue also. By raising the underlying legal arguments relating to the Commission's ability to proceed to hearing in this appeal, Appellants do not intend to waive any rights relating to its rehearing motion on Order 25,213 and any potential appeal to this court.

Appellants have filed a second motion for rehearing concerning matters that the Commission decided for the first time in Order 25,213, including its explicit determination that RSA 362-F:3 contains an unstated and endlessly continuing RPS REC purchase obligation after the year 2025. Consequently, Appellants' second motion for rehearing addresses some of the same errors of law presented in this

appeal. The Commission's decision on Appellants' second motion for rehearing could moot some or all of the issues presented in this notice of appeal, or it could result in a second appeal. It is unclear from RSA 541:6 and the court's rules whether the Appellants are to file this appeal now (rather than waiting for the outcome of the second motion for rehearing). It is clear, however, that the Appellants may file this appeal and that the court has jurisdiction to consider it. *See* RSA 541:6 and Supreme Ct. R. 10. The Appellants are filing this appeal out of an abundance of caution to ensure that their rights of appeal on the questions presented are preserved.

H. Direct and Concise Statement of Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Question and Why the Acceptance of the Appeal Would Protect a Party From Substantial and Irreparable Injury, or Present the Opportunity to Decide, Modify or Clarify an Issue of General Importance in the Administration of Justice

This is the first time that the court has been asked to address the Commission's jurisdiction and authority to authorize an electric distribution utility to enter into a multi-year contract for the purchase of RECs and to pre-approve the recovery of the RPS compliance costs associated with such contracts from the utility's energy service ratepayers under RSA 362-F:9 and RSA 374-F:3, V(c). This appeal, therefore, presents the opportunity to clarify issues of general importance in the administration of justice in that it will provide needed guidance to the Commission, retail sellers of electricity, private generators of renewable energy, and energy service ratepayers for application of RSA 362-F in all future proceedings under this statute, including guidance as to whether: (i) the Commission can prospectively waive its grant of continuing jurisdiction under RSA 365:28 by approving change in law provisions in a private contract under RSA 362-F:9 and 374-

F:3, V(c), (ii) a distribution utility, acting in concert with a private developer and with approval by the Commission of contract provisions that effect a waiver of the Commission's continuing jurisdiction under RSA 365:28, may impose payment obligations on ratepayers that are at odds with the legislative prerogative to determine, from time to time, what RPS compliance costs will be imposed on ratepayers, (iii) the Commission properly can deny a motion to dismiss challenging the Commission's jurisdiction and authority to proceed, where a petition seeks relief that facially exceeds the bounds of what is approvable under RSA 362-F:9, I and RSA 362-F:3, and (iv) the REC purchase obligations in RSA 362-F:3 place any restriction on the contracts that may be authorized under RSA 362-F:9, I and the costs that can be recovered by distribution utilities from their customers in rates under RSA 374-F:3, V(c).

Finally, as detailed below, a substantial basis exists for a difference of opinion on the questions presented in this appeal.

- I. RSA 365:28 PROVIDES THE COMMISSION WITH CONTINUING JURISDICTION TO REVISIT ANY OF ITS ORDERSS AT ANY TIME, AND NEITHER RSA 365:28, RSA 362-F, OR RSA 374-F ALLOWS THE COMMISSION TO WIAVE ITS CONTINUING JURISDICTION AND AUTHORITY; THEREFORE THE COMMISSION'S DECISION THAT IT COULD PROCEED TO APPROVE THE PPA WAS UNLAWFUL BECAUSE, BY ITS TERMS, THE PPA PRECLUDES THE COMMISSION'S ABILITY TO REVISIT ITS ORDERS APPROVING THE PPA AND COST RECOVERY.

In the Orders 25,192 and 25,213, the Commission effectively asserted its right to waive, ignore or otherwise not apply the plain meaning of RSA 365:28 to contracts under RSA 362-F and RSA 374-F: V(3) by approving contract provisions that have

the effect of precluding the Commission from exercising that jurisdiction and authority. As more fully described in Appellants' Motion to Dismiss (App. at 107-118), the Commission's initial approval of Articles 1.44, 1.57, 8.1, and 23.1 of the Laidlaw PPA will unlawfully preclude the Commission from revisiting its order relating to, among other things, the number of RECs purchased, REC pricing, and cost recovery, regardless of changes made to the RPS program by the New Hampshire legislature and regardless of changes in circumstances over the 20-year term of the PPA.

However, RSA 362-F, 374-F:3, V(c), and 365:28, read in *pari materia*, prohibit the Commission from insulating the contracting parties from future legislative action by creating non-modifiable REC purchase obligations and prices, at ratepayers' expense. RSA 365:28 grants the Commission broad authority to revisit and "alter, amend, suspend, annul, set aside, or otherwise modify" any of its orders.² Nothing in the RPS statute or RSA 374-F:3, V(c) explicitly modifies or repeals the Commission's jurisdiction under RSA 365:28 over the orders it issues pursuant to RSA 362-F:9 and RSA 374-F:3, V(c). This was intentional. Whenever the legislature has intended to curtail the Commission's jurisdiction under RSA 365:28, the legislature has done so explicitly.³ The lack of an explicit repeal or modification

² RSA 365:28 vests the Commission with broad jurisdiction to revisit any of the orders. It states, in its entirety:

365:28 Altering Orders. At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it. This hearing shall not be required when any prior order made by the commission was made under a provision of law that did not require a hearing and a hearing was, in fact, not held.

RSA 365:28.

³ See, e.g., RSA 369-B:3, II and III (revoking the Commission's general authority under RSA 365:28

of the Commission's jurisdiction under RSA 365:28 demonstrates that the legislature intended to require the Commission to retain its jurisdiction over orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c).

In fact, read in *pari materia*, RSA 362-F, RSA 374-F:3, V(c), and RSA 365:28 bar the Commission from approving any RSA 362-F contract containing terms that would abrogate the Commission's jurisdiction under RSA 365:28. RSA 362-F and RSA 365:28 both govern the Commission's jurisdiction over orders concerning REC purchase agreements while RSA 374-F:3, V(c) governs cost recovery. These three provisions therefore must be read in *pari materia*. See *Petition of Public Service Company of New Hampshire*, 130 N.H. 265, 273-74 (1988) (reading "anti-CWIP" and "emergency rate" statutes in *pari materia* to prevent the Commission from authorizing emergency rates to ameliorate a financial crisis that PSNH claimed arose from the anti-CWIP law). Statutes that deal with similar subject matter should be construed so that they do not contradict each other where reasonably possible, so that they lead to reasonable results and effectuate the legislative purpose of the statutes. *Id.* at 273.

RSA 362-F, RSA 374-F:3, V(c), and RSA 365:28 do not contradict each other, are not ambiguous, and are readily harmonized. RSA 362-F:9 empowers the Commission to issue orders authorizing electric distribution companies to enter into multi-year REC purchase agreements. RSA 374-F:3, V(c) allows for recovery of the

to rescind, alter, or amend its orders or requirements thereof with regard to rate reduction bond financing); RSA 362-C:6 (prohibiting the Commission from altering, amending, suspending, annulling, setting aside or otherwise modifying its approval of the restructuring of PSNH); and RSA 362-C:7 (same with regard to Commission approvals of certain rate plans for the New Hampshire Electric Cooperative).

prudently incurred costs of compliance with the RPS statute. RSA 365:28 grants the Commission continuing jurisdiction over orders issued pursuant to these provisions and the ability to revisit and "alter, amend, suspend, annul, set aside, or otherwise modify" those orders. Further, between the commencement of the RPS program and its termination in 2025, the legislature reserved to itself at least three opportunities to change or eliminate RPS requirements after receiving reports and recommendations from the Commission. RSA 362-F:5. These reviews are to occur in 2011, in 2018, and again in 2025, immediately before the RPS program is set to end, *id.*, with legislative action or inaction to occur in the 2012, 2019 and 2026 legislative sessions. *See Id.* RSA 365:28, which was not repealed or limited by the enactment of the RPS statute, works in harmony with RSA 362-F:5 and 374-F:3, V(c) by permitting the Commission to revisit its orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c) to respond to any changes in law following such reviews (or otherwise) or to any other circumstances affecting the public interest.

Unlike the RPS programs in other states, New Hampshire did not provide for vesting of statutorily-created REC purchase obligations underlying multi-year REC purchases and recovery of related costs. For example, Massachusetts law provides that "If RPS requirements terminate . . . contracts already executed and approved by the Department will remain in full force and effect." 220 CMR 17:08(3). The New Hampshire legislature could have provided for similar vesting by making an explicit statement similar to the one quoted above, or it could have authorized the Commission to provide for such vesting, but the New Hampshire legislature did not.

The New Hampshire legislature also could have authorized such vesting by qualifying the Commission's jurisdiction under RSA 365:28. Again, the legislature did not. Instead, the New Hampshire legislature left intact the Commission's jurisdiction under RSA 365:28. Order 25,213 seeks to avoid the import of the application of RSA 365:28 by stating that, if the Commission "were to claim unlimited authority to revise contractual obligations such as those contained in the [PPA] after [approving] them, the resulting uncertainty would halt the use of [contracts] for the procurement of power and RECs. Such uncertainty would be harmful to both utilities and their customers, and would ultimately be detrimental to the development of renewable energy facilities in New Hampshire." Order 25,192 at 8; *see also* Order 25,213 at 17. Notwithstanding that view, RSA 362-F did not repeal RSA 365:28 or RSA 374-F:3, V(c) and enacted no provision allowing the Commission to waive such authority. Compare footnote 3 and statutes cited therein

In Order 25,213, the Commission stated that "the Commission has never construed [its authority under RSA 365:28] 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 the purposes of this case. Accordingly, we deny it." Order 25,213 at 71, App. at 235. The simple fact that the Commission has never been asked to decide this issue before, and that no case exists on point since the 2007 passage of the RPS statute, does not constitute a statutory analysis of RSA 362-F:9, RSA 374-F:3, V(c), and RSA 365:28, which, read *in pari materia*, demonstrates a legislative intent to subject RSA 362-F Commission

orders to the requirements of RSA 365:28. While future Commissions will certainly apply their discretion to determine whether a particular order should be altered or amended under a particular set of facts, it is outside this Commission's jurisdiction, by PPA approval, to deny those future Commissions the very exercise of discretion that they are required to exercise by RSA 365:28.

An order approving a contract under RSA 362-F must be reviewable under RSA 365:28 to give full effect to all relevant statutes. Therefore, the Commission lacks jurisdiction and authority to approve RSA 362-F contracts which do not give effect to the Commission's continuing authority and jurisdiction under RSA 365:28.

II. THE COMMISSION SHOULD HAVE DISMISSED THE PETITION FOR LACK OF JURISDICTION AND AUTHORITY BECAUSE, THE PETITION AND PPA SEEK APPROVAL OF AND COST RECOVERY FOR REC PURCHASES THROUGH 2034 WHILE THE STATUTORY REC PURCHASE REQUIREMENTS END IN 2025.

A. Under RSA 362-F:3, RPS Requirements End in 2025, and the Commission has no Authority to Approve a Contract for the Purchase of RECs that Extends Beyond that Date or to Approve Cost Recovery for RECs to be Purchased Post-2025.

The Commission lacks authority to approve the PPA because the term of the PPA (and hence the REC purchase obligation) extends beyond the end of the RPS program. The PPA has a 20-year term commencing on the In-Service Date. App. at 21 (PPA at 7, Article 2.1). The PPA provides for an In-Service date as early as June 1, 2014, and as late as December 31, 2014, unless extended for reasons specified in the PPA. App. at 32 (PPA at 18, Article 12.3.2). The 20-year term of the PPA will therefore end in 2034 or later. However, the RPS program, and the requirement that PSNH purchase Class I RECs ends in 2025. RSA 362-F:3.

“The [Commission] is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute.” *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982). The Commission's power to authorize PSNH to enter into a multi-year purchase agreement for RECs in conjunction with a power purchase agreement "is limited to the authority specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision." *Cf. Id.* (applied to sale of stock and bonds).

The scope of the Commission's authority to authorize PSNH to enter into the PPA is derived from RSA 362-F:9, I. This is the only statute that permits the Commission to authorize PSNH "to enter into multi-year purchase agreements" for RECs "in conjunction with . . . purchased power agreements," and it only permits the Commission to authorize contracts necessary "to meet reasonably projected renewable portfolio requirements and default service needs *to the extent of such requirements . . .*" RSA 362-F:9, I. Emphasis supplied. RSA 374-F:3, V(c) is the only statute that permits the Commission to approve the recovery by distribution companies of the cost of such contracts from their ratepayers, and this statute only permits the recovery in rates of "prudently incurred costs arising from *compliance with the renewable portfolio standards* of RSA 362-F . . ." RSA 374-F:3, V(c). Renewable portfolio compliance standards are set forth in RSA 362-F:3, and these Renewable portfolio compliance standards end in 2025. RSA 362-F:3. There is no grant of authority to the Commission to authorize and approve cost recovery for

multi-year contracts for RECs beyond the extent of the requirements set forth in RSA 362-F:3.

The duration of the RPS program is set forth in RSA 362-F:3, titled "Minimum Electric Renewable Portfolio Standards." That provision states, "*For 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*. . ." RSA 362-F:3. Emphasis supplied. The table provides the percentages and class types only for the years 2008 through 2025. *Id.* Neither the wording of the provision nor the table creates a purchase requirement for the years 2026 and beyond. *Id.* Without further legislative action, the RPS program and PSNH's renewable portfolio requirements end December 31, 2025.

It is clear from a plain reading of the RPS statute, as a whole, that the legislature did not intend to empower the Commission to authorize multi-year REC contracts that extend beyond the year 2025. First, in RSA 362-F:9, I, the legislature was careful to limit permissible authorization of REC contracts to the "extent" of "renewable portfolio requirements." These requirements are set forth in RSA 362-F:3, and by clear statutory language, extend only through the year 2025. Second, the legislature reserved to itself the authority to increase, decrease, or eliminate the Class I purchase requirements in years 2026 and beyond. The legislature did so by creating a requirement in RSA-F:3 that extends only until 2025, while limiting the Commission to making recommendations to the legislature as to what should occur after that time. Whether a purchase obligation will exist after 2025, the classes to

which it will apply, and at what levels, are matters of legislative prerogative. This allocation of authority is set forth in RSA 362-F:5, titled "Commission Review and Report."

A review of legislative history is unnecessary given the lack of ambiguity in RSA 362-F:3. However, the RPS statute's legislative history confirms that the REC purchase obligation ends in 2025. The RPS statute's legislative history involves two bills. The first, Senate Bill 314, was filed in the 2006 legislative session but did not become law. House Journal No. 15 at 2006 (April 26, 2006), App. at 303. This bill, rejected by the legislature in 2006, created a never-ending REC purchase obligation by setting percentage REC purchase requirements from 2007 through 2013 in a table and adding a column labeled "Thereafter" to the table that held the percentages for the year 2013 constant for all subsequent years. Senate Journal No. 7 at 157-162 (March 9, 2006), App. at 306. The second bill, House Bill 873, was based on Senate Bill 314 and became RSA 362-F. This bill, passed by the legislature in 2007, removed the "thereafter" from the last column of the table and replaced it with a column of percentage REC purchase requirements for the years 2015 through 2025, only. House Journal No. 13 at 1245-1252 (April 5, 2007), App. at 295; *see also* RSA 362-F:3. If the legislature had intended to create a perpetual REC purchase obligation, it would not have removed the "thereafter" provision from the statute. The purposeful intent of the legislature in ending the REC purchase obligation in 2025 and the plain meaning of RSA 362-F:3 are in harmony with the remainder of RSA 362-F and do not lead to any absurd results.

Because the PPA obligates PSNH to purchase RECs for approximately nine years after 2025, when the RPS program ends and the purchase requirement ceases to exist, the terms and conditions of the PPA, on its face, exceeds PSNH's renewable portfolio requirements in absolute statutory terms. Consequently, the Commission lacks authority under RSA 362-F to authorize PSNH to enter into the PPA and to approve PSNH's request for cost recovery for a non-existent REC obligation, and should have dismissed the petition without prejudice and required PSNH to file a contract that did not facially exceed the REC term. To do otherwise causes the Appellants and other parties to litigate (a non-approvable contract) through six days of hearing. Furthermore, the Commission lacks authority under RSA 374-F:3, V(c) to approve, as prudently incurred, any cost recovery for a non-existent REC obligation extending beyond the RSA 362-F statutory limit of 2025. *See* RSA 374-F:3, V(c) (recovery in default service rate limited to prudently incurred costs of *compliance*).

B. The Commission May Not Legislate an Extension of the RPS Program by Approving the Private Contractual Terms of the PPA.

The legislature reserved for itself the question whether ratepayers will be obligated to fund an RPS program after 2025, *see* RSA 362-F:3, and limited the Commission's role to one of making recommendations for legislative action. *See* 362-F:5. The Commission may not, by approving a private contract (*i.e.* the PPA), extend the RPS program and ratepayer responsibility for that program beyond 2025. If the Commission were to do so, the Commission would be arrogating power that the legislature has reserved for itself.

The role of the Commission with regard to RPS requirements post-2025 is set forth in RSA 362-F:5. Under RSA 362-F:5, the Commission is required to review the RPS program three times, and report its findings and any recommendations to the legislature by November 1, 2011, 2018, and 2025. The Commission is to include in its reports any recommendations for legislative action that the Commission may have with regard to changes in class requirements or other aspects of the program. RSA 362-F:5. Ultimately, however, it is the legislature that will decide whether the RPS program and its requirements will continue, and if so, in what form.

Authorizing PSNH to enter into the PPA with its term that extends beyond 2025 and obligating PSNH's ratepayers to bear the expense of REC purchases would extend the RPS by fiat. The Commission would, in effect, be usurping the legislature's authority to decide whether the RPS program will extend beyond 2025. Nothing in RSA 362-F empowers the Commission to do so.

C. It was Error for the Commission to Proceed to Hearing on the Presumption that it Could Impose Public Interest Conditions on the PPA to Remedy an Initial Lack of Jurisdiction and Authority to Grant the Approval Requested by the Petition.

In its order denying Appellants' motion to dismiss, the Commission avoided deciding any issues relating to its specific jurisdiction and authority under RSA 362-F:9, I and RSA 374-F:3, V(c), despite the fact that PSNH's Petition requested approval of and cost recovery for REC purchases through 2034, which on its face, exceeds the Commission's authority to approve. Instead, the Commission relied upon authority granted under RSA 362-F:9 to condition the PPA to meet the public interest standards set forth in RSA 362-F:9, II. The Commission stated that:

We will review the PPA to determine whether it meets the public interest consistent with the statute and will also consider whether we should exercise our authority under RSA 362-F:9, I to place conditions on our approval of the PPA. We will consider the individual criteria and other arguments at hearing. The existence of contraction terms that may conflict with statutory requirements or authority is not a basis for dismissal before the facts and arguments in the case are fully developed, rather it is a factor to be considered in our public interest review of the PPA, especially in light of the conditioning authority granted to the Commission under RSA 362-F:9, I.

Order 25,192 at 8, App. at 144.

In Order 25,213, the Commission mistakes its jurisdiction to condition a contract, like the PPA, to meet statutory public interest criteria with its obligation to determine whether the approval sought in the contract and its petition falls within the Commission's jurisdiction and authority to grant. In so doing, the Commission misreads the grant of power to impose conditions in RSA 362-F:9, I. This is a grant of authority to insure that a contract meets the public interest criteria in RSA 362-F:9, II. It is not a grant of authority to impose conditions to create jurisdiction and authority in the first instance. In other words, the conditioning authority goes to bringing a contract within the public interest as defined in statute, not to conditioning a contract to bring it within the Commission's jurisdiction. The Commission lacks the authority under the RPS statute to authorize the purchase of and to approve cost recovery for RECs beyond 2025. *See* Argument II A, above. Consequently, it was error to hold that post-merits imposition of contract conditions by the Commission can remedy this lack of initial jurisdiction and authority and error to proceed to hearing:

When a claim is made that a court has no jurisdiction to act, it is essential that that issue be fully litigated before the case continues. ‘The issue of jurisdiction is not only separate but also preliminary, and reasonable procedure demands that it be finally decided before other issues of the litigation are reached.’

Morel v. Marable, 120 N.H. 192, 193-94 (1980), *quoting Maryland Casualty Co. v. Martin*, 88 N.H. 346, 348 (1937).

I. Statement that Every Issue Specifically Raised has Been Presented to the Administrative Agency and has Been Properly Preserved for Appellate Review by a Contemporaneous Objection or, Where Appropriate, by a Properly Filed Pleading

Every issue specifically raised herein has been presented to the Commission and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. Specifically, every issue raised in this Appeal was presented to the Commission in the Appellants’ motion to dismiss (App. at 107), reply to PSNH’s objection to motion to dismiss (App. at 131), motion for rehearing (App. at 150), or written closing statement (App. at 158).

J. Content of Record on Appeal

The Appellants request that the court require the Commission to transmit to the court the entire record for appeal in Docket DE 10-195.

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER, INC.,
PINETREE POWER-TAMWORTH, INC.,
SPRINGFIELD POWER LLC,
DG WHITEFIELD, LLC D/B/A
WHITEFIELD POWER & LIGHT COMPANY, AND
INDECK ENERGY-ALEXANDRIA, LLC

By Their Attorneys,
OLSON & GOULD, P.C.

Date: *May 17, 2011*

By: *David J. Shulock, Esq.*

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CERTIFICATION

I hereby certify that copies of this notice of appeal have this day been forwarded via U.S. Mail, postage prepaid, to Debra Howland, Executive Director & Secretary, Public Utilities Commission, 21. S. Fruit St., Suite 10, Concord, NH 03301-2429, Office of the Attorney General, 33 Capitol St., Concord, NH 03301-6397, Robert Bersak, Esquire, Public Service Company of New Hampshire, 780 North Commercial Street, P.O. Box 330, Manchester, NH 03105, to Suzanne Amidon, Esquire, Edward N. Damon, Esquire, Staff, New Hampshire Public Utilities Commission, 21 S. Fruit St., Suite 10, Concord, NH 03301-2429, to Meredith A. Hatfield, Esquire, Office of Consumer Advocate, 21 S. Fruit St., Ste. 18, Concord, NH 03301, to James Rodier, Esquire, Clean Power Development, 1500 A. Lafayette Rd., No. 112, Portsmouth, NH 03801-5918, Keriann Roman, Esquire, City of Berlin, Donahue, Tucker & Ciandella PLLC, 225 Water St., Exeter, NH 03833, to Christopher Boldt, Esquire, City of Berlin, Donahue Tucker & Ciandella PLLC, 104 Congress Street, Suite 304, Portsmouth, NH 03801, to Jonathan Edwards, *Pro se*, Edrest Properties LLC, P.O. Box 202, Berlin, NH 03570, to Angela O'Connor, New England Power Generators Association, 141 Tremont St., 6th Floor, Boston, MA 02111.

Dated: *May 17, 2011*

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