

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 09-067

Complaint of Clean Power Development, LLC
Against Public Service of New Hampshire

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
SUPPLEMENTAL LEGAL MEMORANDUM

Pursuant to the Commission's Secretarial letter dated August 17, 2010, Public Service Company of New Hampshire ("PSNH") hereby submits its supplemental memorandum of law.

On April 2, 2010, the Commission received initial legal briefs in this proceeding. In PSNH's filing, the Company noted that it had submitted an application to the Federal Energy Regulatory Commission ("FERC") for authorization to terminate the mandatory power purchase obligation from qualifying facilities with net generating capacity of five megawatts or greater.¹ On April 15, 2010, the Federal Energy Regulatory Commission issued its "Order Granting in Part and Denying in Part" PSNH's application.²

On April 19, 2010, as a result of the FERC Order, Clean Power Development ("CPD") filed a "Motion for Leave to Supplement Memorandum of Law." Specifically, CPD requested permission "to supplement its Memorandum of Law with respect to the impact of FERC's Order on the proceedings here in New Hampshire in DE 09-067." By Secretarial letter dated May 7, 2010, the Commission granted CPD's request.

¹ PSNH's Application to FERC, a copy of which was attached as Appendix 1 to PSNH's April 2, 2010, Legal Memorandum, was docketed as Docket No. QM10-4.

² *Public Service Co. of New Hampshire*, 131 FERC ¶ 61,027 (2010).

By letter dated May 12, 2010, PSNH informed the Commission that it intended to file a request for rehearing of the FERC Order and suggested that the filing of supplemental legal memos concerning the impact of that FERC Order be delayed until after the FERC rules on such rehearing request. On May 14, 2010, PSNH filed its “Motion for Clarification and/or Rehearing” with the FERC.³ PSNH’s request for clarification/rehearing dealt with the issue of whether CPD was entitled to the grandfathering of QF rights under 18 C.F.R. § 292.314 (2009).⁴

The sole issue for which PSNH has sought clarification and/or rehearing from FERC is whether CPD had initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to PSNH filing its application with FERC. PSNH is unaware of any ongoing proceeding before this Commission wherein CPD has asserted its rights as a QF and requested the issuance of such a rate order pursuant to PURPA.

On various occasions, CPD has stated differing and conflicting statements regarding the issue of whether it did or did not know about its rights as a QF, and whether it did or did not initiate a proceeding before this Commission requesting a PURPA rate order:

- During the November 9, 2009, pre-hearing conference in this proceeding, CPD affirmatively stated that it purposely did not seek to initiate a state PURPA proceeding as part of its Complaint in this docket. In response to a question from Chairman Getz asking about CPD’s views on the applicability of PURPA to its complaint⁵, CPD responded, “We have had some awareness of this [PURPA] going back to day one here. We haven't tried to force our deal on Public Service by saying ‘you've got some kind of an obligation under federal law’, because we're in a hurry, and we didn't see that that would get us to where we need to go for the

³ PSNH’s rehearing motion filed with FERC is attached hereto as Appendix 1.

⁴ See, ¶24 of the April 15, 2010, FERC Order.

⁵ The Chairman’s exact question was, “*Can I ask you one more legal question that's I think raised in the Petition to Intervene by Concord Steam. They appear to be taking a position that essentially the PURPA laws still apply and there's still an obligation on PSNH to, as I take it, and maybe Mr. Patch will have more on this, to take -- to offer a long-term contract of some sort. Does Clean Power share the same view about the application of the PURPA laws as Concord Steam?*” Transcript, Prehearing Conference, November 3, 2009, at 22.

quickest.”⁶ Later in that same hearing, CPD similarly admitted that “[t]he requirement under PURPA’ . . . we were careful not to raise it in our complaint.”⁷

- In its April 2, 2010, Memorandum of Law filed in this docket, CPD (contrary to its prior statements and admissions to the Commission five months earlier) implied that it was unaware that PURPA’s mandatory purchase obligation still existed and argued that “If PSNH had disclosed to CPD and the Commission that a mandatory obligation to purchased (sic) still existed under Federal law, CPD would have made every effort to obtain a long-term contract from PSNH for a facility in Berlin.”⁸
- On May 19, 2010, CPD filed an “Answer to PSNH’S Motion for Clarification and/or Rehearing” with FERC in its Docket No. QM10-4. In that filing, CPD stated, “. . .CPD and the NHPUC have indeed initiated a State PURPA proceeding, and therefore the Commission’s Order was in not error (sic) by grandfathering CPD and excluding it from the termination Order.”⁹

Thus, in a period of approximately six months, CPD has gone on record saying first that it knew about its PURPA rights and that it was careful not to raise such PURPA rights in its Complaint; then, changing its stand 180°, CPD stated that it was in fact unaware of its PURPA rights and would have raised them before this Commission had it known about them; then five weeks later CPD stated that, contrary to its first two positions, it had indeed initiated before this Commission the very PURPA proceeding it was “careful not to raise” and which it “would have made every effort to obtain.”

On May 17, 2010, the Commission suspended the deadline for filing supplemental memoranda of law pending further Commission review.

On June 11, 2010, the FERC issued an “Order Granting Rehearing for Further Consideration” – a so-called “tolling order” – regarding PSNH’s request for rehearing. In

⁶ *Id.* at 22-23.

⁷ *Id.* at 84.

⁸ Memorandum of Law of Clean Power Development, LLC, April 2, 2010, NHPUC Docket No. DE 09-067 at 9.

⁹ Answer of Clean Power Development, LLC to PSNH’s Motion for Clarification and/or Rehearing, May 19, 2010, FERC Docket No. QM10-4 at 5, (footnote deleted), available from the FERC website on-line at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=12348627>

that Order, FERC stated, “In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.” PSNH informed the Commission of the issuance of this tolling order by letter dated June 14, 2010.¹⁰

To date, the FERC has not issued any further orders in its Docket No. QM10-4. Hence, PSNH’s request for clarification or rehearing has not yet been substantively addressed by FERC. The United States Court of Appeals for the Fifth Circuit has stated that the issuance of a tolling order “made clear that FERC had not yet made a final decision in the proceeding, and the...order was therefore still open for its consideration.”¹¹ Similarly the United States Court of Appeals for the First Circuit has noted, “FERC's issuance of a ‘tolling order’ enable[es] FERC to take the additional time it indicates that it needs to review more fully the arguments raised in the application for rehearing. The tolling orders inevitably extend the time for a final administrative ruling and thus judicial review.”¹² A FERC tolling order is procedurally similar to actions taken by this Commission when it suspends previously issued orders following timely filed motions for rehearing pursuant to RSA 541:5.¹³

As a result of the pendency of FERC’s June 11, 2010, tolling order, FERC has yet to issue a final ruling on PSNH’s application in its Docket No. QM10-4. Thus, it is not possible at this time to provide a substantive supplement to the original Memorandum of Law discussing the impact of FERC’s Order on this proceeding.

¹⁰ A copy of the FERC tolling order was provided to the Commission as an attachment to PSNH’s June 14, 2010 letter.

¹¹ *Valero Interstate Transmission Co. v. F.E.R.C.* 903 F.2d 364, 369 (5th Cir.,1990)

¹² *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir., 1988).

¹³ *See, e.g.*, Secretarial Letter dated October 27, 2008, Docket No. DE 08-103, “Investigation of Installation of Scrubber Technology at Merrimack Station,” suspending pursuant to RSA 541:5 the Commission’s decision pending further consideration of the issues raised in motions for rehearing. *See also, Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 721 (1984), where, commenting on the requirements of RSA 541:5, the Court noted, “The commission's initial order should not be deemed a valid authorization until the rehearing is completed.”

In its June 14, 2010, letter to the Commission, PSNH committed to “continue to update the Commission on the status of the FERC proceeding.” PSNH reaffirms that commitment, and will promptly inform the Commission of any actions in the FERC docket.

Respectfully submitted this 20th day of September, 2010.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: 

Robert A. Bersak
Assistant Secretary and Assistant General Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Manchester, NH 03101-1134
603-634-3355
bersara@PSNH.com

Appendix 1

***“PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE’S
MOTION FOR CLARIFICATION AND/OR REHEARING”***

May 14, 2010

FERC Docket No. QM10-4-000

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Public Service Company of New Hampshire))))	Docket Nos. QM10-4-000 QM10-4-001 QM10-4-002 QM10-4-003
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**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
MOTION FOR CLARIFICATION AND/OR REHEARING**

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. §§ 385.212 and 385.713, Northeast Utilities Service Company (“NUSCO”), on behalf of Public Service Company of New Hampshire (“PSNH”), respectfully submits this Motion for Clarification and/or Rehearing of the Commission’s *Order Granting in Part and Denying in Part the Application to Terminate Mandatory Purchase Obligation* issued on April 15, 2010 in the above-referenced docket (the “*Order*”).¹

As detailed below, PSNH respectfully requests that the Commission grant clarification of or, in the alternative, rehearing of Paragraphs 11, 23, and 24 of the *Order* because: (i) Clean Power Development (“CPD”) did not, as required by Order No. 688-A,² argue to the Commission that CPD had a contract or legally enforceable obligation “pending approval” before the New Hampshire Public Utilities Commission (“NHPUC”); (ii) contrary to Order No. 688-A,³ the *Order* did not apply or even consider New Hampshire law in determining whether CPD initiated a state Public Utility Regulatory Policies Act (“PURPA”) proceeding before PSNH filed its application for relief from PURPA’s power purchase requirements with the

¹ *Public Service Company of New Hampshire*, 131 F.E.R.C. ¶ 61,027 (2010).

² *See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, F.E.R.C. Stats. & Regs. ¶ 31,250, at P 138-40 (2007) (hereinafter, “Order No. 688-A”).

³ *See id.*

Commission; (iii) there is no evidence on the record in this docket that CPD initiated a state PURPA proceeding; (iv) the issue of whether and when CPD initiated a state PURPA proceeding is a factual and legal question that should be determined by the NHPUC under New Hampshire law; and (v) the NHPUC's determination should govern the issue of whether CPD's PURPA rights are grandfathered. In addition, PSNH respectfully requests that the Commission grant clarification and/or rehearing of its decision in Paragraph 15 of the *Order* to reject PSNH's Request for Leave to Answer and Answer to Motions to Intervene and Protests for filing.

PSNH's request for clarification and/or, in the alternative, rehearing is limited to the issues described immediately above and further discussed in Section II below concerning Paragraphs 11, 15, 23, and 24 of the *Order*. PSNH does not challenge or request clarification or rehearing of any other parts of the *Order*.

I. BACKGROUND

A. PSNH's Application

On January 7, 2010, pursuant to Section 210(m) of PURPA, PSNH submitted its Application for Authorization to Terminate the Mandatory Power Purchase Obligation from QFs with Net Generating Capacity of 5 MW or Greater (the "Application"). In the Application, PSNH requested relief, on a service territory-wide basis, from the mandatory power purchase obligations of Section 292.303(a) of the Commission's regulations (the "Mandatory Purchase Obligation") for the following two categories of qualifying cogeneration facilities and qualifying small power production facilities (collectively, "QFs"):

1. QFs with a net generating capacity greater than 20 MW ("Large QFs"); and
2. QFs with a net generating capacity between 5 MW and 20 MW ("Small QFs").

For Large QFs, PSNH relied on the rebuttable presumption set forth in Section 292.309(e) of the Commission’s regulations that Large QFs in so-called “Day 2” markets have nondiscriminatory access to those markets. For Small QFs, PSNH attempted to overcome the rebuttable presumption set forth in Section 292.309(d)(1) of the Commission’s regulations that Small QFs do not have nondiscriminatory access to markets. At the request of Commission Staff, PSNH made several supplemental filings with the Commission containing additional information about New Hampshire QFs.⁴

B. Motions to Intervene and Protest

In response to PSNH’s Application, six QFs filed Motions to Intervene,⁵ one QF filed a Motion to Intervene and Comment,⁶ and two QFs, including CPD, filed Motions to Intervene and Protest.⁷

⁴ On January 8, 2010, Commission Staff requested that PSNH provide the information specified in Sections 292.310(b) and (c) of the Commission’s regulations for QFs and other projects in New Hampshire with net generating capacities below 5 MW. In response to the Commission Staff’s request, PSNH filed the names and addresses of certain confidential QFs and other projects in New Hampshire under 5 MW as Supplement #2 to the Application on January 14, 2010. In addition, on January 15, 2010, PSNH electronically filed the names, QF numbers, and addresses of the public QFs and other projects in New Hampshire with net generating capacities less than 5 MW as Supplement #3 to the Application. Further, on January 22, 2010, PSNH submitted the additional information listed in Section 292.310(c) of the Commission’s regulations for the public QFs and other projects in New Hampshire under 5 MW as Supplement #4 to the Application. As agreed upon by Commission Staff, PSNH did not provide the requested information for net metering projects in New Hampshire under 5 MW that are overseen by the NHPUC.

⁵ See Motion to Intervene of Brookfield Energy Marketing Inc., Docket No. QM10-4-000 (January 28, 2010); Motion to Intervene of Consolidated Hydro New Hampshire, Inc., Docket Nos. QM10-4-000, QM10-4-001, and QM10-4-002 (February 1, 2010); Motion to Intervene of Mascoma Hydro Corporation, Docket Nos. QM10-4-000, QM10-4-001, and QM10-4-002 (February 1, 2010); Motion to Intervene of Somersworth Hydro Co., Inc., Docket Nos. QM10-4-000, QM10-4-001, and QM10-4-002 (February 1, 2010); Motion to Intervene of Sweetwater Hydroelectric, Inc., Docket Nos. QM10-4-000, QM10-4-001, and QM10-4-002 (February 1, 2010); Motion to Intervene of WM Renewable Energy, L.L.C., Docket Nos. QM10-4-000, QM10-4-002, and QM10-4-003 (February 12, 2010).

⁶ See Motion to Intervene and Comments of Granite State Hydropower Association, Inc., Docket Nos. QM10-4-000, QM10-4-001, and QM10-4-002 (February 12, 2010).

⁷ See Motion to Intervene and Protest of Clean Power Development, LLC, Docket No. QM10-4-000 (February 3, 2010); Motion to Intervene and Protest of Indeck Energy-Alexandria, LLC, Docket No. QM10-4-000 (February 11, 2010).

CPD filed a Motion to Intervene and Protest in opposition to PSNH’s Application on February 3, 2010 (the “Protest”).⁸ CPD argued that “the Commission should decline to consider PSNH’s request for authorization to terminate the Mandatory Power Purchase Obligation from Qualifying Facilities with respect to CPD” because PSNH’s request is “patently inconsistent” with PSNH’s prior “representations to the NHPUC that there is no requirement for it to enter into a long-term power purchase agreement with CPD.”⁹

In support of its argument, CPD explained that it filed a complaint against PSNH with the NHPUC on April 7, 2009 in NHPUC Docket No. DE 09-067 (the “NHPUC Complaint”), claiming that PSNH refused to enter into negotiations to purchase the energy, capacity and renewable energy certificates associated with CPD’s proposed generating facility.¹⁰ In the NHPUC Complaint, CPD alleged that PSNH’s failure to negotiate with CPD violated New Hampshire’s Least Cost Planning statute, the Electric Renewable Portfolio Standards law, and the New Hampshire Energy Policy.¹¹ The NHPUC Complaint is utterly silent on PSNH’s power purchase requirements under PURPA. In fact, CPD acknowledged to the NHPUC that it specifically did not include a request to initiate a state PURPA proceeding in its complaint as such a proceeding would not meet its time requirements.¹²

⁸ Motion to Intervene and Protest of Clean Power Development, LLC, Docket No. QM10-4-000 (February 3, 2010).

⁹ *Id.* at 2, 4.

¹⁰ *Id.* at 2.

¹¹ See *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE09-067 (April 7, 2009), available at <http://puc.state.nh.us/Regulatory/CaseFile/2009/09-067/INITIAL%20FILING%20-%20PETITION/09-067%202009-04-07%20Complaint%20of%20Clean%20Power%20Development%20Against%20PSNH.PDF>.

¹² See Transcript of Prehearing Conference, *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE 09-067, at 22-23 and 84 (November 3, 2009), available at <http://www.puc.nh.gov/Regulatory/CaseFile/2009/09-067/TRANSCRIPTS-OFFICIAL%20EXHIBITS-CLERKS%20REPORT/09-067%202009-11-13%20Transcript%20of%2011-3-09%20hearing.pdf>.

C. PSNH's Request for Leave to Answer and Answer

On February 18, 2010, PSNH filed a Request for Leave to Answer and Answer to Motions to Intervene and Protests (the "Answer"),¹³ the contents of which PSNH incorporates herein by reference. With respect to CPD's Protest, PSNH argued that "CPD's protest failed to provide any basis for rejecting PSNH's request for relief from PURPA's Mandatory Purchase Requirement for QFs with a net generating capacity of 5 MW or greater."¹⁴ PSNH also argued that "CPD's estoppel argument is both meritless and irrelevant to the single issue in this proceeding: whether New Hampshire QFs (including CPD) have nondiscriminatory access to ISO-NE's markets."¹⁵ Because CPD did not claim in its Protest that it had initiated a state PURPA proceeding that may result in a contract or legally enforceable obligation before PSNH filed its Application with the Commission,¹⁶ PSNH did not address that issue in its Answer. The Commission chose not to accept PSNH's Answer for filing.¹⁷

D. The Order

The Commission issued the *Order* on April 15, 2010, granting PSNH's request to terminate its Mandatory Purchase Obligation on a service territory-wide basis for Large QFs, effective January 7, 2010, and denying without prejudice PSNH's request for Small QFs.¹⁸

¹³ PSNH's Request for Leave to Answer and Answer to Motions to Intervene and Protests, Docket No. QM10-4-000 (February 18, 2010).

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ *See* Order No. 688-A at P 137.

¹⁷ *Public Service Company of New Hampshire*, 131 F.E.R.C. ¶ 61,027, at P 15.

¹⁸ *Id.* at P 18, 22.

Further, contrary to CPD's own statements to the NHPUC five months earlier,¹⁹ the *Order* stated that CPD had initiated a state PURPA proceeding with the NHPUC before PSNH filed the Application with the Commission and, as a result, held that "any contract or legally enforceable obligation that results from" the proceeding "will be grandfathered and not subject to [the] termination order."²⁰

II. STATEMENT OF ISSUES AND IDENTIFICATION OF ERRORS

In accordance with Rule 713(c)(1) and (2), PSNH respectfully requests clarification or, in the alternative, rehearing with respect to the following issues and specifications of error:

- (i) Paragraphs 11 and 23 of the *Order* incorrectly describe CPD's arguments in its Protest, erroneously stating that CPD argued to the Commission that it had initiated a state PURPA proceeding with the NHPUC on April 7, 2009, to establish a legally enforceable obligation with PSNH. Contrary to those incorrect descriptions, in its Protest CPD opposed PSNH's Application solely on estoppel grounds unrelated to PURPA, and before the NHPUC CPD had expressly stated that it had not initiated a state PURPA proceeding. According to Order No. 688-A, if a QF argues that it has a proceeding for a contract or legally enforceable obligation under PURPA pending before a state regulatory agency, the Commission may consider whether such contract or obligation was pending approval.²¹ The *Order* offers no reason or explanation for its departure from Order No. 688-A on this point. Since CPD did not make that argument, it was not appropriate for the Commission to determine that CPD initiated a state PURPA proceeding before PSNH filed its Application.
- (ii) Although Order No. 688-A states that "whether a contract or obligation exists would depend on state law,"²² the Commission did not apply or

¹⁹ See Transcript of Prehearing Conference, *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE 09-067, at 22-23 and 84 (November 3, 2009), available at: <http://www.puc.nh.gov/Regulatory/CaseFile/2009/09-067/TRANSCRIPTS-OFFICIAL%20EXHIBITS-CLERKS%20REPORT/09-067%202009-11-13%20Transcript%20of%2011-3-09%20hearing.pdf>.

²⁰ *Id.* at P 24.

²¹ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, F.E.R.C. Stats. & Regs. ¶ 31,250, at P 138-40 (2007) (hereinafter, "Order No. 688-A"); *JD Wind 1, LLC*, 129 F.E.R.C. ¶ 61,148 (2009), *reh'g denied* 130 F.E.R.C. ¶ 61,127 (2010).

²² Order No. 688-A at P 138.

even consider New Hampshire law when it determined in Paragraph 24 of the *Order* that CPD had initiated a state PURPA proceeding before PSNH filed its Application. Further, the *Order* offers no reason or explanation for its departure from Order No. 688-A on this point. As a result, the determination in Paragraph 24 of the *Order* is incorrect.

- (iii) It was not appropriate for Paragraph 24 of the *Order* to find that CPD had initiated a state PURPA proceeding before PSNH filed its Application because such finding is unsupported by any evidence in the record in this docket and is contradicted by CPD's own statements and filings made before the NHPUC. CPD has expressly acknowledged that it has not initiated a state PURPA proceeding with the NHPUC.
- (iv) It was not appropriate for Paragraph 24 of the *Order* to determine that CPD had initiated a state PURPA proceeding before PSNH filed its Application because under Order No. 688-A and FERC precedent, the Commission generally leaves that determination to state regulatory authorities.²³ Further, the NHPUC should make that determination because it is governed by New Hampshire law, which the NHPUC is obviously more familiar with, and because the NHPUC has jurisdiction over the NHPUC Complaint and first-hand knowledge of the entire record in NHPUC Docket No. DE 09-067.
- (v) The *Order* erred in ordering that any contract or legally enforceable obligation based upon PURPA that results from CPD's NHPUC proceeding will be "grandfathered and not subject to [the] termination order."²⁴ The issue of whether CPD's PURPA rights are grandfathered cannot be determined until the NHPUC determines whether CPD initiated a state PURPA proceeding before PSNH filed its Application.
- (vi) Paragraph 15 of the *Order* erred in rejecting PSNH's Answer for filing because the Answer provides important information bearing on the Commission's determination in Paragraph 24 of the *Order* and on this Motion for Clarification and/or Rehearing.

III. MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING

A. CPD Did Not Argue in its Protest That a Contract or Obligation Was Pending Approval Before the NHPUC

Under Order No. 688-A:

²³ See Order No. 688-A at 138-40; *JD Wind 1, LLC*, 129 F.E.R.C. ¶ 61,148 (2009), *reh'g denied* 130 F.E.R.C. ¶ 61,127 (2010); *Kawaihae Cogeneration Partners*, 84 F.E.R.C. ¶ 61,325, at 62,456 (1998).

²⁴ *Public Service Company of New Hampshire*, 131 F.E.R.C. ¶ 61,027, at P 24.

[[If a QF argues that any contract or obligation was “pending approval before the appropriate State regulatory authority or non-regulated electric utility,” and thus argues that the utility’s obligation to purchase from the QF ought not be terminated pursuant to a § 292.310 proceeding, the Commission will consider those claims in the individual proceedings as they arise.²⁵

Contrary to the description of CPD’s Protest in Paragraphs 11 and 23 of the *Order*, this threshold requirement for Commission consideration of grandfathering was not met because CPD never argued that it had a contract or obligation pending approval with the NHPUC. As a result, under Order No. 688-A, it was inappropriate for the *Order* to determine whether CPD initiated a state PURPA proceeding before PSNH filed its Application.

The statement in Paragraph 11 of the *Order* that “[CPD] argues that PSNH’s request should be denied with respect to [CPD] because, on April 7, 2009, [CPD] initiated the process with the [NHPUC] to establish a legally enforceable obligation. [CPD] argues that any obligation established should be grandfathered...” and similar statements in Paragraph 23 are inconsistent with CPD’s arguments in its Protest. As explained below, CPD opposed PSNH’s application solely on estoppel grounds, and did not explicitly or implicitly argue that it had a legally enforceable obligation pending approval before the NHPUC.

In its Protest, CPD argued that PSNH should be estopped from requesting relief from the Mandatory Purchase Obligation because PSNH had allegedly denied having any obligation to enter into a long-term power purchase agreement with CPD.²⁶ Specifically, CPD claimed that:

PSNH’s representations to the NHPUC that there is no requirement for it to enter into a long-term power purchase agreement with CPD are patently inconsistent

²⁵ Order No. 688-A at P 138-40 (“QFs that believe that some other sort of state proceeding has created a legally enforceable obligation under state law may argue their claim before the Commission... A QF may argue that an obligation or contract is pending approval as provided by state law in any proceedings seeking termination of the purchase obligation, or pursuant to a petition for declaratory order.”)(emphasis provided).

²⁶ Motion to Intervene and Protest of Clean Power Development, LLC, Docket No. QM10-4-000, at 2, 4.

with the filing before the Commission in this proceeding....CPD has unsuccessfully sought to negotiate a long-term fixed rate power purchase agreement with PSNH for many years. PSNH has rebuffed all of CPD's attempts....On numerous occasions, PSNH has represented to the [NHPUC] that there is no requirement for it to enter into a long-term power purchase agreement with CPD....In direct contrast with its position in New Hampshire, PSNH's filing with the Commission on January 10, 2010 seeks authorization to terminate the mandatory power purchase obligation...For the foregoing reasons, in any order that may eventually issue in this proceeding, the Commission, at a minimum, should not terminate PSNH's mandatory power purchase obligation with respect to any CPD facility.²⁷

In addition, CPD explained that it filed the NHPUC Complaint with the NHPUC on April 7, 2009 (docketed by the NHPUC as DE 09-067), claiming that PSNH refused to enter into negotiations to purchase energy, capacity, and renewable energy certificates associated with the output of CPD's proposed generating facility.²⁸ Also, CPD cited an Order of Notice in NHPUC Docket No. DE 09-067, dated October 9, 2009, in which the NHPUC summarized CPD's claims against PSNH as follows:

CPD claimed that...PSNH's refusal to negotiate with CPD constituted, among other things, a violation of PSNH's least cost plan approved by the Commission in Order No. 24,945 (February 27, 2009) in Docket No. DE 07-108 and RSA 362-F:1, the purpose section of the Electric Renewable Portfolio Standards law, RSA 378:37, the New Hampshire Energy Policy, and RSA 378:38 and 39, New Hampshire's law requiring electric utilities to file least cost integrated resource plans for approval by the Commission.²⁹

Nowhere in its Protest did CPD argue that the NHPUC Complaint initiated a state PURPA proceeding against PSNH. Moreover, CPD did not request that the Commission determine whether the NHPUC Complaint initiated a state PURPA proceeding, nor did it request

²⁷ *Id.* at 2-4.

²⁸ *Id.* at 2.

²⁹ *Id.*; Order of Notice, *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE09-067, at 1 (Oct. 9, 2009), available at <http://www.puc.nh.gov/Regulatory/CaseFile/2009/09-067/ORDERS/09-067%202009-10-09%20Order%20of%20Notice.PDF>.

that any legally enforceable obligation arising from the NHPUC Complaint be grandfathered. Instead, CPD simply requested that it not be subject to any termination order because PSNH should not be granted relief from an obligation that it previously denied having.³⁰ Thus, under Order No. 688-A, the Commission should not have even considered whether CPD initiated a state PURPA proceeding before PSNH filed its Application. As the *Order* offered no explanation for its departure from the plain language in Order No. 688-A, the statements in Paragraphs 11 and 23 of the *Order* and the determination in Paragraph 24 of the *Order* are inappropriate and should be clarified or, in the alternative, reheard and revised by the Commission.

B. The Order Did Not Apply State Law to Determine that CPD Initiated a State PURPA Proceeding Before PSNH Filed its Application as Required by Order No. 688-A

In Order No. 688-A, the Commission determined that state law governs the determination of whether a contract or legally enforceable obligation exists under PURPA: “[w]hether the state regulatory authority’s process for creating a legally enforceable obligation has begun, and thus there is a contract or obligation pending, depends on state law.”³¹ Despite this clear, unambiguous instruction in Order No. 688-A, the *Order* did not apply or even consider New Hampshire law regarding QF contracts and legally enforceable obligations when it determined in Paragraph 24 that “[CPD] initiated its proceeding with the [NHPUC] before PSNH filed its

³⁰ As explained in PSNH’s Answer, CPD incorrectly alleged that PSNH previously denied its long-term power purchase obligations under PURPA. In that Answer, it is evidenced that PSNH had on many occasions noted an obligation to comply with PURPA purchase mandates imposed by the NHPUC. *See* Request for Leave to Answer and Answer to Motions to Intervene and Protests, Docket No. QM10-4-000, at 9. To support its argument, CPD inappropriately quoted a NHPUC Order of Notice in a vacuum without providing the proper context of the Order or sufficient background information concerning the record of that NHPUC proceeding. *Id.* As described in PSNH’s Answer, PSNH has always recognized its power purchase obligations under PURPA and on myriad occasions informed CPD of the options available to it under PURPA. *Id.* at 9-10.

³¹ Order No. 688-A at P 138-40 (“Whether a contract or obligation exists would depend on state law.... we will make such determinations on a case-by-case basis based on state law.”) (emphasis provided).

petition to terminate its purchase obligation.” Nor did it provide a reason for departing from the requirement to apply state law. For these reasons, Paragraph 24 of the *Order* is inconsistent with Order No. 688-A.

Therefore, PSNH requests clarification of or, in the alternative, rehearing of Paragraph 24 of the *Order* because it is inconsistent with Order No. 688-A’s mandate that the existence of a contract or legally enforceable obligation depends on state law.

C. The Finding in ¶ 24 of the Order is Unsupported by Evidence on the Record in this Docket and Contradicted by CPD’s Own Statements and Filings Before the NHPUC

No evidence on the record in this docket supports the finding in Paragraph 24 of the *Order* that CPD initiated a state PURPA proceeding before PSNH filed its Application with the Commission. In fact, the *Order* did not provide any basis or reasoning for this determination. It appears that the determination in Paragraph 24 was based solely on the incorrect statements in Paragraphs 11 and 23 of the *Order* and on CPD’s unsupported arguments in its Protest. As explained in section III.A above, CPD did not explicitly or implicitly argue in its Protest that it had a legally enforceable obligation pending approval before the NHPUC; nor did it file any documents or information with the Commission that would support a finding that NHPUC Docket No. DE 09-067 is a state PURPA proceeding. Therefore, nothing in CPD’s protest, or any other documents on the record in this docket, support the finding in Paragraph 24 that CPD initiated a state PURPA proceeding before PSNH filed its Application.

Further, review of the record in NHPUC Docket No. DE 09-067 reveals that CPD’s action against PSNH is not a state PURPA proceeding.³² First, the CPD’s Complaint filed with

³² PSNH respectfully requests that the Commission take administrative notice of the record in NHPUC Docket No. DE 09-067, as it has done on numerous occasions in other proceedings. *See, e.g., Southern Company Services, Inc.*, 129 F.E.R.C. ¶ 61,253, at P 13, fn. 9 (2009); *Southwest Power Pool, Inc.*, 129 F.E.R.C. ¶ 61,163, at P

the NHPUC did not cite or otherwise reference PURPA or its implementing regulations, nor did it reference PSNH's power purchase obligations under PURPA. Further, on multiple occasions, CPD specifically acknowledged that it had not initiated a state PURPA proceeding with the NHPUC. During a November 9, 2009 NHPUC pre-hearing conference in Docket No. DE 09-067, CPD claimed that it purposely did not seek to initiate a state PURPA proceeding in its NHPUC Complaint. In response to a question from the Chairman of the NHPUC asking about CPD's views on the applicability of PURPA to its complaint, CPD responded, "We have had some awareness of this [PURPA] going back to day one here. We haven't tried to force our deal on Public Service by saying 'you've got some kind of an obligation under federal law', because we're in a hurry, and we didn't see that that would get us to where we need to go for the quickest."³³ Later in that same hearing, CPD similarly admitted "[t]he requirement under PURPA' we were careful not to raise it in our complaint."³⁴

More recently, in its Memorandum of Law filed with the NHPUC in Docket No. DE 09-067 on April 2, 2010, CPD (contrary to its own statements and admissions to the NHPUC five months earlier) claimed that it did not know that PURPA's Mandatory Purchase Obligation still existed and argued that if it had known the obligation existed, CPD would have tried to obtain a long-term PURPA contract with PSNH:

If PSNH had disclosed to CPD and the Commission that such a mandatory obligation still existed, CPD would have made every effort to obtain a long-term contract from PSNH for a facility in Berlin...If PSNH had

22 (2009); *California Independent System Operator Corporation*, 126 F.E.R.C. ¶ 61,165, at P 30, 32 (2009); *California Independent System Operator Corporation*, 125 F.E.R.C. ¶ 61,053, at P 42, fn. 37 (2008).

³³ Transcript of Prehearing Conference, *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE 09-067, at 22-23 (November 3, 2009), available at: <http://www.puc.nh.gov/Regulatory/CaseFile/2009/09-067/TRANSCRIPTS-OFFICIAL%20EXHIBITS-CLERKS%20REPORT/09-067%202009-11-13%20Transcript%20of%2011-3-09%20hearing.pdf> (emphasis added).

³⁴ *Id.* at 84.

disclosed to CPD and the Commission that a mandatory obligation to purchased [sic] still existed under Federal law, CPD would have made every effort to obtain a long term contract from PSNH for a facility in Berlin.³⁵

Hence, CPD admitted two months before PSNH filed its Application with the Commission (in November, 2009) as well as of April 2, 2010, nearly three months after PSNH filed its Application with the Commission, that CPD had not initiated a state PURPA proceeding.

Since the evidence in this docket and in NHPUC Docket No. DE 09-067 expressly refutes the *Order's* conclusion that CPD initiated a state PURPA proceeding, the Commission should grant clarification and/or rehearing of the determination in Paragraph 24 of the *Order*.

D. It is More Appropriate for the NHPUC, not the Commission, to Determine Whether and When CPD Had a Legally Enforceable Obligation Pending Approval Before the NHPUC

In Order No. 688-A, the Commission emphasized that it is not responsible for determining whether and when a legally enforceable obligation is created:

[W]e emphasize, however, that in the division of responsibilities of administering PURPA between this Commission and state regulatory authorities (and non-regulated utilities), it is the state regulatory authorities (or non-regulated utilities) that determine whether and when a legally enforceable obligation is created, and the procedures for obtaining approval of such an obligation.³⁶

Similarly, in *JD Wind 1, LLC*, 130 F.E.R.C. ¶ 61,127 (2010), the Commission recently acknowledged that it generally leaves “to state commissions the issue of when and how a legally

³⁵ Memorandum of Law of Clean Power Development, LLC, *Complaint of Clean Power Development, LLC against Public Service Company of New Hampshire*, NHPUC Docket No. DE 09-067, at 9 (April 2, 2010), available at <http://puc.state.nh.us/Regulatory/CaseFile/2009/09-067/LETTERS,%20MEMOS/09-067%202010-04-02%20Clean%20Power%20Dev%20Memorandum%20of%20Law.PDF>. Compare CPD's claim in April, 2010 that if it had known that it was entitled to a legally enforceable purchase obligation under PURPA it would have pursued one, with its statement to the NHPUC five months earlier, where it acknowledged the existence of such a PURPA entitlement, but said it had expressly chosen not to pursue its PURPA rights.

³⁶ Order No. 688-A at P 139 (emphasis added).

enforceable obligation is created.”³⁷ Thus, under Order No. 688-A and Commission precedent, the issue of whether CPD initiated a state PURPA proceeding before PSNH filed its Application in January 2010 is a factual and legal question that should be decided by the NHPUC, not the Commission, especially when the QF did not even raise this issue to the Commission.

Should the Commission question CPD’s own admissions on the subject, the NHPUC is in a far better position than the Commission to determine if CPD initiated a state PURPA proceeding. First, according to Order No. 688-A, state law governs the issue of whether and when a contract or legally enforceable obligation is created.³⁸ Since the NHPUC is the state regulatory body that oversees, implements, and interprets New Hampshire’s energy laws and regulations, the NHPUC should have a better understanding of applicable New Hampshire law than the Commission. Further, the NHPUC has jurisdiction over the NHPUC Complaint and first-hand knowledge of the entire record in NHPUC Docket No. DE 09-067. For these reasons, the NHPUC, not the Commission, is the appropriate regulatory body to determine whether and when CPD created a legally enforceable obligation under PURPA (*i.e.*, initiated a state PURPA proceeding). Therefore, the Commission should grant clarification of or, in the alternative, rehearing of Paragraph 24 of the *Order* and find that the issue of whether and when CPD initiated a state PURPA proceeding is for the NHPUC to determine under New Hampshire law.

E. The Issue of Whether CPD’s PURPA Rights are Grandfathered Depends on the NHPUC’s Determination of Whether CPD Initiated a State PURPA Proceeding Before PSNH Filed its Application

It was not appropriate for Paragraph 24 of the *Order* to determine that CPD’s PURPA rights are grandfathered and not subject to PSNH’s termination order. The issue of whether

³⁷ *JD Wind I, LLC*, 130 F.E.R.C. ¶ 61,127 at P 24 (explaining that the Commission gives guidance to state regulatory commissions when they resolve issues in a manner inconsistent with the Commission’s regulations).

³⁸ Order No. 688-A at P 138-40.

CPD's PURPA rights are grandfathered cannot be determined until the NHPUC determines whether CPD initiated a state PURPA proceeding before PSNH filed its Application. To date, the NHPUC has not yet made that determination. Thus, it was premature for the *Order* to grandfather CPD's PURPA rights.

F. The Commission Should Have Accepted PSNH's Answer for Filing Because it Contains Important Facts and Information Bearing on the Determination in Paragraph 24 of the Order and on this Motion for Clarification and Rehearing

Paragraph 15 of the *Order* should not have rejected PSNH's Answer because it provides valuable information bearing on the determination in Paragraph 24 of the *Order* and on this Motion for Clarification and/or Rehearing. Specifically, PSNH's Answer provides information concerning CPD's action against PSNH in NHPUC Docket No. DE 09-067 and contains citations to important documents on record in that docket that are relevant to the issue of whether CPD had initiated a state PURPA proceeding before PSNH filed its Application with the Commission. Moreover, the Commission recently allowed Xcel Energy Services, Inc. to file an answer in response to motions to intervene and protests opposing its application for relief from PURPA's Mandatory Purchase Obligation for QFs over 20 MW on a territory-wide basis.³⁹ Therefore, PSNH respectfully requests that the Commission grant clarification and/or rehearing of Paragraph 15 of the *Order* and accept PSNH's Answer for filing.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, PSNH respectfully requests that the Commission grant clarification and/or rehearing of the *Order* and determine that: (i) in its Protest, CPD did not meet the Order No. 688-A threshold requirement of arguing to the Commission that it had a legally enforceable obligation pending approval before the NHPUC

³⁹ See *Xcel Energy Services, Inc.*, 122 F.E.R.C. ¶ 61,048, at P 21 (2008).

prior to PSNH's Application filing; (ii) contrary to Order No. 688-A, the determination in Paragraph 24 of the *Order* was not based on state law; (iii) there is no evidence on the record in this docket to support the determination in Paragraph 24 of the *Order*; (iv) the NHPUC is the appropriate regulatory body to determine the issue of whether and when CPD initiated a state PURPA proceeding; (v) the issue of whether CPD's PURPA rights are grandfathered should be based on the NHPUC's determination regarding the state PURPA proceeding; and (vi) the Commission accepts PSNH's Answer for filing.

Respectfully submitted,

NORTHEAST UTILITIES SERVICE COMPANY and
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: 

Philip M. Small, Esq.
Kathryn Hinton, Esq.
Brown Rudnick LLP
CityPlace I, 185 Asylum Street
Hartford, CT 06103-3402
Tel: (860) 509-6575
Fax: (860) 509-6501

Phyllis E. Lemell, Esq.
Assistant General Counsel
Northeast Utilities Service Company
107 Selden Street
Berlin, CT 06037
Tel: (860) 665-5518
Fax: (860) 665-5504

Robert A. Bersak, Esq.
Assistant General Counsel
Public Service Company of New Hampshire
780 North Commercial Street
P. O. Box 330
Manchester, NH 03105-0330
Tel: (603) 634-3355
Fax: (603) 634-2438

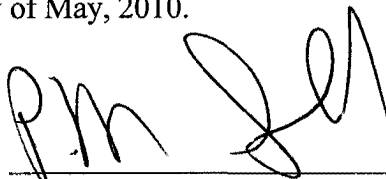
Counsel for Northeast Utilities Service Company and
Public Service Company of New Hampshire

Dated: May 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding

Dated at Hartford, Connecticut this 14th day of May, 2010.

A handwritten signature in black ink, appearing to read 'P.M. Small', is written above a horizontal line.

Philip M. Small, Esq.
Brown Rudnick LLP
CityPlace I, 185 Asylum Street
Hartford, CT 06103-3402
Tel: (860) 509-6575
Fax: (860) 509-6501
psmall@brownrudnick.com

Service List

SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

Executive.Director@puc.nh.gov

bersara@psnh.com

bill@cleanpowerdevelopment.us

catherine.corkery@sierraclub.org

chair@carbonactionalliance.org

city_manager@berlinnh.gov

davidaborden@aol.com

dpatch@orr-reno.com

eatongm@nu.com

gилfavor@comcast.net

hallsr@nu.com

jmonahan@dupontgroup.com

jrodier@freedomenergy.com

judith@kestrelnet.net

Ken.E.Traum@oca.nh.gov

mcclammer@aol.com

Meredith.A.Hatfield@oca.nh.gov

mosesp@worldpath.net

ocalitigation@oca.nh.gov

peter@concordsteam.com

selectmen@winchester.nh.gov

selectmen@winchester.nh.gov

selectmen@winchester.nh.gov

Stephen.R.Eckberg@oca.nh.gov

steve.mullen@puc.nh.gov

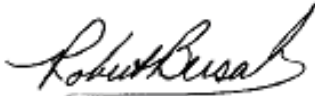
suzanne.amidon@puc.nh.gov

tom.frantz@puc.nh.gov

CERTIFICATE OF SERVICE

I certify that on this 20th day of September, 2010, I caused the attached
Legal Memorandum to be served pursuant to
N.H. Code Admin. Rule Puc 203.11.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: _____

Robert A. Bersak
Assistant Secretary and Assistant General Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Manchester, NH 03101-1134
603-634-3355
bersara@PSNH.com