STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

Power Purchase Agreement with Berlin Station LLC

Docket No. DE 10-195

Motion for Determinations as a Matter of Law

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and moves that the Public Utilities Commission ("PUC" or "Commission") make two key determinations as a matter of law in this docket, in light of Chapter 340 of the 2018 New Hampshire Laws, commonly referred to as SB 577. In support of this Motion, the OCA states as follows:

I. Introduction

On June 28, 2018, Governor Sununu signed SB 577 into law. SB 577 explicitly directs the Commission to revise page 97 of Order No. 25,213, which the Commission entered in this docket in 2011 so as to approve, with certain conditions, a power purchase agreement ("PPA") between Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") and the owner of the biomass generation facility on the site of the former paper mill in Berlin.[1] As stated at the

[1] Eversource entered into the original PPA with Laidlaw Berlin BioPower, LLC ("Laidlaw"). Berlin Station LLC is now the owner of the plant and has succeeded to Laidlaw's interests under the PPA. *See* Petition to Intervene on Behalf of Berlin Station, LLC (August 30, 2018) at ¶ 3. For ease of reference, this pleading will refer to the plant and its owner as "Berlin Station" throughout.

prehearing conference convened on September 5, 2018, the OCA does not contest that the purpose of SB 577 is to lift for a three-year period certain limitations on the right of the plant owner to receive payment from Eversource for costs in excess of the prevailing prices of energy, capacity and renewable energy credits (RECs) in the applicable regional markets. However, for the reasons set forth below, an open question – which the Commission should resolve as a matter of law at this juncture – is the extent to which these so-called "over market" costs are recoverable from Eversource customers on a nonbypassable basis. A second open question, which the Commission should likewise resolve at this juncture, is whether the Commission will obtain (and provide the OCA with access to) the "cost and profitability records" which SB 577 explicitly authorizes the Commission to receive in connection with the current proceedings.

II. The 2015 Restructuring Agreement precludes recovery of SB 577 costs from Eversource Customers.

In adopting SB 577, the General Court explicitly found that "the continued operation of the Burgess BioPower plant in Berlin is important to the energy infrastructure of the state of New Hampshire and important for the attainment of renewable energy portfolio standard goals of fuel diversity, capacity, and sustainability." SB 577 at § 1. To assure that "continued operation," the General Court issued a very specific directive to the PUC: "amend . . . Order No. 25,213 . . . to suspend the operation of the cap on the cumulative reduction factor as set forth on page 97 of its Order for a period of three years from the date the operation of the cap would have otherwise taken effect." *Id.* at § 2, ¶1.

These provisions are notably silent on the question of how the costs arising out of this change to Order No. 25,213 should be accomplished.

As it was originally envisioned in the edition of the PPA presented to the Commission in 2010, what the agreement refers to as the "cumulative reduction factor" was a means of securing to Eversource's customers certain financial advantages in connection with Eversource's negotiated right to purchase the plant at the end of the 20-year effective period of the PPA.[2] As the Commission noted, "[b]y using the [cumulative reduction factor] to offset the purchase price of the project at the end of the PPA, [Eversource] customers will have the opportunity to recapture the over-market payments, if any, made during the PPA term over a subsequent time frame." Order No. 25,213 at 21.

Exercising laudable prescience, the Commission found these protections to be inadequate when reviewing the PPA under RSA 362-F:9 (requiring a determination that such agreements be "in the public interest" based on five enumerated factors). The Commission observed: "Weighing and balancing the costs of the PPA as filed, which could be as much as $2 billion over the term of the PPA, against its benefits, we conclude that the costs to [Eversource's] hundreds of thousands of residential and business default service customers throughout the state outweigh the environmental and economic development benefits." *Id.* at 90. Accordingly, the

[2] As explained in Order No. 25,215, the cumulative reduction factor in the original PPA was "designed to calculate and track any [e]nergy payments that differ from the [ISO New England] spot market energy price." Order No. 25,213 at 14. These differences, either positive or negative, were to be "continuously aggregated over the 20 years of the PPA and if, at the termination of the PPA, the aggregate balance [were] negative, that balance [would] be the [cumulative reduction factor] for the purpose of reducing the purchase price of the [f]acility" as provided in separate provisions of the PPA granting Eversource the right to purchase the plant at the conclusion of the 20 years. *Id.* at 14-15.

Commission required certain revisions to the PPA, including the one directly relevant here: the Commission "cap[ped] the level of the [cumulative reduction factor] on a cumulative annual basis at $100 million" and required that "[t]o the extent that the accumulated account exceeds $100 million in any year, the overage [must] be credited against the energy price paid in the following year." *Id.* at 97.

The two counterparties, Eversource and Berlin Station, acceded to this and all other conditions imposed by the Commission in Order No. 23,215. And, had certain events not transpired between the entry of Order No. 23,215 and the adoption of SB 577, the effect of SB 577 would be unfavorable to ratepayers in an unambiguous fashion: There would be no cap to the cumulative reduction factor, over-market costs would be passed without limitation on to Eversource default service customers, and their only hope for relief would lie in the future possibility of Eversource acquiring the facility at a more reasonable price that would, at that future juncture, make default energy service cheaper than it would otherwise be.

Events *have* intervened, however.

On June 5, 2015, Eversource along with the OCA and a wide variety of other parties entered into the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement ("2015 Restructuring Agreement"), which was filed concurrently in Docket No. DE 11-250 (an investigation into the extent to which Eversource should recover the costs associated with the mercury scrubber the company built at Merrimack Station in Bow) and Docket No. DE 14-238 (a docket opened at the direction of the General Court to consider the potential

divestiture of Eversource's remaining generation assets). The 2015 Restructuring Agreement commited Eversource to selling its remaining generation portfolio at auction, provided that Eversource could recover most but not all of its $418 million investment in the seldom-dispatched and coal-fired Merrimack Station, and authorized the securitization and thus the guaranteed recovery of these costs via Eversource's nonbypassable stranded cost recovery charge (SCRC) (rather than via the default energy service charge, which customers can bypass by choosing a competitive energy supplier).

The 2015 Restructuring Agreement also contained provisions that are highly relevant here. In addition to the securitized stranded costs referenced in the previous paragraph, the signatories agreed that Eversource could recover via the SCRC so-called "Part 2" stranded costs, consisting in relevant part of "all over-market or under-market costs related to . . . the PPAs." 2015 Restructuring Agreement at 9, line 230. "PPA" is a defined term in the agreement, meaning "[e]xisting commitments created by contract for [Eversource] to purchase power from the Burgess BioPower facility in Berlin, New Hampshire and the Lemptster Wind Power Project in Sullivan County New Hampshire." *Id.* at 5, lines 133-135. The 2015 Restructuring Agreement required Eversource to "retain the PPAs and sell the energy and capacity from those agreements into the [wholesale] market, with the difference between the contract costs and the market revenues associated with the PPAs' energy and capacity to be recovered through the SCRC." *Id.* at 21-22, lines 566-569.

At the time the OCA entered into this settlement in 2015, the maximum extent to which residential customers could be subject to over-market costs associated with purchases of energy, capacity and renewable energy credits from Berlin Station was a specific, known quantity, as the result of the Commission-imposed cap on the cumulative reduction factor as approved in Docket No. DE 10-195. Thus, to the extent SB 577 removes this limitation on cost recovery, it amounts to a material change to the terms of the 2015 Restructuring Agreement.

The Commission approved the 2015 Restructuring Agreement in Order No. 25,920 (subject to two subsequent amendments to the agreement, not germane here), entered in dockets DE 11-250 and DE 14-238 on July 1, 2016. Order No. 25,920 contains no discussion of the recovery of over-market PPA costs via the SCRC. This presumably reflects the reality that, thanks to the resolution of Docket No. DE 10-195 and the cap on the cumulative reduction factor, the extent of PPA costs to be recovered from customers via the SCRC was anything but controversial.

In the context of civil proceedings, the New Hampshire Supreme Court has repeatedly stated that "[s]ettlement agreements are contractual in nature and, therefore, are generally governed by principles of contract law." *Moore v. Grau*, 2018 WL 3748554 at *2 (quoting *Poland v. Twomey*, 156 N.H. 412, 414-15 (2007)). Eversource's ratepayers are entitled to the benefit of the bargain they struck via the 2015 Restructuring Agreement, including the limitation on their liability for payment of over-market costs associated with the PPA between Eversource and Berlin Station.

In the particular circumstances of this case, one of two things is therefore true. Either Eversource cannot recover additional costs from customers via the SCRC and must absorb any additional payments to Berlin Station that are mandated as the result of SB 577, or SB577 is itself unconstitutional because it violates the Contract Clause of the U.S. Constitution and its counterpart in the New Hampshire Constitution (Part 1, Article 23, precluding "[r]etrospective laws"). The New Hampshire Supreme Court deems the two constitutional provisions to be coextensive when the question is whether the government has impaired contractual rights. *See Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass'n*, 159 N.H. 627, 635 (2010) (citations omitted).

"The threshold inquiry is a contract clause analysis is whether a law has a retroactive effect upon an existing contract." *Deere & Co. v. State*, 168 N.H. 460, 471-72 (2015) (citation omitted). Here, PSNH is estopped from arguing that the 2015 Restructuring Agreement is not contractual in nature, having argued as recently as July 9 that merely suggesting otherwise by a signatory to that agreement is an anticipatory breach of contract. *See* Exh. 5 in Docket No. DE 18-049 (Letter of Eversource Chief Regulatory Counsel Robert A. Bersak to OCA) at 5 (noting that any variation from the terms of the 2015 Restructuring Settlement would "require the consent of all Settling Parties").[3] *See Appeal of Public Service Co. of N.H.*, 170 N.H. 87, 102 (2017) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, it may not thereafter,

[3] *See also* Supplemental Technical Statement of Christopher J. Goulding, filed in Docket No. DE 18-049 (June 26, 2018) at 6 ("Eversource has abided by its obligations under the 2015 Agreement and anticipates that other parties shall do the same").

simply because its interests have changed, assume a contrary position") (citing *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2005)). Without conceding that the Office of the Consumer Advocate could be liable for breach of contract merely by asking the Commission to revise the terms of a settlement agreement pursuant to RSA 365:28, it is our respectful suggestion that for purposes of the present case the essential terms of the 2015 Restructuring Agreement are contractual in nature for purposes of constitutional analysis.

The next question is "whether the legislature intended the law to apply retroactively." *Deere & Co.*, 168 N.H. at 471-72 (citation omitted). SB 577 is silent on the question of retroactive effect with respect to exposing Eversource ratepayers to additional stranded cost recovery beyond that which had been expressly agreed to in the 2015 Restructuring Agreement. The New Hampshire Supreme Court strives to interpret statutes in a manner that renders them consistent with constitutional limitations, which here would support a conclusion that the intent was to require Eversource to bear any additional costs associated with the lifting of the cumulative reduction factor cap*See Opinion of the Justices*, 2018 WL 3404752 at *6 ("When we interpret statutes already in effect, they are construed to avoid conflict with constitutional rights whenever reasonably possible") (citation omitted). The Fiscal Note to the Senate-passed version of SB 577 is at variance with such a gloss on the bill, stating that "[b]ecause the costs of the [Berlin Station PPA] are paid by Eversource customers, if such an increase occurred it would increase costs to customers above the $100 million cap on the energy component of the current

contract"). However, the key difference between the Senate-passed version and the version ultimately signed into law by the Governor is the demise of a requirement for the Commission to "initiate a proceeding in order to consider how it is in the public interest to revise its Order 25,213" in favor of a simple directive to revise page 97 of the order to eliminate the cap on the cumulative reduction factor. Thus, it is at least arguable, in light of the 'avoidance of unconstitutional gloss' principle, that the deletion of the public interest determination by the PUC in favor of a mandatory change to Order No. 25,213 reflected (among other things) a legislative determination to avoid the adverse ratepayer effects warned of in the fiscal note to the Senate-passed version.

Assuming that SB 577 has a retroactive effect on an existing contractual arrangement, the next step in the analysis is whether the change in law amounts to a "substantial impairment of a contractual relationship." *Deere & Co.* 168 N.H. at 472 (citation omitted). "This inquiry, in turn, has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* (citation omitted). For the reasons already stated, there cannot be any significant dispute that the relationship among the parties to the 2015 Restructuring Agreement is contractual, and that the impairment is substantial -- particularly for ratepayers who are already bearing hundreds of millions of dollars in stranded costs associated with an investment Eversource should never have made in a mercury scrubber for a coal-fired plant emblematic of the region's energy past rather than its energy future.

The question thus becomes whether the impairment wrought by the legislation has "a significant and legitimate public purpose." *Id.* (citations omitted). "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) and *Tuttle,* 159 N.H. at 642); *see also Sveen v. Melin*, 138 S.Ct. 1815, 1821-22 (2018).

SB 577 is a textbook example of a statute whose purpose is to extend a benefit to special interests. In so arguing, the Office of the Consumer Advocate does not question the legitimacy or the persuasiveness General Court's implicit policy judgment that the economy of the North Country – particularly Berlin and its environs – would be grievously harmed by the demise of Berlin Station. It is, rather, simply our contention that such a targeted benefit – based on the premise that financial aid to the owners of Berlin Station will redound to the benefit of the surrounding community (particularly employees and fuel suppliers) – amounts to the provision of a benefit to special interests from the perspective of the hundreds of thousands of electricity ratepayers, many of whom face their own challenging economic realities, whose bargain with Eversource via the 2015 Restructuring Agreement the General Court has altered. *Cf. Energy Reserves Group*, 459 U.S. at 411-412 (suggesting that "remedying of a *broad and general* social or economic problem" is an example of a "significant and legitimate public purpose" under the federal Contracts Clause) (citations omitted, emphasis added).

In light of these concerns, the OCA requests that the Commission take one of three courses of action. First, the Commission should conclude (in its role as arbiter between the interests of utility shareholders and utility customers pursuant to RSA 363:17-a) that it is Eversource and not its customers that is financially responsible for the effects of lifting the cumulative reduction factor approved in Docket No. DE 10-195. If the Commission does not so conclude, it should declare that SB 577 is unconstitutional under the federal Contracts Clause and Part 1, Article 23 of the New Hampshire Constitution, and therefore determine that residential utility customers cannot be liable for any additional stranded costs arising out of the PPA between Eversource and Burgess BioPower. If the Commission does neither of these things, it should at the very least transfer this question to the New Hampshire Supreme Court pursuant to RSA 365:20 ("The commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission"); *cf. Petition of Public Service Co. of N.H.*, 125 N.H. 595, 597 (1984) (declining to accept such a transfer unless "justiciable rights are involved and the question arises in adversary proceedings before the Commission") (citation omitted). *See* N.H. Supreme Court Procederal Rule 9 (providing for interlocutory transfer of questions of law without a ruling from the transferring administrative agency or trial court in appropriate circumstances).

III. The Commission Must Obtain Berlin Station's Cost and Profitability Records

Paragraph II of section 2 of SB 577 states that "[d]uring the proceedings the Burgess BioPower plant shall, upon request, make their cost and profitability records available to the public utilities commission, which records shall be exempt from public disclosure under RSA 91-A:5, IV." The Commission must obtain these records from Berlin Station, or whatever affiliate of Berlin Station has custody of such records, for the following reasons.

First, the Office of the Consumer Advocate hereby requests that the Commission obtain the records. SB 577 does not specify that the records must be made available only if the Commission requests them. Rather, the statute by its terms authorizes anyone – and, certainly, any party to the proceeding referenced in the paragraph – to tender such a request. Because the OCA is entitled by statute to receive "copies of all confidential information filed with the public utilities commission in adjudicative proceedings in which the consumer advocate is a participating party," RSA 363:28, VI, the OCA is automatically entitled to a copy of these records (but must "maintain the confidentiality of such information"). Therefore, the OCA in particular has a basis for tendering the "request" referenced in paragraph II of section 2 of the statute.

Secondly, the Commission should reconsider the conclusion it tentatively expressed at its September 5, 2018 prehearing conference that the Commission has no reason to request the records given that lifting the cap on the

cumulative reduction factor is not a discretionary act. At the prehearing conference, Eversource suggested (and Berlin Station did not appear to contest) that the lifting of the cap of the cumulative reduction factor triggers a need for the counterparties to renegotiate their PPA and submit the results to the Commission for approval. *See* RSA 362-F:9 (requiring Commission approval of such agreements). Approval requires a determination that the PPA is "in the public interest," based on five factors that include efficiency and cost effectiveness, consistency with the restructuring policy principles of RSA 374-F:3, and "[e]conomic development and environmental benefits for New Hampshire." The financial realities confronted by Berlin Station would be highly relevant to such determinations.

The fact that the records themselves would be exempt from disclosure under RSA 91-A:5, IV is no impediment. The referenced provision of the Right-to-Know Law governs only the *public* disclosure of the information; it does not govern the extent to which the Commission can use the information in an adjudicative proceeding and, indeed, the Commission routinely issues protective orders that allow parties access to such information for purposes of litigating cases and developing a full record for the Commission. As necessary, the Commission can close any proceedings at which the information is introduced into evidence.

IV. The Commission should allow parties an opportunity to reply to pleadings in opposition to this motion.

This motion and the arguments rendered in favor of it raise significant and novel questions of law. The Office of the Consumer Advocate, and potentially other

parties whose rights may be advanced by the granting of the relief sought in this pleading, cannot anticipate what arguments will be marshaled in opposition. In these circumstances, the Commission should provide all parties with an opportunity to reply (within a reasonable period, perhaps five days) to whatever pleadings are interposed in opposition within the ten days authorized by N.H. Code Admin. Rules Puc 203.07(e). To the extent this requires a waiver of the Commission's rule governing motion practice, the Commission should grant such waiver pursuant to N.H. Code Admin. Rules Puc 201.05 because it would serve the public interest and not disrupt the orderly and efficient resolution of matters before the Commission.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Enter an order concluding as a matter of law that

   a. Public Service Company of New Hampshire d/b/a Eversource Energy is required to absorb and not pass along to its ratepayers the costs associated with lifting the cap on the cumulative reduction factor previously adopted by the Commission on page 97 of Order No. 25,215, or

   b. Chapter 340 of the 2018 New Hampshire Laws (SB 577) is inconsistent with the Contracts Clause of the U.S. Constitution and Part 1, Article 23 of the New Hampshire Constitution to the extent Chapter 340 requires customers of Public Service Company of New Hampshire d/b/a Eversource Energy to pay additional, nonbypassable stranded costs beyond those previously authorized in the 2015 Public Service Company of New Hampshire Restructuring and Rate Stabilization Agreement; or

   c. Transfer the question of the constitutionality of Chapter 340 to the New Hampshire Supreme Court pursuant to RSA 365:20; and

B. Direct Berlin Station LLC and/or its affiliates to file cost and profitability records of Berlin Station with the Commission pursuant to section 2, paragraph II of Chapter 340 and furnish the Office of the Consumer Advocate with a copy of such records pursuant to RSA 363:28, VI.

C. Grant any other such relief as it deems appropriate.

Sincerely,

D. Maurice Kreis
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September 18, 2018

Certificate of Service

I hereby certify that a copy of this Motion was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis