

THE STATE OF NEW HAMPSHIRE

**BEFORE THE
PUBLIC UTILITIES COMMISSION**

DE 19-142

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
RATE RECOVERY OF COSTS IN EXCESS OF THE CUMULATIVE REDUCTION
CAP UNDER THE POWER PURCHASE AGREEMENT WITH BERLIN STATION, LLC**

**BURGESS BIOPOWER, LLC'S MOTION TO STRIKE CERTAIN PORTIONS OF
OPPOSITION OF THE OFFICE OF THE CONSUMER ADVOCATE TO MOTION FOR
APPROVAL OF FIRST
AMENDMENT TO AMENDED AND RESTATED POWER PURCHASE AGREEMENT**

NOW COMES Burgess Biopower, LLC ("Burgess") and pursuant to N.H. Code Admin. Rule Puc 203.07, hereby moves the New Hampshire Public Utilities Commission ("Commission") to strike certain portions of the Office of the Consumer Advocate's ("OCA") recently filed Opposition of the Office of the Consumer Advocate to Motion for Approval of First Amendment to Amended and Restated Power Purchase Agreement ("Objection") in the above-captioned proceeding, because they impermissibly contain affirmative requests for relief that are beyond the scope of a responsive pleading, premature, or both. In support of this motion, Burgess states as follows:

1. Burgess Biopower is the operator of the Berlin Station biomass facility and is an intervenor in this proceeding.
2. On November 19, 2019, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") petitioned for approval of an amendment ("Amendment") to PSNH's power purchase agreement ("PPA") with Berlin Station, LLC. The Amendment incorporates changes to the PPA mandated by the passage of Senate Bill 577, signed into law

by Governor Sununu as Chapter 340 of the 2018 New Hampshire Laws (“SB 577”). SB 577 required the Commission to amend a particular page of Order No. 25,213 approving the PPA “to suspend the operation of the cap on the cumulative reduction factor . . . for a period of 3 years from the date the operation of the cap would have otherwise taken effect.” 2018 N.H. Laws Ch. 340:2, I. As directed by the Legislature, the Commission reopened the underlying docket (DE 10-195) and complied with the General Court’s instructions in Order No. 26,198, issued on December 5, 2018.

3. While Burgess disagrees with many of the OCA’s arguments in the Objection, Burgess does not contest that they have been appropriately raised. In many instances, however, the OCA’s Objection improperly requests the Commission for affirmative relief. Because those requests fall outside the scope of a responsive pleading, such as the Objection, the Commission should strike them.

4. The OCA’s Objection contains four separate, improper requests for affirmative relief: 1) that the Commission hold an evidentiary hearing; 2) that the Commission provide an opportunity for discovery preceding the evidentiary hearing; 3) that the Commission require Berlin Station to provide some kind of surety or other financial guarantee before approving the Amendment; and 4) that the Commission “must” obtain Berlin Station’s cost and profitability records.¹ See Objection at 5-6. OCA reiterates some of those affirmative requests for relief in paragraphs B and C on page 7 of its Objection. None of the requests is proper, and all must be stricken.

¹ In this Motion to Strike, Burgess does not address the merits of these various requests, only the appropriateness of raising the requests in a responsive pleading.

5. The requests conflict with the Commission’s procedural rules, which contemplate parties seeking affirmative relief only through petitions or motions, not by oppositions or objections. *See* N.H. Admin. R. Puc 203.05 (pleadings), and 203.07 (motions). The rules also place the burden of proving “the truth of any factual proposition” on the party seeking relief “through a petition, application, motion or complaint.” *Id.* at Puc 203.25; *see also id.* Puc 202.01(a) (except as otherwise provided, “any person seeking the action of the Commission shall do so by submitting a petition pursuant to Puc 203.”). Oppositions are not on that list of specific requests for affirmative relief, and not an appropriate vehicle for making those requests. The purpose for the Commission’s rules is self-evident. Not only does including affirmative requests for relief in a responsive pleading unfairly deprive parties of the opportunity to proffer objections, it also deprives the Commission of a complete record before making any decision on such a request.

6. For similar reasons, several courts in other jurisdictions have barred parties from seeking affirmative relief in oppositions or responses. *See BBC Grp. NV, Ltd. Liab. Co. v. Island Life Rest. Grp. Ltd. Liab. Co.*, No. C18-1011 RSM, 2019 U.S. Dist. LEXIS 91591, at *1 (W.D. Wash. May 31, 2019) (denying request for affirmative relief in a party’s response brief in a discovery dispute because the party “must make its own motion” under the federal rules); *News Am. Mktg. FSI LLC v. Four Corners Direct, Inc.*, 192 F. Supp. 3d 1277, 1278 n.3 (M.D. Fla. 2016) (“To the extent Garnishee’s Response [to a motion to compel] contains any requests for affirmative relief, these requests are improper in a response.”); *Minh Le v. Mortgage*, No. 3:14-cv-785-J-34MCR (M.D. Fla. Nov. 14, 2014) (denying a request in a response to amend a complaint because “inclusion of this request for affirmative relief in the Response rather than filing a motion is improper”); *Armington v. Dolgencorp, Inc.*, Case No. 3:07-cv-1130-J-JRK,

2009 U.S. Dist. LEXIS 9694, 2009 WL 210723, at *2 (M.D. Fla. Jan. 20, 2009) (“It is not appropriate to seek an order for affirmative relief in a response to a motion.”); *K.D. v. L.D.*, 2016 NY Slip Op 50690(U), ¶ 2, 51 Misc. 3d 1218(A), 38 N.Y.S.3d 831 (Sup. Ct.) (“While Plaintiff requests affirmative relief in her opposition papers, she has not filed a cross motion, motion to dismiss, or other properly filed request for relief. Accordingly, Plaintiff’s request for affirmative relief will not be addressed by this Court, at this time.”); *Bank of Am., N.A. v. A thru Z Motor Vehicle Servs., Inc.*, 2012 NY Slip Op 52376(U), ¶ 6, 38 Misc. 3d 1205(A), 1205A (Sup. Ct. 2012) (citing court rules and case law for the notion that the “Court may not grant affirmative relief that is requested solely in opposition papers to a motion” and “may only grant affirmative relief that is requested within a motion or cross-motion”); *Running v. Fifth & Bergen Hous. Dev. Fund Corp.*, 2005 NY Slip Op 51973(U), ¶ 6, 10 Misc. 3d 1055(A), 1055A, 809 N.Y.S.2d 484, 484 (Sup. Ct.) (same); *see also Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (quotation omitted) (affirming the denial of a request for leave to amend that was improperly “imbedded within an opposition memorandum”).

7. In other jurisdictions, the rules are especially clear that parties cannot seek affirmative relief in responsive pleadings. *See Harrington v. Aerogelic Ballooning, LLC*, Civil Action No. 18-cv-02023-MSK-NYW, 2019 U.S. Dist. LEXIS 113138, at *8 n.3 (D. Colo. Apr. 25, 2019) (“Defendants seek affirmative relief through the Response, which is expressly prohibited by Local Rule 7.1(d),” which states that a “motion shall not be included in a response or reply to the original motion. A motion shall be filed as a separate document.”); *Bartel v. D.C. Bd. of Elections & Ethics*, 808 A.2d 1240, 1241 n.1 (D.C. 2002) (“Mr. Bartel’s opposition seeks affirmative relief which we cannot grant. *See* D.C. App. R. 27(a).”).

8. New Hampshire is one jurisdiction with clear rules barring parties from seeking affirmative relief in responsive pleadings. Under Rule 11, for example, “[a] ***request for court order must be made by motion*** which must (1) be in writing unless made during a hearing or trial, (2) state with particularity the grounds for seeking the order, and (3) state the relief sought.” (Emphasis added.) And although Superior Court Rule 13 addressing objections allows objecting parties to request oral argument on an underlying motion, OCA’s four substantive requests for relief go well beyond any limited scope of relief that might be permitted in an objection. The local rules of the U.S. District Court for the District of New Hampshire also expressly prohibit combining in one filing objections to pending motions and affirmative motions for relief. *See* U.S. District Court Local Rule 7.1(a). These New Hampshire court rules further show that OCA’s requests for relief here are improper.

9. The OCA’s requests are also premature. When warranted, the Commission generally issues a discovery schedule, usually following a prehearing conference technical session that typically has been stipulated to by the parties. And, when warranted, the Commission will also schedule a hearing. That is the normal course of events in these proceedings. Should the OCA wish to deviate from that course and make a specific request for a hearing, discovery, or any other affirmative relief at this time—even though PSNH filed its Petition on November 19, 2019—it can simply petition the Commission, consistent with N.H. Admin. R. Puc 202.01 and Puc 203.07. That way, the parties to the docket will at least be afforded an opportunity to object, and the Commission will have a complete record before it upon which to base its decision.

10. Accordingly, Burgess respectfully requests that the Commission strike OCA’s affirmative requests for relief.

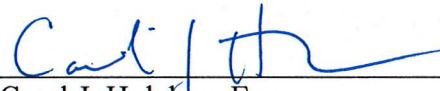
11. The OCA objects to this Motion; the other parties in the docket did not respond to Burgess' request for concurrence.

WHEREFORE, Burgess respectfully requests that this Commission:

- A. Strike any request for affirmative relief contained in OCA's Objection, including but not limited to the material beginning with the second full paragraph on page 5 of its Opposition and continuing through the bottom of page 6, and Paragraphs B and C on page 7;
- B. Grant such further relief as may be just and proper.

Respectfully Submitted,

BURGESS BIOPOWER, LLC,
By its attorneys,




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Dated: December 5, 2019

Certificate of Service

I hereby certify that a copy of the foregoing Motion to Strike on behalf of Burgess Biopower, LLC, has on this 5th day of December, 2019, been sent by overnight mail to the Public Utilities Commission and by electronic mail to the service list in DE 19-142 on December 6th, 2019.

By: 
Carol J. Holahan