

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. _____

**Appeal of
Bridgewater Power Company, L.P., Pinetree Power, Inc.,
Pinetree Power-Tamworth, Inc., Springfield Power LLC,
DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and
Indeck Energy-Alexandria, LLC**

**APPEAL BY PETITION PURSUANT TO RSA 541:6
(NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION)**

**OLSON & GOULD, P.C.
David J. Shulock, Esq. (NH #10597)
Robert A. Olson, Esq. (NH #1933)
David K. Wiesner, Esq. (NH #6919)
2 Delta Drive, Suite 301
Concord, NH 03301-7426
(603) 225-9716**

TABLE OF CONTENTS

A. Names of Parties Seeking Review	1
B. Administrative Agency's Orders and Findings Sought to be Reviewed	3
C. Questions Presented for Review	3
D. Constitutional Provision, Statute, Ordinance, Regulation, Rule, or Other Legal Authority Involved in the Case	4
E. Provisions of Insurance Policies, Contracts, or Other Documents Involved in the Case	5
F. Statement of the Case	6
G. Jurisdictional Basis For Appeal	13
H. Direct and Concise Statement of Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Question and Why the Acceptance of the Appeal Would Protect a Party From Substantial and Irreparable Injury, or Present the Opportunity to Decide, Modify or Clarify an Issue of General Importance in the Administration of Justice	14
I. Statement that Every Issue Specifically Raised has Been Presented to the Administrative Agency and has Been Properly Preserved for Appellate Review by a Contemporaneous Objection or, Where Appropriate, by a Properly Filed Pleading	24
J. Content of Record on Appeal	25

Complete Case Title and Docket Number in Administrative Agency

*Petition for Approval of Purchased Power Agreement
with Laidlaw Berlin BioPower, LLC
New Hampshire Public Utilities Commission Docket No. DE 10-195*

- A. Names of Parties Seeking Review
Bridgewater Power Company, L.P., Pinetree Power, Inc.,
Pinetree Power-Tamworth, Inc., Springfield Power LLC,
DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and
Indeck Energy-Alexandria, LLC (collectively, the “Appellants”)

Name, Firm Name, Address and Telephone Number of
Appealing Party’s Counsel
David J. Shulock, Esquire (NH #10597)
Robert A. Olson, Esquire (NH #1933)
David K. Wiesner, Esquire (NH #6919)
Olson & Gould, P.C.
2 Delta Drive, Suite 301
Concord, NH 03301
(603) 225-9716

Names of Parties of Record, Counsel, and Addresses
Public Service Company of New Hampshire (“PSNH”)
Robert Bersak, Esquire
Public Service Company of New Hampshire
780 North Commercial Street, P.O. Box 330
Manchester, NH 03105
(603) 634-2700

Staff of the New Hampshire Public Utilities Commission (“Staff”)
Suzanne Amidon, Esquire
Edward N. Damon, Esquire
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
(603) 271-2431

Office of Consumer Advocate ("OCA")
Meredith A. Hatfield, Esquire
Office of Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1172

Clean Power Development ("CPD")
James Rodier, Esquire
Attorney-at-Law
1500 A. Lafayette Road, No. 112
Portsmouth, NH 03801-5918
(603) 559-9987

City of Berlin
Kerian Roman, Esquire
Donahue, Tucker & Ciandella PLLC
225 Water Street
Exeter, NH 03833
(603) 778-0686

City of Berlin
Christopher Boldt, Esquire
Donahue, Tucker & Ciandella PLLC
104 Congress Street, Suite 304
Portsmouth, NH 03801
(603) 766-1686

Edrest Properties LLC
Jonathan Edwards, *Pro se*
P.O. Box 202
Berlin, NH 03570

New England Power Generators Association
Angela O'Connor
141 Tremont Street, 6th Floor
Boston, MA 02111

B. Administrative Agency's Orders and Findings Sought to be Reviewed

1. New Hampshire Public Utilities Commission Order No. 25,192 (January 14, 2011) (App. at 137).
2. New Hampshire Public Utilities Commission Order No. 25,213 (April 18, 2011) (App. at 165).
3. New Hampshire Public Utilities Commission Order No. 25,239 (June 23, 2011) (App. II at 136).

C. Questions Presented for Review

1. Did the Commission misconstrue RSA 362-F when it authorized PSNH to contract with Laidlaw Berlin BioPower, LLC ("Laidlaw") for the purchase of renewable energy certificates ("RECs") through 2034, where RSA 362-F plainly extends the requirement that PSNH purchase RECs only through the year 2025?

2. Did the Commission misapply RSA 374-F:3, V(c) when the Commission approved PSNH's request to recover the cost of REC purchases from ratepayers through 2034 where RSA 374-F:3, V(c) permits recovery only of prudent costs arising from compliance with RSA 362-F requirements?

3. Did the Commission exceed its jurisdiction and authority under RSA 362-F, 374-F:3, V(c), and 365:28, and err as a matter of law by authorizing contractual change in law provisions that insulate PSNH and Laidlaw from legislative changes to RSA 362-F and that prevent this and future Commissions from revising critical terms of the Commission's approval orders, including, but not limited to, the number of NH Class I RECs to be purchased, the purchase price for those RECs, and the reasonableness of the costs to be recovered from ratepayers in future?

4. Did the Commission exceed its jurisdiction and authority and err as a matter of law by authorizing change in law provisions that pre-authorize the purchase of “RECs” and pre-approve cost recovery for “RECs,” even if those “RECs” fail to meet changing statutory eligibility requirements under RSA 362-F, or even if RSA 362-F is superseded, pre-empted, or repealed?

5. Did the Commission err when it: (i) authorized PSNH to contract with Laidlaw for the purchase of RECs based upon a projection of compliance requirements extending beyond the year 2025 when no such requirements appear in statute, (ii) averaged its projection of RECs necessary for PSNH to meet its annual compliance requirements over a 20-year contract term and thereby authorized PSNH to purchase more RECs than reasonably necessary to meet each of its annual requirements during the first half of the contract term, and (iii) allowed recovery from PSNH ratepayers of the costs of REC purchases not reasonably necessary for compliance with the annual purchase requirements set forth in statute.

D. Constitutional Provision, Statute, Ordinance, Regulation, Rule, or Other Legal Authority Involved in the Case

N.H. RSA 362-F:1, *et seq.*

N.H. RSA 365:28

N.H. RSA 374-F:3, V(c)

N.H. RSA 374:3

The text of the first three provisions is set forth verbatim in App. I on pages 278 through 294. The text of N.H. RSA 374:3 is as follows:

374:3 Extent of Power. The public utilities commission shall have the general supervision of all public utilities and the plants owned, operated or controlled by the same so far as necessary to carry into effect the provisions of this title.

E. Provisions of Insurance Policies, Contracts, or Other Documents Involved in the Case

Petition for Approval of Purchase Power Agreement with Laidlaw Berlin BioPower, LLC ("Petition") (July 26, 2010) (App. at 1)

Purchase Power Agreement between Public Service Company of New Hampshire and Laidlaw Berlin BioPower, LLC ("PPA") (June 18, 2010) (App. at 15)

Petition to Intervene of Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (September 24, 2010) (App. at 100)

Wood-Fired IPPs' Motion to Dismiss (December 13, 2010) (App. at 107)

Objection of Public Service Company of New Hampshire to Wood-Fired IPPs' Motion to Dismiss (December 23, 2010) (App. at 119).

Wood-Fired IPPs' Reply to PSNH's Objection to Wood-Fired IPPs' Motion to Dismiss (January 6, 2011) (App. at 131)

Public Utilities Commission Order No. 25,192 (January 14, 2011) (App. at 137)

Wood-Fired IPPs' Motion for Rehearing (February 14, 2011) (App. at 150)

PSNH'S Objection to Wood-Fired IPPs' Motion for Rehearing (February 16, 2011) (App. at 155)

Public Utilities Commission Order No. 25,213 (April 18, 2011) (App. at 165)

Wood-Fired IPPs' Motion for Rehearing (May 17, 2011) (App. II at 1)

Amended and Restated Power Purchase Agreement between Public Service Company of New Hampshire, Laidlaw Berlin Biopower, LLC, and Berlin Station, LLC as assignee of Laidlaw Berlin Biopower, LLC dated May 18, 2011 (the "amended PPA") (App. II at 92)

City of Berlin's Objection to Motions for Rehearing Filed by Edrest Properties and Wood-Fired IPPs (May 24, 2011) (App. II at 126)

PSNH's Objection to Wood-Fired IPPs' Motion for Rehearing (May 24, 2011) (App. II at 130)

Public Utilities Commission Order No. 25,239 (June 23, 2011) (App. II at 137)

F. Statement of the Case

This is the second of two appeals from one Public Utilities Commission ("Commission") proceeding under RSA 362-F, New Hampshire's renewable portfolio standard ("RPS") statute. In PUC Docket No. DE 10-195, Public Service Company of New Hampshire ("PSNH") sought PUC approval of and cost recovery from its customers for payments to be made under a 20-year long, \$2 billion PPA for the purchase of renewable energy certificates ("RECs") and power. *Cf.* RSA 362-F:3 and Order 25,213 at 69. App. at 233. The Commission approved the PPA in Order 25,213 with minor conditions and directed PSNH to file a conforming contract. App. at 254-62, 271. Appellants filed a notice of appeal on May 17, 2011. With some exceptions, the appeal filed May 17, 2011 addressed the issue of whether the Commission should have proceeded to hearing without deciding basic, preliminary legal questions regarding its jurisdiction and authority to approve the PPA as proposed. PSNH filed an amended PPA on May 18, 2011. App. II at 91. The Commission issued Order 25,239 approving the amended PPA on June 23, 2011. App. II at 136.

Order 25,239 did not moot the appeal filed May 17, 2011 and also raises additional appeal issues. This notice of appeal addresses the Commission's jurisdiction, in terms of the Commission's construction of RSA 362-F and application of RSA 374-

F:3, V:3, and 365:28, in approving the amended PPA. It also addresses additional justifications stated by the Commission in Order 25,239 for approving the amended PPA. Consequently, there is overlap in the legal arguments relating to the questions raised in the two notices of appeal.

RSA 362-F, New Hampshire's Renewable Portfolio Standard

New Hampshire's RPS statute, RSA 362-F, is designed to encourage and support the generation of electricity using renewable fuels and technologies. The RPS statute does so by creating a demand for a regulatory product referred to as "renewable energy certificates" or "RECs." Eligible generators are issued one REC for each megawatt-hour of electricity that they produce. RECs can be sold separately from electric energy and provide renewable generators with income in addition to the income derived from energy sales.

The RPS statute creates a demand for RECs by requiring each retail seller of electricity operating in the state to obtain and retire RECs sufficient in number and class type to meet or exceed statutorily required amounts based on the percentage of total megawatt-hours of electricity supplied by the retail seller of electricity to its end-use customers on an annual basis. RSA 362-F:3. The percentage purchase requirements for each year in which a REC compliance obligation exists are set forth in a table in RSA 362-F:3. *Id.* The table separately lists the years 2008 through 2025 and an applicable percentage purchase requirement for each class, for each of those years. *Id.*

Regulated electric distribution utilities, a subset of the retail electricity sellers subject to the statute, may recover the prudent costs of complying with RPS requirements from their customers or ratepayers by including those costs in their customers' electricity

rates. Whether the cost of REC purchases may be recovered in electricity rates is normally determined after-the-fact in Commission rate proceedings; however, the RPS statute permits distribution utilities to seek authorization from the Commission to enter into multi-year contracts to purchase RECs and to obtain pre-approval of the recovery of those associated REC purchase costs. RSA 362-F:9 and RSA 374-F:3, V(c). The Commission may grant such authorization to the extent of the renewable portfolio requirements. RSA 362-F:9, I. Cost recovery in customer rates is likewise limited to prudently incurred costs of compliance with renewable portfolio requirements. RSA 374-F:3, V(c). The Commission has previously held that the purpose of its authorization of multi-year REC purchase contracts is to allow a distribution utility to collect its prudently incurred costs from its customers. *In re Public Service Company of New Hampshire*, Docket DE 08-077, Order No. 24,965, 94 NH PUC 209, 218-19 (May 1, 2009).

Procedural And Factual Background

On July 26, 2010, PSNH filed a “Petition for Approval of Purchased Power Agreement with Laidlaw Berlin BioPower, LLC” (the “Petition”), and supporting pre-filed testimony of Gary A. Long, Terrence Large, and Richard LaBrecque. App. at 1. PSNH’s power purchase agreement (“PPA”) with Laidlaw Berlin BioPower, LLC (“Laidlaw”) was attached as an exhibit to Mr. Long’s testimony. App. at 15. Laidlaw proposes to construct a wood-fired electric generation facility that would be eligible to produce New Hampshire Class I RECs. App. at 69 and 72. As filed, the PPA required PSNH to purchase 100% of the electrical output products and RECs produced by Laidlaw’s generation facility for a 20-year period, beginning in 2014 and ending in 2034.

App. at 85-86 and 233. As a condition prerequisite to PSNH's obligation to begin purchasing products under the PPA, including RECs, the PPA requires PSNH to receive a final, non-appealable Commission decision allowing for full cost recovery of the rates, terms and conditions of the PPA. App. at 22. Accordingly, PSNH's Petition sought authority to enter into the Laidlaw PPA and a prospective determination that PSNH will recover all costs associated with the PPA over its 20-year term from its ratepayers under RSA 362-F:9 and RSA 374-F:3, V(c). App. at 3-4.

Appellants' Motion to Dismiss

Appellants¹ filed a motion to dismiss the Petition prior to the merits hearing, (App. at 107), raising three arguments challenging the Commission's jurisdiction and authority to award the relief requested by PSNH: the Commission could not approve contract provisions that would effect a waiver or otherwise preclude the Commission's subsequent exercise of its continuing jurisdiction under RSA 365:28; the Commission could not approve the REC purchase terms of the contract that extend beyond the 2025 end of the statutory REC purchase obligation; and the Commission could not usurp legislative authority and extend a statutory program that ends in 2025 by allowing PSNH to purchase RECs and to recover the costs in customer rates.

¹ Appellants are six independent generators of electricity that operate wood-fueled generation facilities in New Hampshire. All six Appellants are PSNH ratepayers. All will compete for biomass wood fuel with Laidlaw under a complicated wood price adjustment mechanism contained in the Laidlaw PPA that ties energy prices paid to Laidlaw to wood-fuel prices paid by PSNH. Appellants are variously eligible to receive New Hampshire Class I, New Hampshire Class III, and Connecticut Class I RECs and either seek to sell these certificates to PSNH or compete with PSNH, and, potentially, Laidlaw for the sale of these RECs to others. App. at 100-106.

Order No. 25,192

Commission's Denial of Appellants' Motion to Dismiss

In Order 25,192, the Commission denied Appellant's motion to dismiss and indicated that it would proceed to a hearing on the merits. In so doing, the Commission addressed only one of the three underlying legal arguments related to the Commission's jurisdiction and authority. The issue the Commission addressed was whether it could approve contractual provisions that require the Commission to waive or have the effect of precluding it from exercising its jurisdiction and authority under RSA 365:28 to subsequently review and potentially alter its orders in this case. App. at 144. One purpose and effect of the challenged contract provisions, once approved by the Commission, is to guarantee Laidlaw that PSNH will continue to purchase and pay for RECs at a guaranteed price, even if those RECs no longer qualify for compliance with the New Hampshire RPS statute, even if the legislature modifies the RPS program to decrease the cost of the program to ratepayers, and even if the legislature repeals the statute and the RPS program in its entirety. A second purpose and effect of the challenged provisions, now approved by the Commission, is to guarantee PSNH that it can continue to collect the costs associated with the amended PPA from its ratepayers, even if the costs are not compliance costs authorized to be recovered under RSA 374-F:3, V(c). PSNH and Laidlaw effectively would be insulated from changes to current law at the expense of ratepayers, a result that the legislature did not intend when it enacted RSA 362-F and amended RSA 374-F:3, V(c).

With regard to the remaining two issues, the Commission held that it could proceed to adjudicate any petition for approval of a contract when the petition is

“properly filed” and decide whether to dismiss based upon fundamental issues of jurisdiction and authority, in this case, after six days of hearings including direct and cross-examination, and after review of evidence and argument regardless of any conflicts with statute, given that the Commission has authority to condition its eventual approval. App. at 143-44. Appellants moved for rehearing of all issues, based on the point that the Commission should not proceed without deciding the underlying basic legal issues addressing the Commission’s authority, because the Commission could not cure its initial lack of jurisdiction and authority by placing conditions on its approval. App. at 150-54.

Order No. 25,213
Commission’s Conditional Approval

After hearings were held on the merits, the Commission issued Order 25,213, which denied Appellants’ motion for rehearing with regard to the RSA 365:28 issues based upon the arguments raised in pleadings. App. at 235. Regarding the remaining two issues relating to the termination of the RPS REC purchase obligation in 2025 and cost recovery for purchases beyond that date, the Commission construed RSA 362-F:3 to contain a REC purchase obligation after 2025. App. at 240. In so doing, the Commission relied upon evidence and argument placed in the record after Appellants filed their motion for rehearing and also upon arguments and legislative history not raised by any party. App. at 236-40. Contrary to its reasoning in Order 25,192, the Commission did not address whether placing conditions on its approval could cure an initial lack of jurisdiction and authority. Furthermore, Order 25,213 granted conditional approval of the PPA, and directed PSNH to file an amended contract conforming to Order No. 25,213 within 30 days of the date of that order. App. at 271. This decision

was not unanimous. Commissioner Below disagreed with the Commission's conclusion that RSA 362-F contains a REC purchase requirement after 2025 and with the Commission's allowance of cost recovery after 2025. App. at 272-77.

Appellants filed their first notice of appeal on May 17, 2011. With some exceptions, this first notice of appeal addressed whether the Commission should have proceeded to hearing without first deciding basic, preliminary legal questions regarding its jurisdiction and authority to approve the PPA as proposed. Also on May 17, 2011, Appellants filed a Motion for Rehearing with the Commission seeking reconsideration of a number of issues decided in Order No. 25,213. These included (i) the Commission's construction of RSA 362-F:3 to include an obligation to purchase RECs after the year 2025 and consequent authorization and approval of cost recovery for such purchases despite a clear statute and legislative history to the contrary, (ii) the Commission's decision to levelize REC requirements (whether for periods ending before or after 2025) and consequent authorization and approval of cost recovery for the purchase of RECs not required for compliance during the approximate first half of the contract term, and (iii) the Commission's approval of the change in law provisions as that approval relates to RSA 365:28 and cost recovery, and as that approval relates to authorization to purchase, and allowance of cost recovery for, RECs that will not be eligible for compliance with the New Hampshire RPS statute. App. II at 1-91. On May 18, 2011, PSNH filed an amended PPA purporting to conform to the conditions imposed by the Commission in Order No. 25,213. App. II at 92. On May 24, 2011, PSNH and the City of Berlin filed objections to the Wood-Fired IPPs' Motion for Rehearing of Order No. 25,213. App. II at 126-36.

Order 25,239
Commission's Final Approval

On June 23, 2011, on a 2-1 vote, the Commission, denied rehearing except with regard to the issue whether the Commission has authority to levelize statutory REC purchase requirements in a manner that first levelizes REC purchases beyond 2025 when no statutory REC purchase requirement exists, and then, as a result of this levelization, obligates PSNH's ratepayers to pay for RECs that are not required for compliance during approximately the first half of the term of the amended PPA. App. II at 144-45. On rehearing, the Commission rejected the Wood-Fired IPPs' arguments and held that the Commission had such authority. App. II at 145-46. Commissioner Below dissented on the basis that the Commission had misconstrued the statute, and that rehearing should have been granted on the fact that the statute does not provide for REC purchases or cost recovery after 2025. App. II at 152. This second notice of appeal followed.

G. Jurisdictional Basis For Appeal

The court has jurisdiction over this appeal pursuant to RSA 541:6. The appeal filed May 17, 2011 was filed due to the ambiguity in RSA 541:6 whether appeals must be taken within 30 days of the issuance of an interim order or may await conclusion of all proceedings, and due to the lack of clarity of the finality of Order 25,213, which purports to pre-approve the amended contract before it was filed with the Commission. To the extent that the court finds that the previous appeal was filed prematurely, the notice of appeal filed May 17, 2011 is hereby incorporated as if fully set forth herein. In any event, Appellants respectfully request that the court consolidate the two appeals.

H. Direct and Concise Statement of Reasons Why a Substantial Basis Exists for a Difference of Opinion on the Question and Why the Acceptance of the Appeal Would Protect a Party From Substantial and Irreparable Injury, or Present the Opportunity to Decide, Modify or Clarify an Issue of General Importance in the Administration of Justice

This is the first time that the court has been asked to interpret RSA 362-F:3. On its face, this statute requires utilities and their ratepayers to purchase RECs, but ends this compulsory purchase obligation after the year 2025. Despite the plain wording of RSA 362-F:3, and despite clear legislative history to the contrary, the Commission has determined that utilities have an obligation after 2025 to purchase RECs and ratepayers have a continuing obligation after 2025 to pay for such RECs.

This is also the first time that the court has been asked to interpret RSA 362-F:9, I, and its relationship to the annual REC purchase requirements set forth in RSA 362-F:3, and its relationship to recovery of prudent compliance costs under RSA 374-F:3 V(c). RSA 362-F:9, I permits the Commission to approve multi-year purchases of RECs necessary “to meet reasonably projected renewable portfolio requirements . . . to the extent of such requirements.” RSA 362-F:9, I. The Commission has construed this provision to allow it to ignore the annual purchase requirements set by the legislature in RSA 362-F:3, to permit PSNH instead to purchase RECs on a levelized basis, and thereby to require PSNH ratepayers to fund REC purchases that are not required for statutory compliance for approximately the first half of the contract through rates, in violation of RSA 374-F:3, V(c).

If this court does not review the Commission’s construction of the relevant statutes, then the harm to ratepayers, such as Appellants, will be substantial and irreparable. The Commission has disclaimed the jurisdiction and authority to revisit the

amended PPA and its approval under RSA 365:28. Furthermore, not even a legislative repeal of the RPS statute would remedy the harm done by an incorrect construction if that construction is permitted to stand. This is because the amended PPAs' change in law provisions require PSNH to continue to purchase from and make payment to Laidlaw for products that may no longer be eligible for compliance with RSA 362-F, and the Commission's approval of the amended PPA's provision regarding recovery in rates would continue to permit PSNH to recover these costs from its ratepayers.

The questions raised in this appeal present the court with the opportunity to clarify issues of general importance in the administration of justice in that it will provide needed guidance to the Commission, retail sellers of electricity, private generators of renewable energy, and ratepayers for application of RSA 362-F in all future proceedings under this statute, including guidance as to the following issues:

- (i) whether the RPS purchase requirements stated in RSA 362-F:3 end after 2025;
- (ii) whether the annual RPS purchase requirements of any electricity supplier may be levelized to allow electricity suppliers to contract in advance for and to require ratepayers to pay for the purchase of more RECs than are required to comply with the RPS statute;
- (iii) whether this or future Commissions may never revisit Commission orders conditioning and approving multi-year contracts despite changed circumstances; and
- (iv) whether ratepayers can be required to fund the purchase of "RECs" even if the legislature repeals the RPS statute or some other change in law renders "RECs" purchased under contract ineligible for compliance with the New Hampshire RPS statute for whatever reason.

Finally, as detailed below, a substantial basis exists for a difference of opinion on the questions presented in this appeal.

- I. THE COMMISSION MISCONSTRUED RSA 362-F:3 WHEN IT HELD THAT THE STATUTE IMPOSED A REC PURCHASE REQUIREMENTS AFTER 2025; SUCH A CONSTRUCTION IS CONTRARY TO BOTH THE PLAIN WORDING OF THE STATUTE AND ITS LEGISLATIVE HISTORY AND, CONTRARY TO THE COMMISSION'S CLAIM, IS NOT NECESSARY TO AVOID AN ABSURD RESULT.

The RPS compliance requirements and related REC purchase obligations are set forth in RSA 362-F:3, entitled "Minimum Electric Renewable Portfolio Standards." These requirements end in 2025. RSA 362-F:3 states, "For each year specified in the table below, each provider of electricity shall obtain and retire certificates sufficient in number and class type to meet or exceed the following percentages of total megawatt-hours of electricity supplied by the provider to its end-use customers that year. . ." RSA 362-F:3. Emphasis supplied. The table provides the percentages and class types only for the years 2008 through 2025. *Id.* Neither the wording of the provision nor the table creates a purchase requirement for the years 2026 and beyond. *Id.* Without further legislative action, the RPS program and PSNH's REC purchase requirements end on December 31, 2025.

A plain reading of RSA 362-F:3, and of the RPS statute as a whole demonstrates that the legislature did not intend to require utilities and their ratepayers to pay for purchases of RECs beyond the year 2025. First, in RSA 362-F:9, I, the legislature was careful to limit permissible authorization of REC purchase contracts to the "extent" of "renewable portfolio requirements." These requirements are set forth in RSA 362-F:3, and by statutory language, extend only through the year 2025. Second, the legislature reserved to itself the authority to increase, decrease, or eliminate the REC purchase requirements in years 2026 and beyond. The legislature did so by creating a requirement

in RSA-F:3 that extends only until 2025, while limiting the Commission to making recommendations to the legislature as to what should occur after that time. Whether a purchase obligation will exist after 2025, the classes to which it will apply, and at what levels, are matters of legislative prerogative. This allocation of authority is set forth in RSA 362-F:5, titled “Commission Review and Report.”

A review of legislative history is unnecessary given the lack of ambiguity in RSA 362-F:3. However, even if ambiguity were found to exist or an absurd result would seem to follow if the REC requirement were not extended beyond 2025, the RPS statute’s legislative history confirms that the legislature ended the REC purchase obligation for utilities and their ratepayers in 2025. The RPS statute’s legislative history involves two bills. The first, Senate Bill 314, was filed in the 2006 legislative session but did not become law. House Journal No. 15 at 2006 (April 26, 2006), App. at 303. This bill, rejected by the legislature in 2006, created a continuing REC purchase obligation by setting percentage REC purchase requirements from 2007 through 2013 in a table and adding a column labeled “Thereafter” to the table that held the percentages for the year 2013 constant for all subsequent years. Senate Journal No. 7 at 157-162 (March 9, 2006), App. at 306. The second bill, House Bill 873, was based on Senate Bill 314 and ultimately became RSA 362-F. This bill, passed by the legislature in 2007, removed the “thereafter” from the last column of the table and replaced it with a column of percentage REC purchase requirements for the years 2015 through 2025, only. House Journal No. 13 at 1245-1252 (April 5, 2007), App. at 295; *see also* RSA 362-F:3.

If the legislature had intended to create a continuing REC purchase obligation when it finally enacted RSA 362-F, it would not have removed the “thereafter” provision

from the statute. It was within this context that Representative Suzanne Harvey, a sponsor of House Bill 873, stated to the Senate Energy, Environment and Economic Development Committee that “each [state program] is different. Every state customizes . . . what they will accept as a renewable energy for credit, and also customizes the percentages, when they start and where they end and at what year” and that “our proposed RPS program starts at a baseline percentage of renewables required, starting in 2008 and goes out to 2025.” App. II at 7, 44. When it enacted House Bill 314, the legislature intended to create a REC purchase obligation and ratepayer payment obligation starting in 2008 and ending in 2025.

The legislative intent to end the REC purchase obligation in 2025 and the plain wording of RSA 362-F:3 are in harmony with the remainder of RSA 362-F and do not lead to any absurd results. The Commission posited a number of reasons it believed that applying the plain meaning of RSA 362-F:3 would lead to absurd results, none of which have merit: (i) that as 2025 approaches, contract terms might be too short to finance and build new generation, App. I at 239, that (ii) the Commission would have to place temporal restrictions on multi-year agreements not stated in RSA 362-F:9, I, *id.*, and (iii) that the Commission’s review and reporting in 2025 would be a meaningless exercise. *Id.* As summarized by Commissioner Below in his dissent, none of the Commission’s concerns amounts to an absurd result. *See* App. I at 272-77 (Below, dissenting). Rather, each of the Commission’s concerns is simply an aspect of the legislative intent behind the RPS statute.

Contrary to the Commission’s reasoning, the RPS statute is designed to stimulate investment in new *or* existing facilities. RSA 362-F:1. Even if contract terms might

become too short to finance new generation as 2025 approaches, investment in modifying existing facilities to meet statutory eligibility requirements could continue. Additionally, even the Commission recognized that the legislative debate focused on a trajectory for achieving renewable energy goals *by the year 2025*, not on requiring utilities and their ratepayers purchase RECs after that year. App. I. at 239. The legislature may have misjudged the trajectory, but the drafters recognized this and embedded three Commission and legislative reviews into the statute so that the legislature could make any necessary mid-course adjustments. See RSA 362-F:5 and App. I at 276 (Below, dissenting); *see also* App. II at 14 and 46. The Commission may question whether the RPS requirements should end before the term of the amended PPA under review expires, but the ultimate decision of how long ratepayers should fund the purchase of RECs is an important policy matter that the legislature has reserved for itself.

Contrary to the Commission's reasoning, it is not an absurd result for the Commission to have to place temporal limits on its approval of multi-year contracts under RSA 362-F:9, I. This provision of the RPS statute limits the Commission's ability to authorize entry into contracts to the extent of the RPS compliance requirements. RSA 362-F:9, I. Limiting contract approvals to the extent of REC purchase requirements, explicitly set forth in RSA 362-F:3 by specific year and percentage, does not constitute reading a temporal restriction into the statute; rather, it constitutes reading the multiple provisions of the RPS statute in harmony and giving effect to the plain meaning of the entire statute as written. Conversely, the Commission's reasoning would effectively alter the language of RSA 362-F:9, I, by removing the "extent of such requirement" language and changing "multi-year agreement" into "long-term" or "20-year agreement."

Lastly, construing RSA 362-F:3 as written does not make the Commission's review and report to the legislature in 2025 a meaningless exercise. The Commission cannot presage the content or usefulness of a review and report to be conducted in 2025 and declare it to be a meaningless exercise today. The legislature could, in response to the Commission's 2011 report, extend the RPS beyond 2025 during the 2012 session. The legislature could do so in the 2019 legislative session after a review and report prepared by the Commission in 2018, or in the 2026 legislative session following the Commission's last report in 2025. Indeed, if the legislature had intended to continue the RPS program beyond 2025, it presumably would have called for Commission reviews and reports after that year.

II. THE COMMISSION LACKS JURISDICTION AND AUTHORITY TO AUTHORIZE AND APPROVE COST RECOVERY FOR REC PURCHASES BEYOND 2025 OR TO LEVELIZE THE STATUTORY REC PURCHASE REQUIREMENTS ON AN ANNUAL BASIS, AND TO PREAPPROVE COST RECOVERY FOR REC PURCHASES THAT ARE NOT REQUIRED FOR COMPLIANCE WITH THE ANNUAL PURCHASE REQUIREMENTS SET FORTH IN THE RPS STATUTE.

The scope of the Commission's authority to authorize PSNH to enter into a REC purchase contract under RSA 362-F is derived from RSA 362-F:9, I. This is the only statute that permits the Commission to authorize PSNH "to enter into multi-year purchase agreements" for RECs "in conjunction with . . . purchased power agreements," and it only permits the Commission to authorize contracts necessary "to meet reasonably projected renewable portfolio requirements and default service needs *to the extent of such requirements . . .*" RSA 362-F:9, I. Emphasis supplied. RSA 374-F:3, V(c) is the only statute that permits the Commission to approve the recovery by distribution

companies of the cost of such contracts from their ratepayers, and this statute only permits the recovery in rates of “prudently incurred costs arising from *compliance with the renewable portfolio standards* of RSA 362-F” RSA 374-F:3, V(c). Emphasis supplied. Renewable portfolio compliance standards are set forth in RSA 362-F:3, and these RPS compliance standards end in 2025. RSA 362-F:3 and Argument I above. There is no legislative grant of authority or jurisdiction to the Commission to authorize and approve cost recovery for multi-year contracts for REC purchases beyond the extent of the requirements set forth in RSA 362-F:3. Because PSNH’s compliance obligation to purchase RECs ends in 2025 under RSA 362-F:3, the Commission lacks authority to approve and provide cost recovery for REC purchases that would occur after that date; hence, the Commission’s orders are unlawful in asserting the Commission’s authority and jurisdiction to approve such a contract.

Likewise, the Commission lacks authority and jurisdiction under RSA 362-F to levelize a projection of PSNH’s future REC purchase requirements. The Commission purports to find this authority in its grant of authority to determine the public interest in RSA 369-F:9, I and a general grant of authority under RSA 374:3. App. II at 145. However, the legislature placed a limitation on the Commission’s power to authorize multi-year contracts, that is “to the extent of” RPS purchase requirements, and a complementary limitation on the Commission’s authority to allow cost recovery for such multi-year purchases, such that only costs arising from compliance with RPS purchase requirements can be recovered from ratepayers. RSA 362-F:9, I and RSA 374-F:3, V(c). The Commission’s order ignores and effectively writes “to the extent of” out of the RPS statute. Additionally, while the Commission may condition contracts to meet the public

interest considerations listed in RSA 362-F:9, II, “levelization” of the annual REC purchase requirements set forth by the legislature is not one of the public interest factors listed in RSA 362-F:9, II. The Commission is authorized to condition the contract; it is not authorized to condition the statutory requirements.

Moreover, levelization of the annually increasing statutory requirements allows PSNH to purchase more RECs in 2014 than are required by RSA 362-F:3, at a detriment to PSNH ratepayers and in violation of RSA 362-F:9, I. Because the excess RECs that PSNH will purchase in the early years of the amended PPA term are not required for compliance with the RPS requirements set forth in RSA 362-F:3 during those years, the Commission lacks authority and jurisdiction under RSA 374-F:3, V(c) to pre-approve for ratepayer recovery the cost of these excess REC purchases. For the reasons stated above, the Commission erred in finding that it acted reasonably in projecting PSNH’s RPS requirements.

III. THE COMMISSION LACKED AUTHORITY TO WAIVE ITS CONTINUING JURISDICTION UNDER RSA 365:28 TO REVISIT ANY OF ITS ORDERS AT ANY TIME; THEREFORE THE COMMISSION’S APPROVAL OF THE CHANGE IN LAW PROVISIONS OF THE AMENDED PPA WAS UNLAWFUL BECAUSE THOSE TERMS PRECLUDE THIS AND FUTURE COMMISSIONS FROM REVISITING THE ORDERS CONDITIONING AND APPROVING THE AMENDED PPA AND RELATED COST RECOVERY.

As more fully described in Appellants’ Motion to Dismiss (App. at 107-118), Appellants’ second Motion for Rehearing (App. II at 17-22), and Appellant’s notice of appeal filed May 17, 2011, and incorporated as if fully set forth herein, the Commission’s final approval of Articles 1.44, 1.57, 8.1, and 23.1 of the amended PPA will unlawfully preclude the Commission, should it seek to do so in the future, from

revisiting its orders relating to, among other things, the number of RECs purchased, REC pricing, and cost recovery, regardless of any changes made to the RPS program by the New Hampshire legislature and regardless of any changes in circumstances over the 20-year term of the amended PPA. RSA 365:28 contains no provision allowing its prospective waiver, nor any provision that would authorize this Commission to preclude future Commissions from revisiting the orders conditioning and approving the amended PPA based upon any changes in law. Similarly, there is no provision in either RSA 362-F or 374-F:3, V(c), which govern the same subject matter and so must be read *in pari materia*, that limits the Commission's continuing jurisdiction or that permits the Commission to waive that jurisdiction in advance through the approval of contract terms. When the legislature has seen fit to limit the Commission's continuing jurisdiction under RSA 365:28, it has done so explicitly.² The lack of any explicit modification or repeal of the Commission's jurisdiction under RSA 365:28 demonstrates that the legislature intended to require the Commission to retain its jurisdiction over orders issued pursuant to RSA 362-F:9 and RSA 374-F:3, V(c).

IV. THE COMMISSION LACKS AUTHORITY TO AUTHORIZE AND APPROVE COST RECOVERY FOR THE PURCHASE OF RECS THAT ARE NOT REQUIRED FOR COMPLIANCE WITH THE NEW HAMPSHIRE RPS STATUTE.

The change in law provisions of the amended PPA, described in Argument III above, effectively require the present approval of the Commission for the purchase of,

² See, e.g., RSA 369-B:3, II and III (revoking the Commission's general authority under RSA 365:28 to rescind, alter, or amend its orders or requirements thereof with regard to rate reduction bond financing); RSA 362-C:6 (prohibiting the Commission from altering, amending, suspending, annulling, setting aside or otherwise modifying its approval of the restructuring of PSNH); and RSA 362-C:7 (same with regard to Commission approvals of certain rate plans for the New Hampshire Electric Cooperative).

and cost recovery for, renewable attributes that do not qualify for compliance with the New Hampshire RPS, or at prices that may not be permissible under the New Hampshire RPS, if the statute is amended, repealed, or displaced. *See, e.g., id.* at Art 1.44 (NH Class I RECs are defined to include RECs that would have been produced regardless of subsequent changes in law and, hence, may not be New Hampshire Class I RECs) and Art. 1.57 (payment may never drop below the alternative compliance payment amount in effect on the date of the amended PPA, regardless of any subsequent changes in law, including changes that would render the Laidlaw RECs ineligible for New Hampshire Class I). There is nothing in RSA 362-F:9, I or RSA 374-F:3, V(c) that allows the Commission to authorize the purchase of and approve for cost recovery anything but the costs of compliance with the New Hampshire RPS statute. If the purchase is for something other than compliance with the RPS statute, then the Commission may not pre-approve ratepayer recovery for these costs. There simply is no legislative authorization for the Commission to do so.

I. Statement that Every Issue Specifically Raised has Been Presented to the Administrative Agency and has Been Properly Preserved for Appellate Review by a Contemporaneous Objection or, Where Appropriate, by a Properly Filed Pleading

Every issue specifically raised herein has been presented to the Commission and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. Specifically, every issue raised in this Appeal was presented to the Commission in the Appellants' motion to dismiss (App. at 107), reply to PSNH's objection to motion to dismiss (App. at 131), motion for rehearing

(App. at 150), written closing statement (App. at 158), or second motion for rehearing (App. II at 1-91).

J. Content of Record on Appeal

The Appellants request that the court require the Commission to transmit to the court the entire record in Docket DE 10-195.

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,
PINETREE POWER, INC.,
PINETREE POWER-TAMWORTH, INC.,
SPRINGFIELD POWER LLC,
DG WHITEFIELD, LLC d/b/a WHITEFIELD
POWER & LIGHT COMPANY, and
INDECK ENERGY-ALEXANDRIA, LLC

By Their Attorneys,
OLSON & GOULD, P.C.

Date: *July 21, 2011*

By: *David J. Shulock, Esq.*
David J. Shulock, Esq. (NH # 10597)
Robert A. Olson, Esq. (NH # 1933)
David K. Wiesner, Esq. (NH # 6919)
2 Delta Drive, Suite 301
Concord, NH 03301-7426
(603) 225-9716

CERTIFICATION

I hereby certify that copies of this notice of appeal have this day been forwarded via U.S. Mail, postage prepaid, to Debra Howland, Executive Director & Secretary, NH Public Utilities Commission, 21. S. Fruit St., Suite 10, Concord, NH 03301-2429; Office of the Attorney General, 33 Capitol St., Concord, NH 03301-6397; Robert Bersak, Esq., Public Service Company of New Hampshire, 780 North Commercial Street, P.O. Box 330, Manchester, NH 03105; Suzanne Amidon, Esq. and Edward N. Damon, Esq., NH Public Utilities Commission, 21 S. Fruit St., Suite 10, Concord, NH 03301-2429; Meredith A. Hatfield, Esq., Office of Consumer Advocate, 21 S. Fruit St., Ste. 18, Concord, NH 03301; James Rodier, Esq., Clean Power Development, 1500 A. Lafayette Rd., No. 112, Portsmouth, NH 03801-5918; Keriann Roman, Esq., City of Berlin, Donahue, Tucker & Ciandella PLLC, 225 Water St., Exeter, NH 03833; Christopher Boldt, Esq., City of Berlin, Donahue Tucker & Ciandella PLLC, 104 Congress Street, Suite 304, Portsmouth, NH 03801; Jonathan Edwards, *Pro se*, Edrest Properties LLC, P.O. Box 202, Berlin, NH 03570; and to Angela O'Connor, New England Power Generators Association, 141 Tremont St., 6th Floor, Boston, MA 02111.

Dated: *July 21, 2011*

David J. Shulock, Esq.
David J. Shulock, Esq.