

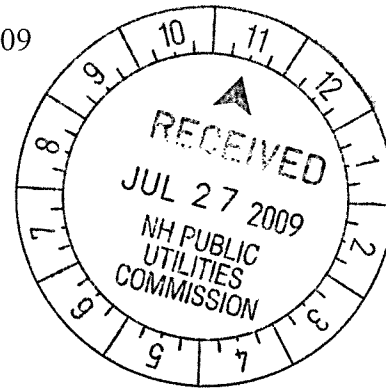
DE 08-077

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July 22, 2009

Clerk  
New Hampshire Supreme Court  
One Noble Drive  
Concord, NH 03301



Dear Clerk:

Please find enclosed an original and 8 copies of an appeal under RSA 541 (Rule 10) along with my check for \$205.00 for the filing fee.

This is an appeal of Public Utilities Commission Orders No. 24, 965 and 24, 982.

Thank you.

Sincerely,

*Jim Rodier*

**SUPREME COURT DOCKET NO. \_\_\_\_\_**

**APPEAL OF FREEDOM PARTNERS, LLC  
UNDER RSA 541:6 AND RSA 365:21  
FROM ORDER OF PUBLIC UTILITIES COMMISSION  
(Supreme Court Rule 10)**

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**Appeal of Public Utilities Commission Orders No. 24, 965 and 24, 982.**

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**Counsel: James T. Rodier, Esq.  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5912  
NH Bar No. 8583**

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**SUPREME COURT DOCKET NO. \_\_\_\_\_**

**APPEAL OF FREEDOM PARTNERS, LLC  
UNDER RSA 541:6 AND RSA 365:21  
FROM ORDER OF PUBLIC UTILITIES COMMISSION  
(Supreme Court Rule 10)**

**A. PARTIES:**

**1. Parties seeking review:**

Freedom Partners, LLC  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5912

Counsel: James T. Rodier, Esq.  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5912  
NH Bar No. 8583

**2. Other Parties of Record:**

(A) Public Service Company of New  
Hampshire  
780 N. Commercial St.  
PO Box 330  
Manchester, NH 03105-0330

Counsel: Gerald M. Eaton, Esq.

(B) Office of Consumer Advocate  
21 South Fruit St.  
Suite 18  
Concord, NH 03301-2429

Counsel: Meredith Hatfield, Esq.

(C) Staff of the Public Utilities Commission

Counsel: Suzanne G. Amidon, Esq.

(D) Lempster Wind, LLC

Counsel: Susan S. Geiger, Esq.  
Orr & Reno PC  
One Eagle Square  
PO Box 3550  
Concord, NH 03302-3550

**B. ORDERS TO BE REVIEWED; MOTION FOR REHEARING AND  
OBJECTION THERETO:**

Annexed hereto are the following: (1) Order No. 24,965 of the Public Utilities Commission (“PUC” or “Commission”) dated May 1, 2009 approving the Power Purchase Agreement and Renewable Energy Certificate Option Agreement (the “Agreements”) between Public Service Company of New Hampshire (“PSNH” and Lempster Wind, LLC (“Lempster”) (p. 13 hereto); (2) the Motion for Rehearing dated May 20, 2009 by Freedom Partners, LLC

("Freedom") (p. 33 hereto); (3) PSNH's Objection to Motion for Rehearing dated May 27, 2009 (p. 41 hereto); and (4) the PUC's Order No. 24, 982 dated June 25, 2009 denying the Motion for Rehearing (p. 52 hereto).

**C. QUESTIONS PRESENTED FOR REVIEW:**

1. Did the PUC erroneously rule that, under RSA 362-F:9,1, PSNH may sell Renewable Energy Certificates obtained through the Lempster Agreements in other markets, notwithstanding the plain and ordinary meaning of the words used in RSA 362-F:9,1 requiring the Lempster REC's to be devoted to meeting PSNH's "reasonably projected renewable portfolio requirements?"
2. Did the PUC erroneously rule that, under RSA 362-F:9,1, PSNH was not required to seek Commission authority prior to entering into the agreements with Lempster, notwithstanding the plain and ordinary meaning of the words used in RSA 362-F:9,1 requiring that "the Commission may authorize an electric distribution company to enter into multi-year purchase agreements"?
3. Did the PUC erroneously rule that a factually incorrect statement in its Order does not constitute grounds for rehearing because it was not a "finding" relevant to the central matter in this docket?
4. Did the PUC erroneously rule that Commission's Order comported with the requirements of RSA 378:41 even though the Order did not reference to "conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission," as required by RSA 378:41?

**D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:**

There are no Constitutional provisions involved in this appeal. The statutory provisions involved are:

**362-F:9 Purchased Power Agreements. –**

I. Upon the request of one or more electric distribution companies and after notice and hearing, the commission may authorize such company or companies to enter into multi-year purchase agreements with renewable energy sources for certificates, 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 or such an

approach, as may be conditioned by the commission, to be in the public interest.

II. In determining the public interest, the commission shall find that the proposal is, on balance, substantially consistent with the following factors:

(a) The efficient and cost-effective realization of the purposes and goals of this chapter;

(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.

III. The commission may authorize one or more distribution companies to coordinate or delegate procurement processes under this section.

IV. Rural electric cooperatives for which a certificate of deregulation is on file with the commission shall not be required to seek commission authorization for multi-year purchased power agreements or certificate purchase agreements under this section.

**378:41 Conformity of Plans.** – Any proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission.

#### **E. DOCUMENTS INVOLVED:**

The documents involved include: (1) the Closing Statement of Freedom Partners, LLC dated February 13, 2009 (App., 64); (2) PSNH's Response to Freedom's Closing Statement dated February 19, 2009 (App., 68); (3) Freedom's Reply to PSNH's Response dated February 27, 2009.(App., 72); and Freedom's Letter to Deborah A. Howland dated May 28, 2009 (App., 75).

#### **F. STATEMENT OF THE CASE CONTAINING FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:**

RSA 362-F, Electric Renewable Portfolio Standard, became effective on July 10, 2007.

The purpose of this statute is "...to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire, whether at new or existing facilities." RSA 362-F:1.

The statute provides that:

[u]pon the request of one or more electric distribution companies and after notice and hearing, the commission may authorize such company or companies to enter into multi-year purchase agreements with renewable energy sources for certificates, 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 or such an approach, as may be conditioned by the commission, to be in the public interest.

RSA 362-F:9,I (Emphasis added).

On January 2, 2008, PSNH entered into a 15-year power purchase agreement and a renewable energy certificate<sup>1</sup> (REC) option agreement with Lempster. Six months later, on May 29, 2008, pursuant to RSA 362-F:9, I, PSNH filed a petition with the Commission requesting approval of the agreements. On June 5, 2008, the PUC issued an Order of Notice initiating Docket No. DE 08-077.

Freedom Partners, LLC filed a timely Petition for Intervention on June 25, 2008. In order to avoid an objection by PSNH to its intervention, Freedom, as a broker of RECs and other environmental commodities, agreed to limitations on the scope of its intervention. Transcript (June 27, 2008) at 7. The Commission granted Freedom's Petition to Intervene subject to the agreed-upon limitations. Id. at 40.

PSNH began recovering its costs under the agreements in November, 2008. Transcript (February 5, 2008) at 10.

An evidentiary hearing was held in this proceeding on February 5, 2009. Subsequent to the hearing, on February 13, 2009, Freedom filed a closing statement with the Commission. On February 17, 2009, PSNH filed its response. On or about February 23, 2009, Freedom filed its reply to the PSNH response. The Commission issued Order No. 24,965 (May 1, 2009) whereby it "approved" the Power Purchase Agreement and Renewable Energy Certificate Option Agreement. Order No. 24,965 at 19.

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<sup>1</sup> A renewable energy certificate (REC) is "...the record that identifies and represents each megawatt-hour generated by a renewable energy generating source..." RSA 362-F:2, III.

Freedom filed a Motion for Reconsideration on May 20, 2009 contending that Order No. 24,965 was unlawful on a number of grounds, as enumerated hereinafter.

PSNH objected to the Motion for Rehearing on May 27, 2009. The PUC issued Order 24,982 on June 25, 2009<sup>2</sup> denying the Motion for Rehearing.<sup>3</sup> This appeal followed within 30 days.

**G. JURISDICTIONAL BASIS FOR APPEAL:**

The jurisdictional basis for this Appeal is RSA 541:6 and RSA 365:21.

**H. STATEMENT OF REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:**

Order No. 24,965 and Order No. 24,982 are erroneous as a matter of law because they do not interpret RSA 362-F:9, I. in accordance with the plain and ordinary meaning of the words used in the statute. As such a substantial basis exists for a difference of opinion.

I. During the hearing on the merits held on February 5, 2009, PSNH testified that it will not use the REC's purchased under the Lempster Agreements to meet its New Hampshire renewable portfolio requirements if higher value can be obtained by selling the RECs into other New England markets:

Q. So, I guess the way we leave it is that, if you can get more for these REC's in Maine, Massachusetts, Rhode Island, or Connecticut, or even Vermont now, I guess, or New York, that's what you're going to do with these RECs.

A. (Witness nodding affirmatively.)

Transcript (February 5, 2009) at 25.

In Order No. 24,965, the Commission ruled that:

Although the statute does provide that multi-year agreements should be used to meet "reasonably projected renewable portfolio requirements," RSA 362-F:9, I, there is

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<sup>2</sup> The PUC did not comply with RSA 541:5 which requires that the commission shall rule on a motion for rehearing "within ten days either grant or deny the same or suspend the order or decision complained of pending further consideration..."

<sup>3</sup> In Order 24,982, the PUC correctly noted that Freedom's "Motion for Reconsideration" should have been captioned as a "Motion for Rehearing". See FN 4 at 2.



nothing in RSA 362-F that bars a company from selling excess RECs procured through such agreements.

Order No. 24,965 at 18. (Emphasis added.)

In its Motion for Rehearing, Freedom contended that this ruling is erroneous as a matter of law. In Order No. 24, 982 denying the Motion for Rehearing, the PUC “clarified” its prior ruling by noting that:

to the extent that RECs sold in other markets are not excess, the sale for a higher price in another REC market is consistent with RSA 362-F because it allows PSNH to maximize customer benefits while still funding renewable investment in New Hampshire through [alternative compliance payments], an alternative means of meeting renewable portfolio standards.”

Order No. 24, 982 at 8.

There is nothing in the record in this proceeding with respect to whether or not selling REC’s outside of New Hampshire and then making “alternative compliance payments” would maximize consumer benefits. If the Commission were to re-open the record in this proceeding to take evidence on this issue, it would see that it does not.<sup>4</sup>

The language of RSA 362-F:9, I is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.” Green Crow Corp. v. Town of New Ipswich, 950 A.2d 163 (NH 2008) (“We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history, consider what the legislature might have said, or add words not included in the statute”). The plain and ordinary meaning of the words used in the statute require the Lempster REC’s to be devoted to meeting PSNH’s “reasonably projected renewable portfolio requirements.”

Allowing PSNH to sell the Lempster RECs outside of New Hampshire would be inconsistent with “the intent of the legislature as expressed in the words of [the] statute.” Appeal of Public Service Co., 141 N.H. 13, 17 (1996).

**II.** In Order 24,965 the Commission ruled that:

...the reason the statute requires our approval of these multi-year agreements is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service

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<sup>4</sup> The current level of the alternative compliance payment established by RSA362-F:10 is approximately \$60; the current market price of a New Hampshire Class I REC is approximately \$35. Selling a REC at \$35 and replacing it for \$60 would be harmful to consumers.

rates. If PSNH had intended to use the agreements “below the line,” the Company would not have had to seek the Commission’s approval. Therefore, we disagree that PSNH was required to seek approval from the Commission before it could enter into the subject agreements.

Order 24,965 at 17, 18

In essence, the Commission’s Order states that “approval” is not needed by PSNH to enter into the Agreements. The Order only states that “approval” is needed to allow the utility to recover its costs in energy service rates.

In its Motion for Rehearing, Freedom contended that the Commission was required to authorize or “empower” PSNH to enter the agreements, not merely to ratify its actions after the fact. In denying the Motion for Rehearing, the PUC:

..conclude[d] that our interpretation of the word “authorize” in RSA 362-F, which would allow the Commission to determine the public interest of a contract after an agreement is executed, is reasonable and consistent with the statutory framework of RSA 362-F.”

Order No. 24,982 at 2.

The issue presented in this appeal is whether RSA 362-F:9, I permits a utility to enter into an agreement (and begin recovering its costs) before receiving Commission approval. The crux of the PUC’s Order is its ruling that “[i]f PSNH had intended to use the agreements ‘below the line’, the Company would not have had to seek the Commission’s approval.”<sup>5</sup> Therefore, the Commission seems to have reasoned that RSA 362-F allows the Commission to determine the public interest after an agreement is executed if the costs of the agreement are recovered from ratepayers.

The plain and ordinary meaning of the words used in RSA 362-F:9, I permit the PUC to “authorize an electric distribution company to enter into multi-year purchase agreements with renewable energy sources.” (Emphasis added.) In this case, the Commission’s approval was granted approximately 16 months after the agreements were entered into, and approximately six months after PSNH began recovering its costs. The Commission’s ruling would appear to interpret to RSA 362-F:9, I to allow for Commission approval of an agreement at any point in time (e.g., 5 years) after the agreement became effective and PSNH began recovering its costs.

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<sup>5</sup> In denying the Motion for Rehearing, the Commission ruled that “to the extent that utility transactions impact rates, we have the authority to determine whether such transactions are prudent, reasonable and in the public interest.” Order No. 24,982 at 9. Implicit in the Commission’s ruling is the premise that a public utility is free to do anything it wants to do so long as it does not seek recovery of the costs from ratepayers. This is an extremely dubious premise.

This is a hardly a result which the Legislature could have had in mind when it enacted RSA 362-F.

III. In Order 24,965, the Commission stated that “we do not find that PSNH’s interest in keeping pricing terms confidential implies that it will be applying a “litmus test” or somehow acting unfairly in negotiating REC purchase agreements.” Order at 18. (Emphasis added.)

This finding is unreasonable because it misconstrues an issue in the proceedings. However, the issue in question does in fact inquire into PSNH’s attitude about a central issue in the proceeding, to wit, PSNH’s practices and policies for determining which renewable energy projects to enter into pursuant to RSA 362-F:9, II (d).<sup>6</sup>

In its Motion for Rehearing, Freedom contended that the foregoing issue has nothing to do with “keeping pricing terms confidential,” and accordingly this finding should be stricken from the Order.

In denying the Motion for Rehearing, the PUC ruled that:

[t]he statement in question is not a "finding" relevant to the central matter in this docket, *i.e.*, whether the power purchase and REC option agreements between PSNH and Lempster are in the public interest pursuant to RSA 362-F:9. Consequently, Freedom's argument does not constitute grounds for rehearing.

Order No. 24, 982 at 10. (Emphasis in original).

The Commission did make a finding of fact on the aforementioned issue in Order No. 24,965.<sup>7</sup> Having had a plain mistake brought to its attention in the Motion for Rehearing, the PUC seeks to avoid correction of the mistake by declaring that it does not relate to a “central

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<sup>6</sup> The issue presented by Freedom in its closing statement was as follows:

PSNH further testified under cross-examination that PSNH has an open door policy for all renewable resource developers and that all proposals of any kind would be considered in good faith and treated strictly on their merits. There are no litmus tests. According to PSNH, “nobody would be in or out because of who [sic] they are.”

<sup>7</sup> The Commission directly addressed this matter in its Order:

It has been proposed in this proceeding that PSNH must issue an RFP to obtain the best market prices for RECs. While we agree that an RFP is one method to acquire RECs, the Legislature did not specify a particular solicitation method for distribution companies such as PSNH to enter into multi-year purchase agreements with renewable energy sources for certificates.

Order No. 24,965 at 18,19.

matter” in the proceeding. This presents an opportunity for the Court to clarify an issue of general importance in the administration of justice.

**IV. RSA 378:41 requires that:**

“[a]ny proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission.”

PSNH’s 2007 Least Cost Integrated Resource Plan was approved by the Commission Order No. 24,945 (February 27, 2009). There is no reference whatsoever in Order 24, 962 to RSA 378:41 much less a reference to PSNH’s least cost integrated resource plan most recently filed and found adequate by the commission.

In its Motion for Rehearing, Freedom contended that “[t]he Commission’s Order is unlawful because it does not comply with the requirements of RSA 378:41 which require a reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the Commission.” In denying the Motion for Rehearing, the Commission stated that:

Staff’s testimony acknowledged that PSNH had addressed the factors listed in RSA 362-F:9,II, (a)-(e), including the extent to which the multi-year agreement comported with RSA 378:37 and PSNH’s “integrated least cost resource plan pursuant to RSA 378:41.” Hearing Exhibit 8 at 5.

Order No. 24,982 at 11.

The Staff’s testimony referred to by the Commission, in turn, merely referred to PSNH’s testimony.<sup>8</sup>

In any event, even if there was an oblique reference in Staff’s testimony to RSA 378:41, there is most decidedly no reference to conformity of the PUC’s decision with the least cost integrated resource plan most recently filed and found adequate in Commission Order No. 24,945 (February 27, 2009)

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<sup>8</sup> Staff’s witness testified as follows:

Q. Did PSNH address the factors listed in RSA 362-F:9, 11(a) — (e)?

A. Yes. Mr. Wicker [PSNH] addressed those factors on page 9 of his testimony. In PSNH’s view, the agreements meet all of the required standards.

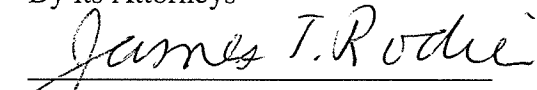
Exhibit 8 at 5.

**I. ISSUES PRESERVED FOR APPELLATE REVIEW**

Every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a properly filed pleading.


Respectfully submitted,  
FREEDOM PARTNERS, LLC  
By its Attorneys

Dated: July 22, 2009

  
James T. Rodier  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5918  
603-559-9987

CERTIFICATION OF SERVICE

I have served copy of the foregoing on each person identified on the attached service list for this docket.

  
James T. Rodier

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STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DE 08-077

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of a Power Purchase Agreement and a Renewable Energy Certificate  
Option Agreement with Lempster Wind, LLC

Order Granting Petition

ORDER NO. 24,965

May 1, 2009

**APPEARANCES:** Gerald M. Eaton, Esq. on behalf of Public Service Company of New Hampshire; James Rodier, Esq. on behalf of Freedom Partners, LLC; Meredith A. Hatfield, Esq., Office of Consumer Advocate, on behalf of residential ratepayers; and Suzanne G. Amidon, Esq. on behalf of Staff.

**I. PROCEDURAL HISTORY**

On May 29, 2008, Public Service Company of New Hampshire (PSNH) filed a petition requesting approval of a power purchase agreement and a renewable energy certificate (REC) option agreement with Lempster Wind, LLC (Lempster Wind) pursuant to RSA 362-F:9. With its petition, PSNH filed the supporting testimony and related exhibits of S. B. Wicker, Jr., a Principal Engineer with PSNH, along with a motion for confidential treatment of certain information contained in the power purchase agreement and REC option agreement related to the pricing of energy, capacity and RECs. On August 20, 2008, PSNH filed a copy of a power purchase agreement between PSNH and the New Hampshire Electric Cooperative (NHEC) providing for the sale to NHEC of a portion of the energy, capacity and RECs that PSNH purchases from Lempster Wind.

On June 5, 2008, the Commission issued an order of notice scheduling a prehearing conference for June 27, 2008. The Office of Consumer Advocate (OCA) filed a letter on June 11, 2008 stating that it would be participating in the docket on behalf of residential ratepayers pursuant to RSA 363:28. Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (Constellation) filed a joint petition to intervene on June 19, 2008. On June 24, 2008, Lempster Wind entered a limited appearance for purposes of monitoring the proceeding. Freedom Partners, LLC (Freedom) filed a motion to intervene on June 25, 2008.

On June 23, 2008, Constellation filed an objection to PSNH's motion for confidential treatment. At the prehearing conference, the Commission granted PSNH's motion. In addition, the Commission granted Constellation's motion to intervene with the condition that Constellation not be provided access to the confidential information contained in the filing. The Commission also granted Freedom's motion to intervene on a limited basis consistent with Freedom's agreement with PSNH not to seek access to confidential information. Following the prehearing conference, Staff submitted a proposed procedural schedule, which the Commission approved by a secretarial letter issued on July 8, 2008.

On August 5, 2008, Constellation filed a motion to compel PSNH to respond to certain of Constellation's data requests. Further filings, motions and objections were made by PSNH, Lempster Wind and Constellation, all of which were addressed in Order No. 24,895 (September 17, 2008).

Constellation filed the direct testimony of Daniel W. Allegretti, Vice President and Director of Wholesale Energy Policy for Constellation Energy Resources, LLC, on October 1, 2008. Steven E. Mullen, Assistant Director of the Commission's Electric Division, filed both a confidential and a public version of Staff testimony on the same day. Discovery ensued on



Constellation's and Staff's testimony which resulted in PSNH filing a motion on November 6, 2008 requesting the Commission to compel Constellation to respond to certain of PSNH's data requests. PSNH filed rebuttal testimony on November 7, 2008.

Constellation filed an objection to PSNH's motion to compel on November 11, 2008 and, on November 25, filed a motion to substitute witnesses by replacing Daniel W. Allegretti with Thomas E. Bessette and Bruce McLeish. In Order No. 24,918 (December 5, 2008), the Commission granted in part and denied in part PSNH's motion to compel, granted Constellation's motion to substitute witnesses, and postponed the originally scheduled December 9, 2008 hearing.

By secretarial letter dated January 14, 2009, the Commission rescheduled the hearing to February 5, 2009. On January 23, 2009, Constellation filed a motion for protective order and confidential treatment for the information it provided in accordance with Order No. 24,918 and, on the same day, notified the Commission that Constellation had decided to withdraw from participation in the proceeding. Freedom filed a partial objection to Constellation's motion for protective order and confidential treatment which the Commission denied by secretarial letter dated February 4, 2009. The hearing took place on February 5, 2009. On February 13, 2009, Freedom filed its closing statement and, on February 17, 2009, PSNH filed its response.

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. PSNH**

PSNH filed its petition for approval of a 15-year power purchase agreement and a 15-year REC option agreement between PSNH and Lempster Wind pursuant to RSA 362-F:9, which provides in part:

Upon the request of one or more electric distribution companies and after notice and hearing, the commission may authorize such company or companies to enter into multi-

year purchase agreements with renewable energy sources for certificates, 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 or such an approach, as may be conditioned by the commission, to be in the public interest.

In prefiled testimony, PSNH stated that Lempster Wind is a wholly-owned subsidiary of Iberdrola Renewable Energies, USA, Ltd. which, in turn, is a wholly-owned subsidiary of Iberdrola Renovables, S.A. PSNH explained that the Lempster Wind project is located on Lempster Mountain in Lempster, New Hampshire and will consist of 12 Gamesa G87 wind turbines. Each turbine will be mounted on a 256-foot tower and will have a nameplate rating of 2.0 megawatts (MW) for a total project output of 24 MW. According to PSNH, the estimated capacity factor for the project is 33 percent, and the project is expected to produce approximately 70,000 megawatt-hours (MWH) per year, along with a corresponding number of New Hampshire Class I RECs.

PSNH explained that the power purchase agreement between PSNH and Lempster Wind governs the purchase by PSNH of energy, capacity and New Hampshire RECs produced by Lempster Wind. The REC option agreement governs the rights and obligations of Lempster Wind in repurchasing certain New Hampshire Class I RECs from PSNH over the term of both agreements. PSNH stated that it had also entered into an interconnection agreement with Lempster Wind regarding the terms and conditions of Lempster Wind's interconnection with PSNH's electric distribution system. PSNH noted that the interconnection agreement does not require Commission approval but was filed for informational purposes.

As described by PSNH, the project will interconnect with PSNH's electrical distribution system through approximately 10.5 miles of dedicated 34.5 kilovolt (kV) line extending from the project site in Lempster to PSNH's substation located in Newport. PSNH will solely own this

dedicated circuit, which will be built on top of an existing, rebuilt distribution circuit. According to PSNH, the existing, rebuilt distribution circuit in Newport and Goshen will continue to be owned by PSNH and will serve its customers. PSNH also serves approximately a dozen customers along Route 10 in Lempster near the Goshen town line, while the remaining existing distribution circuit in Lempster is owned by and serves NHEC's customers. NHEC will continue to own, and PSNH and NHEC will jointly operate and maintain, the portion of the existing, rebuilt distribution line in NHEC's service territory under an agreement for the joint use of pole structures between PSNH and the NHEC. PSNH supplied a copy of this agreement with its filing but noted that the agreement did not require Commission approval. PSNH testified that Lempster Wind will pay for the necessary distribution system improvements.

PSNH testified that it had separately filed for permission to serve Lempster Wind as a customer even though the Lempster Wind project is located in NHEC's franchise area. According to PSNH, when the wind is not blowing and the turbines are not spinning, Lempster Wind requires an electric current at an appropriate voltage to run the electronics and, in the winter, heat some components of the turbines. While NHEC cannot supply electric service at the appropriate voltage, PSNH can supply the power over its 34.5 kV line. According to PSNH, its petition to serve Lempster Wind, if approved, would allow PSNH to serve Lempster Wind for those periods of time when additional voltage is required.<sup>1</sup> Otherwise, NHEC would serve Lempster Wind's retail electric service needs such as maintenance and lighting.

In its testimony, PSNH indicated that PSNH and NHEC were in the process of drafting a resale agreement under which PSNH agreed to resell to NHEC 10 percent of the energy, capacity and RECs procured from Lempster Wind. At hearing, PSNH noted that the agreement between

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<sup>1</sup> PSNH filed the petition to serve Lempster Wind on October 29, 2008 in Docket No. DE 08-139. The Commission approved the petition in Order No. 24,933 (January 16, 2009).

PSNH and NHEC was finalized and filed in the instant docket on August 20, 2008, for informational purposes. Because the agreement is a wholesale power contract, it is subject to the jurisdiction of the Federal Energy Regulatory Commission and does not require Commission approval.

PSNH testified that ISO New England Inc. (ISO-NE) had approved the electrical interconnection for the Lempster Wind project. Also, the New Hampshire Site Evaluation Committee issued a Certificate of Site and Facility for the project in June 2007. According to PSNH, Lempster Wind informed PSNH that all other permits and approvals for construction and operation of the Lempster Wind project have been received.

In its prefiled testimony, PSNH said that it expected the electrical interconnection with Lempster Wind to be completed in August 2008 with all of the wind turbines on line and the project to be in full commercial operation in September. At hearing, PSNH said that it started purchasing power from the Lempster Wind project on October 21, 2008, and that the project began commercial operation on November 10, 2008. Further, the project was accepted into ISO-NE for capacity purposes on December 1, 2008. PSNH also stated that it had purchased RECs from Lempster Wind on a monthly basis since the facility began operation.

PSNH said it planned to use the energy and capacity purchased under the agreements to satisfy its default service energy obligation, and that forecasted costs for such purchases will be included in PSNH's default service rate with actual costs being reconciled on an annual basis. Regarding the RECs, PSNH said REC purchases under these agreements will be used to comply with applicable New Hampshire renewable portfolio standards (RPS). PSNH noted that the costs of the New Hampshire RECs will also be included in PSNH's energy service rate, so those REC costs will be forecasted and reconciled in the same manner as energy costs.

According to PSNH, it negotiated with Lempster Wind a price term for energy that is calculated as a percentage of the ISO-NE energy price, subject to a \$/MWh floor.<sup>2</sup> PSNH explained that the ISO-NE energy price is the hourly real-time ISO-NE locational marginal price (LMP) at the North Road node (ID #4394) in the New Hampshire load zone of the ISO-NE market. PSNH said it will calculate the average energy price paid to Lempster Wind on a monthly basis and, if the average energy price is less than the energy floor price, an adjustment to the amount paid for energy for that month will be made so that the average energy price paid is equal to the floor price. Regarding capacity, PSNH noted that it would pay Lempster Wind a certain percentage of the amount PSNH is credited in connection with Lempster Wind's capacity in PSNH's ISO-NE settlement account.

With respect to the purchase of RECs, PSNH stated that the agreement provides that it will pay Lempster Wind a fixed dollar amount for each REC, with the amount differing for project years 1-5, 6-10 and 11-15. PSNH said it will purchase RECs produced by Lempster Wind subject to the REC option agreement. Under the REC option agreement, Lempster Wind may repurchase RECs from PSNH, up to a fixed quantity, over the term of the agreement. According to PSNH, Lempster Wind would probably exercise this option if it could sell RECs into other states' RPS programs or the voluntary "green" market for a higher price than the purchase prices contained in the REC option agreement. In exchange for exercising this option, Lempster Wind would pay PSNH a premium per repurchased REC. PSNH said it would use the premium to offset the costs of replacement RECs or, if none were available in the market, the expense of alternative compliance payments (ACPs). PSNH testified that the RECs it purchases from Lempster Wind will help satisfy PSNH's Class I REC requirements.

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<sup>2</sup> The Commission granted confidential treatment to the pricing terms for energy, capacity and RECs as well as certain terms of the REC option agreement during the June 27, 2008 prehearing conference.

In response to questions at hearing, PSNH stated that if the Commission did not approve the agreements the Company would record the project costs "below the line," meaning that the costs of the agreements would not be included in rates and the energy, capacity and RECs could not be used for the benefit of PSNH's customers.

Addressing the legal standards set forth in RSA 362-F:9, PSNH said that the agreements will provide energy and capacity for its customers based on market prices, lower PSNH's future cost of purchased power, and add a new source of renewable generation to help PSNH meet its REC requirements while also further diversifying PSNH's mix of resources. In addition, PSNH said that the agreements are market-driven competitive solutions to PSNH's need for renewable energy and are administratively efficient as they will serve as a model for future negotiations. Further, PSNH stated that the agreements will provide economic development and environmental benefits to New Hampshire as they provide the necessary support for development of the wind project while also reducing PSNH's reliance on fossil fuel-based market purchases. Accordingly, PSNH concluded that the approval of the agreements is in the public interest and satisfies the requirements of RSA 362-F:9.

On February 19, 2009, PSNH filed reply comments to those filed by Freedom following the hearing. PSNH stated that, contrary to Freedom's assertion, RSA 362-F:9 clearly authorizes utilities to enter into long-term agreements to purchase energy and/or RECs. PSNH said its agreements with Lempster Wind need not be pre-approved but must be submitted to and approved by the Commission to allow PSNH to recover the costs of the agreements. In further response to Freedom's written statement, PSNH said that Freedom offered no support for its contention that PSNH's customers are likely to pay higher bills if the Commission approves the agreements with Lempster Wind. PSNH also asserted its rights to acquire RECs in amounts it

believes are necessary for PSNH's reasonably projected RPS requirements, and its right to sell those RECs for the benefit of its retail customers in the event that its REC acquisitions exceed its RPS requirements. Finally, PSNH said that it does not use a "litmus test" regarding preconditions for interconnection with its electrical system related to the sale of capacity, energy and RECs.

### **B. Constellation**

In prefiled testimony, Constellation claimed that PSNH should use a request for proposal (RFP) process to procure RECs because only an RFP process would result in the acquisition of RECs at the least cost to customers. According to Constellation, absent an RFP process, there was also no basis to determine whether the prices PSNH agreed to pay for RECs produced by Lempster Wind are market based. Constellation also expressed concern about what effect PSNH's long-term agreement to energy costs and the uncertainty of the forward costs of energy would have on PSNH's ratepayers if the Commission approved the agreements. Before the hearing, Constellation withdrew from the docket and its testimony was not introduced into the hearing record.

### **C. Freedom Partners**

At the hearing, Freedom Partners questioned whether PSNH intended to sell the RECs acquired from Lempster Wind in other states' renewable markets rather than use them for NH RPS compliance. In response, PSNH's witness stated that PSNH would try to maximize the value of the RECs either by using them to satisfy NH RPS requirements or by selling them in other available markets.

Freedom Partners also asked whether the output from Lempster Wind has to be transmitted under one of PSNH's open access tariffs to the NEPOOL pooled transmission

facilities (PTF). PSNH replied that it takes delivery of the power at the site of the facility so PTF tariff requirements do not apply. PSNH further said that while there is a nodal LMP at the Newport substation, that price is within percentage points of the New Hampshire LMP.

Freedom Partners also inquired whether PSNH would apply the same concepts followed in the Lempster Wind agreements to other renewable generation facilities. PSNH replied that while it has developed certain ways of dealing with the purchase of energy, capacity and RECs that meet its needs as well as a project's needs, every deal is different and open to negotiation.

Subsequent to the hearing, on February 13, 2009, Freedom Partners filed a statement with the Commission expressing the following opinions: 1) PSNH has no authority to enter into the contracts absent Commission approval; 2) RECs purchased by PSNH from Lempster Wind can only be used to meet New Hampshire RPS requirements; 3) if approved, the Lempster Wind agreements would result in PSNH customers paying "higher bills;" 4) the disparity in treatment of transmission costs is an impediment to renewable resource providers entering into an agreement with any entity other than PSNH; and 5) PSNH should not use a "litmus test" but treat every renewable developer objectively.

#### **D. Office of Consumer Advocate**

At hearing, the OCA asked PSNH how many RECs it would need for 2009. PSNH responded that it would need 43,000 Class I RECs. The OCA noted that the Lempster Wind project is expected to produce 70,000 RECs annually, with NHEC entitled to 7,000 RECs, leaving approximately 63,000 RECs for PSNH. The OCA also pointed out that other generation units owned by the Company are eligible to produce Class I RECs, so PSNH could end up with Class I RECs in excess of the amount needed for NH RPS compliance in future years. PSNH stated that, to maximize the value of the RECs, it could bank the RECs for use in future years or



possibly sell them to other entities. In further response to the OCA, PSNH said that if Lempster Wind exercised its option to buy back RECs, PSNH would receive a premium that would partially offset the costs of purchasing RECs on the market or making the ACPs under the RPS law. The OCA inquired as to PSNH's position regarding the use of RFPs to procure RECs. The Company responded that the market for new projects is very limited at present. PSNH further offered that an RFP process would be appropriate if there were a number of renewable projects that can supply RECs. The OCA concluded by stating that it deferred to the Staff regarding whether the Commission should approve the proposed agreements between PSNH and Lempster Wind.

#### **E. Staff**

Mr. Mullen testified that he reviewed the agreements to determine whether they are in the public interest in accordance with RSA 362-F:9. In his prefiled testimony, Mr. Mullen recited the factors set forth in RSA 362-F:9, II that the Commission must consider in determining the public interest and drew particular attention to the following wording at the beginning of that subsection:

“In determining the public interest, the commission shall find that the proposal is, on balance, substantially consistent with the following factors. . .”

Mr. Mullen testified that he interpreted the words “on balance, substantially consistent with” as requiring the Commission to look at the terms and conditions of the PSNH/Lempster Wind power purchase and REC option agreements as an entire package in determining whether the multi-year proposals are in the public interest. In addition, Mr. Mullen said he read the words “substantially consistent” as allowing varying degrees of consistency with the required factors provided that the proposed agreements are in overall conformance with the required factors.

In reviewing the applicable restructuring policy principles contained in RSA 374-F:3, Mr. Mullen determined that four are relevant to the review of the agreements in the instant docket: 1) system reliability (RSA 374-F:3, I); 2) universal service (RSA 374-F:3, V); 3) environmental improvement (RSA 374-F:3, VIII); and 4) renewable energy resources (RSA 374-F:3, IX). Mr. Mullen concluded that the proposed agreements satisfy each of these principles. First, Mr. Mullen stated that the addition of a new generating source to the regional electric grid should enhance the reliability of the regional electric system, although he acknowledged that the reliability of the system would not be enhanced as much by a wind facility as it would by a baseload facility operating at times of system peaks. Second, the Lempster Wind project supports the goal of increasing commitments to renewable energy resources while also providing additional generation with no new increases in air pollution. Finally, according to Mr. Mullen, the pricing terms in the proposed agreements should mitigate price volatility while not creating any new deferred costs. Mr. Mullen also opined that the agreements are consistent with the principles of New Hampshire's energy policy, RSA 378:37, in that the agreements with Lempster Wind provide fuel source diversity to PSNH's supply portfolio using a renewable generation source that has no harmful emissions associated with its operation. Also, Mr. Mullen expressed his opinion that the agreements contained reasonable pricing terms for energy, capacity and RECs that will help PSNH and its customers avoid future purchases at uncertain pricing terms:

Mr. Mullen examined the demand and available supply of Class I RECs. He noted that, for 2009, providers of electricity in New Hampshire will need to collectively purchase 61,425 Class I RECs – an amount representing 0.5% of the total megawatt-hours of electricity supplied. As for availability of RECs, Mr. Mullen listed other facilities the Commission has approved for

the production of New Hampshire Class I RECs but he cautioned that Class I RECs from those facilities may or may not be available for purchase by New Hampshire electric providers if those facilities are also certified in other states having RPS requirements. In such cases, NH Class I facilities may choose to sell their RECs in those states' renewable markets.

Mr. Mullen compared the price of the RECs in the agreement between PSNH and Lempster Wind to the estimated 2009 Class I ACP price and commented on how changing supply and demand conditions could impact REC market prices. He explained that in the event of an over-abundance of Class I RECs available in the market, the market price could fall below the REC prices in the agreements. However, he pointed out that the available supply depends on a number of factors, including future development of renewable energy resources, whether NH Class I resources also qualify for RECs in other states, the maturity of the RPS programs in New Hampshire and other states and the eligibility of sources in control areas adjacent to the New England control area.

Addressing the REC option agreement, Mr. Mullen noted that the agreement gives Lempster Wind the option of buying back a certain number of RECs during the first 10 years of the contract. If Lempster Wind opts to repurchase RECs, it will be required to pay PSNH the original purchase price plus a premium per REC. Mr. Mullen said that PSNH could use the premium payment to offset its costs of fully satisfying its Class I REC requirements. Mr. Mullen testified that the Commission approved a similar provision in Docket No. DE 07-125, *Public Service Company of New Hampshire*, Order No. 24,839 (April 4, 2008).<sup>3</sup>

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<sup>3</sup> In Docket No. DE 07-125, the Commission approved agreements between PSNH and Pinetree Power, Inc. and Pinetree Power-Tamworth (Pinetree) which included a provision that allowed Pinetree to sell its Class III RECs to parties other than PSNH. Similar to the instant arrangement, if Pinetree chose to sell RECs to parties other than PSNH, Pinetree would have to pay PSNH a premium per REC.

Mr. Mullen described the energy pricing terms of the power purchase agreement as the greater of a percentage of the hourly real-time ISO-NE LMP at the local node in the NH load zone or a floor price that is fixed for the 15-year term of the agreement. He noted that the pricing for energy followed the market price of power. He explained that since the energy price is a percentage of the NH nodal price, the “trigger point” for the average monthly NH nodal price is actually higher than the floor price. Mr. Mullen stated that in the event that the floor price became operative (i.e., the floor price exceeded the prevailing market price for energy), the excess costs would be part of PSNH’s costs of providing energy service to its customers.

Regarding the possibility that the energy prices paid by PSNH to Lempster Wind could be above market, Mr. Mullen explained that there would have to be a number of other developments in the market for that to happen. Considering the upward trend of energy prices at the time he filed his testimony, Mr. Mullen expressed the view that it was possible, but highly unlikely, that at some point in time the energy floor price could be above market. At hearing, in response to a question about lower energy prices that had recently been experienced, Mr. Mullen stated that nothing had occurred that had changed his recommendation to approve the contracts.

Mr. Mullen said the provisions in the power purchase agreement regarding the pricing of capacity are similar to the provisions governing the pricing of energy in that the price will vary as market conditions change. In any event, PSNH will pay Lempster Wind for capacity priced at a discount from the prevailing market prices.

Because the legislature allowed use of multi-year contracts for the acquisition of RECs, Mr. Mullen said PSNH should be able to recover the prudently incurred costs associated with the agreements. He also stated his view that nothing in the proposed agreements fit the definition of stranded costs pursuant to RSA 374-F:2.

Finally, Mr. Mullen found it reasonable that NHEC be able to purchase from PSNH 10% of the RECs, energy and capacity produced by Lempster Wind at the same price that PSNH paid to Lempster. According to Mr. Mullen, given that Lempster Wind is located in NHEC's service territory, cooperation between NHEC and PSNH, including sharing the output of the facility, was important in the effort to assist Lempster Wind in attaining commercial operation. In conclusion, Mr. Mullen recommended that the Commission approve the agreements.

### **III. COMMISSION ANALYSIS**

With the enactment of RSA 362-F, the Legislature created new obligations for providers of electricity to obtain and retire renewable energy certificates from various renewable energy sources in amounts representing certain percentages of each supplier's total megawatt-hours of electricity provided to its customers in a given year. The agreements at issue in this proceeding are part of PSNH's efforts to meet the Class I percentage requirements set forth in RSA 362-F:3 through the use of purchased power agreements in accordance with RSA 362-F:9. Pursuant to RSA 362-F:3, PSNH is required to acquire RECs from qualifying Class I sources, i.e., new renewable electric generation facilities as defined in RSA 362-F:4, I, in an amount equal to 0.5% of the total megawatt hours of electricity it supplies to its customers during 2009. PSNH's obligation to acquire Class I RECs increases to 1.0% of the electricity it supplies to its customers in 2010, and by 1.0% per year thereafter until 2025.

PSNH entered into a 15-year power purchase agreement and REC option agreement with Lempster Wind under which PSNH commits to purchase RECs, energy and capacity from Lempster Wind while also providing Lempster Wind the option to repurchase certain amounts of RECs over the term of the agreements. RSA 362-F:9, I allows us to authorize electric distribution companies to enter into such multi-year REC purchase agreements "in conjunction

with or independent of purchased power agreements” so long as we find the contracts to be in the public interest.

RSA 362-F:9, II sets forth certain factors we must consider in assessing whether the REC purchase and related purchased power proposals contained in the agreements are in the public interest:

“In determining the public interest, the commission shall find that the proposal is, on balance, substantially consistent with the following factors:

(a) The efficient and cost-effective realization of the purposes and goals of this chapter;

(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.”

As Staff highlights in its testimony, RSA 362-F:9, II requires the Commission to find that the proposal is, on balance, substantially consistent with the above factors. Accordingly, we must consider both the purchased power agreement and the REC option agreement in determining whether the proposed agreements are in the public interest. We have considered those factors along with the evidence in the record and conclude that approval of the purchased power agreement and the REC option agreement is in the public interest.

The Lempster Wind project is a new, renewable generating source that introduces no new pollution or harmful emissions into the environment. These agreements support the financial viability of the project and, therefore, are consistent with the environmental principles of the

electric utility restructuring statutes (RSA 374-F:3, VIII and IX) and New Hampshire's energy policy set forth in RSA 378:37.

In addition, we find the pricing terms for energy and capacity and RECs to be reasonable. Energy and capacity pricing in the power purchase agreement are both established by reference to actual prices experienced in the ISO-NE market, therefore allowing PSNH to pay energy and capacity prices that align with movements of market prices. Regarding the energy floor price, we find that the inclusion of this pricing term, while providing income protection to Lempster Wind, does so at a price level that is significantly discounted from current market energy prices. We agree with Staff that if market prices were to decline to the level of the floor price or below, then many other positive developments from a pricing perspective, such as decreases in fuel costs, would likely also be occurring.

Considering the number of variables in the continually developing REC market in New Hampshire and other states, it is difficult to predict future REC market prices. Nonetheless, given the REC prices in the power purchase agreement and the potential future movement of those agreed-upon prices, we find the REC pricing terms to be a cost-effective means for PSNH to meet some of its RPS compliance requirements. The REC option agreement, which allows Lempster Wind to repurchase a certain number of RECs upon payment of a premium to PSNH, affords an opportunity for Lempster Wind to potentially obtain a higher value for its RECs while also affording PSNH and its customers some mitigation of RPS compliance costs by requiring Lempster Wind to pay PSNH a premium for the RECs that are reacquired.

We agree with Staff that the reason the statute requires our approval of these multi-year agreements is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service rates. If PSNH had intended to use the agreements "below the

line,” the Company would not have had to seek the Commission’s approval. Therefore, we disagree that PSNH was required to seek approval from the Commission before it could enter into the subject agreements. If for some reason we were to find that the contracts were not in the public interest, PSNH would still be bound by the contracts, but would not be allowed to recover the associated costs from its customers.

We disagree with Freedom’s assertion that PSNH can only use the Class I RECs acquired through its agreement with Lempster Wind for compliance with its New Hampshire RPS requirements. At hearing, PSNH testified that it intended to maximize the value of RECs for the benefit of its customers. Although the statute does provide that multi-year agreements should be used to meet “reasonably projected renewable portfolio requirements,” RSA 362-F:9, I, there is nothing in RSA 362-F that bars a company from selling excess RECs procured through such agreements. Therefore, we find no legal barrier to PSNH selling the RECs it procures from Lempster Wind so long as the sale is consistent with the rules and process used in the trading of RECs in the NEPOOL market. Nevertheless, whether PSNH uses the RECs for compliance with New Hampshire’s RPS law, or sells them to try to achieve greater value, we will review PSNH’s actions as part of our annual review of its energy service revenues and costs.

In addition, Freedom’s bare assertion that PSNH customers will pay “higher bills” as a result of these agreements is not supported by the evidence. Finally, we do not find that PSNH’s interest in keeping pricing terms confidential implies that it will be applying a “litmus test” or somehow acting unfairly in negotiating REC purchase agreements.

It has been proposed in this proceeding that PSNH must issue an RFP to obtain the best market prices for RECs. While we agree that an RFP is one method to acquire RECs, the Legislature did not specify a particular solicitation method for distribution companies such as



PSNH to enter into multi-year purchase agreements with renewable energy sources for certificates. Rather, the statute provides that we consider “(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.” RSA 362-F:9, II (d)-(e).

It is important to recognize that the REC market in New Hampshire is still developing. If the REC market develops to a point where there is an adequate supply of New Hampshire Class I RECs, using an RFP to procure RECs may indeed result in the lowest cost per REC. At present, however, there is a limited supply of Class I RECs and, based on the foregoing, we find that the two multi-year agreements regarding power, capacity and RECs between PSNH and Lempster Wind are consistent with the factors set forth in RSA 369-F:9, II and are in the public interest. In light of the above, we will approve the agreements between PSNH and Lempster Wind.

**Based upon the foregoing, it is hereby**

**ORDERED**, the Power Purchase Agreement and Renewable Energy Certificate Option Agreement between Public Service Company of New Hampshire and Lempster Wind, LLC are hereby APPROVED, and it is;

**FURTHER ORDERED** that the motion for confidential treatment filed on January 23, 2009 by Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. is hereby GRANTED.

By order of the Public Utilities Commission of New Hampshire this first day of May,  
2009.

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Thomas B. Getz  
Chairman

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Graham J. Morrison  
Commissioner

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Clifton C. Below  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

**PETITION FOR APPROVAL OF POWER PURCHASE AGREEMENT  
AND RENEWABLE ENERGY CERTIFICATE OPTION AGREEMENT  
BETWEEN PSNH AND LEMPSTER WIND, LLC**

DE 08-077

**MOTION FOR RECONSIDERATION**

NOW COMES Intervenor Freedom Partners, LLC (Movant), by and through its undersigned counsel, and pursuant to N.H. RSA 541:3 and 541:4, respectfully move the New Hampshire Public Utilities Commission (“Commission”) to rehear and reconsider Order No. 24,965 (May 1, 2009) (“Order”). In support of this Motion, Movant states as follows:

For the reasons stated in the accompanying Memorandum in Support of Motion for Reconsideration, the Order is contrary to law, and unreasonable.

WHEREFORE, Movant respectfully requests the Commission to:

- A. Reconsider its decision in this proceeding;
- B. Grant such other and further relief as may be just and equitable.

Respectfully submitted,  
FREEDOM PARTNERS, LLC

By its Attorneys  
**/s/ James T. Rodier**  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5918  
603-559-9987

Dated: May 19, 2009

**CERTIFICATION OF SERVICE**

Pursuant to Rules Puc 203.02(2) and Puc 203.11, I have served copy of this Motion on each person identified on the commission’s service list for this docket.

**/s/ James T. Rodier**

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

PETITION FOR APPROVAL OF A POWER PURCHASE AGREEMENT  
AND A RENEWABLE ENERGY CERTIFICATE OPTION AGREEMENT WITH  
LEMPSTER WIND, LLC  
DE 07-108

**MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

NOW COME Intervenor Freedom Partners, LLC<sup>1</sup> (Movant or Freedom), by and through its undersigned counsel, and respectfully submits this Memorandum in Support of its Motion for Reconsideration.

**INTRODUCTION**

An evidentiary hearing was held in this proceeding on February 5, 2009. Subsequent to the hearing, on February 13, 2009, Movant filed a closing statement with the Commission. Order at 10. On February 17, 2009, PSNH filed its response. On or about February 23, 2009, Freedom filed its reply to the PSNH response.<sup>2</sup> The Commission”) issued Order No. 24,965 (May 1, 2009) whereby it “approved” the Power Purchase Agreement and Renewable Energy Certificate Option Agreement.

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when the motion states good reason for such relief. On appeal, a party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. In re Appeal of Pinetree Power, Inc. 152 N.H. 92 at 95 (2005) (Citation omitted).

**ARGUMENT IN SUPPORT OF RECONSIDERATION**

**A. RECs purchased by PSNH from Lempster Wind can only be used to meet New Hampshire RPS requirements.**

The law applicable to -year purchases from renewable energy sources is clear:

...the Commission may authorize an electric distribution company to enter into multi-year purchase agreements with renewable energy sources for certificates, 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...

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<sup>1</sup> Freedoms Partners, LLC is a different corporate entity from Freedom Logistics, LLC.

<sup>2</sup> There is nothing in the Order that acknowledges Freedom’s reply comments.

RSA 362-F:9, I (Emphasis added).

In its Order, the Commission ruled that:

Although the statute does provide that multi-year agreements should be used to meet “reasonably projected renewable portfolio requirements,” RSA 362-F:9, I, there is nothing in RSA 362-F that bars a company from selling excess RECs procured through such agreements.

Order at 18. (Emphasis added.)

PSNH testified that it will not use the REC’s purchased under the Lempster PPA to meet its New Hampshire renewable portfolio requirements if higher value can be obtained by selling the RECs into other New England markets:

Q. So, I guess the way we leave it is that, if you can get more for these REC’s in Maine, Massachusetts, Rhode Island, or Connecticut, or even Vermont now, I guess, or New York, that’s what you’re going to do with these RECs.

A. (Witness nodding affirmatively.)

Transcript (February 5, 2009) at 25.

This ruling is erroneous as a matter of law. The language of RSA 362-F:9, I is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.” Green Crow Corp. v. Town of New Ipswich, 164-165, N.H. (2008) (“We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history, consider what the legislature might have said, or add words not included in the statute.”)

The Commission’s interpretation of RSA 362-F:9, I is erroneous because it added words not included in the statute to allow the sale of “excess” REC’s. In any event, PSNH may well sell all of the RECs. This is far different from a mere sale of “excess” REC’s

The plain and ordinary meaning of the words used in the statute require the Lempster REC’s to be devoted to meeting “reasonably projected renewable portfolio requirements.” Such a reading would be consistent with “the intent of the legislature as expressed in the words of [the] statute.” Appeal of Public Service Co., 141 N.H. 13, 17 (1996).

**B. PSNH was required to seek authority from the Commission to enter into the contracts.**

In the Order, the Commission ruled that

...the reason the statute requires our approval of these multi-year agreements is to allow the petitioning utility to recover the prudently incurred costs of such agreements in its energy service rates. If PSNH had intended to use the agreements “below the line,” the Company would not

have had to seek the Commission's approval. Therefore, we disagree that PSNH was required to seek approval from the Commission before it could enter into the subject agreements.

Order at 17, 18. (Emphasis supplied.)

The Order expressly states that Commission "approval" is not needed by PSNH to enter into the agreements. The Order only states that "approval" is needed to allow the utility to recover its costs in energy service rates.

RSA 362-F:9, I provides that "the Commission may authorize an electric distribution company to enter into multi-year purchase agreements." To "authorize" is to "empower." Merriam-Webster Online Dictionary. 2009 (Emphasis supplied).<sup>3</sup> To "approve" means to "accept as satisfactory" or to "ratify." Id. Pursuant to RSA 362-F:9, I, PSNH needed the Commission to empower it to enter the agreements, not merely to ratify its actions after the fact.

**C. PSNH would not have been entitled to use the agreements "below the line" without Commission approval**

In its order, the Commission also ruled that "if PSNH had intended to use the agreements "below the line," it would not have had to seek the Commission's approval." This appears to reflect PSNH's testimony during the hearing:

Q: Okay. And did you say, if it's not approved, you're going to take it below the line?

A: We have no choice. We cannot use it for our customers, because it would not be approved by the Commission. That's my understanding.

Transcript (February 5, 2009) at 21.

Implicit in the Commission's ruling is the premise that a public utility is free to do anything it wants to do so long as it does not seek recovery of the costs from ratepayers. This is erroneous as a matter of law.

Although no legal authority was provided by the Commission for its ruling, presumably the Commission had in mind the Supreme Court's ruling in Appeal of Public Service Company of New Hampshire, 122 N.H. 1062, 1066:

This court has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use.

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<sup>3</sup> <http://www.merriam-webster.com/dictionary/authorize>

Appeal of Public Service Company of New Hampshire, 122 N.H. 1062, 1066 (1982). (Emphasis added.)

Freedom acknowledges that PSNH has the management discretion to assemble a default service supply portfolio that is subject only to the Commission's after-the-fact analysis of whether the resulting costs charged to customers are actual, prudent and reasonable, subject to the mandate that “[d]efault service should be procured through the competitive market.” RSA-F:3(c). However, this is not the same as saying that PSNH can enter into any contract it wants so long as it does not seek recovery from ratepayers.

PSNH is a public utility under New Hampshire law. See, RSA 362:2. As such, it has devoted its private business to a public use. Appeal of Public Service Company of New Hampshire, supra. The public utilities commission is a specialized state agency with technical expertise in the field of public utilities and is vested by the NH Legislature with “plenary authority” over PSNH. Order No. 24,614 (April 13, 2006), at 7. RSA 347:3 endows the PUC with “general supervision of all public utilities ... so far as necessary’ to effectuate the Commission’s various enabling statutes.” Additionally, RSA 374:4 delegates to the PUC both the “power” and the “duty, to keep informed as to all public utilities in the state.”

As a regulated utility, if PSNH wants to enter an agreement for use “below the line,” it needs authorization from the Commission to do so. Otherwise, would the Commission look the other way if PSNH conducts a wholesale marketing operation out of Manchester offices utilizing PSNH employees, resources, information and credit? Similarly, would the Commission be helpless if PSNH decides obtain a CEP license from Massachusetts and sell to NSTAR’s customers?

**D. The Commission’s finding that the energy floor price is set “at a price level that is significantly discounted from current market energy prices” is unreasonable and contrary to the evidence.**

In the Order, the Commission found that “the inclusion of this pricing term [the energy floor price], while providing income protection to Lempster Wind, does so at a price level that is significantly discounted from current market energy prices.” Transcript (February 5, 2009) at 17 (Emphasis added.). This finding is contrary to the evidence and unreasonable.

The record evidence is as follows. PSNH testified that the forward price for a flat block of energy would be about 6 cents per kwh:

Oh, okay. This is, I mean, this is my area. All I can say is, I mean, I had a conversation with Mr. Lebreque this morning and he told me he would expect, if you went out and bought power for the year, you’d pay slightly under \$60, \$59 for flat, \$58, \$59, something like that. That’s what--

Transcript (February 5, 2009) at 32, 33.

Moreover, PSNH's estimated forward prices were compared to the values shown on the ICAP Energy quote sheet. The ICAP Energy quotes (which PSNH was familiar with) were lower than Mr. Lebreque's estimates.

Additionally, the Commission should refer to the ISO-NE Monthly Market Operations Report for March 2009.<sup>4</sup> Table 4.1.1 (All Hours, March 2009) indicates that the average real-time NH load zone LMP for March 2009 was \$39.63 per Mwh, or less than 4 cents per Kwh. It is inconceivable that the floor price in the Lempster contract is less than 4 cents per kwh. There is no reason why the Commission should not take administrative notice pursuant to Puc 203.27 of the publicly available facts pertaining to "current market energy prices."

Accordingly, the Commission's finding that the energy floor price is set "at a price level that is significantly discounted from current market energy prices" is contrary to the evidence and unreasonable.

The Commission also found that "Freedom's bare assertion that PSNH customers will pay "higher bills" as a result of these agreements is not supported by the evidence." Order at 18 (Emphasis supplied).

In its closing statement, Freedom made the following contention based upon the foregoing evidence:

During 2009, PSNH customers are likely to pay higher bills if the Commission authorizes PSNH to enter into the Lempster Agreements. However, this is not to say that purchases would be uneconomic over the 15-year deal term should energy costs return to the levels which prevailed in the first half of 2008.

The evidence supports Freedom's assertion that customers are likely to pay higher bills during 2009. This is not a "bare" assertion.

**E. The Commission's statement in the Order "that PSNH's interest in keeping pricing terms confidential implies that it will be applying a "litmus test" or somehow acting unfairly in negotiating REC purchase agreements" is contrary to the record and should be stricken from the Order.**

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<sup>4</sup> ([http://www.iso-ne.com/markets/mkt\\_anlys\\_rpts/mnly\\_mktops\\_rtps/2009/2009\\_03\\_monthly\\_market\\_report.pdf](http://www.iso-ne.com/markets/mkt_anlys_rpts/mnly_mktops_rtps/2009/2009_03_monthly_market_report.pdf))



In the Order, the Commission stated that “we do not find that PSNH’s interest in keeping pricing terms confidential implies that it will be applying a “litmus test” or somehow acting unfairly in negotiating REC purchase agreements.” Order at 18.

This finding is unreasonable because it misconstrues an issue in the proceedings. The issue presented by Freedom was in its closing statement was the follows:

PSNH further testified under cross-examination that PSNH has an open door policy for all renewable resource developers and that all proposals of any kind would be considered in good faith and treated strictly on their merits. There are no litmus tests. According to PSNH, “nobody would be in or out because of who they are.”

The issue raised by Freedom has nothing to do with “keeping pricing terms confidential.” Therefore this finding should be stricken from the Order.

**E. The Commission’s Order does not comply with the requirements of RSA 378:41.**

RSA 378:41 requires that

“[a]ny proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission.”

The Commission’s Order is unlawful because it does not comply with the requirements of RSA 378:41 which require a reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the Commission. There is no such reference in the Order.

WHEREFORE, for all of the foregoing reasons, Freedom Partners, LLC respectfully requests the Commission to:

- A. Reconsider its Order in this proceeding; and
- B. Grant such other and further relief as may be just and equitable.

Respectfully submitted,  
FREEDOM PARTNERS, LLC

By its Attorney  
/s/ James T. Rodier  
1500A Lafayette Road, No. 112  
Portsmouth, NH 03801-5918  
603-559-9987

Dated: May 19, 2009

CERTIFICATION OF SERVICE

Pursuant to Rules Puc 203.02(2) and Puc 203.11, I have served copy of this petition on each person identified on the commission's service list for this docket.

/s/ James T. Rodier



**Public Service  
of New Hampshire**

PSNH Energy Park  
780 North Commercial Street, Manchester, NH 03101

Public Service Company of New Hampshire  
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The Northeast Utilities System

May 27, 2009

Debra A. Howland  
Executive Director and Secretary  
State of New Hampshire  
Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429

Re: Petition for Approval of Power Purchase and REC Option Agreements between  
Public Service Company of New Hampshire and Lempster Wind, L.L.C.  
Docket No. DE 08-077

Dear Ms. Howland:

Enclosed herewith is the original and six copies of Public Service Company of  
New Hampshire's ("PSNH") Objection to Freedom Energy Partners' Motion for  
Reconsideration.

Copies of the Motion for Protective Order have been sent to the persons on  
the attached Service List pursuant to NH Code Admin. Rule Puc § 203.11.

Very truly yours,

Gerald M. Eaton  
Senior Counsel

Enclosures  
cc: Service List

**Service List**  
**Docket DE 08-077**

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Mr. Carl N. Vogel III  
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Public Service of New Hampshire  
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THE STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire's  
Petition for Approval Power Purchase Agreements with  
Lempster Wind, LLC

Docket No. DE 08-077

**OBJECTION OF  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
TO  
MOTION FOR RECONSIDERATION  
OF  
FREEDOM ENERGY PARTNERS, LLC**

Pursuant to N.H. Code Admin. Rule Puc §203.07(f),<sup>1</sup> Public Service Company of New Hampshire ("PSNH") hereby objects to the Motion for Reconsideration ("Motion") filed by Freedom Partners, LLC ("Freedom").<sup>2</sup> In support of its Objection, PSNH says the following:

**I. INTRODUCTION**

PSNH is under a statutory obligation to acquire and retire a certain number of Renewable Energy Certificates ("RECs") annually through the year 2025. RSA 362-F:3. PSNH entered into certain fifteen year agreements with Lempster Wind, LLC ("Lempster") to purchase power, capacity and RECs. PSNH submitted those agreements to the Commission on May 29, 2008, requesting approval under RSA 362-F:9. (Exhibits 2 and 3).

A hearing on the merits was held on February 5, 2009, at which PSNH offered the pre-filed direct testimony of Mr. Sheldon B. Wicker, Jr. (Exhibit 1). Mr. Wicker was subject to cross examination. On May 1, 2009, the Commission issued its Order No. 24,965

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<sup>1</sup> PSNH was served with the Motion and the Memorandum in Support of Freedom's Motion for Reconsideration ("Memorandum") on May 19, 2009. This Objection is timely filed, as Rules Puc §203.07(f) and Puc § 202.03(c) permit a full five business days in which to file an objection.

<sup>2</sup> In the Memorandum at footnote 1, Freedom notes, "Freedom's (sic) Partners, LLC is a different corporate entity from Freedom Logistics, LLC." According to the New Hampshire Secretary of State, Freedom Partners, LLC, is a corporation not in good standing in New Hampshire.

approving both the purchase power agreement and the REC option agreement. On May 19, 2009, Freedom filed its Motion and supporting Memorandum.<sup>3</sup>

## **II. SUBSTANTIVE OBJECTIONS**

### **A. There is no restriction on the use of Lempster RECs purchased by PSNH.**

Freedom claims that under RSA 362-F:9, I, RECs purchased by PSNH from Lempster Wind can only be used to meet New Hampshire RPS requirements. As a result, Freedom asserts that the Order is erroneous as a matter of law because it allows PSNH to maximize the value of such RECs by sale of such RECs outside of New Hampshire if higher value can be obtained in other New England markets. Freedom's reading of the law is incorrect.

In a nutshell, RSA 362-F:9 provides the Commission with authority to approve multi-year purchase agreements by electric distribution companies with renewable energy sources for RECs to meet reasonably projected renewable portfolio requirements, if such agreements are in the public interest. The record reflects Mr. Wicker's assertion that acquisition of the Lempster RECs are within the reasonably projected needs of PSNH. *Transcript*, February 5, 2009, at 65. Therefore, the Order fully complies with the law.

Once such purchase is approved, nothing in the law mandates that an electric distribution company must forego economic opportunities to re-sell such RECs for the benefit of its retail customers. Mr. Wicker testified that PSNH will try to maximize the value of the RECs for the benefit of its customers. *Id.* at 25. Such maximization of value for the benefit of customers is part of the public interest standard contained in RSA 362-F:9. Indeed, RSA 362-F:9, II, (a) expressly includes efficiency and cost-effectiveness as part of the public interest consideration. RSA 362-F:9, II, (b) requires the public interest standard to be substantially consistent with the restructuring policy principles of RSA 374-F:3 - - which calls for "near term rate relief" and "lower prices for all customers." RSA 364-F:3, X.

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<sup>3</sup> Under RSA 541:3, a motion for rehearing should specify all grounds for rehearing, and under RSA 541:4 "Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Freedom's Motion only states, "For the reasons stated in the accompanying Memorandum in Support of Motion for Reconsideration, the Order is contrary to law, and unreasonable." Assuming the Commission will ignore these technical infractions of the appeal statute, PSNH will respond to the arguments made in Freedom's Memorandum.

Freedom's reading of RSA 362-F:9 would prohibit electric distribution companies from maximizing the value of RECs, thereby increasing costs to consumers – a result contrary to the requirements of that very law.<sup>4</sup>

**B. Electric distribution companies are not required to seek Commission approval under RSA 362-F:9 before entering into a long term contract for the purchase of RECs.**

Freedom claims that Commission pre-approval is necessary before an electric distribution company may enter into an agreement with renewable energy sources for RECs. Once again, Freedom is incorrect.

The purpose of RSA Chapter 362-F, the Electric Renewable Portfolio Standard, is set forth in RSA 362-F:1. The law's purpose is summed up in the last sentence:

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.

Freedom's claim is again contrary to the law. The law finds that it is in the public interest to stimulate investment in renewable generation technologies, not to restrict it.<sup>5</sup> Agreements by the state's electric distribution companies to purchase RECs from renewable energy developers is likely the largest potential investment source available to stimulate the development of renewable energy.

**C. A utility does not need approval of the Commission to enter into an agreement which will be booked below the line.**

Freedom seeks rehearing on the issue of whether a utility requires approval of the Commission to enter into an agreement which will be booked below the line. That fact situation is not in issue in this case, as PSNH is not seeking to book the arrangements with

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<sup>4</sup> In another recently-docketed proceeding, counsel for Freedom has asserted that "PSNH has the obligation under RSA 378:37 and 38 'to develop and implement an integrated resource plan that satisfies customer energy service needs at the lowest overall cost consistent with maintaining supply reliability.'" Complaint of Clean Power Development, LLC Against Public Service of New Hampshire, Docket No. DE 09-067, April 7, 2009, at ¶18. It is curious that in the instant docket, Freedom argues that PSNH's opportunity to satisfy customer energy service needs at the lowest overall cost is contrary to law.

<sup>5</sup> Counsel for Freedom has cited this same law in the Complaint cited in the previous footnote, at ¶17 (the second ¶17 in that Complaint, found between ¶¶18 and 19).

Lempster below the line; hence, it is not a proper ground for rehearing. “There is no right to an adjudication of matters not in contention.” *Conway v. New Hampshire Water Resources Bd.*, 89 N.H. 346 (1038). Nonetheless, should the Commission deem it necessary to address this specification, PSNH provides the following discussion.

Freedom baldly asserts, “As a regulated utility, if PSNH wants to enter an agreement for use ‘below the line,’ it needs authorization from the Commission to do so.” Freedom provides absolutely no authority for this legal claim.

To the contrary, Freedom correctly cites to *Appeal of Public Service Company*, 122 N.H. 1062 (1982). In that case, the New Hampshire Supreme Court stated, “This court has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use.” *Id.* at 1066-67.<sup>6</sup> Despite Freedom’s citation to this Supreme Court decision, the Memorandum ignores this very holding and continues on in an incoherent manner in its attempt to create law, where none exists.

Freedom’s Memorandum does not cite a single case or decision holding that a utility must obtain Commission approval for activities which will be booked below the line. The Commission’s own rules anticipate that certain utility activities are conducted below the line. Rule Puc 310 requires utility promotional, political and institutional advertising or activities to be booked below the line; utilities do not need pre-approval of those transactions. Gas utilities have regularly engaged in non-utility businesses below the line, such as retail propane and appliance sales -- even a retail space storage business.<sup>7</sup>

Moreover, Freedom lacks standing to raise this issue.<sup>8</sup> During the June 27, 2008 procedural hearing in this docket (which Freedom did not attend), the Commission was informed that Freedom had agreed to limit its intervention to issues related to Renewable

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<sup>6</sup> See also, *Appeal of Easton*, 125 N.H. 205, 211 (1984).

<sup>7</sup> “Manchester Gas has numerous nonutility businesses, which recently have included bottled propane gas and merchandising gas appliances. Pursuant to a consumer complaint, the commission was made aware of a new nonutility business called Rent-A-Space. This storage business, which bloomed to existence with a \$100,000 investment, is operated by Manchester Gas employees. . . .” *In re: Concord Natural Gas Corp., Manchester Gas Company et al.*, 66 NH PUC 48, 49-50 (1981). Once the holding company EnergyNorth, Inc. was formed, the utility was somewhat proud of successfully operating its non-utility business within the holding company structure. *In re: Concord Natural Gas Corp.*, 70 NH PUC 632, 637 (1985).

<sup>8</sup> “...a party’s standing is a question of subject matter jurisdiction, which may be addressed at any time. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005).” *Libertarian Party of New Hampshire v. Secretary of State*, 158 N.H. 194, 195 (2008).



Energy Certificates and the REC market. *Transcript*, June 27, 2008, at 6-7. Freedom's intervention in this proceeding was granted "subject to the conditions agreed to between Freedom and Public Service Company of New Hampshire." *Id.* at 40. This specification for rehearing falls outside this consented-to limitation.<sup>9</sup>

**D. The Commission was correct in determining that the energy prices will be reasonable over the course of the term of the Power Purchase Agreement.**

Next, Freedom complains that the Commission's finding that the energy floor price is set "at a price level that is significantly discounted from current market energy prices" is unreasonable and contrary to the evidence. There is ample factual basis in the record to support the Commission's finding.

Mr. Wicker testified as follows:

Q. Do you believe these Agreements are beneficial for PSNH's customers and will meet the requirements of the New Hampshire RPS program?

A. Yes. We believe the Agreements provide energy and capacity for our customers at prices that are below market and lower our future cost of purchased power. These Agreements also add a new source of renewable generation in New Hampshire, wind power, to help PSNH meet its New Hampshire RPS requirements. Exhibit 1 at 10.

Freedom attempts to contradict this evidence by stating that "Moreover, PSNH's estimated forward prices were compared to the values shown on the ICAP Energy quote sheet. The ICAP Energy quotes (which PSNH was familiar with) were lower than Mr. Labrecque's estimates." Memorandum at 5. Attorney Rodier admitted that the witness he was cross examining, Mr. Wicker (not Mr. Labrecque), "may not be familiar with this [the ICAP Energy Quote Sheet]." *Transcript*, February 5, 2009 at 31. More significantly, the ICAP Energy quote sheet is not made part of the record; the prices on the ICAP Energy quote sheet were not read into the record; and, Mr. Wicker never admitted that Mr. Labrecque's numbers were higher or lower than the ICAP Energy quote sheet. There is no record

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<sup>9</sup> But for the agreement limiting Freedom's intervention, PSNH objects to Freedom's participation in this proceeding as it lacks standing. Rather than repeat its standing objection here, PSNH refers the Commission to the objection on standing regarding Freedom Partners' affiliates (Freedom Logistics, LLC and Halifax-American Energy Company, LLC) in its Brief filed on May 22, 2009, in Docket No. DE 08-145, and incorporates those arguments herein by reference.

evidence of what the ICAP Energy quote sheet contained; therefore, the Commission should not rely on it.

The Memorandum goes on to cite the ISO-NE Monthly Market Operations Report for March 2009. Memorandum at 5. Freedom asks the Commission to take administrative notice of the ISO-NE Monthly Market Operations Report for March 2009. *Id.* This request to take administrative notice is untimely. Under RSA 541-A:33, VI, “[p]arties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.” *See also*, Rule Puc § 203.27 (b). This March Report was created and issued after the record was closed in this proceeding. Freedom is using a snapshot of energy prices and quotes for an entirely different market in a feeble attempt to prove that fifteen years of pricing under the Purchased Power Agreement is unreasonable.<sup>10</sup> Despite the evidentiary shortcomings of this attempt, the argument fails on the merits.

Freedom sums up this specification for rehearing by asserting that, “The evidence supports Freedom’s assertion that customers are likely to pay higher bills during 2009.” Memorandum at 5. As discussed earlier, due to the agreed-upon limitations on Freedom’s intervention in this proceeding, Freedom lacks standing to raise this issue. This specification for rehearing falls outside of the consented-to limitation on intervention (*i.e.*, issues related to Renewable Energy Certificates and the REC market.)

**E. There is no need for the Commission to strike the “litmus test” language from its order.**

Freedom complains that the Commission’s Order misconstrues an issue in the proceedings. As a result, Freedom moves to have certain wording stricken from the Order. There is no need for the Commission to do so.<sup>11</sup>

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<sup>10</sup> This logic is analogous to concluding that if the spot price of oil decreases on a particular day, a decision made months earlier to enter into a pre-buy plan for heating oil for the upcoming winter was an incorrect decision.

<sup>11</sup> The cross examination by Attorney Rodier of Mr. Wicker on the area of negotiations with other small power developers (Transcript, February 5, 2009 at 33 -36) is irrelevant to whether the Lempster agreements should be found in the public good. It is now obvious that Attorney Rodier was conducting this cross examination for the benefit of another client of Attorney Rodier, Clean Power Development, LLC. *See*, Docket No. DE 09-067.

As discussed earlier, due to the agreed-upon limitations on Freedom's intervention in this proceeding, Freedom lacks standing to raise this issue. This specification for rehearing falls outside this consented-to intervention (*i.e.*, issues related to Renewable Energy Certificates and the REC market.)

**F. The Commission's Order No. 24,965 fully complied with RSA 378:41.**<sup>12</sup>

Freedom's last specification for rehearing asserts, "The Commission's Order is unlawful because it does not comply with the requirements of RSA 378:41 which require a reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the Commission. There is no such reference in the Order." Freedom is just plain wrong. The Order contains multiple references to the least cost integrated resource plan statutes.

Mr. Wicker's testimony addressed the least cost integrated resource plan issue directly: "In PSNH's Integrated Least Cost Resource Plan filed on September 30, 2007, PSNH discusses the need to enter into longer-term contracts with renewable facilities that produce RECs." Exhibit 1 at 9. Mr. Mullen addressed this issue in his testimony. Exhibit 8, page 7, lines 7 through 24.

In the context of the decision, the Commission quoted the provisions of RSA 362-F:9,  
II

In determining the public interest, the commission shall find that the proposal is, on balance, substantially consistent with the following factors:

...

(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;

Order No. 24,965 at 16 (Emphasis added).

The Commission specifically found

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<sup>12</sup> This specification is identified as the second subparagraph E by Freedom in its Memorandum.

The Lempster Wind project is a new, renewable generating source that introduces no new pollution or harmful emissions into the environment. These agreements support the financial viability of the project and, therefore, are consistent with the environmental principles of the electric utility restructuring statutes (RSA 374-F:3, VIII and IX) and New Hampshire's energy policy set forth in RSA 378:37.

*Id.* at 17.

Clearly the requirements of RSA 378:41 have been satisfied both "within the context of the hearing and the decision" in this proceeding.

As discussed earlier, due to the agreed-upon limitations on Freedom's intervention in this proceeding, Freedom lacks standing to raise this issue. This specification for rehearing falls outside this consented-to intervention (*i.e.*, issues related to Renewable Energy Certificates and the REC market.)

### **III. CONCLUSION.**

Freedom lacks standing to participate in this proceeding. PSNH consented to, and the Commission granted, Freedom's participation in this proceeding on a very limited basis intended to minimize disruption to an orderly proceeding. Freedom's rehearing request violates both the spirit and the letter of its limited intervenor status.

The facts and citations to the record, case law and previous Commission decisions supplied herein clearly show that Freedom has not demonstrated good reason for granting a rehearing, and Freedom's Motion/Memorandum should be dismissed.

Respectfully submitted,

**Public Service Company of New Hampshire**

May 29, 2009  
Date

By: Gerald M. Eaton  
Gerald M. Eaton  
Senior Counsel  
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(603) 634-2961

**CERTIFICATE OF SERVICE**

I hereby certify that, on the date written below, I caused the attached Objection to Freedom Energy Partners' Motion for Reconsideration to be hand delivered or served pursuant to Puc § 203.02 and Puc § 203.11(c) to the persons on the attached Service List.

May 27, 2009  
Date

By: Gerald M. Eaton  
Gerald M. Eaton  
Senior Counsel  
Public Service Company of New Hampshire  
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STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DE 08-077

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Approval of Power Purchase and REC Option Agreements between Public Service Company of New Hampshire and Lempster Wind, LLC

Order Denying Motion for Rehearing

ORDER NO. 24,982

June 25, 2009

**I. PROCEDURAL HISTORY**

On May 29, 2008, Public Service Company of New Hampshire (PSNH) filed a petition requesting approval of a power purchase agreement and a renewable energy certificate (REC) option agreement with Lempster Wind, LLC (Lempster). Freedom Partners, LLC (Freedom) filed a motion to intervene on June 25, 2008. At the prehearing conference on June 27, 2008, PSNH stated that Freedom had agreed to limit its intervention to issues related to RECs and the REC market. June 27, 2008 Hearing Transcript at 6-7. The Commission granted Freedom the agreed-upon limited intervention. *Id.* at 40.

Following a duly noticed hearing held on February 5, 2009, the Commission issued Order No. 24,965 (May 1, 2009) approving PSNH's petition. On May 20, 2009, Freedom filed a motion for reconsideration pursuant to RSA 541:3<sup>1</sup> and a supporting memorandum. PSNH filed an objection to Freedom's motion for reconsideration on May 27, 2009. Freedom withdrew one of its arguments for reconsideration on May 29, 2009.

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<sup>1</sup> RSA 541:3 allows any person directly affected by a commission action or proceeding to "apply for a rehearing" by motion (emphasis added).

## II. MOTION FOR REHEARING/POSITIONS OF THE PARTIES

### 1. Freedom

A. Freedom asserted that RECs purchased by PSNH from Lempster can only be used to meet New Hampshire Renewable Portfolio Standard (RPS) requirements. In support of its assertion, Freedom referred to RSA 362-F:9 which states that “the Commission may authorize an electric distribution company to enter into multi-year purchase agreements with renewable energy sources for certificates in conjunction with or independent of purchased power agreements from such sources to meet reasonably projected renewable portfolio requirements. (emphasis added).” Freedom Motion at 1. Freedom argued that the Commission exceeded its authority under the statute by finding that PSNH had the right to sell RECs purchased under the Lempster agreements into other markets. *Id.* at 2.

B. Freedom stated that PSNH needed the Commission’s authority prior to entering into the Lempster agreements. Referring to the Merriam-Webster Online Dictionary, Freedom represented that the word “authorize” means “empower” whereas “approve” means “to accept as satisfactory” or “ratify.” According to Freedom, because the statute says the Commission may “authorize” (*i.e.*, “empower”) the statute requires PSNH to seek the Commission’s authority prior to entering into the Lempster agreements. *Id.* at 3.

C. Freedom claimed that the Commission erred in stating that “if PSNH had intended to use the agreements ‘below the line,’ it would not have had to seek the Commission’s approval.” Freedom said that “implicit in the Commission’s ruling is the premise that a public utility is free to do anything it wants to do so long as it does not seek recovery of the costs from ratepayers.” Freedom said such a ruling is “erroneous as a matter of law” and speculated whether the Commission “would look the other way if PSNH conducts a wholesale marketing

operation out of [its] Manchester offices utilizing PSNH employees, resources, information and credit". *Id* at 3-4.

D. Freedom stated that the Commission's finding that the energy floor price is set "at a price level that is significantly discounted from current market energy prices" is unreasonable and contrary to the evidence. Freedom opined that the Commission should refer to the ISO-NE Monthly Market Operations Report for March 2009 and take administrative notice of the market energy prices in that document. *Id.* at 4-5. Freedom withdrew its motion for rehearing with respect to this issue by letter filed on May 29, 2009.

E. According to Freedom, the Commission's statement that "PSNH's interest in keeping pricing terms confidential implies that it will be applying a 'litmus test' or somehow acting unfairly in negotiation REC purchase agreements" is contrary to the record and should be stricken from the order. Freedom said the issue of "litmus tests" raised by Freedom has nothing to do with keeping pricing terms confidential. *Id.* at 6.

F.<sup>2</sup> Freedom argued that the Commission's Order does not comply with the requirements of RSA 378:41 which states "[a]ny proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission." Freedom noted that the Order does not reference PSNH's most recent least cost integrated resource plan and therefore does not comply with RSA 378:41. *Id.*

Freedom concluded by asking the Commission to "[r]econsider its Order in this proceeding; and . . . [g]rant such other and further relief as may be just and equitable."

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<sup>2</sup> Freedom referenced the previous argument and this argument as "E"; however, for purposes of this order, the second paragraph referenced as "E" will be referred to as "F".



## 2. PSNH Objection to Freedom's Motion

A. PSNH disagreed with Freedom's assertion that PSNH could use RECs acquired through the Lempster agreements only to meet its N.H. RPS requirements. PSNH said that RSA 362-F:9 authorizes the Commission to approve multi-year purchase agreements by electric distribution utilities with renewable energy resources for RECs to meet reasonably projected renewable portfolio requirements provided that such agreements are in the public interest. PSNH pointed out that the hearing record includes PSNH's assertion that the acquisition of Lempster RECs are within the reasonably projected needs of PSNH. PSNH Objection at 2.

PSNH also noted that one of the criteria used to measure public interest is whether a long term agreement for the acquisition of RECs represents an "efficient and cost-effective realization of the purposes and goals of this chapter". RSA 362-F:9, II (a). According to PSNH, selling RECs to maximize the value for its customers is consistent with the "efficient and cost-effective realization of the purposes and goals" of RSA 362-F and with the restructuring principles in RSA 374-F:3, which call for "near term rate relief" and "lower prices for all customers." RSA 372-F:3, X. PSNH opined that Freedom's narrow reading of the statute would prohibit electric distribution companies from maximizing the value of RECs, thereby increasing costs to customers — a result contrary to the law. *Id.* at 2

B. In response to Freedom's statement that PSNH could not enter into the Lempster agreements absent Commission authorization, PSNH stated that electric distribution companies are not required to seek Commission approval under RSA 362-F:9 before entering into a long-term contract for the purchase of RECs. PSNH asserts that Freedom's argument is contrary to the law's intent which is to stimulate investment in renewable energy generation technologies. *Id.* at 3.

C. PSNH objected to Freedom's statement that a utility must seek approval of the Commission to enter into an agreement which will be booked below the line by noting that it is not seeking to book the agreements with Lempster below the line and, therefore, the argument is not proper grounds for rehearing. In support of this assertion, PSNH cited a New Hampshire Supreme Court case where the Court stated "[t]here is no right to an adjudication of matters not in contention." *Conway v. New Hampshire Water Resources Board*, 89 N.H. 346, 349 (1938). PSNH Objection at 3-4.

PSNH observed that Freedom cited to *Appeal of Public Service Company*, 122 N.H. 1062 (1982). In that case, the Supreme Court stated that "[t]his court has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to public use." 122 N.H. 1062 at 1066-67. According to PSNH, Freedom cited the order but ignored the holding. PSNH noted that Freedom does not cite a single case or decision holding that a utility must obtain Commission approval for activities which will be booked below the line. In addition, PSNH referred to the Commission's rules, which recognize that an electric utility must book promotional, political and certain other activities that do not require Commission approval below the line. New Hampshire Code Admin. Rules Puc 310.

Finally, PSNH asserts that Freedom does not have the standing to raise this issue in a motion for rehearing because its intervention was limited by agreement to issues related to the acquisition of RECs. PSNH Objection at 4-5.

D. PSNH asserted that Freedom's argument about the level of the energy floor price fails on the merits because there is ample factual basis on the record to support the Commission's findings. *Id.* at 5. Freedom suggested that the Commission should have taken administrative

notice of the market energy prices in the ISO-NE Monthly Market Operations Report for March 2009. In its objection, PSNH said the request for the Commission to take administrative notice is untimely pursuant to RSA 541-A:33, VI which requires parties to a proceeding to be notified “either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and [the parties] shall be afforded an opportunity to contest the material so noticed.” PSNH pointed out that the March report was created after the close of the hearing, and thus could not have been afforded administrative notice even if properly introduced for such purposes. *Id.* at 6.

PSNH further stated that, at hearing, Freedom referred to an ICAP Energy Quote Sheet that was not made part of the record or read into the record, which the PSNH witness, Mr. Todd Wicker, did not use as a reference with respect to the negotiated energy prices in the Lempster agreements. *Id.* at 5. Freedom withdrew this argument as a basis for its motion for rehearing on May 29, 2009.

E. Freedom complained that the Commission’s order improperly relates the words “litmus test” to the need for confidential treatment of the pricing terms in the agreements between Lempster and PSNH. PSNH responded by referring to Freedom’s limited intervention and stated that Freedom has no standing to raise this issue. Therefore, according to PSNH, it is not necessary for the Commission to strike the sentence as requested by Freedom. *Id.* at 6-7.

F. In response to Freedom’s statement that the Commission’s order did not comply with the requirements of RSA 378:41, PSNH pointed out that the order contained multiple references to the least cost integrated resource statutes. In addition, PSNH said that Mr. Wicker’s testimony addressed the Company’s most recently filed least cost plan (Docket No. DE 07-108) and described PSNH’s need to enter into “longer-term” contracts with renewable

facilities that produce RECs. Hearing Exhibit 1 at 9. PSNH noted that Staff's witness also addressed the least cost planning statutes in testimony. Hearing Exhibit 8 at 7.

PSNH also pointed out that the Commission, in Order No. 24,965, quoted the provisions of RSA 362-F:9, II regarding the standards, including PSNH's least cost plan, that the Commission must consider to determine whether the agreements are, on balance, consistent with the public interest. According to PSNH, the requirements of RSA 378:41 have been satisfied both "within the context of the hearing and the decision" in this proceeding. PSNH Brief at 8.

PSNH concluded by saying the facts and citations to the record, case law and previous Commission decisions "clearly show that Freedom has not demonstrated good reason for granting a rehearing, and Freedom's motion should be dismissed." *Id.*

### III. COMMISSION ANALYSIS

At the outset, we note that RSA 541:3 states the right of any person directly affected by a commission order to "apply for a rehearing" with respect to such an order. Pursuant to RSA 541:4, a motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." Pursuant to RSA 541:3, the Commission may grant a rehearing when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either "overlooked or mistakenly conceived" by the deciding tribunal. *See Dumais V. State*, 118, N.H. 309, 311 (1978). In circumstances where new evidence is presented, the petitioner for such relief must explain why new evidence could not have been presented in the underlying proceeding. *O'Loughlin v. N.H. Personnel Comm'n*, 117 N.H. 999, 1004 (1977). We review each of Freedom's arguments below.

A. Freedom first argues that RSA 362-F:9, I forbids electric utilities from selling RECs procured through a long-term contract in other markets and, therefore, Order No. 24,965 is unlawful because we found that PSNH could sell RECs procured through the Lempster agreement in other markets. Freedom errs in its narrow and limiting interpretation of the statute.

The purpose of RSA 362-F is to stimulate investment in renewable energy facilities by requiring providers of electricity to procure a certain percentage of RECs in relation to the electric service they provide, or, in the alternative, to pay alternative compliance payments (ACP) into the New Hampshire Renewable Energy Fund. If PSNH acquired RECs from Lempster and sold those RECs for a value greater than that offered in the New Hampshire REC market, PSNH would be able to pay the ACP and return any additional revenue to ratepayers. In either event, PSNH would be using the RECs it acquired from Lempster to comply with its “reasonably projected renewable portfolio requirements.” RSA 362-F:9 We affirm our holding in Order No. 24,965, that “there is nothing in RSA 362-F that bars a company from selling excess RECs procured through such agreements.” Order No. 24,965 at 18. We clarify our prior holding by noting that to the extent that RECs sold in other markets are not excess, the sale for a higher price in another REC market is consistent with RSA 362-F because it allows PSNH to maximize customer benefits while still funding renewable investment in New Hampshire through ACPs, an alternative means of meeting renewable portfolio standards.

B. Regarding the argument that PSNH was required to seek Commission authority prior to entering into the agreements with Lempster, Freedom referred to the Merriam-Webster Online Dictionary to support its argument that “authorize” means “empower” and hence requires prior authorization by the Commission. We have looked at this reference and note that “empower” is a secondary meaning of the word “authorize” in this source. The primary meaning

of “authorize” in the Merriam-Webster Online Dictionary is “sanction.” This is similar to the definition found in Merriam-Webster Third New International Dictionary, 1986 (unabridged) which defines “authorize” as “endorse” or “sanction,” and the definition contained in Webster’s II New College Dictionary, 2005 (3<sup>rd</sup> edition) which defines “authorize” as “approve” or “sanction.” Based on our review of these sources, we conclude that our interpretation of the word “authorize” in RSA 362-F, which would allow the Commission to determine the public interest of a contract after an agreement is executed, is reasonable and consistent with the statutory framework of RSA 362-F.

In addition, the practical exigencies of contracting in the real world argue against requiring prior Commission authorization before entering into contracts with renewable energy facilities. As we stated in our order, if we determined that a long-term agreement for the acquisition of RECs between an electric utility and a renewable energy facility is not in the public interest, the utility would not be able to recover the costs of such an agreement from its customers. Order No. 24,965 at 18.

C. Freedom next states that PSNH would have to seek the Commission’s approval before the Company could enter into agreements “below the line.” We first note that this argument is not central to our holding in Order No. 24,965 that the power purchase and REC option agreements between Lempster and PSNH are in the public interest. Nonetheless, to the extent that utility transactions impact rates, we have the authority to determine whether such transactions are prudent, reasonable and in the public interest. However, as PSNH noted in its objection, the New Hampshire Supreme Court in *Appeal of Public Service Company of New Hampshire, supra*, held that owners of utilities do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to public use. We recognize

that electric utilities enter into transactions below the line and we require such transactions to be appropriately recorded. *See* New Hampshire Code Admin. Rule Puc 310.

Freedom has inferred too much from our statement in the order that PSNH could use the agreements below the line without Commission approval. Freedom's inference results in its positing hypothetical scenarios that go far beyond the subject matter in this docket. We, therefore, deny this argument as a basis for rehearing.

D. We do not address the argument that the energy floor price is set "at a price level that is significantly discounted from current market energy prices" since Freedom withdrew this argument as a basis for rehearing.

E. Freedom next asserted that we misconstrued an issue by referring to PSNH's interest in keeping pricing terms confidential in connection with whether PSNH would apply a "litmus test" with respect to negotiating REC agreements. The statement in question is not a "finding" relevant to the central matter in this docket, *i.e.*, whether the power purchase and REC option agreements between PSNH and Lempster are in the public interest pursuant to RSA 362-F:9. Consequently, Freedom's argument does not constitute grounds for rehearing.

F. Freedom's final argument is that the Commission's order is unlawful because it does not comply with the requirements of RSA 378:41. RSA 378:41 states as follows: "[a]ny proceeding before the commission initiated by a utility shall include, within the context of the hearing and decision, reference to conformity of the decision with the least cost integrated resource plan most recently filed and found adequate by the commission."

The Commission's hearing and order comport with the requirements of RSA 378:41. As noted by PSNH, it testified concerning the need for PSNH to enter into "longer-term" contracts with renewable facilities for the acquisition of RECs to meet its New Hampshire RPS

requirements consistent with the Company's least cost planning. Staff's testimony acknowledged that PSNH had addressed the factors listed in RSA 362-F:9, II, (a)-(e), including the extent to which the multi-year agreement comported with RSA 378:37 and PSNH's "integrated least cost resource plan pursuant to RSA 378:41." Hearing Exhibit 8 at 5.

Staff specifically pointed out that, at the beginning of RSA 362-F:II, it states that "[i]n determining the public interest, the commission shall find that the proposal is, on balance, substantially consistent with the following factors." *Id.* Staff testified that the language indicates that the Commission "must view the deal in its entirety (*i.e.*, "on balance") in determining whether or not a multi-year proposal is in the public interest, and that "substantially consistent" means that, while there may be varying degrees of consistency with the required factors, there should be no doubt that the proposed agreements conform, overall, with the required factors. *Id.*

In Order No. 29,645, we quoted RSA 362-F:9, II in its entirety, referred to Staff's position *supra*, and found that, based on our review, the purchased power agreement and the REC option agreement are in the public interest as set forth in the statute. Order No. 29,645 at 16. Freedom's argument that we did not consider PSNH's least cost integrated resource plan in reaching our finding is without merit.

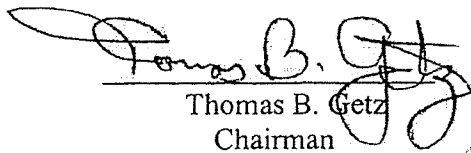



**Based upon the foregoing, it is hereby**


**ORDERED**, that Freedom Partner's LLC Motion for Rehearing is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of

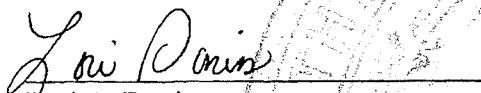
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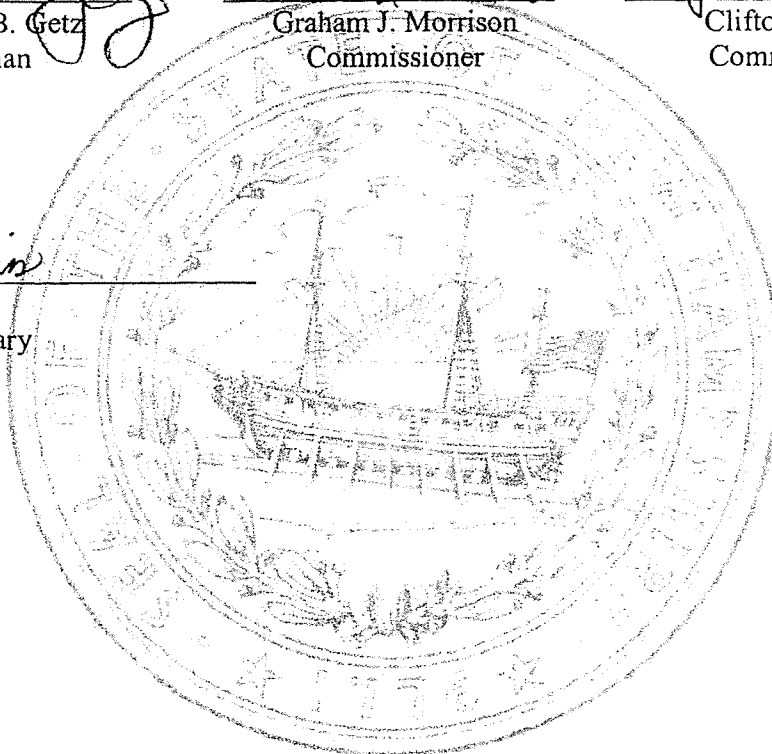
  
Thomas B. Getz  
Chairman

  
Graham J. Morrison  
Commissioner

  
Clifton C. Below  
Commissioner

Attested by:

  
Lori A. Davis  
Assistant Secretary



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February 11, 2009

Debra A. Howland  
Executive Director and Secretary  
State of New Hampshire  
Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429

PETITION FOR APPROVAL OF POWER PURCHASE AGREEMENT  
AND RENEWABLE ENERGY CERTIFICATE OPTION AGREEMENT  
BETWEEN PSNH AND LEMPSTER WIND, LLC

**DE 08-077**

Dear Ms. Howland:

Intervenor Freedom Partners, LLC d/b/a Freedom Energy hereby submits in writing its closing argument with respect to the issues raised in our cross-examination of the PSNH witness in this proceeding.<sup>1</sup>

**Introduction**

On May 29, 2008, Public Service Company of New Hampshire (PSNH) filed a petition pursuant to RSA 362-F:9 for approval of a Power Purchase Agreement (PPA) and Renewable Energy Certificate (REC) Option Agreement (collectively, the Agreements) between PSNH and Lempster Wind, LLC (Lempster Wind). Pursuant to the terms of the Agreements, PSNH will purchase 100% of the energy, capacity and NH RECs from Lempster Wind, with Lempster Wind having the option to repurchase a certain percentage of the RECs from PSNH at a price that includes a premium above the price originally paid by PSNH.

The hearing was held on February 5, 2009.

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<sup>1</sup> We have not had the benefit of reviewing the transcript before submitting these comments.

I. **Applicable Law**

The Commission may authorize an electric distribution company “to enter into multi-year purchase agreements with renewable energy sources for certificates, 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...” RSA 362-F:9,I (Emphasis added).

II. **Discussion**

**A. PSNH has no authority to enter into the Agreements under any circumstances without Commission authorization.**

PSNH testified that the Lempster Wind became commercially operational on December 10, 2008. Since that time, PSNH has purchased 100% of the energy, capacity and NH RECs from Lempster Wind pursuant to the Agreements. PSNH has accounted for those purchases “above-the line” as if the Agreements had already been approved by the Commission pursuant to RSA 362-F:9,I. PSNH also testified that if the Agreements are not approved by the Commission, the purchases from Lempster Wind will be taken “below-the- line” and would not be subject to the Commission’s jurisdiction.

PSNH is an electric distribution company; PSNH has no authority to enter into the Agreements without Commission authorization. The language of RSA 362-F:9,I is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.” *See, e.g., Green Crow Corp. v. Town of New Ipswich*, 950A.2d 163, 164-165, N.H. (2008) (“We look to the plain and ordinary meaning of the words used in the statute and will not examine legislative history, consider what the legislature might have said, or add words not included in the statute.”)

PSNH has no authority to enter into the Agreements under any circumstances without prior Commission authorization.

**B. REC’s purchased by PSNH pursuant to RSA 362-F:9,I may be used only to meet reasonably projected renewable portfolio requirements in New Hampshire.**

PSNH testified that it will not use the REC’s purchased under the Lempster PPA to meet its New Hampshire renewable portfolio requirements if higher value can be obtained by selling the RECs into other New England markets.

The Commission may authorize PSNH “to enter into multi-year purchase agreements with renewable energy sources for certificates..., to meet reasonably projected renewable portfolio requirements...” RSA 362-F:9,I (Emphasis added). PSNH’s only renewable portfolio requirement is in New Hampshire. PSNH has no portfolio requirement in any other New England state. The language of RSA 362-F:9,I is clear; the PUC need look no further than “the plain and ordinary meaning of the words used.” Accordingly, REC’s purchased by PSNH pursuant to RSA 362-F:9,I may be used only to meet reasonably projected renewable portfolio requirements in New Hampshire.

**C. During 2009, PSNH customers are likely to pay higher bills if the Commission authorizes PSNH to enter into the Lempster Agreements.**

PSNH testified that the forward price for a flat block of energy would be about 6 cents per kwh. Base upon the witness’s demeanor in making this assertion, the clear implication was that PSNH’s estimated forward price was above the floor price set out in the Agreement. However, PSNH’s estimated forward price was contradicted by the values shown on the ICAP Energy quote sheet. The ICAP Energy quotes (which PSNH are familiar with) indicate that the forward price for a flat block of energy could be below 5 cents per kwh for most of 2009. If this should come to pass, PSNH’s customer are likely to pay an amount significantly above the prevailing nodal LMP for most of 2009.

During 2009, PSNH customers are likely to pay higher bills if the Commission authorizes PSNH to enter into the Lempster Agreements. However, this is not to say that purchases would be uneconomic over the 15-year deal term should energy costs return to the levels which prevailed in the first half of 2008.

**D. The disparity in treatment of transmission costs is a very substantial impediment for a renewable resource to enter into an agreement with any entity other than PSNH.**

PSNH testified that Lempster would not be charged for any transmission costs upstream from the 34.5Kv interconnection point. PSNH asserted that there are no transmission costs.

However, if Lempster were to sell to any other entity, Lempster (directly or indirectly) would be responsible for any local transmission services from PSNH pursuant to PSNH’s local transmission tariff and any NEPOOL Pool Transmission Facility (PTF) services pursuant to the NEPOOL open access transmission tariff.

This disparity in treatment is a very substantial impediment for a renewable resource to enter into an agreement with any entity other than PSNH. This would clearly conflict with RSA 362-F:9's goal of "promot[ing] market-driven competitive innovations and solutions."

**E. In order to negotiate with PSNH, there should be no litmus tests and every developer should be treated objectively.**

PSNH testified that the Agreements "form a model for future negotiations..." PSNH further testified under cross-examination that PSNH has an open door policy for all renewable resource developers and that all proposals of any kind would be considered in good faith and treated strictly on their merits. There are no litmus tests. According to PSNH, "Nobody would be in or out because of who they are."

In order to make sure that all renewable resource developers have a fair and equal opportunity to sell to PSNH, the Commission should ratify PSNH's assertion that there are no litmus tests and that every developer will be treated objectively and in good faith.

Thank you for opportunity to provide these comments on these issues. I have complied with the filing requirements set out in Puc 203.02.

Sincerely,

**/s/ James T. Rodier**

THE STATE OF NEW HAMPSHIRE  
before the  
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire's  
Petition for Approval Power Purchase Agreements with  
Lempster Wind, L.L.C.

Docket No. DE 08-077

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S  
RESPONSE TO FREEDOM ENERGY PARTNERS' CLOSING STATEMENT

At the hearing on February 5, 2009, Freedom Partners, LLC requested the opportunity to submit closing arguments. The undersigned counsel for Public Service Company of New Hampshire (PSNH) requested permission to respond. PSNH files these comments in response to the Closing Arguments filed by Freedom Energy Partners d/b/a/ Freedom Energy ("Freedom Partners") on February 12, 2009.

**A. Freedom Partners' contention that PSNH has no authority to enter into the Agreements under any circumstances without Commission authorization.** This argument misstates the law, and Freedom Partners provides no support for this bold assertion. The statute could not be more clear that RSA 362-F:9 is entirely permissive ("the commission *may* authorize"). The statute provides a modest incentive for utilities to enter into long term agreements to purchase energy and/or renewable energy certificates (REC's). Presumably this incentive to obtain a prudence finding from the Commission before entering into a long term agreement will encourage electric utilities to enter long term contracts with REC producers as opposed to simply making market purchases. The long term contracts will provide a steady source of revenue which may allow easier access to financing for the renewable energy project developer, and thus encourage renewable resource development. Except for contracts under which a utility proposes to sell, lease or otherwise transfer the franchise, works or system of a utility (RSA 374:30), utilities are free to enter into virtually any type of contract. Certain contracts with affiliates (RSA 366) and contracts for the

purchase of transmission capacity, generation capacity or energy (RSA 374:57) must be filed with the Commission, but need not be pre-approved. If the utility seeks recovery of the costs incurred under the contract, the Commission has ample authority to disallow those costs.

**B. Freedom Partners' contention that REC's purchased by PSNH pursuant to RSA 362-F:9,I may be used only to meet reasonably projected renewable portfolio requirements in New Hampshire.** This statement is also false and without support. If Freedom Partners had been present for the redirect examination of Mr. Wicker, counsel would have heard Mr. Wicker testify that the RECs to be acquired from Lempster Wind are necessary for PSNH's reasonably projected renewable portfolio requirements. PSNH currently has the potential to acquire or produce Class I RECs from additional capacity installed at Smith Hydro, production from Schiller Unit 5 and from Lempster Wind. PSNH does not know how many customers will be convinced by Freedom Logistics to become members of NEPOOL and self-supply or how many customers will switch to competitive suppliers. In some years production and acquisition of RECs could exceed the sales of electricity to end users because sales to ends users fluctuate due to migration. PSNH will be judged on whether it acted reasonably and prudently in managing its generation resources and in acquiring RECs to satisfy its Renewable Portfolio Standard requirements under RSA 362-F.

**C. Freedom Partners' contention that during 2009, PSNH's customers are likely to pay higher bills if the Commission authorizes PSNH to enter into the Lempster Agreements.** There is nothing in the record to support this assertion. Counsel for Freedom Partners failed to mark as exhibits the documents he used in cross examination of Mr. Wicker, and the documents were not substantiated by sworn testimony. The test for the Commission is not whether the next six months will work under the Lempster Agreements, but whether the contract as a whole is in the public good, as judged by the standards for public interest found in RSA 362-F:9 II. Freedom Partners failed to address these standards on the record or in its closing remarks.

**D. Freedom Partners' contention that the disparity in treatment of transmission costs is a very substantial impediment for a renewable resource to enter into an agreement with any entity other than PSNH.** PSNH disagrees with the assertion that Lempster is at an economic/competitive disadvantage if it sells its output to an entity other than the host utility, PSNH. The Lempster generation project connects to the New England, Administered Transmission System at the PSNH-owned, North Road sub-station, which is a Pooled Transmission Facility (PTF) substation. Lempster is not required to take local transmission service under ISO-NE OATT Schedule 21 because it connects to PTF assets. All generators in New England that connect to the Administered Transmission System at the PTF asset level can sell/deliver their output to any load or entity in New England without paying for additional transmission service. Indeed, New England's "Through and Out" transmission service rate to other open access, competitive markets (including NY and PJM, but not Canadian markets) have been set at zero since the establishment of an RTO in New England. Any generator connected to the New England transmission system at PTF (as Lempster is) can sell to any non-Canadian entity or load without paying a transmission fee (either local or regional). Lempster has no reason, based upon transmission service economics, to want to sell to PSNH as opposed to any other market participant.

**E. Freedom Partners' statement that in order to negotiate with PSNH, there should be no litmus tests and every developer should be treated objectively.** PSNH provided no impediments to Lempster Wind, LLC interconnecting and developing its site. There is no evidence that sale of capacity, energy and RECs was a precondition to interconnection to the PSNH system. PSNH has a duty under state law to provide access to its distribution and transmission system (RSA 374-F:3 IV) and has a similar duty under its FERC open access tariff. PSNH does not know what "litmus test" is being referred to by Freedom Partners as no testimony or evidence of such a test was presented on the



record. PSNH has a history of over twenty years of dealing fairly and evenly with third party developers of supplemental energy resources.

February 19 2009  
Date

Respectfully submitted,  
Public Service Company of New Hampshire  
By: Gerald M. Eaton  
Gerald M. Eaton  
Senior Counsel  
780 North Commercial Street  
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Manchester, New Hampshire 03105-0330  
(603) 634-2961

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Motion for Protective Order to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

February 12 2009  
Date

Gerald M. Eaton  
Gerald M. Eaton

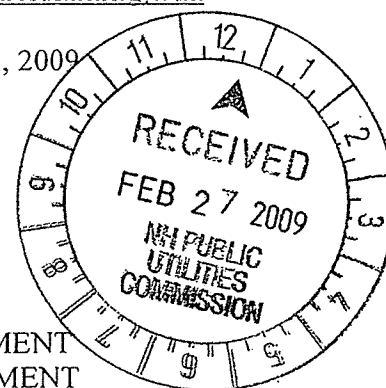
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February 23, 2009

Debra A. Howland  
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PETITION FOR APPROVAL OF POWER PURCHASE AGREEMENT  
AND RENEWABLE ENERGY CERTIFICATE OPTION AGREEMENT  
BETWEEN PSNH AND LEMPSTER WIND, LLC

**DE 08-077**

Dear Ms. Howland:

I am writing to briefly reply to PSNH's Response to Freedom Energy Partners' Closing Statement submitted on February 19 in this proceeding.

**1. PSNH has no authority to enter into the Agreements without Commission authorization.**

In its Response, PSNH contends that "RSA 362-F:9 is entirely permissive..." and signifies nothing more an "incentive to obtain a prudence finding from the Commission before entering into a long term agreement" with REC producers. In other words, PSNH is now contending that PSNH does not need Commission authorization to enter into the Agreements with Lempster.

PSNH's position in its Response is entirely at odds with its testimony during the proceeding. PSNH unequivocally testified that "[b]ecause the agreements have terms of 15 years, Commission approval of the arrangements is required under RSA 362-F:9." Exhibit 1 at 1. (Emphasis added.) Moreover, the commission has ruled that "RSA 362:F-9 allows electric distribution companies to enter into multi-year purchase agreements for RECs, subject to

Commission approval, as one method of obtaining the necessary certificates.” Order No. 24,839 (April 4, 2008) at 8. (Emphasis added.)

**2. REC’s purchased by PSNH pursuant to RSA 362-F:9,I may be used only to meet reasonably projected renewable portfolio requirements in New Hampshire, not sold off to other New England states.**

In its Response, PSNH completely misses the issue raised in Freedom Partners’ closing argument. The issue before the Commission is not whether PSNH needs an amount of REC’s equal to the amount to be produced by Lempster to meet its New Hampshire portfolio requirement. The point is that PSNH has declared that it will not use the Lempster REC’s to fulfill its New Hampshire portfolio requirement unless the value for the New Hampshire REC’s is greater than the corresponding REC value in Maine, Massachusetts, Connecticut, Rhode Island or Vermont.

RSA 362-F:9,I unambiguously requires that the Lempster REC’s be used to meet reasonably projected renewable portfolio requirements in New Hampshire, not sold off. “We first interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” State v. Langill, 157 NH 77, 84 (2008) (citations omitted).

**3. During 2009, PSNH’s customers are likely to pay higher bills if the Commission authorizes PSNH to enter into the Lempster Agreements.**

PSNH appears to be indignant that evidence adduced through cross-examination of the PSNH witness leads to the conclusion that PSNH’s customers are likely to pay higher bills during 2009 if the Commission authorizes PSNH to enter into the Lempster Agreements. ( It is not necessary to mark as exhibits the documents used in the cross-examination of PSNH’s witness. The testimony itself is more than sufficient.)

This is an important circumstance for the Commission to be aware of, notwithstanding PSNH’s protestations. Taken by itself, however, this is not a basis for the Commission to reject the Lempster Agreements.

**4. Treatment of transmission costs.**

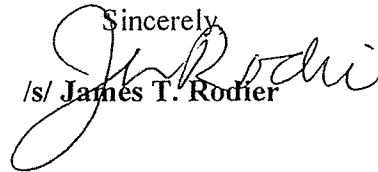
In its Response, PSNH points out that all generators in New England that connect to the New England transmission system at the PTF asset level can sell/deliver their output to any load or entity in New England without paying for additional transmission service. Based upon this

Response, Freedom Partners withdraws the comment on this point contained in its Closing Argument.

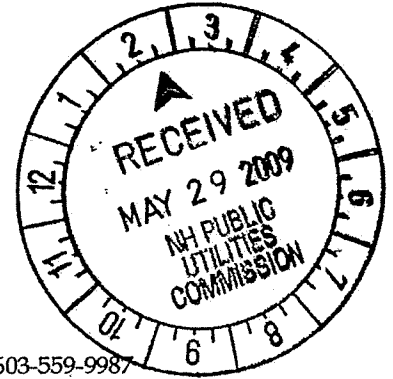
**5. In order to negotiate with PSNH, there should be no litmus tests and every developer should be treated objectively.**

It appears from PSNH's Response that it does not establish any pre-conditions for negotiations with third party developers of renewable energy resources and all are treated "evenly and fairly." On this basis, Freedom Partners withdraws the comment on this point contained in its Closing Argument.

Thank you for considering these reply comments. I have complied with the filing requirements set out in Puc 203.02.

Sincerely,  
  
/s/ James T. Rodier

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May 28, 2009

Debra A. Howland  
Executive Director and Secretary  
State of New Hampshire  
Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429

**PETITION FOR APPROVAL OF POWER PURCHASE AGREEMENT  
AND RENEWABLE ENERGY CERTIFICATE OPTION AGREEMENT  
BETWEEN PSNH AND LEMPSTER WIND, LLC  
DE 08-077**

Dear Ms. Howland:

I am writing on behalf of Freedom Partners, LLC<sup>1</sup> in this proceeding. I have reviewed PSNH's Objection to Freedom's Motion for Rehearing filed yesterday.

PSNH has objected to Freedom's contention that the Commission's finding that the energy floor price is set at a price level that is significantly discounted from current market energy prices is unreasonable and contrary to the evidence. The basis for PSNH's objection is that this specification falls outside the consented-to limitation on intervention.

PSNH now raises this matter after not objecting to Freedom's cross-examination on this issue during the hearing. PSNH also did not object to this portion of Freedom's closing argument. Accordingly, PSNH has wittingly or unwittingly waived any right it may have had to raise an objection at an earlier point in the proceeding. Notwithstanding, the foregoing Freedom hereby notifies the Commission that it will withdraw its motion for rehearing with respect to this issue. The Commission of course is free to deal with this issue sua sponte if it wishes to do so.

Thank you for your attention to this matter.

Sincerely,

*/s/* James T. Rodier

<sup>1</sup> Freedom Partners, LLC is in good standing with the New Hampshire Secretary of State as of May, 27, 2009.

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