

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 10-195

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY**

Consideration of Effects of SB 577 on Order No. 25,213

Order Amending Order No. 25,213

ORDER NO. 26,198

December 5, 2018

APPEARANCES: Robert Bersak, Esq., on behalf of Public Service Company of New Hampshire d/b/a Eversource Energy; Foley Hoag LLP by Carol J. Holahan, Esq., on behalf of Berlin Station, LLC; Donahue, Tucker & Ciandella, PLLC, by Christopher L. Boldt, Esq., on behalf of the City of Berlin; Consumer Advocate D. Maurice Kreis, Esq., on behalf of residential ratepayers; and Suzanne G. Amidon, Esq., on behalf of Commission Staff.

As directed by a state law enacted earlier this year, the Commission hereby amends page 97 of Order No. 25,213 (April 18, 2011), which granted conditional approval to a purchase power agreement between Eversource and Berlin Station, LLC. The amended page is attached to this order.

I. PROCEDURAL HISTORY

On June 28, 2018, Governor Sununu signed into law Senate Bill 577 titled, "AN ACT requiring the public utilities commission to revise its order affecting the Burgess BioPower plant in Berlin, prohibiting the import of certain liquid fuels, and relative to the production of useful thermal energy." Laws of 2018, ch. 340 (SB 577). In Section 1 of SB 577, the New Hampshire legislature found that the "continued operation of the Burgess BioPower plant in Berlin is important to the energy infrastructure of the state of New Hampshire and important for the attainment of renewable energy portfolio standard goals of fuel diversity, capacity, and

sustainability.” Section 2 directs the Commission to “amend its Order No. 25,213 (Docket No. DE 10-195) to suspend the operation of the cap on the cumulative reduction factor as set forth on page 97 of its Order for a period of 3 years from the date the operation of the cap would have otherwise taken effect.”

The Commission issued an order of notice on August 2, 2018, scheduling a prehearing conference on September 5, 2018. At the prehearing conference, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource); the City of Berlin; Berlin Station, LLC (Berlin Station); and the Office of the Consumer Advocate (OCA) appeared and discussed the issues raised by SB 577.

The OCA filed a Motion for Determinations as a Matter of Law on September 18, 2018. Berlin Station filed a timely objection, and Eversource and the City of Berlin filed memoranda stating their positions.

II. POSITIONS

A. Eversource and Berlin Station Request to Implement SB 577

Eversource stated that, to carry out the legislative intent of SB 577, Eversource and Berlin Station must bilaterally negotiate amendments to the existing power purchase agreement (PPA). Eversource said it is willing to enter into such negotiations subject to two conditions: (1) receipt of an amended Order No. 25,213 that provides the legal basis for such discussions; and (2) assurance from the Commission that Eversource will in fact be entitled to recover any additional costs resulting from an extension of the contract.

Berlin Station and the City of Berlin agreed that the Commission should issue the order directed by the legislature. Berlin Station agreed with Eversource that any additional costs should be recovered from ratepayers. The City took no position on cost recovery.

B. OCA's Motion

After the prehearing conference, the OCA filed a motion asking the Commission to resolve a number of legal issues associated with the passage of SB 577. The parties had discussed those issues and the filing of such a motion at the prehearing conference and technical session.

The OCA did not dispute that the purpose of SB 577 was to lift, for a three-year period, certain limitations on the right of the plant owner to receive payment from Eversource for costs in excess of the prevailing prices of energy, capacity, and renewable energy certificates (RECs) in applicable markets. The OCA insisted, however, that the Commission must address two issues: (1) the extent to which the over-market costs are recoverable from Eversource customers on a non-bypassable basis, and (2) whether the Commission should obtain the "cost and profitability records" which SB 577 explicitly authorizes the Commission to receive in connection with the current proceeding. OCA Motion at 2; *see* Ch. 340:2, II.

The OCA noted that while SB 577 requires Eversource to continue to pay over-market prices beyond the terms of the PPA approved by the Commission in Order No. 25,213, the law does not say how this should be accomplished. Up until divestiture, Eversource recovered the over-market costs from customers in Eversource's energy service rate. In Order No. 25,213, the Commission characterized the cumulative reduction factor (CRF) as providing Eversource's energy service customers an opportunity to recapture the over-market payments, if any, made during the term of the PPA in the event Eversource exercised its option under the PPA to purchase Berlin Station at the end of the term of the PPA. The Commission concluded that without the CRF, the costs of the PPA to Eversource's energy service customers outweighed the environmental and economic benefits of the PPA. *See* Motion at 3. The CRF was capped at

\$100 million in over-market costs, and once that amount was reached, any over-market payments made in a subsequent year would be returned to energy service customers in the immediately following year. *See id.* at 4.

The OCA pointed out that the 2015 Restructuring and Rate Stabilization Agreement (2015 Restructuring Agreement)¹ approved by the Commission changed cost-recovery related to PPAs previously approved by the Commission between suppliers and Eversource, including the Berlin Station PPA. The 2015 Restructuring Agreement provided that Eversource's commitments to purchase power from Berlin Station and the Lempster Wind Farm would continue, provided that the difference between the contract price and the market revenues associated with the PPAs' energy, capacity, and RECs would be recovered through the stranded cost recovery charge (SCRC) that was created in connection with divestiture of generation sources. *See id.* at 5.

The OCA said that at the time it signed the 2015 Restructuring Agreement, the maximum extent to which residential customers could be subject to over-market costs associated with purchases of energy, capacity, and RECs from Berlin Station was a specific known quantity, as a result of the Commission-imposed cap on the CRF. The OCA argued that, to the extent SB 577 removes the limit on cost recovery, the law is a material change to the terms of the 2015 Restructuring Agreement. *Id.* at 6.

The OCA noted that in the context of civil proceedings, the New Hampshire Supreme Court has held that settlement agreements are contractual in nature, and governed by contract law. *Id.* (citations omitted). The OCA claimed that Eversource ratepayers are entitled to the benefit of the bargain represented by the 2015 Restructuring Agreement; and that the imposition

¹ The 2015 Restructuring Agreement is a multi-party settlement of issues related to Eversource's divestiture of its generation assets in Docket No. DE 14-238 and the resolution of cost recovery of the gas flue desulphurization unit installed at Merrimack Station in Docket No. DE 11-250.

of any additional costs resulting from SB 577 impairs the contractual rights of ratepayers, and is a violation of the Contract Clause of the United States Constitution and the retrospective laws provision of the New Hampshire Constitution. *Id.* at 6-7; *see* U.S. CONST., art. I, § 10, cl. 1; N.H. CONST., pt. I, art. 23.

Having concluded that the terms of the 2015 Restructuring Agreement are contractual in nature for purposes of constitutional analysis, the OCA noted that SB 577 is silent as to whether Eversource ratepayers should be subject to additional stranded costs beyond those expressly agreed to in the 2015 Restructuring Agreement. While the fiscal note to the Senate-passed version of SB 577 assumed that Eversource customers would pay the additional costs imposed by the bill, the Senate-passed version of the bill directed the Commission to open a proceeding and consider if it is in the public interest to amend Order No. 25,213. The final version of SB 577 was different. As explained above, the final version only directs the Commission to amend Order No. 25,213 in a specific manner, without separately considering the public interest. *See* Motion at 8-9.

Assuming that the bill has a retroactive effect on the 2015 Restructuring Agreement by adding an unknown quantity of additional costs to be borne by Eversource ratepayers, the OCA concluded that SB 577 impairs the bargain struck by the OCA in signing the 2015 Restructuring Agreement, and is arguably unconstitutional. *See* Motion. at 9-11. In making this argument, the OCA recognized that if the impairment to the contract had a “significant and legitimate public purpose,” the change could clear the constitutional threshold. *See id.* at 10. With respect to SB 577, according to the OCA, no such public purpose exists, because the excess money required by the law inures to the benefit of Berlin Station’s owners and the surrounding community at the expense of ratepayers. *Id.*

The OCA argued that the Commission should take one of three courses of action. First, the Commission could conclude that Eversource, not its ratepayers, should be financially responsible for the costs of suspending the effect of the CRF approved in Order 25,213. Second, the Commission could declare that SB 577 is unconstitutional under the federal and state constitutions. Third, if the Commission chose not to undertake either of those options, it should transfer the question of the constitutionality of SB 577 to the New Hampshire Supreme Court. Motion at 11.

Pointing to specific language in paragraph II of section 2 of SB 577, the OCA also argued that the Commission should obtain the cost and profitability records of Berlin Station. According to the OCA, SB 577 authorizes any party to the proceeding referenced in the paragraph to tender such request. The OCA has requested the records and has noted that, pursuant to RSA 363:28, VI, the OCA is automatically entitled to a copy of confidential information filed with the Commission in an adjudicative proceeding in which the OCA is a participating party. The OCA said that removing the limit of the CRF triggers a need for the counterparties to renegotiate the PPA and submit the results to the Commission for approval. That approval, according to the OCA, will require a determination that the amended agreement is in the public interest, as well as findings related to efficiency and cost effectiveness pursuant to RSA 362-F:9. The OCA said that Berlin Station's financial records will assist in making such findings. Motion at 12-13.

1. Eversource

According to Eversource, the OCA Motion impacts recovery of the additional costs imposed by SB 577. Although the expectation of the legislature appears to be that the additional costs will be recovered through Eversource's existing stranded cost adjustment charge as

contained in the 2015 Restructuring Agreement, Eversource asserted that the Commission has authority to create a new, non-bypassable charge if inclusion in the present SCRC is problematic. Eversource took no position on the OCA's demand for access to the books and records of Berlin Station.

2. Berlin Station

Berlin Station first argued that SB 577 does not violate the Contract Clause of the federal or state constitution. According to Berlin Station, although the Contract Clause purports to bar state laws that substantially impair contractual rights, such laws will be upheld if they serve a significant and legitimate public purpose and are necessary and reasonable in the judgment of the legislature. Objection at 2 (citing *Deere & Co. v. State*, 168 N.H. 460, 472 (2015)). Berlin Station claimed that, in passing SB 577, the legislature recognized the significant and legitimate public purpose of the continued operation of the Burgess BioPower plant in Berlin. Objection at 2-3.

Berlin Station also argued that SB 577 has no retroactive effect on the PPA or on the 2015 Restructuring Agreement and is plainly prospective. Objection at 4. Berlin Station noted that SB 577 directs the Commission to reopen the proceeding, and argued that the legislature's policy choice in enacting SB 577 is unrelated to the 2015 Restructuring Agreement. According to Berlin Station, the overriding argument in support of the constitutionality of SB 577 is the public interest finding of the legislature in favor of the supporting energy infrastructure and the goals of fuel diversity, capacity, and sustainability. Objection at 4-5. Berlin Station refuted the OCA's claim that the benefits from SB 577 were unconstitutionally "targeted," saying that claim had no legal support. Berlin Station also argued that certification to the New Hampshire Supreme Court is unnecessary and unwarranted. Objection at 8-9.

Berlin Station said that while cost recovery is not discussed in the legislation, it was referenced in the fiscal note worksheet prepared by the Commission for the Legislative Budget Assistant. The fiscal note resulting from the worksheet stated that suspension of the cap on the CRF would increase costs to customers. Berlin Station said that it is irrelevant whether the costs are recovered through Eversource's stranded cost recovery charge, or some other non-bypassable charge. According to Berlin Station, the legislature intended for ratepayers to bear the cost of suspending the CRF cap, and left it to the Commission to establish an appropriate mechanism.

Finally, Berlin Station claimed that its confidential cost and profitability records are not relevant to this proceeding, and that the Commission should not require their production. According to Berlin Station, the legislature authorized only the Commission, at its discretion, to request such records; and the records will shed no light on the action that the legislation requires the Commission to take. Furthermore, the records are irrelevant because, as Berlin Station views it, the law requires Berlin Station and Eversource to negotiate a change to the PPA, and does not require consideration of the profitability of the facility.

3. City of Berlin

The City agreed with and joined in the arguments and authorities cited by Berlin Station. The City, however, took no position on whether the production of financial records by Berlin Station would be relevant to the issues currently before the Commission.

III. COMMISSION ANALYSIS

We hereby issue the change to Order No. 25,213 mandated by SB 577 and contained in the ordering clause below. The amended page 97 is attached to this order. While we agree with the OCA that there are potential constitutional issues raised by SB 577, we are not in a position to resolve them at this time. We also find that we do not have a sufficient record upon which to

certify a question to the New Hampshire Supreme Court. In this matter, it will be better for the parties and for the Court to have the full context, including any revised agreement from the parties, if the Court is asked to review this matter.

Eversource periodically informs the Commission of the balance in the CRF account. The balance has not yet reached \$100 million, and therefore the over-market costs associated with the PPA between Eversource and Berlin Station have not yet reached the contractual cap. We need not consider any cost recovery mechanism for over-market costs in excess of \$100 million unless and until we are presented with a PPA that will produce such costs.

Should Eversource and Berlin Station negotiate a revised PPA in response to the change contained in this order, they should file that revised PPA in this docket for our review and consideration. The filing should include testimony or a technical statement that identifies all changes to the PPA.

We appreciate the OCA's desire to access Berlin Station's books and records to determine whether an amended agreement is in the public interest. We also appreciate Berlin Station's claim that its confidential cost and profitability records may not be relevant given the legislature's public interest finding. We will reserve a decision on the production of those records until we are asked to review a revised PPA.

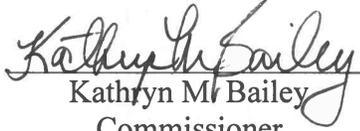
Based upon the foregoing, it is hereby

ORDERED, that Order No. 25,213 is amended by adding in the second paragraph on page 97: *"Amendment made December 5, 2018, as required by Laws of 2018, ch. 340: Operation of the cap shall be suspended for three years from the date on which the cumulative amount reaches \$100 million."*

By order of the Public Utilities Commission of New Hampshire this fifth day of
December, 2018.



Martin P. Honigberg
Chairman

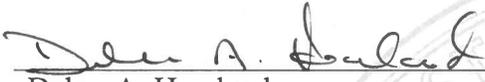


Kathryn M. Bailey
Commissioner



Michael S. Giaimo
Commissioner

Attested by:



Debra A. Howland
Executive Director



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 *Amendment made December 5, 2018, as required by Laws of 2018, ch. 340: Operation of the cap shall be suspended for three years from the date on which the cumulative amount reaches \$100 million.* 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.

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
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21 S. FRUIT ST, SUITE 10
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- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**