THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2009 TERM
AUGUST SESSION

APPEAL OF FREEDOM PARTNERS, LLC

Docket No. 2009-0521

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MEMORANDUM OF LAW IN SUPPORT OF SUMMARY DISPOSITION UNDER RULE 25

This Memorandum of Law is submitted in support of Public Service Company of New Hampshire's ("PSNH") Motion for Summary Disposition pursuant to Supreme Court Rules 10(1), 25(2), and 25(3).

I. Introduction

The New Hampshire General Court passed R.S.A. 362-F:1, *et seq.* in order to "stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire." R.S.A. 362-F:1 (2009). The law requires providers of electricity to annually "obtain and retire" a certain number of renewable energy certificates ("RECs") through the year 2025. R.S.A. 362-F:3 (2009). Subject to the Commission's authorization, electric utilities may enter into multi-year agreements for the purchase of RECs from a renewable energy source. R.S.A. 362-F:9 (2009). As an alternative to purchasing RECs, an electricity provider may, to the extent that RECs are unavailable for purchase at a lower price, make

alternative compliance payments into the Renewable Energy Fund at a fixed price set by the Commission. R.S.A. 362-F:10 (2009).

To comply with R.S.A. 362-F:1, *et seq.*, PSNH entered into certain fifteen year agreements with Lempster Wind, LLC ("Lempster Wind") to purchase RECs, power, and capacity. On May 29, 2008, PSNH filed a petition requesting the Commission's approval of the above-described agreements pursuant to R.S.A. 362-F:9. Freedom Partners, LLC ("Freedom" or "Appellant"), a competitor of PSNH, filed a motion to intervene in the proceeding on June 25, 2008.[1] At the June 27, 2008 procedural hearing, the Commission granted Freedom's motion to intervene, but limited its intervention to issues related to RECs and the REC market. Appellee's Appendix at 5-7, *Transcript*, June 27, 2008, at 6-7; and 40. A hearing on the merits was held on February 5, 2009. On May 1, 2009, the Commission issued Order No. 24,965 approving the agreements between PSNH and Lempster Wind. Pursuant to R.S.A. 541:3, Freedom filed a Motion for Reconsideration on May 19, 2009. Subsequently, PSNH filed its Objection on May 27, 2009. The Commission issued Order No. 24,982 denying Freedom's Motion on June 25, 2009. It is these orders from which Freedom now appeals.

[1] 'Freedom Partners, LLC, inter alia, is a retail broker of Renewable Energy Certificates (REC's) and Verified Greenhouse Gas Emission Reductions (VERs)". Freedom's Petition for Intervention at 1, Appellee's Appendix at ___. PSNH and Freedom compete to acquire RECs from renewable energy sources.

II. Basis for Summary Disposition

Appeals from an administrative agency are discretionary, and the supreme court may decide not to take such an appeal without further reason. Sup. Ct. R. 10 (1). This Court may summarily affirm a decision of an administrative agency if "no substantial question of law is presented and the Supreme Court does not find the decision unjust or unreasonable." Sup. Ct. R. 25 (1) (c). The arguments raised in Freedom's appeal of the Commission's Orders present no substantial question of law. Freedom's first two questions for review essentially petition this Honorable Court to graft additional words and requirements onto an unambiguous statute. The arguments request an advisory opinion as to what PSNH might do with RECs generated by Lempster Wind in the future. The Appellant's arguments merely reflect a competitor's attempt to prevent PSNH from maximizing the value of the Lempster Wind REC purchase agreement and pass that benefit on to its customers. Appellant's two remaining questions for review allege 'errors' which are minor issues and are not relevant to the central holding below. In sum, the issues presented for review are not substantial in their effect on either the central holding below or the general body of law.

Furthermore, the Commission's Order is just and reasonable. PSNH requested Commission approval of two multi-year agreements for the purchase of power and capacity and for the purchase of RECs. PSNH received such authorization after a duly noticed hearing on the merits. *See* Order No. 24,965.

Appellant's Notice of Appeal at 13, et seq. In authorizing the Lempster Wind agreements, the Commission determined that the they were in the public interest by properly weighing the factors listed in R.S.A. 362-F:9. *Id.* at 16. Importantly, Freedom does not directly challenge the Commission's central holding that the Lempster Wind agreements are in the public interest. The Commission followed the applicable procedural requirements, weighed the relevant factors, and issued its Report and Order No. 24,965 in this proceeding explaining its decision. In sum, the Commission acted reasonably during every stage in this proceeding.

For these reasons, and the reasons stated below, the decision by the Commission in its Order is sound and should be summarily affirmed.

III. Argument

A. Freedom does not have standing to appeal the Commission's Order and therefore it must be summarily disposed.

Generally, "a party's standing is a question of subject matter jurisdiction, which may be addressed at any time." *Appeal of Stonyfield Farm, Inc. & a.*, __ N.H. __, No. 2008-897, slip op. at 5, (Issued Aug. 5, 2009) (quoting *Libertarian Party of New Hampshire v. Sec'y of State*, 158 N.H. 194, 195 (2008)); *see also Asmussen v. Commissioner, New Hampshire Dept. of Safety*, 145 N.H. 578, 588-589 (2000) (holding that a "challenge to a party's standing on the ground that no actual controversy exists constitutes a challenge to the court's subject matter jurisdiction, which may be raised at any point in the proceedings.") Importantly, Freedom does

not have standing in this appeal merely because it was a party to the proceeding below; PSNH may challenge Freedom's standing at any time.

Rather, "to have standing to appeal an administrative agency decision to this court, a party must demonstrate that his rights 'may be directly affected by the decision, or in other words, that he has suffered or will suffer an injury in fact.'" *Appeal of Stonyfield Farm, Inc. & a.*, __ N.H. __, No. 2008-897, slip op. at 5, (Issued Aug. 5, 2009) (quoting *Appeal of Richards*, 134 N.H. 148, 154 (1991); *Libertarian Party of New Hampshire v. Sec'y of State* 158 N.H. 194, 195 (2008). The central issue before the Commission in the proceeding below was whether the agreements between Lempster Wind and PSNH are in the public interest. In its appeal, Freedom does not raise a single question in which it has alleged that the decision of the Commission has directly harmed its interests. Instead, Freedom is forced to rely upon hypothetical fact patterns in order to demonstrate how it may possibly be harmed in the future by the Commission's decision. There are simply no facts in the record which support Freedom's standing to bring this appeal. Freedom cannot reasonably demonstrate that it has suffered, or will suffer, *any* injury as a result of the Commission's decision.

The supreme court has held that "the requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." *Libertarian Party*, 158 N.H. at 195-96; *Asmussen v. Commissioner, New Hampshire Dept. of Safety*, 145 N.H. 578, 588 (2000); *Town of Orford v. New Hampshire Air*

Resources Com'n, 128 N.H. 539, 542 (1986). In its appeal, Freedom raises the following objections: 1) whether under R.S.A 362-F allows PSNH to sell RECs acquired from Lempster Wind in markets outside of New Hampshire, 2) whether authorization is required before PSNH may enter into a multi-year contract under R.S.A. 362-F, 3) whether a factually incorrect statement in the Order below is grounds for rehearing, and 4) whether the Commission complied with a statutory requirement which requires it to reference the integrated least cost resource plan. Since there are no facts in the proceeding below which properly present this issue, all of the above arguments on appeal are properly characterized as a request for an advisory opinion; therefore, this court should summarily dispose of this case.[2] Freedom was merely an intervener in the proceeding below and has no stake in the outcome of this proceeding except to the extent that it is attempting to prevent PSNH from maximizing the value of the RECs and passing that benefit onto its customers.

Moreover, the statute in question is not designed to protect Freedom from any injury whatsoever. As previously stated, the purpose of the statute is to "stimulate investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire." R.S.A. 362-F:1 (2009). Importantly, R.S.A. 362-F does not grant a competitor any right to intervene or appeal an Order by the Commission approving a multi-year power purchase agreement. This statute is simply not designed to protect competitive electric

[2] For example, PSNH has not sold RECs produced by Lempster Wind outside of the New Hampshire market or are any such sales proposed by PSNH to take place. Freedom requests this court to advise the Commission that such potential sales should not happen in the future.

suppliers from alleged injuries. The statute is designed to promote investment in renewable energy resources by permitting the Commission's to approve multiyear agreements for distribution electric companies to purchase the RECs and/or power produced by renewable energy resources. Since Freedom has not suffered any direct harm or injury in the instant matter, and it merely requests this Honorable Court to issue an advisory opinion on the construction of a statute, Appellant does not have standing to sustain this appeal.

B. The Commission did not err in authorizing PSNH to sell RECs in markets outside of New Hampshire.

The Commission may authorize multi-year agreements to purchase RECs if such agreements are in the public interest. R.S.A. 362-F:9, I (2009). The Commission must find that an agreement is "on balance, substantially consistent" with several factors when making a public interest determination. R.S.A. 362-F:9, II (2009). In determining that the Lempster Wind agreements were in the public interest, the Commission "considered those factors along with the evidence in the record" and concluded that the agreements were in the public interest. Order No. 24,965 at 16. Consistent with this holding, the Commission found that PSNH was permitted to maximize the value of the RECs by selling them in other New England markets. Order No. 24,965 at 18; Order No. 24,982 at 8. Freedom states that this ruling is contrary to the "plain and ordinary meaning" of the statute, citing to *Green Crow Corp v. Town of New Ipswich*, 157 N.H. 344, 346 (2008). Specifically, Freedom

argues that if PSNH were to resell RECs in other markets, it would not be using the RECs to meet its "reasonably projected renewable portfolio requirements." R.S.A. 362-F:9, I (2009). For the following reasons, Freedom's statutory analysis is incorrect.

In determining whether a multi-year agreement is in the public interest, the Commission must consider the efficiency and cost effectiveness of the agreement. R.S.A. 362-F:9, II (a) (2009). Also, under R.S.A. 362-F:9, II (b), the Commission must include the restructuring principles, enumerated in R.S.A. 374-F:3, as factors in its public interest determination. One such factor includes calls for "near term rate relief' and "to reduce rates for all customers." R.S.A. 374-F:3, XI (2009). In support of these factors, PSNH offered evidence of the pre-filed testimony of Mr. Wicker who stated that PSNH will try to maximize the value of the RECs for the benefit of its customers. *Transcript*, February 5, 2009, at 25; Appellee's Appendix at 13. Mr. Wicker indicated that if PSNH were to receive a higher value for RECs in other New England states then it may sell them in those markets. *Id.* Furthermore, PSNH is required to acquire RECs in order to serve the electric power supply needs of its end use customers. R.S.A. 362-F:2, XIV (2009); R.S.A. 362-F:3 (2009). Should PSNH's energy service end use customers decide in large numbers to take energy service from competitive energy suppliers during the fifteen year term of the agreement, the RECs produced by Lempster Wind may be surplus to the needs of PSNH in certain years. In order to maximize value for its remaining customers, PSNH would sell these excess RECs for the best possible price. Because the

Commission approved these agreements and permitted PSNH's future recovery of reasonable costs associated with the agreements, any premium paid to an out of state purchase over the cost to acquire the RECS from Lempster Wind would be flowed through to PSNH's energy service customers. Based upon this evidence, and weighing the above factors, the Commission correctly concluded that the sale for a higher price in another REC market is consistent with RSA 362-F because it allows PSNH to maximize customers' benefits.

The sale of RECs in other markets is also consistent with the plain and ordinary meaning of the statute because the law provides two alternative means for complying with the portfolio requirements: one may purchase and retire RECs under R.S.A. 362-F:3, or "in lieu of meeting the portfolio requirements" of that section an entity may make an Alternative Compliance Payment ("ACP") into the Renewable Energy Fund. R.S.A. 362-F:10 (2009). As the Commission acknowledged in the Order below, either method is an appropriate "alternative means of meeting renewable portfolio standards." Order No. 24,982 at 8. Contrary to Freedom's assertions in its appeal, this finding is neither unjust nor unreasonable. In weighing the appropriate factors, the Commission acted reasonably in determining that it is in the public interest to allow PSNH to offset the cost of ACPs or the costs of acquiring lower cost RECs with the profits received through the sale of RECs in other markets. This ability permits PSNH to maximize the benefit to customers while simultaneously funding investment in renewable energy in New Hampshire. Order No. 24,982 at 8.

As the Appellant stated in its Notice of Appeal, the Court looks to "the plain and ordinary meaning of the words used in the statute" and will not "add words not included in the statute." *Green Crow*, 157 N.H. at 346 (quoting *Weare Land Use Assoc. v. Town of Weare,* 153 N.H. 510, 511-12 (2006)). In arguing that the sale of RECs in other markets should be prohibited, Freedom contradicts the very authority that it relies upon in its appeal. As the Commission noted, "there is nothing in R.S.A. 362-F that bars a company from selling excess RECs procured through such agreements." Order No. 24,965 at 18. In rejecting Freedom's argument, the Commission acted reasonably by refusing to add words which are not included in the statute. Indeed, Freedom's interpretation of the statute ignores the fact that the statute expressly permits the resale of RECs by any "person or entity that acquires it" subject to the certain limitations. R.S.A. 362-F:7 (2009). If the legislature intended to limit the sale of RECs to the New Hampshire market, it would have stated so. Any additional limitations on the sale of RECs, such as the one advocated by Freedom, would contradict the canons of statutory construction.

Furthermore, in the case cited by Appellant in its appeal, the Court yet again contradicts Freedom's argument when it noted that it will "apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Green Crow*, 157 N.H. at 346 (quoting *Town of Hinsdale v. Town of Chesterfield,* 153 N.H. 70, 73 (2005)). For the purpose of minimizing "regional dependence on fossil fuels" and to "lower and stabilize future energy costs," the legislature passed R.S.A. 362-F seeking to "stimulate

investment in low emission renewable energy generation technologies in New England and, in particular, New Hampshire." R.S.A. 362-F:1 (2009). In light of the regional purpose of this statute, the Commission's decision to permit the sale of RECs within New England is consistent with the express legislative intent of the statute. If electric distribution companies could only enter multiyear agreements to purchase RECS that the companies were absolutely certain would be necessary under their future renewable portfolio standard requirements, fewer agreements would be entered into, for fewer RECs, and for shorter terms of years. The limitation proffered by Freedom flies in the face of the purposes enumerated in R.S.A. 362-F:1.

C. The Commission did not err in ruling that electric distribution companies are not required to seek approval under RSA 362-F:9 prior to entering into long term contracts for the purchase of RECs.

After a petition by an electric distribution company 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." R.S.A. 362-F:9 (2009). Freedom argues that PSNH should have sought authorization from the Commission prior to entering into a multi-year agreement with Lempster Wind. In the proceeding below, Freedom principally relied upon the Merriam Webster Online Dictionary, arguing that the plain and ordinary meaning

of the word "authorize" is to "empower." Freedom's Motion for Reconsideration, at 3; Appellant's Notice of Appeal at 36. In declining to follow Freedom's argument, the Commission "looked at this reference and note[d] that 'empower' is the secondary meaning of the word 'authorize' in this source" and found that the primary definition in that source was "sanction." Order No. 24,982 at 8-9. The Commission then reviewed the Merriam-Webster Third New International Dictionary (1986) and Webster's II New College Dictionary (2005, 3rd Edition) and found that "authorize" was defined as "endorse," "sanction," and "approve." *Id.* at 9. Based upon these sources, the Commission concluded that its interpretation of the meaning of "authorize" permits it "to determine the public interest of a contract after an agreement is executed." *Id.* The Commission's finding was consistent with the vast weight of authority and was neither an unjust nor unreasonable interpretation of the plain and ordinary meaning of the word "authorize." It would be unreasonable to require PSNH and Lempster Wind to approach the Commission with some potential terms of a REC and power purchase arrangement wondering what the Commission may eventually order to be included in the contract the Commission eventually authorized PSNH to enter into. It is more reasonable to expect distribution companies and REC producers to agree on specific terms, execute an agreement and present that final agreement to the Commission for review and approval under R.S.A. 362-F:9.

This Honorable Court has held that "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." *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066-67 (1982). PSNH has the right to enter into contracts without the Commission's approval; such transactions may be recorded 'below the line' and the associated costs may not be recovered through rates charged to customers. The Commission conducts a yearly review of the revenues and costs incurred in the previous year by PSNH in providing energy service, including PSNH's cost of compliance with R.S.A. 362-F, and determines whether such costs are actual, prudent and reasonable. R.S.A. 369-B:3, IV b(1)(A). The effect of the Commission's authorization in this proceeding, is that PSNH is not required to book the transaction 'below the line' and instead may seek to recover the costs through its energy service rates. As the Commission noted, "[i]f 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." Order No. 24,965 at 18. When read properly, R.S.A. 362-F, does not bar PSNH from entering into a multi-year contract whether below or above the line[3]; rather it provides a mechanism for requesting approval of such agreements in order to recover the costs associated with such a transaction.

D. The Commission did not err in declining to rehear a matter based upon an alleged error in its factual finding where the finding was not central to the holding in the original Order.

[3] In regulatory accounting, costs chargeable to the utility's customers are said to be booked "above the line", and costs chargeable to the utility's shareholders are booked "below the line". Carmichael, D.R., Whittington, Ray & Lynford Graham, *Accountant's Handbook, Volume Two: Special Industries and Special Topics*, § 33, p. 33-9 (11th ed., 2007).

The Supreme Court has stated that "findings of fact by the PUC are presumed lawful and reasonable." *Appeal of Office of Consumer Advocate*, 148 N.H. 134, 136 (2002). Freedom argues that the Commission erred in a finding of fact, and that this error should constitute grounds for rehearing. Freedom offers no evidence to support its claim that the Commission's finding was factually incorrect and, therefore, fails to overcome its burden of proof. Moreover, upon denying rehearing, the Commission found that the "statement in question was not a 'finding' relevant to the central matter in this docket" and that "[c]onsequently, Freedom's argument does not constitute grounds for rehearing." Order No. 24,982 at 10. On appeal, Freedom offers no evidence as to why this finding is unreasonable or unjust. The Commission did not err, and even if it did, this error cannot possibly raise a "substantial question of law" as required by Supreme Court Rule 25 (1); therefore, this issue must be summarily disposed.

E. The Commission's Order No. 24,965 fully complied with R.S.A. 378:41.

Freedom argues that the Commission erred by failing to reference PSNH's most recent integrated least cost resource plan in its Order pursuant to R.S.A. 378:41 which states:

> "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."

The Commission stated that it considered the factors set forth in R.S.A. 362-F, II "along with the evidence in the record" in concluding that the Lempster Wind agreement was in the public interest. Order No. 24,965 at 16. One of the factors that was considered by the Commission is the integrated least cost resource plan pursuant to R.S.A. 362-F:9, II (c). In his pre-filed testimony PSNH's expert witness, Mr. Wicker stated that "[i]n 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 p.9; Appellee's Appendix at 9. The witness for the Commission Staff, the Electric Division Assistant Director, Steven Mullen, also addressed this issue in his pre-filed testimony. Exhibit 8 p. 7, lines 7 though 24; Appellee's Appendix at 11. In the context of its decision, the Commission quoted the provisions of R.S.A. 362-C: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;
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> Order No. 24,965 at 16; Appellant's Notice of Appeal at 28 (Emphasis added).

The Commission specifically found

> 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.
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> *Id.* Order No. 24,965 at 17; Appellant's Notice of Appeal at 29.

The requirements of R.S.A.378:41 are part of New Hampshire's Energy Policy as defined in R.S.A. 378:37 et seq. Clearly the requirements of RSA 378:41 have been satisfied both "within the context of the hearing and the decision" in this proceeding.

In its Order Denying Motion for Rehearing, the Commission noted that this testimony had been incorporated into the Commission's findings. Order 24,982, at 10-11; Appellant's Notice of Appeal at pp.61-62. Furthermore, the Commission referenced the Staff's testimony in its decision which acknowledged that PSNH had satisfied the factors in R.S.A. 362-F:9, II including the integrated least cost resource plan. *Id.* The Commission's decision explicitly states that it weighed all of the evidence on the record and considered the relevant factors under R.S.A. 362-F:9, II, which includes considering the integrated least cost resource plan. Again, Freedom's argument is without merit; the Commission's actions were both reasonable and just.

IV. Conclusion

PSNH requested the Commission, pursuant to R.S.A. 362-F:9, to authorize certain multi-year agreements with Lempster Wind. The Commission, after weighing all of the evidence and balancing all of the factors, determined that the agreements are in the public interest. Freedom was not directly affected by the Commission's authorization of the Lempster Wind agreements and did not suffer an injury in fact and therefore does not have standing in this matter. Freedom has failed to raise a substantial question of law, and cannot show that the Commission's

decision was either unjust or unreasonable. For these reasons and the arguments set forth above, PSNH respectfully requests this Court to summarily affirm the decision below, decline to accept Freedom's appeal, and grant such further relief as may be just and equitable.

Respectfully submitted,

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August 12, 2009
Date

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