

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 541:3¹ 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.

¹ 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.² 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.”

² 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 (3rd 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 const 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.*

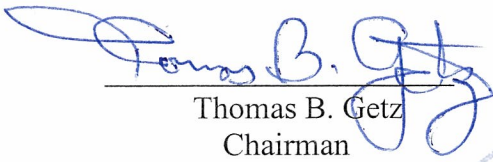
In Order No. 29,645, we quoted RSA 362-F:9,II in its entirety, referred to Staff's position *supra*, and found that, based on our review, the purchased power agreement and the REC option agreement are in the public interest as set forth in the statute. Order No. 29,645 at 16. Freedom's argument that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

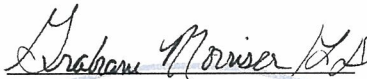
Based upon the foregoing, it is hereby


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

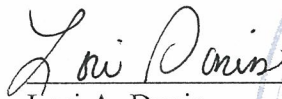
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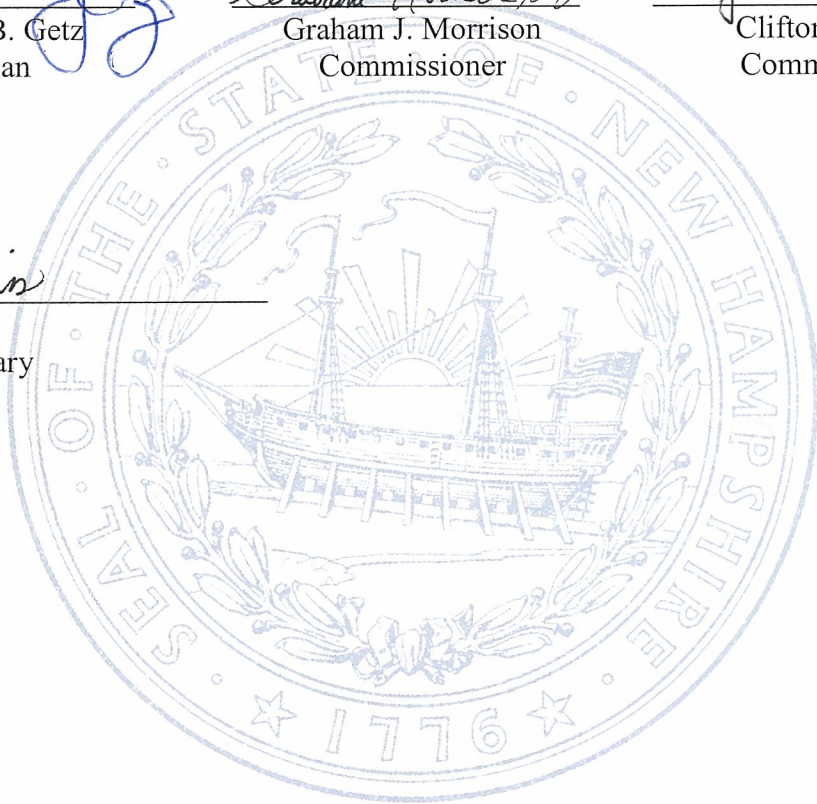

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