STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 11-184

Public Service Company of New Hampshire, 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-Alexandria, LLC et al.

Joint Petition for Approval of Power Purchase Agreements and Settlement Agreement

Order Approving Power Purchase Agreements

O R D E R N O. 25,305

December 20, 2011

APPEARANCES: Robert A. Bersak, Esq. and Sarah B. Knowlton, Esq. for Public Service Company of New Hampshire, David J. Shulock, Esq. and David K. Wiesner, Esq., of Olson & Gould, for Independent Wood-Fired Power Producers, F. Anne Ross, Esq. for Staff Advocates of the Public Utilities Commission, George Bald, Commissioner, for the State of New Hampshire Department of Resources and Economic Development, James T. Rodier, Esq. for Freedom Logistics, LLC d/b/a Freedom Energy Logistics, Halifax- American Energy Company, LLC and PNE Energy Supply LLC, Meredith A. Hatfield, Esq. of the Office of Consumer Advocate on behalf of residential ratepayers, and Edward N. Damon, Esq. and Suzanne G. Amidon, Esq. for Non-Advocate Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

On August 23, 2011, Public Service Company of New Hampshire (PSNH), 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-Alexandria, LLC (collectively, independent wood-fired power producers, or Wood IPPs), the New Hampshire Department of Resources and Economic Development (DRED) and certain Staff of the Commission (the Advocate Staff) (collectively, the Joint Petitioners) filed with the Commission a petition for approval of (i) five power purchase agreements (PPAs) between PSNH and the Wood IPPs (Whitefield Power & Light Company does not petition for a PPA), pursuant to RSA 374:57 and the Public Utilities Regulatory Policies Act, 16 U.S.C. 824a-3, (ii) a

settlement, release and support agreement (settlement agreement) between PSNH, the Wood IPPs and Berlin Station, LLC, Laidlaw Berlin BioPower, LLC (Laidlaw) and Cate Street Capital, Inc. (Cate Street), and (iii) a proposal for the ratemaking treatment relating to the costs of the PPAs. The petition was accompanied by the pre-filed testimony of George M. Bald, Commissioner of DRED, Thomas C. Frantz, Director of the Commission's Electric Division, and Richard C. Labrecque, Supplemental Energy Resources Manager for PSNH. A motion for confidential treatment of certain information in the PPAs and an attachment to the settlement agreement was also filed on August 23, 2011.

The filing followed the Wood IPPs' appeals to the New Hampshire Supreme Court from *Public Service Company of New Hampshire*, Order No. 25,213 (April 18, 2011), which had conditionally approved the original power purchase agreement between PSNH and Laidlaw and *Public Service Company of New Hampshire*, Order No. 25,239 (June 23, 2011), which approved an amended power purchase agreement between PSNH and Laidlaw and denied the Wood IPPs' motion for rehearing. According to the petition, the PPAs are part of a transaction to resolve the Supreme Court appeals, which is necessary to allow the construction and operation of the Laidlaw facility (now called the Berlin Station) to go forward, and to support the continued operation of the Wood IPPs' generating facilities and related economic benefits.

The PPAs provide for the sale of the energy output of the Wood IPPs' generation facilities on a unit contingent basis. Capacity and renewable energy certificates are not being purchased. The PPAs are structured similarly, but have varying terms with regard to pricing, quantities and duration. In addition, each of the PPAs includes fixed base energy prices and a fuel price adjustment mechanism, which consists of an initial wood price and a formula for adjusting the wood price up or down.

The settlement agreement includes mutual releases by the parties and provides for the withdrawal of the court appeals subject to escrow terms. Under the proposed ratemaking methodology set forth in the initial filing, the costs of the PPAs would be recovered as part of PSNH's energy (default) service rate payable by its energy service customers. However, in order to avoid an increase in the energy service rate, PSNH would transfer a liquidated sum of $8.5 million of costs associated with certain uncollectible and administrative expenses from its energy service rate to its distribution rate, thereby necessitating an increase to the distribution rate payable by PSNH's distribution customers, with such increase included as one of the requested approvals. To the extent the above-market costs exceed $8.5 million, the Commission is requested to defer the excess, plus accrued interest, for future recovery in the energy service rate. According to the testimony, the overall rate impact of the PPAs is estimated to be approximately $0.00111 per kWh, while the total distribution rate is expected to increase by 1.66%. For a residential customer using 500 kWh per month, the effect would be a monthly increase of $0.55.

Also on August 23, 2011, Commissioner Amy L. Ignatius filed a letter stating that she disqualified herself from this proceeding inasmuch as Governor Lynch was instrumental in convening the parties and that his counsel, Jeffrey Meyers, to whom she is married, was a participant in negotiations leading to the agreements filed with the Commission.

On August 25, 2011, the Commission issued an order of notice scheduling a pre-hearing conference and technical session for September 9, 2011. The order of notice noted Commissioner Ignatius's voluntary disqualification and, in addition, stated that because Commission Staff members Thomas C. Frantz and F. Anne Ross were involved in negotiating the PPAs on behalf of the state and are one of the Joint Petitioners, they were designated as staff advocates pursuant to RSA 363:32.

On September 6, 2011, the Office of Consumer Advocate (OCA) filed a notice of participation and the Business and Industry Association and Granite State Hydropower Association filed petitions to intervene. On September 7, 2011, Freedom Logistics, LLC d/b/a Freedom Energy Logistics (FEL), Halifax-American Energy Company, LLC (HAEC) and PNE Energy Supply LLC (PNE) filed a joint petition to intervene.

On September 9, 2011, PSNH filed a letter stating that the condition precedent to the PPAs set forth in paragraph 10(b) of the petition had been satisfied. That condition required a financial closing for the Berlin Station that was the subject of Docket No. DE 10-195, including the funding of $2.75 million in "New Market" tax credits dedicated to New Hampshire's North Country and completion of the closing by August 30, 2011. The letter noted that subsequent to the filing of the petition, PSNH, the Wood IPPs and Cate Street Capital, Inc. entered into an agreement extending the date on or prior to which the closing must occur from August 30, 2011 to September 9, 2011. PSNH also stated that the closing occurred on September 2, 2011, with the result that the Wood IPPs' then pending appeals of the Commission orders in Docket No. DE 10-195 were withdrawn and construction could begin immediately.

At the pre-hearing conference on September 9, 2011, the Commission granted all petitions to intervene. Also on September 9, 2011, the Chairman of the Commission, with the concurrence of Commissioner Below, applied for the appointment of a special commissioner by the Governor and Council to act in Commissioner Ignatius's place pursuant to RSA 363:20. The application noted that, in light of Commissioner Ignatius' disqualification and the impending departure of Commissioner Below, the appointment was necessary to comply with RSA 363:16, which requires a quorum of two Commissioners to issue an order. In response, Bruce Ellsworth was appointed as Special Commissioner effective September 28, 2011. On September 12, 2011

Non-Advocate Staff filed a proposed procedural schedule which was approved by secretarial letter on September 22, 2011.

Three motions for confidential treatment of certain information contained in the Joint Petitioners' filing and discovery responses were filed and the confidential versions of the discovery responses were also filed for purposes of obtaining rulings on the motions. All three motions asserted that the information is confidential, commercial and financial information that should be protected from disclosure pursuant to RSA 91-A:5, IV and N.H. Code Admin. Rules Puc 203.08.

First, on August 23, 2011, the Wood IPPs filed a motion for confidential treatment of PPA pricing and other information contained in the Joint Petitioners' filing. On September 15, 2011, the Wood IPPs filed a letter requesting that the Commission also grant confidential treatment to certain price related information in the PSNH and Staff Advocate responses to Non-Advocate Staff data request 1-12 on the basis of the arguments set forth in their August 23, 2011 motion. The OCA filed an objection to the first motion on September 16, 2011. OCA's objection would also relate to the Wood IPPs' letter request.

Second, on September 15, 2011, the Wood IPPs filed a motion for confidential treatment of certain information contained in responses to Non-Advocate Staff data requests 1-1, 1-2 and 1-18 and information to be viewed in connection with verifying the initial wood prices pursuant to the PPAs. Third, on October 3, 2011, the Wood IPPs filed a motion requesting confidential treatment of their responses to OCA 1-5 regarding the wood chip tonnages purchased by each Wood IPP and the cost by source state or province. No objections to the September 15, 2011 and October 3, 2011 motions were filed.

On October 5, 2011, Non-Advocate Staff notified the Commission that the technical session scheduled for the next day would not be held by agreement of the parties. On October 14, 2011, Non-Advocate Staff filed the direct testimony of Steven E. Mullen and on November 14, 2011, PSNH filed the rebuttal testimony of Stephen R. Hall. On November 23, 2011, the Commission issued Order No. 25,294 granting in part and denying in part the pending motions for confidential treatment. In compliance with the Commission's ruling, the Wood IPPs filed confidential and revised redacted copies of the PPAs on November 29, 2011. The hearing on the merits was held on November 30, 2011 (Day 1) and December 1, 2011 (Day 2). On December 5, 2011, Joint Petitioners, OCA, Non-Advocate Staff, and FEL, HAEC and PNE filed written closing statements.

II. POSITIONS OF THE PARTIES AND STAFF

A. Joint Petitioners

In his pre-filed testimony, Commissioner Bald described the high rate of unemployment in the North Country compared to the statewide average. He stated that DRED and the Governor strongly support the Berlin biomass project, which was the subject of the power purchase agreement originally between PSNH and Laidlaw and they have been aware that today's energy markets have created significant operating challenges to the state's currently operating biomass projects, especially those owned and/or operated by Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., and Indeck-Alexandria, LLC. Commissioner Bald noted in particular that these Wood IPPs were facing significant financial pressure to remain in operation and that their closure would result in the loss of hundreds of biomass-related jobs. He further said that the economic impacts facing the state from the potential withdrawal of the Berlin biomass project were serious and the closure of the Wood IPPs was imminent. He stated

that as a result of discussions with Cate Street, the developer of the Berlin biomass project, and the Wood IPPs, the state decided to undertake an active role in trying to resolve the challenges facing the biomass sector of the state's economy. He stated that, accordingly, a meeting was convened to explore a resolution that would meet the needs of Cate Street, the Wood IPPs and PSNH, at least on a short term basis. At the meeting, Advocate Staff was asked to lead negotiations with the Wood IPPs and PSNH to see if a solution could be reached that would end the legal challenge to the Berlin biomass project and allow construction to begin, meet the short term needs of the IPPs and satisfy the rate concerns of PSNH.

According to Commissioner Bald, the negotiations resulted in the five PPAs whose expeditious approval is requested. He opined that the Commission's approval will retain the employment at the Wood IPPs' facilities and keep intact the network of jobs that support the biomass industry in the state, as well as allow Cate Street to proceed to a financial closing in order to begin construction of the Berlin biomass project. He said that the settlement allows the state to implement an economic development plan for the North Country that depends on three factors: (i) financing of the Berlin biomass project and thereby retain the Community Benefit Fund which is being created by the New Market tax credit funding, (ii) addressing the financial problems of Isaacson Structural Steel Company (Isaacson), a major employer in the Berlin area facing a difficult financial crisis, by the City of Berlin's pledge of its $500,000 of the Community Fund to Isaacson and Isaacson's receipt of $1,750,000 of New Market tax credit financing, and (iii) approval of the PPAs, which will maintain Wood IPP generation and its many associated jobs. Commissioner Bald further asserted that the results of the negotiations will advance the policy objectives of the forestry statutes, in particular, RSA 227-G and RSA 227-J. In sum, Commissioner Bald stated that the Commission should approve the PPAs as soon as

possible because they are short term and provide much needed assistance to the plants and the affected regional economy while the state works out a long-term sustainable policy.

Staff Advocate Thomas Frantz' pre-filed testimony recommended approval of the PPAs and the settlement agreement. He described the Wood IPPs as being short duration, unit contingent, energy only power contracts capped at specific output levels for each plant. He said that the prices can vary based on changes in the wood market but those changes are also bounded and that the base price for energy is set forth in each of the PPAs.

According to Mr. Frantz, his involvement and that of General Counsel Anne Ross, the other Staff Advocate, began in early June 2011 when they attended a meeting with the Governor and others. He said that the Governor, having gotten a commitment from the Wood IPPs, PSNH and Cate Street to participate in good faith negotiations, asked Staff Advocates to lead the negotiations with the support of Commissioner Bald. He confirmed that the negotiations had multiple short term objectives, including finding a solution that allowed the Berlin biomass project to get constructed in a timely manner and preserve the economic benefits of the project,[1] retaining existing jobs at the Wood IPPs' facilities[2] and the many jobs associated with supplying fuel to the facilities, and not adversely affecting PSNH's energy service rate.[3] In addition, in Mr. Frantz' opinion, the resolution had to be at rates, terms and conditions that after consideration of the clear public benefits obtained by reaching the negotiated settlement, would be found by the Commission to be just and reasonable and in the public interest.

[1] This meant that the Wood IPPs would have to withdraw their appeals to the New Hampshire Supreme Court from the Commission's decisions in DE 10-195.

[2] He said that, absent the PPAs, the continued operation of the Wood IPPs' plants was doubtful based on current market prices for electricity.

[3] Mr. Frantz stated that the PPAs are expected to be above-market over their terms and that the amount of any above-market costs will depend on natural gas prices and weather over the short period of time the PPAs are in effect, as well as changes in delivered wood prices. He explained that the costs associated with the PPAs will be recovered in PSNH's energy service rate; however, in order to keep the rate from increasing, the Joint Petitioners have agreed to request the Commission's approval of a cost recovery methodology that moves a specific amount of costs out of the energy service rate and into the distribution rate.

According to Mr. Frantz, he and Ms. Ross met individually with each of the Wood IPPs and PSNH. He said that in general, PSNH sought lower rates and shorter terms and the Wood IPPs wanted longer terms and higher rates. In Mr. Frantz' view, the PPAs have terms long enough to give the plants some stability while longer term solutions for the Wood IPP plants' viability can be evaluated, possibly through changes to the Renewable Portfolio Standard (RPS) law, RSA 362-F, or market changes allowing them to compete successfully in the regional electricity market. He further said that the terms are short enough that the benefits realized by the settlement are not outweighed by the pressure of above-market costs. Staff Advocates were also concerned that since negotiations are time consuming, they did not want to have to deal with the same issues and circumstances in the next year. As to the prices in the PPAs, Mr. Frantz said that they were based on current market conditions, forward prices and operating requirements of the Wood IPP plants.

Mr. Frantz maintained that the rates resulting from the transactions accomplish the policy interests described by Commissioner Bald and provide for the purchase of electricity at reasonable cost to PSNH's customers. He noted that the energy prices at the termination of the PPAs are below the starting price for the first year of the Berlin biomass facility and maintained that they are just and reasonable and in the public interest in the context of the overall settlement of the issues involving PSNH, the Berlin biomass facility, and the Wood IPPs.

Mr. Frantz projected that, at the base energy price and maximum output level of each facility and assuming no change in the energy prices due to wood price changes, the cost of the PPAs would be approximately $20 million above-market cumulatively over the term of the PPAs. He estimated the overall rate impact of the PPAs to be approximately $0.00111 per kWh, while the total distribution rate is expected to increase by 1.66%. As a percentage of total retail

revenue, the increase is estimated to be approximately 0.71%, slightly less for residential customers and slightly more for Rate GV and Rate LG customers. For a residential customer using 500 kWh per month, the effect would be a monthly increase of $0.55.

Mr. Labrecque, the manager of PSNH's Supplemental Energy Sources Department, explained that each of the Wood IPPs qualifies as a Qualifying Facility (QF) under PURPA and is required to continue to qualify as such through the term of each PPA. He said that QFs with net generating capacity less than or equal to 20 MW are entitled under 16 U.S.C. 824a-3 and 18 CFR Part 292 to require PSNH to purchase electric energy from their facilities. Citing 18 CFR 292.304(a)(i), he further explained that the rates paid by an electric utility for the energy from a QF shall be just and reasonable to the consumer and in the public interest, similar to the standards set forth in RSA 374:57 and RSA 369-B:3,IV(b)(1)(A).

Mr. Labrecque provided further details regarding the proposed rate recovery methodology. He said that the energy procured under the PPAs will be used as part of PSNH's energy service portfolio and recovered as part of that rate. However, to avoid any increase in the energy service rate that may result from the PPAs, PSNH would transfer a liquidated amount of $8.5 million of costs associated with uncollectible and certain administrative expenses from its energy service rate to its distribution rate. He said that by doing so, up to $8.5 million of above-market power costs from the PPAs can be included in PSNH's energy service rate annually without adversely impacting that rate.

He stated that to the extent that the above-market costs of the PPAs exceed $8.5 million during any year, it is proposed that PSNH defer for future recovery any such excess. Any deferral created under this mechanism would accrue interest at the Company's weighted cost of capital for its generation segment and would continue to be recovered through the energy service

rate annually until fully recovered, with annual recovery limited to the extent that above-market costs attributable to the PPAs and the deferral recovery do not in total exceed the $8.5 million annual limit. Finally, under the Joint Petitioners' proposal, PSNH would begin recovery of the $8.5 million transferred to its distribution rates effective as of the first day of the month following the earliest start date of any of the PPAs in a manner that results in full recovery thereof Mr. Labrecque provided an estimate of the above market costs of the PPAs. He calculated that, assuming 100% delivery of the maximum quantities of energy set forth in the PPAs and based on recent futures market prices for energy in New England, and assuming an average fuel price adjustment of $2 per ton over the terms of the PPAs, the total above market costs of the PPAs would be approximately $24 million, of which $3.3 million is attributable to the fuel price adjustment mechanism. He noted that if market energy prices, wood prices or the quantity of energy delivered under the PPAs varies, the total above-market impact would change.

Mr. Labrecque summarized the approvals requested in connection with the joint petition as follows: (a) finding the PPAs and the settlement agreement to be in the public interest and approving same; (b) verifying, reviewing and approving an "initial wood price" for each of the individual PPAs; (c) authorizing PSNH to transfer the liquidated amount of $8.5 million attributable to uncollectible and certain administrative expenses from its energy service rate to its distribution rate; (d) authorizing PSNH to increase its distribution rates on the first day of the month following the earliest effective date of any of the PPAs to recover the $8.5 million in costs transferred thereto, in a manner that results in full recovery; (e) authorizing PSNH to recover through its energy service rate the market value of purchases under the PPAs and additionally up to $8.5 million annually of any above-market costs associated with purchases under the PPAs; and (f) authorizing PSNH to defer with a return at PSNH's weighted cost of capital for its

generation segment for future recovery through its energy service rate any above-market costs associated with the purchases under the PPAs which exceed the $8.5 million annual cap and further authorizing PSNH to recover all such deferred amounts through its energy service rate annually until fully recovered, with annual recovery limited to the extent that above-market costs attributable to the PPAs and the deferral recovery do not in total exceed the $8.5 million annual limit.

Stephen R. Hall provided rebuttal testimony on behalf of PSNH responding to Non-Advocate Staff's pre-filed testimony regarding the ratemaking methodology proposed by the Joint Petitioners. Mr. Hall noted that the petition and the PPAs expressly state that the effectiveness of the PPAs is conditioned upon the Commission's approval of a ratemaking methodology that provides for full recovery of the costs of the transactions by PSNH without increasing its energy service rate. In his pre-filed testimony, Mr. Mullen stated that he did not favor the ratemaking methodology proposed by the Joint Petitioners but offered several possible alternatives. In response, Mr. Hall stated that PSNH and the Joint Petitioners reviewed those alternatives and found that they would not achieve similar results to those sought by PSNH and are therefore unacceptable.

As to Mr. Mullen's first alternative, i.e., deferring all above-market PPA costs for future recovery through the energy service rate, Mr. Hall concluded that it would likely result in a write-off of above-market costs attributable to the PPAs, and PSNH will not agree to any ratemaking methodology that does not allow for full cost recovery of the rates, terms and conditions of the PPAs by PSNH. According to Mr. Hall, a ratemaking proposal that does not ensure the timely full recovery of all PPA costs would expose PSNH to the risk of not recovering the above-market cost. Regarding Mr. Mullen's second alternative, i.e., recovery of the above-

market costs through the stranded cost charge, Mr. Hall maintained that there is little argument that the costs of the PPAs do not fall within the types of stranded costs set forth in RSA 374-F:2,IV(a) and (b). Nonetheless, Mr. Hall accepted that if the PPAs are deemed to be "new mandated commitments approved by the commission" under RSA 374-F:2,IV(c), they could be recovered through the stranded cost charge.

As to Mr. Mullen's third alternative, i.e., deferral of all above-market costs for future recovery in a manner to be determined by the legislature, Mr. Hall claimed that PSNH would not receive approval of the requisite ratemaking methodology unless and until the legislature enacts acceptable legislation. He maintained that the uncertainty of gaining the necessary approval and the potentially lengthy delay that would likely be required to obtain the necessary legislation, places the Wood IPPs in an uncertain position which affects their on-going operation and the public policy benefits of the PPAs described by Commissioner Bald. On this basis, Mr. Hall concluded that this alternative would place the PPAs in jeopardy of taking effect.

Mr. Hall stated that the originally proposed ratemaking methodology is PSNH's preferred approach, but if the Commission does not accept that methodology, PSNH suggests the possibility of creating a new and distinct non-bypassable distribution charge to collect the above-market costs of the PPAs, a charge which would be temporary, and lasting only as long as necessary to recover all above-market costs with a return at PSNH's weighted cost of capital for its generation segment. According to Mr. Hall, this proposal is based on the Commission's "plenary" ratemaking authority.

Mr. Hall stated that the above-market costs are the price to be paid for gaining the public policy benefits described by Commissioner Bald. He also stated that the costs of the PPAs do not run afoul of RSA 374-F and that the public policy benefits are similar in nature to those

funded by the system benefits charge created by RSA 374-F:3,VI. He concluded that the Commission has the authority to create a similar special purpose non-bypassable charge to fund the public benefits of the PPAs. Finally, Mr. Hall opined that the PPAs conform to PSNH's least cost integrated resources plan most recently filed and approved by the Commission in Docket No. 07-108.

In their written closing statement, the Joint Petitioners request the Commission to approve PSNH's entry into the PPAs, the cost recovery mechanism set forth in the Joint Petition, and the mutual release provision of the settlement agreement on an expedited basis so that the public policy benefits of the PPAs may be realized at the earliest possible time. The Joint Petitioners rely on RSA 374:57, which allows recovery of power purchase costs in rates unless the Commission finds that PSNH's "decision to enter into the transaction was unreasonable and not in the public interest." Since RSA 374:57 does not define the terms "reasonable" and "in the public interest," the Joint Petitioners state that their application must be determined by balancing the factors set forth in related statutes such as RSA 362-A:8,II(b) and RSA 374-F:3,IX. The Joint Petitioners also cite to *Appeal of PineTree Power, Inc.*, 152 NH 92, 97 (2005) and they conclude that the PPAs meet all of the referenced public interest criteria.

According to the Joint Petitioners, the PPAs and settlement agreement comprise a significant part of the State's economic development strategy for the North Country, referring to the financing of the Berlin Station power plant, funding for Isaacson, and the resulting preservation of substantial financial benefits to the North Country. They also mention that Commission approval will permit the Wood IPPs to remain open during their contract terms, whereas it is likely that these plants otherwise would shut down. According to the Joint Petitioners, Commission approval will result in statewide and local benefits through the retention

of 120 jobs at Wood IPPs' facilities, the retention of hundreds of jobs for loggers, truckers, and other forest industry workers, and state and local tax payments totaling at least $1.6 million. They state, in addition, that, as Commissioner Bald testified, the markets for all forest products are interrelated and depend on each other and thus the Wood IPPs' creation of a market for low grade wood benefits other markets and industries in New Hampshire, such as the market for high quality timber and its use in the manufacture of dimensional lumber and furniture.

The Joint Petitioners note that the PPAs and Settlement Agreement were negotiated with the active participation of Staff Advocates, Commissioner Bald, the Governor's office, the Executive Council and members of the General Court. They further state that no party to the docket has disputed the substantial public policy benefits to be obtained by Commission approval nor did any party challenge the reasonableness of the PPA pricing terms or initial wood prices. Finally, they say that Staff Advocate witness Thomas Frantz reviewed cost and expense information for the Wood IPPs and concluded that the pricing terms are just and reasonable under the circumstances, and they point out that Non-Advocate Staff verified the initial wood pricing, did not oppose the PPA pricing terms, and concluded that the Commission has an adequate statutory and policy basis to approve the PPAs in view of the factors that must be considered and the unique circumstances of this case.

The Joint Petitioners strongly urge the Commission to approve the proposed cost recovery mechanism set forth in their initial filing and argue that recovery of the PPA costs through PSNH's energy service rate is fully consistent with the power purchase cost recovery provisions of RSA 369-B:3,IV(b)(1)(A). They further assert that the reallocation of $8.5 million of common costs to the distribution rate as proposed is within the Commission's plenary jurisdiction and that common costs such as uncollectible expense and Commission assessments

are not directly related to PSNH's generation expenses, and may be allocated and reallocated as the Commission sees fit without violating any statute or the Commission's ruling in *Public Service Company of New Hampshire*, Order No. 25,256 (July 26, 2011) issued in the PSNH customer migration docket, Docket No. DE 10-160. They state that such common costs have been included entirely in PSNH's distribution rates in the past. They concede that the proposed temporary reallocation of these costs to distribution rates need be in effect only so long as necessary for all above-market costs of the PPAs to be recovered through energy service rates.

The Joint Petitioners respond to Non-Advocate Staff witness Steven Mullen's testimony that the proposed common cost reallocation is inconsistent with statutory policies favoring competitive price signals by arguing that any such price signal effects are inconsequential in view of the temporary duration and *de minimis* rate impact of the reallocation, and that to the extent these effects exist, they are substantially outweighed by the important public policy benefits to be obtained by continued operation of the Wood IPPs under the PPAs, citing *Public Service Company of New Hampshire,* Order No. 24,276 at 57-58 (February 6, 2004) (RSA 374-F:3 policy principles are not intended to be rules, but interdependent guidelines that are part of an evolving statutory scheme that takes into account changing circumstances).

Assuming the Commission finds the rate recovery mechanism in the Joint Petition unacceptable, the Joint Petitioners propose as an alternative that, as described by PSNH witness Stephen Hall, the above-market portion of energy purchases under the PPAs would be recovered through a "new and distinct" non-bypassable charge assessed to all PSNH distribution customers without any deferral or carrying charge. Mr. Hall testified during the public hearing that this new temporary charge is not required to be separately stated on customers' bills and its inclusion in general rate components would result in greater administrative efficiency, and the Joint

Petitioners specifically request that PSNH not be required to separately state such charges on customer bills. According to the Joint Petitioners, this alternative approach also could also be approved under the Commission's plenary ratemaking authority.

Finally, the Joint Petitioners request that the Commission approve the provisions of the settlement under which PSNH releases certain types of claims. They maintain that this is a common provision in commercial settlements and is similar to releases approved by the Commission in other dockets. They argue that the release provisions were necessary to achieve the related public policy benefits and allow the commercially reasonable "finality" to their transactions with each other.

B. Freedom Logistics, LLC d/b/a Freedom Energy Logistics, Halifax- American Energy Company, LLC and PNE Energy Supply LLC

In their written closing statement, FEL, HAEC and PNE argue that the Wood IPPs, as "qualified facilities," have chosen to negotiate a rate with PSNH rather than pursue their rights to sell under a under a long-term contract or rate order. According to them, FERC must find pursuant to 18 CFR § 292.304 (a)(i) that the resulting negotiated rates are just and reasonable to the electric consumer of the electric utility and in the public interest. They concede that given PSNH's obligation to enter into a long-term contract, the resulting negotiated rates under the PPAs for periods of approximately 2 ½ years are just and reasonable. They further argue that pursuant to state law, the negotiated rates under the PPAs are reasonable and in the public interest for the reasons testified to by Commissioner Bald, and recovery thereof by PSNH should not be disallowed pursuant to RSA 374:57. Finally, FEL, HAEC and PNE state that if the Commission does approve a *de facto* recovery of above-market costs of the PPAs through a non-bypassable charge, its approval should clearly state that the recovery method is temporary and

not permanent, not precedential, and only for the limited purposes and duration described by Staff Advocate witness Frantz.

C. Office of Consumer Advocate

In its written closing statement, OCA argues that the PPAs are not lawful and must be rejected. OCA states that in determining whether the PPAs are reasonable and in the public interest, the Commission must consider the price to be paid within the context of RSA 369-B:3,IV(b)(1)(A) (default service must be provided at the Company's "actual, prudent and reasonable" costs). Viewed from the perspective of a PSNH customer, paying millions of dollars of above-market costs for electric service is neither reasonable nor prudent. OCA also complains that the proposed ratemaking treatment, in which the above-market portion of the PPAs will be shifted from PSNH's energy service rate to its distribution rate, would result in energy service rates for PSNH energy service customers that do not accurately reflect actual costs and impose costs associated with energy on customers who choose a competitive supplier. Such a result, according to OCA, is neither fair nor lawful.

OCA refers to the possibility that, under the initially proposed ratemaking treatment, the actual costs could exceed the Joint Petitioners' current estimate of their total over market cost of $25.2 million and, if so, the Joint Petitioners' ratemaking treatment also includes deferral of PSNH's recovery of over market PPA costs if they are more than $8.5 million per year. They also note that under this proposal PSNH customers will be required to pay carrying costs for the period of any deferral.

OCA maintains that proposals to shift other costs in order to "make room" in its energy service rate for the PPAs' above-market costs do not cure these legal defects and contravene PSNH's commitments regarding recovery of these same costs.

OCA asserts that the balance of interests between PSNH's ratepayers and its shareholders in accordance with, for example, RSA 363:17-a, tips to the detriment of ratepayers because PSNH's ratepayers will be harmed while PSNH's shareholders, who obtain no benefits and run no risks under the proposed ratemaking treatment, are agnostic. OCA notes that RSA 374:57 does not require the Commission to consider the interests of the Wood IPPs or putative benefits of the PPAs to the general public. OCA asserts that had the Joint Petitioners structured the PPAs to include the purchase of renewable energy certificates (RECs), the Commission could have reviewed the PPAs under RSA 362-F:9, which authorizes the Commission to approve certain multi-year agreements providing for the purchase by electric distribution companies of power and RECs, after considering a number of different public interest factors, including economic and environmental benefits. Acknowledging the benefits put forth in support of the PPAs, OCA nevertheless maintains that, particularly with respect to electric restructuring and the regulation of PSNH, the legislature has specified that rates be unbundled, competitive and market driven under RSA 374-F:3. OCA maintains that where the legislature deems a particular goal to be in the public good, it so states and creates specific mechanisms for carrying out that policy, such as the ratepayer subsidies through the RPS law.

OCA concludes that to approve an above-market contract for electricity, the Commission must have specific, express authorization from the legislature and that if above-market contracts for electricity are necessary to prevent the Wood IPPs from closing, the legislature and not the Commission should so require. In addition, OCA objects to any Commission reliance on factual assertions contained in data responses which were not sponsored by a party's witness since they were not provided under oath or subjected to cross examination.

Finally, OCA states that if the Commission approves the PPAs, the Commission do so only with the following conditions: (1) energy costs may not be shifted from energy service to distribution costs as that would be contrary to law and would violate the settlement and the Commission order in DE 09-035, (2) any above-market costs that the Commission requires ratepayers to pay under the PPAs must be collected through a separate charge on customer's bills in order to increase transparency and allow ratepayers to understand the choice made on their behalf, (3) any recovery of costs should reflect the actual costs each year, without any deferrals that increase costs to customers, (4) any recovery of above-market costs should be for as short a period as possible, and (5) the Commission should make clear that any approval of above-market purchases by a utility on behalf of its customers is not precedential.

D. Non-Advocate Staff

Non-Advocate Staff Steven E. Mullen pre-filed direct testimony regarding the three main issues in this case: should the PPAs be approved, should the settlement agreement be approved, and how should PSNH recover of the costs of the PPAs? With regard to the settlement agreement, Mr. Mullen stated that without more specificity provided in relation to the claims being released and by what parties, it is unclear how an informed decision can be made regarding approval of the settlement agreement. He also stated that the connection between the Commission's approval of the settlement agreement and its ratemaking authority, the basis for approving the settlement agreement referred to by PSNH, is not clear.

Mr. Mullen described the PPAs in general terms, without disclosing any information for which a claim of confidential treatment had been made. He stated that each PPA has an established base energy price per megawatt-hour that stays constant for any portion of a calendar year encompassed by the agreement. The PPAs provide for separate quarterly payments to or

from the Wood IPPs, depending on the extent to which delivered wood prices are either above or below the initial wood price identified in each agreement.

As part of the calculation of the fuel adjustment to be made quarterly over the duration of the PPAs, each of the PPAs provides that the initial wood price is subject to verification, review and approval by the Commission. Mr. Mullen stated that, based on his own calculations, the initial estimates made by Mr. Labrecque and Mr. Frantz of the amount by which the PPAs are above-market continue were reasonable. He also said that changes in circumstances since their estimates were first made have essentially offset one another, leaving the above-market estimate virtually unchanged. More specifically, he opined that the shorter lengths of the periods during which energy purchases will actually be made under the PPAs, which is caused by the simple passage of time, offset the recent decline in the energy futures prices, which would increase the above-market calculation.

According to Mr. Mullen, the initial wood prices were based on the examination of actual wood prices paid at the respective Wood IPP plants over the prior six to twelve month period. Pursuant to each PPA, the initial wood prices are to be verified and reviewed, and ultimately approved by the Commission. Mr. Mullen stated that the review was accomplished through a review and audit of wood fuel price information in order to verify that the initial wood prices fairly and reasonably reflect wood prices actually paid by the Wood IPPs at a time near the commencement of the PPAs. Mr. Mullen explained that the review was held on September 20, 2011, at the offices of the attorneys for the Wood IPPs. In addition to Mr. Mullen, Mr. Frantz of the Staff Advocates and Stephen Eckberg of OCA participated in the review of detailed wood deliveries by date, supplier, tonnage, cost per ton and total amount paid. Based on the review, Mr. Mullen found that the information was well organized and supported the initial wood prices

stated in the PPAs and he offered his testimony as a verification report. Accordingly, Mr. Mullen recommended that if the PPAs are approved, the initial wood prices be included in the approval. Mr. Mullen noted that one of the PPAs commences in mid-2012. He said that for that agreement, the review of the initial wood price will have to take place at a later date.

According to the petition, the Joint Petitioners seek Commission approval of the PPAs pursuant to RSA 374:57 and the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. 824a-3 regarding energy contracts with wholesale generators and the FERC implementing regulations, 18 C.F.R. 292.301(b) and 18 C.F.R. 292.304(a)(1)(i), as well as RSA 369-B:3,IV(b)(1)(a) regarding supplemental power purchases by PSNH. Mr. Mullen noted that he was not an attorney but he stated that to him the references to "public interest" in the laws indicate that the PPA energy prices to be paid relative to the market and rate impacts are not the only factors that may be considered in determining whether the PPAs should be approved and that factors based on other public interests and public policies, such as the impacts to the state and local economies and the wood industry, as well as the effect on the jobs of those employed both directly and indirectly by the plants, are also relevant. In addition, he described RSA 362-A:8,II(b) which sets forth certain factors, including but not limited to rate impacts, to be considered by the Commission in connection with making decisions affecting qualifying small power producers. Mr. Mullen said he would not recommend approval of the PPAs if the analysis was simply one of whether the energy prices in the PPAs are above-market; however, referencing the policy interests and considerations described in the pre-filed testimony and discovery responses of the Joint Petitioners as well as in various comment letters submitted to the Commission, Mr. Mullen concluded that, when the numerous public interest and public policy considerations advanced in support of the PPAs are taken into account along with the

relatively short-term nature of the PPAs and the other facts and circumstances of this case, there is a sufficient basis upon which the PPAs may be approved. Regarding the proposed method of cost recovery for the above-market costs of the PPAs, Mr. Mullen noted that there appeared to be a discrepancy between PSNH and Staff Advocates as to whether the transfer of the $8.5 million to be transferred from recovery through PSNH's energy service rate to its distribution rate was to be temporary or permanent. He stated that according to PSNH, the duration of the transfer should be permanent while Staff Advocates stated that the transfer was not intended to be permanent.

He further stated that according to the Joint Petitioners, the $8.5 million to be transferred was based on an estimate of the typical annual quantity of uncollectible and regulatory assessment expenses that are allocated to energy service for recovery. He did not agree with PSNH's assertion that the allocation of costs pertaining to uncollectible and regulatory assessment expenses do not correlate to the quantity of energy service provided. He argued that if, for example, PSNH's energy service load migration to competitive supply increases by 50%, PSNH would have less energy service sales and less energy service revenue. With lower energy service sales, he maintained that total uncollectible expense directly attributable to the quantity of energy service provided will decrease, and with lower energy service revenues, PSNH's gross utility revenue on which the PUC assessment is based will also decrease. He asserted that there is a definite relationship between uncollectible expenses and regulatory assessment expenses on the one hand and the quantity of energy service provided on the other hand and that this reality is reflected in the previous Commission–approved rate settlements in DE 06-028 and DE 09-035 that included the $8.5 million as allocable to energy service rather than to distribution service. He described the transfer as a clawback of items that were previously bargained for, especially in

view of PSNH's position that the transfer should be permanent. He recommended that if the Commission approves the transfer of costs to distribution rates, the transfer only be for the duration of the PPAs.

Mr. Mullen offered for consideration several possible alternatives to the proposed $8.5 million cost transfer that would avoid upward pressure on PSNH's energy service rates having the PPAs in PSNH's energy service portfolio: (i) defer all above-market costs of the PPAs for future recovery through the energy service rate; (ii) recover the above-market costs of the PPAs through the stranded cost recovery charge (SCRC); or (iii) defer all above-market costs of the PPAs for future recovery in a method to be determined by the legislature. Regarding the first alternative, he said that deferring all the above-market costs for future recovery through the energy service rate would provide a simpler method of treating the above-market costs than that proposed in the petition and recovery of the deferred amount could commence whenever either the energy price in the PPAs becomes below market or PSNH's energy service rate becomes lower than its marginal cost of supplemental power. He stated that one disadvantage to this approach is that, given the uncertainty of future market prices, the deferred amount may not be recovered for quite some time.

Regarding the second alternative, he said that recovery of the above-market costs through the SCRC would be consistent with the treatment of above-market costs of independent power producer contracts in existence at the time electric industry restructuring was implemented in PSNH's service territory. He said that an argument could be made that the contracts qualify as "new mandated commitments approved by the commission" pursuant to RSA 374-F:2,IV(c). He noted the contracts are new but raised the question of whether they are "mandated" as set forth in the restructuring statute. He said that, since there has been significant justification for

the PPAs as furthering important state policy goals, that could be considered to be a form of "mandate" though he also acknowledged that the issue is not clear-cut. The rate impact of this alternative would be the same as the $0.00111 per kilowatt-hour described in Mr. Frantz' testimony but Mr. Mullen suggested that one way to mitigate any change to the SCRC would be to begin recovery of the over-market PPA costs after Part 1 of PSNH's SCRC terminates on April 30, 2013.

Regarding the third alternative, Mr. Mullen stated that considering the wide-ranging public policy goals put forth as justifications for approval of the PPAs and the economic impact of the operation of all the Wood IPP facilities, along with the intent to allow time for potential solutions to be developed at the legislature, it makes sense that recovery of the above-market costs be part of any legislative solution. Mr. Mullen suggested that one legislative solution would be to amend RSA 374-F:2,IV(c) to specifically allow recovery of the above-market costs to be recovered through PSNH's SCRC; another would be to allow the above-market costs to be made in lieu of alternative compliance payments otherwise required from PSNH pursuant to RSA 362-F. He said that under this alternative, the above-market power costs would be recovered through PSNH's energy service rate but there would be no impact as those costs would substitute for alternative compliance payments, which are included in the energy service rate calculations.

Non-Advocate Staff submits as its written closing statement that, taking into account the pre-filed testimony as well as the testimony and exhibits introduced at hearing, there is a complete record upon which the Commission can base its decision in this docket.

III. COMMISSION ANALYSIS

Joint Petitioners ask us to approve five PPAs, the proposed ratemaking treatment for recovering the costs paid by PSNH under the PPAs, and PSNH's entry into a related settlement agreement, including PSNH's release of claims to the Wood IPPs. We treat the issues in turn.

A. PPAs

The PPAs provide for PSNH's purchase of unit contingent energy from the Wood IPPs; they do not involve the purchase of capacity or RECs. The contract terms of the PPAs vary somewhat but all are relatively short term with durations of less than two years. Quantity caps also apply to the purchases, ranging from 192,500 MWh to 275,940 MWh. The price for the energy supplied under all of the PPAs is $69 per MWh, payable monthly. Quarterly fuel price adjustment payments are also provided for under each of the PPAs. These payments may be made either by PSNH to the Wood IPP or from the Wood IPP to PSNH depending on whether the actual wood price paid is greater than or less than an initial wood price stated in the PPA. The amount of the quarterly fuel price adjustment, expressed in dollars per ton, is determined by somewhat different formulas under each PPA, but the resulting payments under all the PPAs are based on an adjustment multiplier of 1.8 tons per MWh.

The Joint Petitioners admit that the PPAs are expected to be significantly above-market. In the initial filing, PSNH provided an estimate of above-market costs totaling almost $24 million.[4] Prefiled testimony of PSNH witness Richard Labrecque, Exhibit 1, at 6. At hearing, PSNH provided an updated above-market estimate of approximately $25.2 million, based on an assumed effective date of January 1, 2012, and more recent forward market prices.

[4] This estimate assumed 100% delivery of the maximum quantities of energy in each of the PPAs, then-recent forward market prices for energy in New England, and an average fuel price adjustment of $2 per ton over the terms of the PPAs. Prefiled testimony of PSNH witness Richard Labrecque, Exhibit 1, at 6.

1. Statutory Review

We begin with the general proposition that the energy purchases under the PPAs constitute "supplemental power purchases" consistent with RSA 369-B:3,IV(b)(1)(A), which provides in part that:

> until the completion of the sale of PSNH's ownership interests in fossil and hydro generation assets located in New Hampshire, PSNH shall supply all, except as modified pursuant to RSA 374-F:3, V(f),[5] transition service and default service offered in its retail electric service territory from its generation assets and, if necessary, through supplemental power purchases in a manner approved by the commission. The price of such default service shall be PSNH's actual, prudent, and reasonable costs of providing such power, as approved by the commission.[6]

Preliminarily, the statute requires that supplemental power purchases be "necessary." At hearing, PSNH testified that the PPAs meet a shortfall in PSNH's energy service load that is not met by PSNH's own generation. Day 1 Transcript (Tr.) Redacted at 129-130. No party disputed that testimony and we note that it comports with our findings regarding PSNH's projected default service needs in Order No. 25,213 (April 18, 2011) at 80-82. Accordingly, we find that the energy purchases under the PPAs are "necessary" as required by the statute.

Secondarily, the price of such energy service must be PSNH's "actual, prudent, and reasonable costs" of providing such power as approved by the Commission. OCA argues that, viewed from the perspective of PSNH customers, paying millions of dollars of above-market costs for electric service is neither reasonable nor prudent. OCA further argues that, particularly with respect to electric restructuring and the regulation of PSNH, the Legislature has specified that rates be unbundled, competitive and market driven under RSA 374-F:3. OCA concludes

[5] RSA 374-F:3, V(f) authorizes the Commission to approve alternative means of providing default energy service, including a renewable energy service option. *See e.g., Public Service Company of New Hampshire*, Order No. 25,080 (March 5, 2010) (approved implementation of a proposed renewable default energy service rate pursuant to RSA 374-F:3, V(f) as modified by a partial settlement agreement).

[6] Although this statute appears in a chapter that describes conditions the Commission must impose on PSNH in exchange for securitization of certain stranded costs, the Commission has treated the provisions of RSA 369-B:3 as directly binding legislative directives. *Public Service Company of New Hampshire*, Order No. 24,117 (January 30, 2003) at 39.

that to approve an above-market contract for electricity, the Commission must have specific, express authorization from the Legislature and that such authorization is lacking under the current law.

RSA 369-B:3, IV(b)(1)(A) neither expressly prescribes nor expressly proscribes supplemental purchases in excess of market rates. In all likelihood, putting aside the prudence or reasonableness of the corresponding non-price contractual terms, supplemental purchases at or below market rates would tend to be construed prudent and reasonable. The statute, however, does not require that supplemental purchases be made only at or below market rates. The Commission thus has the greater duty to consider whether energy service rates, and by implication supplemental purchases, are prudent and reasonable. Consequently, we consider whether these PPAs are prudent and reasonable and in doing so we look to other statutes for guidance.

We turn next to RSA 374:57, which reinforces the general proposition that PSNH may purchase energy under the PPAs, and employs reasonableness and the public interest as the appropriate standards. That statute provides in part that:

> The commission may disallow, in whole or part, any amounts paid by [an electric] utility under any . . . agreement [filed with the Commission including an agreement for the purchase of energy, whether or not the agreement is FERC jurisdictional] if it finds that the utility's decision to enter into the transaction was unreasonable and not in the public interest.

RSA 374:57 contemplates the possibility of the Commission's disallowance of costs. We will treat the petition as a request, made in advance of costs being incurred under the PPAs, that the Commission not disallow the costs and instead find that PSNH's entry into the PPAs is reasonable and in the public interest. Because a decision on whether PSNH's entry into the PPAs is reasonable and in the public interest does not depend on future events or information

only available in the future, we conclude that it may properly be made now based on the record before us, consistent with RSA 374:57. *See EnergyNorth Natural Gas, Inc.*, Order No. 24,825 (February 29, 2008) (Commission approved company's agreement with Tennessee Gas Pipeline (TGP) for firm gas transportation to provide company with additional capacity on the Concord Lateral, in advance of TGP's construction and operation of facilities necessary to render firm transportation service and company's incurrence of annual demand costs).

In addition, there are numerous additional statutes that address the public interest from both broad and narrow perspectives. Among others, we have considered RSA 378:37, RSA 362-A:1, RSA 374-F:3, RSA 362-F:1, and RSA 362-F:9. In our statutory review, we do not find either an outright prohibition on such agreements or explicit authority in support of such agreements. However, we find several instructive statutes.

We start by considering that the Legislature has not limited the State's overall energy policy to meeting the energy needs of the state at the lowest possible cost in every case. Under RSA 378:37, New Hampshire's energy policy is to meet energy needs at the lowest *reasonable* cost while also providing for, among other things, the diversity of energy sources and the protection of the safety and health of the citizens, the physical environment of the state, and the future supplies of nonrenewable resources.

Other statutes similarly indicate that factors other than cost are to be considered. The legislature has described the purpose of the Limited Electrical Energy Producers Act, RSA 362-A, as follows:

> It is found to be in the public interest to provide for small scale and diversified sources of supplemental electrical power to lessen the state's dependence upon other sources which may, from time to time, be uncertain. It is also found to be in the public interest to encourage and support diversified electrical production that uses indigenous and renewable fuels and has beneficial impacts on the environment and public health. It is

> also found that these goals should be pursued in a competitive environment pursuant to the restructuring policy principles set forth in RSA 374-F:3 . . . . RSA 362-A:1.

One of the applicable policy principles of RSA in 374-F:3 provides in part:

> Increased future commitments to renewable energy resources should be consistent with the New Hampshire energy policy as set forth in RSA 378:37 and should be balanced against the impact on generation prices. Over the long term, increased use of cost-effective renewable energy technologies can have significant environmental, economic, and security benefits . . . . RSA 374-F:3,IX.

Among the provisions of the Limited Electrical Energy Producers Act is one stating that the Commission shall "in all decisions affecting qualifying small power producers[7] . . . consider the following factors in its decisions:

> (1) The economic impact upon the state, including, but not limited to, job loss or creation through the utilization of indigenous fuels for electric generation.
>
> (2) The community impact including, but not limited to, property tax payments and job creation.
>
> (3) Enhanced energy security by utilizing mixed energy sources, including indigenous and renewable electrical energy production.
>
> (4) Potential environmental and health-related impacts.
>
> (5) The impact on electric rates. RSA 362-A:8.

Under this statute, it is apparent that to the extent our decision on whether to approve the PPAs is a "decision affecting" the Wood IPPs, cost impact is only one factor to be considered along with four other non-cost factors.

The importance of renewable energy generation to the state is further underscored by the RPS law, whose purpose as set forth in RSA 362-F:1 recognizes that:

> Renewable energy generation technologies can provide fuel diversity to the state and New England generation supply through use of local renewable fuels and resources that

[7] As each of the Wood IPPs' facilities are under 30 MW in size and have been deemed qualified in the past, we conclude that the Wood IPPs may be treated as small power producers under the applicable definition in RSA 362-A:1-a,VIII, IX.

> serve to displace and thereby lower regional dependence on fossil fuels. This has the potential to lower and stabilize future energy costs by reducing exposure to rising and volatile fossil fuel prices. The use of renewable energy technologies and fuels can also help to keep energy and investment dollars in the state to benefit our own economy. In addition, employing low emission forms of such technologies can reduce the amount of greenhouse gases, nitrogen oxides, and particulate matter emissions transported into New Hampshire and also generated in the state, thereby improving air quality and public health, and mitigating against the risks of climate change. It is therefore in the public interest to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities.

In furtherance of this purpose, the Commission is authorized by RSA 362-F:9,I to permit electric distribution companies to enter into multi-year purchase agreements with renewable energy sources for RECs in conjunction with or independent of purchased power agreements from such sources, to meet reasonably projected renewable portfolio requirements and default service needs to the extent of such requirements, if it finds such agreements, as may be conditioned by the Commission, to be in the public interest after balancing the factors set forth in section 9,II. RSA 362-F:9 is not directly controlling in this case because the PPAs do not provide for the purchase of any RECs. However, the statutory balancing test is yet another example of the Legislature saying that cost is not always the only consideration that may be taken into account. Applying that test, the Commission balances a number of cost and non-cost factors:

(a) The efficient and cost-effective realization of the purposes and goals of [RSA Ch. 362-F];

(b) The restructuring policy principles of RSA 374-F:3;

(c) The extent to which such multi-year procurements are likely to create a reasonable mix of resources, in combination with the company's overall energy and capacity portfolio, in light of the energy policy set forth in RSA 378:37 and either the distribution company's integrated least cost resource plan pursuant to RSA 378:37-41, if applicable, or a portfolio management strategy for default service procurement that balances potential benefits and risks to default service customers;

(d) The extent to which such procurement is conducted in a manner that is administratively efficient and promotes market-driven competitive innovations and solutions; and

(e) Economic development and environmental benefits for New Hampshire.

An example of a case in which an investment decision based on factors in addition to cost was deemed reasonable and in the public interest is found in *Appeal of Pinetree Power*, 152 N.H. 92 (2005), an appeal brought by three of the Wood IPPs and another wood plant of a Commission decision to approve a modification requested by PSNH of its Schiller Unit 5 generation facility to permit it to burn wood as well as fossil fuels. The Commission determined that the modification would not be in the public interest of PSNH's retail customers because of the cost recovery terms proposed by PSNH, but ruled that the modification could be in the public interest of PSNH's retail customers and the public, in general, if PSNH met certain additional conditions. *Id.* at 94. Subsequently, however, the Commission found the proposed Schiller Project, as conditioned by the terms set forth in a reconsideration motion, to be in the public interest of PSNH's retail customers as required by RSA 369-B:3-a. *Id.* at 95. The appellants argued that PSNH cannot modify or retire its generating facilities unless doing so is in the "public interest of PSNH's retail customers," under RSA 369-B:3-a and that the interest to which the PUC must give priority is rate relief. The Court disagreed, stating that other statues, including RSA 374-F, were instructive on what can be found to be in the public interest. *Id.* at 96. The Court found that the customer benefits of restructuring clearly include rate relief but held that the statutory scheme supports the conclusion that the "public interest" even of PSNH's customers alone encompasses more than simply rates. *Id.*

In light of the statutes and case law discussed above, we conclude that market prices are not the sole or dispositive criterion for evaluating the PPAs. The legislative scheme developed

over time as evidenced throughout RSA Title XXXIV sets forth a variety of purposes and factors, which expresses recurring themes favoring fuel diversity and renewables, economic development, environmental and health impacts, and energy security, and which grants substantial discretion to the Commission relative to rate setting. As a result, we may consider non-cost factors in our determination of whether the PPAs are reasonable and in the public interest.

2. Public Benefits

In determining whether the PPAs are in the public interest, and whether it was prudent and reasonable for PSNH to enter into them, we examine the public benefits asserted by the Joint Petitioners in relation to the projected over market costs. The Joint Petitioners testified to important benefits for the public to be gained from the PPAs and settlement agreement. As they describe the transaction, it comprises an important part of the State's economic development strategy for the North Country. For example, the settlement agreement provided a means for the financing and construction of the Berlin Station power plant and funding for Isaacson Structural Steel Company to go forward, with the resulting preservation of substantial financial benefits to the North Country. Moreover, we are mindful that the Commission has previously found that the Berlin Station project is in the public interest under the conditions set forth in Order No. 25,213 (April 18, 2011) and, in Order No. 25,239 (June 23, 2011), has found that the amended power purchase agreement complied with those conditions. The record in this case also indicates that Commission approval will permit the Wood IPPs to remain open during their contract terms, whereas it is likely that these plants otherwise would shut down. According to the Joint Petitioners, Commission approval will result in statewide and local benefits through the retention

of 120 jobs at Wood IPPs' facilities, the retention of hundreds of jobs for loggers, truckers, and other forest industry workers, and state and local tax payments totaling at least $1.6 million.

The PPAs entail total costs of approximately $71 million, about $25 million of which is projected to be over market. Staff Advocate witness Frantz initially estimated the overall rate impact of the PPAs to be approximately $0.00111 per kWh, while the total distribution rate was expected to increase by 1.66%. He said that for a residential customer using 500 kWh per month, the effect would be a monthly increase of $0.55. At hearing, he clarified that his estimate of the overall rate impact was based on the addition of $8.5 million to be recovered through the distribution rate under the Joint Petitioners' proposed ratemaking treatment and that, although the estimated above-market costs had increased since the initial filing, his estimate of the overall rate impact would stay the same because the $8.5 million addition would not change. Day 1 Redacted Tr. at 127-128. However, he said the increase would affect the expected period of time over which the above-market costs would be recovered. Day 1 Redacted Tr. at 128. On the other hand, the energy price under the PPAs of $69 per MWh is slightly less than the starting base energy price of base energy price of $69.80 the Commission approved in Order No. 25,213 (April 18, 2011) and the terms of the PPAs are much shorter than the power purchase agreement the Commission approved for the Berlin station project.

The Commission's balancing role in this proceeding is not limited to the interests of PSNH's customers as ratepayers and PSNH's shareholders, as the OCA supposes. Consistent with the various statutory purposes and factors discussed above, the public interest affected by the PPAs is broader and encompasses PSNH ratepayers as New Hampshire citizens and residents, and incorporates public benefits in terms of economic development, job retention and creation, community impact related to property tax payments, enhanced energy security, and

potential environmental and health-related impacts. As we consider the public interest effects of the PPAs we conclude that the public benefits identified by the Joint Petitioners outweigh the projected over market costs.

3. PURPA

The petition also requests approval of the PPA pursuant to PURPA, 16 U.S.C. 824a-3. According to PSNH, the Wood IPPs are qualified facilities as defined in PURPA and must remain so during the applicable terms of the PPAs. Prefiled testimony of PSNH witness Richard Labrecque, Exhibit 1, at 3, lines 4-6. Further, according to PSNH, the applicable PURPA standard for the rates paid by an electric utility for the energy from a qualified facility is that they be "just and reasonable to the electric consumer of the electric utility and in the public interest," citing 18 CFR section 292.304(a)(i). *Id.* at 4, lines 2-4. FEL, HAEC and PNE point out that an electric utility or a qualifying facility may agree to rates, terms or conditions that differ from what would otherwise be required under FERC regulations. At the same time, they assert that FERC must find that the negotiated rates are just and reasonable to the electric consumer of the electric utility and in the public interest, while simultaneously opining that "it would appear that the resulting negotiated rates…are just and reasonable." Closing Statement, p.4. As we understand the argument, they are not arguing that the Commission lacks authority to act on the petition. In any event, while the PURPA standard may be instructive for purposes of applying state law, in this case we do not rely on Federal law as a necessary source of PSNH's authority to purchase the supplemental power or our authority to review and approve the PPAs.

4. Initial Wood Prices

We are specifically requested to approve the initial wood prices set forth in the PPAs. Non-Advocate Staff presented testimony that representatives of Staff Advocates, OCA and Non-

Advocate Staff reviewed detailed historic wood price information for each of the Wood IPPs except Springfield Power, LLC and stated that the information was well organized and adequate to support the initial wood prices as being fairly and reasonably representative of the wood prices actually paid by the Wood IPPs at a time near the commencement of the PPAs. Direct Testimony of Steven Mullen, Exhibit 6, at 10-11. Accordingly, Non-Advocate Staff recommended that if the Commission approves the PPAs , the initial wood prices stated in the PPAs be included in the approval. *Id.* at 11. No party challenged that testimony and we will accept it and approve the initial wood prices stated in the PPAs.

As for the PPA involving Springfield Power, LLC, since the term does not commence until the later of Commission approval or June 1, 2012, Non-Advocate Staff indicates that a similar verification process would take place at a later time to establish the initial wood price within the range set forth in that PPA. *Id.* We conclude that such a procedure is appropriate and we will direct Joint Petitioners to notify the Commission of the initial wood price in accordance with the PPA. Non-Advocate Staff will then conduct a review of the wood price and file a report with the Commission regarding the results of the review and verification of the initial wood price. Staff Advocates and OCA will be invited to participate in that review. The initial wood price applicable to the Springfield Power, LLC PPA will be subject to our approval.

5. Conclusion

We find, under the particular circumstances present in this case, that the PPAs are in the public interest and that the resulting costs to ratepayers are reasonable and prudent. We note as well that this finding is consistent with the Commission's ruling in Docket No. DE 02-166, Order No. 24,177 (January 30, 2003) that only the market value of IPP power was intended by the Legislature to be included in PSNH's "actual, prudent and reasonable costs" of providing

Transition Service. The "IPP power" referred to in DE 02-166 was related to historic agreements considered as part of the bargain in the PSNH Restructuring Agreement and the balance the Legislature sought in enacting RSA Chapter 369-B. The PPAs with the Wood IPPs do not constitute IPP power in precisely the same way, but the underlying principle applies. Specifically, in assessing the public interest, and having determined that there are public benefits in approving the above market prices in the PPAs, it is reasonable to allocate the market portion of the PPAs to energy service and to allocate the above market costs to all customers in some fashion. We discuss below the appropriate method of recovery.

Finally, under RSA 378:41, we are required to reference conformity of our decision with the least cost plan most recently filed and found adequate. PSNH addressed this issue in its rebuttal testimony, stating that

> PSNH's 2007 Least Cost Integrated Resource Plan reviewed by the Commission in Docket No. DE 07-108 discussed the requirement under federal law to interconnect and purchase the generation from generators deemed to be Qualifying Facilities ("QF") under the Public Utility Regulatory Policies Act ("PURPA"). PSNH further clarified its obligations under PURPA more recently in Docket No. DE 09-067, *Complaint of Clean Power Development*. At the margin, PSNH is always participating in the energy market to buy/sell supplemental power needs. To that end, the 2007 Least Cost Integrated Resource Plan also notes that "PSNH will also explore opportunities to increase its supply base through contracts for durations of greater than one-year from merchant generators, providing energy, capacity, and Renewable Energy Certificates if eligible." Rebuttal testimony of Stephen Hall, Exhibit 4, at 9-10.

Based on the record before us, we are satisfied that our decision to approve the PPAs sufficiently conforms to the least cost integrated resource plan that the Commission accepted in *Public Service Company of New Hampshire*, Order No. 24,945 (February 27, 2009) in Docket No. DE 07-108.

B. Rate Recovery Method

Having determined that the PPAs are prudent, reasonable and in the public interest, we next consider the appropriate ratemaking methodology for PSNH's recovery of its costs. A number of methods have been presented for our consideration, including an initial proposal by the Joint Petitioners, an alternative offered by the Joint Petitioners, some possible ratemaking approaches discussed by Non-advocate Staff, and a set of possible conditions described by OCA.

Under the Joint Petitioners' initial proposal, the energy procured under the PPAs would be used as part of PSNH's energy service portfolio and recovered as part of that rate. However, to avoid any increase in the energy service rate that may result from the PPAs, PSNH would transfer a liquidated amount of $8.5 million of costs associated with uncollectible and regulatory assessment expenses from its energy service rate to its distribution rate. In a discovery response, PSNH opined that these uncollectible and assessment expenses are not energy related and could be appropriately transferred.

OCA maintains that the proposed ratemaking treatment, in which the above-market portion of the PPAs will be shifted from PSNH's energy service rate to its distribution rate, would result in energy service rates for PSNH energy service customers that do not accurately reflect actual costs and impose costs associated with energy on customers who choose a competitive supplier. Such a result, according to OCA, is neither fair nor lawful. Non-Advocate Staff criticized Joint Petitioners' initial proposal on grounds that the allocation of costs pertaining to uncollectible and regulatory assessment expense is in fact correlated with the quantity of energy service provided, a reality that is reflected in Commission-approved distribution rate settlements, which included portions of uncollectible and regulatory assessment expenses as allocable to energy service rather than distribution service based on allocation of

costs to functional rate components according to revenues.[8] In its written closing statement, OCA echoed Non-Advocate Staff's criticisms.

At hearing, Joint Petitioners supported their initial proposal by stating that uncollectible and regulatory assessment expenses are part of common administrative and general costs that are not directly related to supplying power. Day 1 Tr. Redacted at 46-47, 77-78. They also pointed out that in the past such expenses were recovered through PSNH's distribution rate and stated generally that no method of allocating common costs is perfect. However, it became apparent at hearing that the $8.5 million figure exceeds the approximately $6.1 million of actual, recent uncollectible and regulatory assessment expenses associated with energy service, which weighs against this approach. Exhibit 17; Day 1 Tr. Redacted at 91-92.

The Joint Petitioners, however, propose as an alternative a new, temporary charge for PSNH's recovery of the above-market costs, based on the broad discretion traditionally afforded the Commission to regulate rates. As expressed by the New Hampshire Supreme Court:

> "[w]hile the authority of the Commission 'does not extend beyond expressed enactment or its fairly implied inferences' (*Petition of Boston & Maine R. R.*, 82 N.H. 116, 129 A. 880), as was pointed out in *State v. N. H. Gas & Elec. Co., supra, 86 N.H. 30, 163 A. 731,* the authority of the Commission to regulate rates 'is plenary save in a few specifically excepted instances.' *Lorenz v. Stearns*, 85 N.H. 494, 506, 161 A. 205." *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394, 397 (1961). *See also Bacher v. Public Service Company of New Hampshire*, 119 N.H. 356, 357-358 (1979), *Legislative Utility Consumers' Council v. Public Service Company of New Hampshire*, 119 N.H. 332, 341 (1979).

Moreover, the statutory standards for the sufficiency of ratemaking decisions do not require the Commission to "determine the outcome using any specific methodology, so long as the result is consistent with the 'public interest' and the rates are 'just and reasonable.'" *Northern Utilities,*

[8] The rate settlements were approved in *Public Service Company of New Hampshire*, Order No. 24,750 (May 25, 2007) in Docket No. DE 06-028 and *Public Service Company of New Hampshire*, Order No. 25,123 (June 28, 2010) in Docket No. DE 09-035.

Inc., Order No. 23,674 at 21-22 (April 5, 2001) (citing *Appeal of Richards*, 134 NH 148 (1991); see also *New Hampshire Natural Gas Utilities*, Order No. 24,508 at 10 (September 1, 2005).

RSA 369-B:3,IV(b)(1)(A) specifies that the price of PSNH's energy service must be its "actual" as well as "prudent, and reasonable" costs of providing such power, as approved by the Commission. Under this statute, the Commission is required to exercise its discretion in deciding whether the price of PSNH's energy service meets the statutory standard. The statute does not require that all costs of providing energy service must necessarily be recovered entirely through the energy service rate in all cases. Order No. 24,117 (January 30, 2003) illustrates this point. In that order, the Commission ruled that, notwithstanding the language of RSA 369-B:3,IV(b)(1)(A), the above-market costs of certain independent power producer contracts should be recovered through PSNH's stranded cost recovery charge and not its transition service rate. *Id.* at 35. While we do not view the above-market costs of the PPAs as being stranded costs within the strict definition set forth in RSA 374-F:2, IV, as they are not costs that are unrecoverable due to the deregulation of generation, *see New Hampshire Public Utilities Commission Statewide Restructuring Plan*, 143 N.H. 233, 236 (1998), they are analogous to the stranded, above-market costs at issue in Order No. 24,117. From this, we conclude that we are not prohibited from approving a new, temporary charge for PSNH's recovery of the above-market costs, though we do not adopt the specific alternative proposed by the Joint Petitioners.

Our decision to approve the PPAs and permit recovery of over-market costs through a non-bypassable charge, moreover, does not run contrary to the Commission's decision in Docket No. DE 10-160, Order No. 25,256 (July 26, 2011) relative to PSNH customer migration. In that case, it was determined that imposing a non-bypassable charge to pay a portion of PSNH's fixed generation costs would constitute unfair cost shifting to customers that have taken advantage of

competitive supply. This case is distinguishable in that the costs that are being recovered from all customers, which are non-bypassable, are costs associated with public benefits that accrue to all PSNH customers, whether they take default energy service or competitive supply. Thus, there is no unfair cost shifting to customers who have taken advantage of competitive supply.

As a further matter of context, FEL, HAEC and PNE assert that the increase in customers' rates is relatively small. Written closing statement at 1. Correspondingly, to the extent PSNH's energy service rates do not exactly reflect the actual costs of providing power if a new, temporary charge is imposed, the rate differential is not significant. More to the point, however, in view of the widespread public benefits to be gained from approval of the PPAs, it is reasonable in this case for the above-market costs to be assigned more widely than to just energy service customers.

It would be within our authority to adopt the Joint Petitioners' preferred approach, which effectively treats the over-market costs as fungible dollars to be recovered through a non-bypassable charge by relying on the surrogate of reversing the Commission's earlier decision to treat certain uncollectible and regulatory assessment expenses as energy service costs. Similarly, it would be within our authority to adopt the Joint Petitioners' alternative approach. We conclude, however, that the better approach is to address the over-market costs directly, inasmuch as we have determined those costs are prudent, reasonable and in the public interest because of the public benefits from the PPAs. As a result, we reject the specific approaches proposed by the Joint Petitioner's including the suggested transfer of uncollectable and regulatory assets costs to delivery rates. Instead, we elect to use an existing analogous rate recovery method, which employs features recommended by the OCA and Non-Advocate Staff and is preferable in terms of administrative efficiency and greater transparency.

Accordingly, the market-based portion of the costs of the PPAs will be recovered through the energy service rate, while the above-market portion will be recovered through PSNH's SCRC in the same way as the above-market portion of existing independent power producer rate orders and contracts are recovered today. This is a temporary measure that will terminate without further action by the Commission upon full recovery of the PPA costs. Under this method, there will be no deferrals and no carrying charges that would accrue on a deferral. To enhance transparency, we will require that until all the costs of the PPAs are fully recovered, PSNH identify in its annual, mid-year and quarterly SCRC filings the above-market costs attributable to the PPAs, broken down by plant facility and showing separately the effect of the fuel price adjustment payments on the extent of the above-market costs. This method does not contain every feature of any specific alternative but it fairly addresses the substance of all of them, including many of the conditions posed by OCA.

C. Release of Claims

Joint Petitioners also ask us to approve PSNH's entry into the settlement agreement, including PSNH's release of claims to the Wood IPPs. The settlement agreement was attached to the petition as Attachment 1 and contains a provision for mutual releases, in addition to provisions regarding enforcement of the settlement agreement and non-disparagement.

In summary, the release provision states that in consideration of the parties' agreement to support the Commission's approval of the PPAs and the Wood IPPs' agreement (subject to escrow commitments that have been consummated) to withdraw their appeals of the Commission's decision to approve the power purchase agreement involving Berlin Station, each of the parties releases each of the other parties with respect to all claims relating to Docket No. DE 10-195, the then pending appeals to the New Hampshire Supreme Court, the amended power

purchase agreement between PSNH and Berlin Station (except for any contractual obligations between the parties arising thereunder), the PPAs (except for any contractual obligations between the parties to the PPAs arising thereunder). PSNH's reason for seeking Commission approval of the settlement agreement is that its shareholders make no return from the PPAs and therefore they should not be asked to take on the risk that the Company's entry into the settlement agreement was imprudent.

Non-Advocate Staff questioned how an informed decision to approve the settlement agreement could be made without more specificity regarding the claims being released, given the possibility that Commission approval of the releases could have regulatory consequences affecting PSNH's customers. They also mentioned the lack of clarity regarding the relationship between approval of the settlement agreement and the Commission's ratemaking powers, PSNH's asserted basis for the Commission's authority to approve the settlement agreement.

We conclude that we have the authority to approve PSNH's entry into the settlement agreement as a necessary, incidental element of our approval of the other aspects of the transaction before us. The settlement agreement expressly states that PSNH represents and warrants that it has no knowledge, after due inquiry, of any claims being released against or with respect to any other party. Based on PSNH's warranty and, consistent with our approval of the other aspects of the transaction, we will approve PSNH's entry into the settlement agreement. We note that we retain our traditional regulatory authority to mitigate impacts on PSNH's customers should any future harm arise due to the release of claims.

D. Conclusion

In closing, we view this case as *sui generis*. Our findings and rulings in this case are not to be taken as any kind of precedent or general policy statement regarding how the Commission

would analyze a request for approval of above-market power purchase agreements in the future or, more generally, for approval of other cost recovery methods.

Based upon the foregoing, it is hereby

ORDERED, that the PPAs, with the initial wood prices stated therein, are approved; and it is

FURTHER ORDERED, that the initial wood price for the PPA between PSNH and Springfield Power, LLC shall be established as set forth above; and it is

FURTHER ORDERED, that cost recovery by PSNH shall be on the terms set forth above; and it is

FURTHER ORDERED, that PSNH's entry into the settlement agreement is approved.

By order of the Public Utilities Commission of New Hampshire this twentieth day of December, 2011.

Thomas B. Getz
Chairman

Bruce B. Ellsworth
Special Commissioner

Attested by:

Debra A. Howland
Executive Director