THE STATE OF NEW HAMPSHIRE

BEFORE THE
PUBLIC UTILITIES COMMISSION

DE 10-195

PETITION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
FOR APPROVAL OF A POWER PURCHASE AGREEMENT WITH
LAIDLAW BERLIN BIOPOWER, LLC

BERLIN STATION, LLC'S OBJECTION TO OCA'S MOTION FOR DETERMINATIONS AS A MATTER OF LAW

NOW COMES Berlin Station, LLC ("Berlin Station") and pursuant to N.H. Code Admin. Rule Puc 203.07(e), hereby objects to The Office of Consumer Advocate's ("OCA") Motion for Determinations as a Matter of Law filed with the New Hampshire Public Utilities Commission ("Commission") in the above-captioned proceeding. In support of this Objection, Berlin Station states as follows:

1. On June 28, 2018, Governor Chris Sununu signed SB 577 into law (Laws of 2018, ch.340), which legislation specifically recognized the importance of the Berlin Station to the energy infrastructure of New Hampshire and its importance in enabling the State to achieve its energy policy goals related to the renewable portfolio standards, fuel diversity, capacity and sustainability. In support of achieving these policy objectives, SB 577 directs the Commission to reopen docket DE-10-195, to modify certain limited terms of its Order in that docket and suspend the operation of the cumulative reduction factor ("CRF") for a period of three years. *See* Exhibit A.

2. Following a prehearing conference and technical session in this matter on September 5, 2018, the OCA filed a Motion seeking determinations of certain legal issues which the OCA claimed should prevent the Commission from following the legislative directives in

SB 577. For the reasons set forth in more detail below, the OCA's assertions are without merit and must be denied.

I. SB 577 Does Not Violate the State or Federal Constitutions.

3. The Commission should reject the OCA's assertion that SB 577 violates the Contract Clauses of the Federal and State Constitutions. Although the clauses purport to bar state laws that substantially impair contractual rights, *see* U.S. Const. art. I, § 10, cl. 1; N.H. Const. pt. I, art. 23, such laws will be upheld if they serve a "significant and legitimate public purpose" and are "necess[ary] and reasonabl[e]" in the legislature's judgment. *Deere & Co. v. State*, 168 N.H. 460, 472 (2015) (quotation omitted). This is a highly deferential standard. *See id.*; *see also Mo. Pet Breeders Ass'n v. Cty. of Cook*, 106 F. Supp. 3d 908, 925 (N.D. Ill. 2015) ("The inquiry under the Contract Clause resembles rational basis review."). It does not permit an adjudicator—or for that matter, the OCA—to substitute its policy preferences for those of state lawmakers. Indeed, "[w]ithin the last 100 years . . . the [Supreme] Court ***rarely*** has relied on the [Contract] Clause as a reason to invalidate state legislation which retroactively affected contractual rights or obligations." Ronald D. Rotunda, John E. Nowak, Treatise of Constitutional Law: Substance and Procedure § 15.8, at 878 (5th ed. 2012) (emphasis added). The OCA offers no valid rationale for the Commission to deviate from this trend.

4. The OCA's motion makes three fatal mistakes in its Contract Clause analysis. First, any assertion of constitutional impairment cannot be sustained where, as here, the parties to the agreement contemplated a change in law, and have included in their agreement a provision that requires them to negotiate in good faith to amend the agreement to comply with the new law. *See* Amended and Restated Power Purchase Agreement at 28 (change in law provision). Second, the OCA ignores the import of SB 577's "significant and legitimate public purpose"—specifically, the explicit legislative finding 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, § 340:1. Third, the OCA criticizes the means by which the Legislature chose to fulfill this purpose as "targeted" without explaining why "targeted" legislation is constitutionally unreasonable. *See* OCA Mot. 10. Had the OCA drafted SB 577, it might have chosen a different way to address the issues the law identifies. But the Contract Clause standard is not governed by the OCA's policy preferences. Where, as here, the Legislature has selected particular means to address an issue that to its mind, are reasonable, the Contract Clause will not bar their implementation even if those means incidentally affect contract rights.

5. The OCA's motion invokes the Federal and State Contract Clauses, but the New Hampshire Supreme Court has held that the two are virtually the same. *See Deere*, 168 N.H. at 471. The Federal Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. Const. art. I, § 10, cl. 1. The State Clause, in turn, provides that "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const. pt. I, art. 23. Although the State Clause makes no explicit reference to contracts, the New Hampshire Supreme Court has held that "its proscription duplicates the protections" of the Federal Clause and that the "protections" of both Clauses are "equivalent." *Deere*, 168 N.H. at 471 (quotation omitted). And since at least 1983, the U.S. Supreme Court has recognized that although the Federal Clause's prohibition appears "facially absolute," it "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (finding no contract clause violation for state law imposing price controls on natural gas).

6. According to the OCA, SB 577 impairs contract rights that arise under either the PPA or the 2015 Restructuring Agreement. *See* OCA Mot. 6. The OCA assumes "that SB 577 has" intended "retroactive effect" on these contracts—though this assumption is questionable. *Id.* at 9. As the OCA observes, "SB 577 is silent on the question of retroactive effect." *Id.* at 8. And its terms are plainly prospective. Sb 577 directs the Commission to reopen proceedings and suspend the cap on the CRF for three years. SB 577, § 340:2. The OCA also argues that "the impairment" of contract rights "is substantial," though it offers little support for that conclusion. OCA Mot. 9. The OCA states simply that "ratepayers . . . are already bearing hundreds of millions of dollars in stranded costs associated" with Eversource's separate investment "in a mercury scrubber for a coal-fired plant." *Id.* at 9. The policy choices made by the Legislature in SB 577 are unrelated to the scrubber costs referred to in the OCA's Motion, which relate to a different generation facility located in an entirely different region of the State. The Commission should not be distracted by OCA's attempt to conflate the two in an effort to thwart the Legislature's clear intent with respect to the suspension of the cap.

7. In any event, the Commission can deny the OCA's motion without resolving these issues. SB 577 meets the Court's separate standard for laws which serve an important public purpose despite affecting contract rights. The Court will uphold such a law if (1) "it has a 'significant and legitimate public purpose'" and (2) "the legislature's 'adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose.'" *Deere*, 168 N.H. at 473 (quoting *Energy Reserves Grp.*, 459 U.S. at 411) (assuming retroactivity and substantial impairment but upholding a law because it met the standard stated above).

8. The first prong is easily met. As stated above, SB 577's "Findings" section shows the Legislature's intent to achieve statewide energy benefits, such as supporting the State's

"energy infrastructure" and attaining "renewable energy portfolio standard goals of fuel diversity, capacity, and sustainability." *See* Exhibit A, SB 577, § 340:1. The legislative history confirms that the Legislature had these statewide benefits in mind when it enacted the law. *See Deere*, 168 N.H. at 476 (rejecting the argument that Court "cannot view legislative history" when determining if law has a "significant and legitimate" purpose). In recommending that SB 577 "Ought to Pass," the House's Science, Technology and Energy Committee wrote that "[d]ue to unexpected and continued very low natural gas prices and without the three-year suspension . . . Burgess would be forced to shut down sometime in 2020. This would have affected the ***state's*** electrical capacity and fuel diversity situation in addition to numerous lost jobs in related fields." *See* Exhibit B, Committee Report, House Science Technology and Energy, May 2, 2018 (emphasis added). These findings are owed significant deference. *See CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 268 (2d Cir. 2009) (observing that "current Contract Clause jurisprudence" requires deference "to state legislative judgments concerning whether a statute advances a significant and legitimate public purpose"). Promoting the achievement of statewide energy goals is unmistakably a "significant and legitimate public purpose" and one clearly within the legislature's prerogative to determine. *Deere*, 168 N.H. at 471 (quotation omitted); *cf. Consol. Edison Co. v. Pub. Serv. Com.*, 63 N.Y.2d 424, 434 (1984) ("The regulation of local electric utilities has been recognized as ordinarily arising under a State's police power.").

9. SB 577 also meets the second part of the Contract Clause analysis. The law is "based upon reasonable conditions" and is "appropriate to" the statewide energy benefits "justifying the legislation's adoption." *Deere*, 168 N.H. at 472. SB 577 achieves its explicit purpose by directing the Commission to initiate proceedings 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." SB 577, § 340:2. The temporary suspension of the cap

will enable Berlin Station to continue operations; without such suspension, the Legislature recognized the likelihood that the plant would be forced to close. Significant deference is owed to the Legislature's determination that SB 577 is a "reasonable and necessary" way to address the concerns stated in its "Findings" section. *Deere*, 168 N.H. at 479.

10. The OCA's motion offers no valid reason for invalidating SB 577 under this standard. First, the OCA appears to take the indefensible position that the law lacks a legitimate purpose because it "extend[s] a benefit to special interests." OCA Mot. 10. Then, confusingly, the OCA asserts that the law does reflect an "implicit" policy judgment—that the North County's economy would "be grievously harmed" by Berlin Station's closure—which might be permissible. *Id.* Regardless, the Commission need not divine "implicit" policies in SB 577; its actual energy policy goals are explicitly stated in its text. *See* SB 577, § 340:1. Yet the OCA's real issue with SB 577 seems not to be its purpose, but its means of achieving that purpose. Specifically, the OCA asserts that the bill is too "targeted," as it is "based on the premise that financial aid to the owners of Berlin Station will redound to the benefit of the surrounding community." *Id.*

11. Simply because a law is "targeted" does not mean it violates the Contract Clauses. And in any event, the OCA's judgment that a "targeted" law is an inappropriate way to address SB 577's identified goals is of little relevance to the Contract Clause analysis. Like rational basis review, the Contract Clause standard does not demand that the legislature select the most narrowly tailored solution to an identified problem. Its solution need only be "based on reasonable conditions" and "appropriate to the public purpose justifying [its] adoption." *Deere*, 168 N.H. at 473. The Legislature's judgment that it can achieve statewide benefits to energy infrastructure and diversity by lifting the cap is owed significant deference. The OCA cites no case in which a court has invalidated a "targeted" state law under the Contract Clauses. OCA

Mot. 10. Succinctly stated, where the Legislature has adopted a bill to advance statewide energy policy, simply because implementation of that broader policy also has direct economic benefits for specific regions within the state does not somehow render it unconstitutional.

12. Moreover, the OCA's reliance on *Tuttle v. N.H. Medical Malpractice Joint Underwriting Association*, 159 N.H. 627 (2010) is misplaced. SB 577 has none of the characteristics of the law struck down in that case. The law in *Tuttle* mandated the direct transfer to the State of $110 million in "excess surplus premiums" collected by a medical malpractice insurance association despite policy language requiring the association to either reduce future assessments or redistribute excess funds to policyholders. *Id.* at 633-34. Because the law impairing those policies so blatantly inured to the State's pecuniary benefit, the Court struck it down under a heightened form of Contract Clause scrutiny. *Id.* at 655-56. The Court cited precedent observing that "complete deference to a legislative assessment of reasonableness and necessity [was] not appropriate because the State's self-interest [was] at stake." *Id.* at 655 (quotation omitted).

13. That is not the case here. SB 577 works no transfer of funds to State coffers. Instead, this law directs the Commission to reopen a proceeding to amend a provision in a prior order. The State receives no direct pecuniary gain from the law, so application of the stricter scrutiny applied in *Tuttle* is not warranted. *See Deere*, 168 N.H. at 478 (quotation omitted) ("To the extent that *Tuttle* can be read to require that we conduct a more searching inquiry with regard to the reasonableness and necessity of SB 126, we note that our inquiry in *Tuttle* was more exacting than our inquiry here because, unlike SB 126, the legislation in *Tuttle* inured to the State's financial benefit.").

14. SB 577 also lacks other characteristics the *Tuttle* Court found troubling. Unlike the law in *Tuttle*, SB 577 responds to urgent circumstances: the potential closure of Berlin

Station in 2020. *See Tuttle*, 159 N.H. at 657. ("Further, the State has not suggested, and nothing in the record indicates, that the Act was precipitated by an emergency. . . ."). Also unlike the law in *Tuttle*, SB 577 can be characterized as a "temporary measure." *Id.* The law requires suspending the cap only "for a period of 3 years." SB 577 § 340:2. *See, e.g.*, Exhibit C; Excerpted pages from N.H. House of Representatives, House Record, May 3, 2018 (three-year suspension of cap needed "to secure a more permanent solution to protect our energy infrastructure").

15. Finally, the Commission should reject the OCA's attempts to make this case about the 2015 Restructuring Agreement. The 2015 Restructuring Agreement is not the object of SB 577's mandate. SB 577's explicit focus is on the PPA. Yet even if this case were about the Restructuring Agreement, the constitutional analysis would lead to the same result discussed above. SB 577 would still have a significant and legitimate public purpose. It would still be a reasonable way for the Legislature to have addressed that purpose; and it would still not implicate the State's own pecuniary interests.

16. Thus, the Commission can and should reject the false choice offered in the OCA's motion: i.e., that it either invalidate SB 577 or make "Eversource . . . financially responsible for the effects of lifting the cumulative reduction factor." OCA Mot. 11. For the reasons stated above, SB 577 does not violate either the Federal nor the State Contract Clauses. Thus, the Commission need not interpret the statute to avoid constitutional issues because there are none. *See Id.* at 8.

II. Certification to the N.H. Supreme Court is Unnecessary and Unwarranted.

17. Nor should the Commission take the unusual step to "transfer this question to the New Hampshire Supreme Court." *Id.* at 11. Although RSA 365:20 authorizes the Commission to "reserve, certify and transfer" legal questions to the Court, there is no guarantee that the Court

will accept the transfer. The Court's procedural rules make plain that accepting such a transfer is wholly within the Court's discretion. N.H. Supreme Ct. R. 9 ("The supreme court may, in its discretion, decline to accept an interlocutory transfer of a question of law without ruling by a trial court or by an administrative agency."). Those rules are meant to promote judicial economy. Consistent with that goal, Rule 9 requires "a statement of the reasons why . . . an interlocutory transfer may materially advance the termination or clarify further proceedings of the litigation, 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." The OCA fails to explain why a transfer is advisable under this list of circumstances, especially given the Commission's adjudicatory expertise in issues relating to energy contracts and its more general authority to resolve issues of constitutional law related to substantive matters within its statutory jurisdiction. *See, e.g., Re Freedom Ring, L.L.C.*, 82 NH PUC 833 (1997) (analyzing the Contract Clause). Certification will not promote judicial economy; but will merely prolong the proceeding unnecessarily.

III. The Legislature Contemplated Cost Recovery.

18. Moreover, while the OCA suggests that the Legislature did not contemplate how the costs arising out of the suspension of the cap would be recovered, the legislative materials relating to SB 577 indicate otherwise. While the Legislature may not have identified the precise mechanism through which the costs would be recovered, it is abundantly clear that the Legislature understood that ratepayers would bear the costs related to the suspension of the cap. For example, the fiscal note worksheet prepared by the Commission, clearly states that the suspension of the cap would be "paid by Eversource's customers." Exhibit D at 2. The Fiscal Note ultimately prepared by the Legislative Budget Assistant similarly states that suspension of the cap "would increase costs to customers." Exhibit E at 1. In the notes from the hearing on SB

577 before the Science, Technology and Energy Committee, Representative Richardson specifically questioned one supporter of the bill as what the cost of the bill would be to ratepayers. The witness' response: "$19 to $25 per year for residential customers." Exhibit E at 2. Whether those estimates are accurate is irrelevant; they do demonstrate, however, that in passing SB 577, the Legislature understood that the bill could raise rates for the ratepayers. Finally, the OCA's testimony before the House and Senate Committees demonstrates that the OCA understood that the bill would impose the recovery of any costs associated on ratepayers, and OCA's testimony highlighted that issue for legislative committees. *See* Exhibit F at 2 and Exhibit G.

19. Within the context of its constitutional duties, the Legislature made certain policy choices to promote energy strategy within the State, and along with that, the determination of who would pay for the policy choices. It is unimportant whether those costs are recovered through the Stranded Cost Recovery Charge, or some other non-bypassable charge that is within the Commission's discretion to fashion. The testimony offered at the hearings on SB 577 evidences the Legislature clear policy choices as to cost-recovery related to the suspension of the cap.

IV. Berlin Station's Confidential Records Are Irrelevant to this Proceeding.

20. Finally, the OCA incorrectly asserts that the Commission "must obtain" Berlin Station's "cost and profitability records." OCA Mot. 12. SB 577 provides 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." SB 577, § 340:2. *See* Exhibit A (emphasis added). Whether to make the "request" is a matter of Commission discretion. And as the Commission indicated at

the prehearing conference, given SB 577's mandate to suspend the cap, such a request is unnecessary. *See* Prehearing Conference Tr. 21:12-23:11.

21. Moreover, and more to the point, where, as here, the legislative directive to the Commission is non-discretionary, the confidential business records of Berlin Station are simply irrelevant, have no probative value whatsoever and will shed no light on the actions the legislation requires the Commission to take. *State v. Rice*, 169 N.H. 783, 784 (2017) ("Indeed, irrelevant evidence is inadmissible.").

22. Nor will these records be relevant in any subsequent proceeding regarding changes to the PPA. As stated at the prehearing conference, the parties to the PPA intend to discuss the mechanics of the cap suspension in order to best effectuate the Legislature's intent, consistent with Paragraph 23.1 of the PPA, entitled "Change in Law." That provision requires that, when a change in law occurs, the parties will negotiate in good faith "in an attempt to amend this Agreement to incorporate such changes…" *See* Amended and Restated Power Purchase Agreement at 28. Where, as here, a change in law requires the parties to negotiate terms to comply with the new law, that fact neither changes the Legislature's policy choices nor its directives to the Commission to suspend the CRF, and the records remain irrelevant.

V. No Responsive Pleadings Are Necessary.

23. Finally, the Commission should reject the OCA's request to file a responsive pleading. At the technical session for this matter, the parties specifically discussed whether briefs and reply briefs should be filed on these issues. After a break, Commission Staff voiced the Commission's preference that the OCA file a motion and any party objecting file an objection. The OCA's request will only further prolong action on the Legislature's express directive regarding the suspension of the CRF.

WHEREFORE, Berlin Station respectfully requests that this Commission:

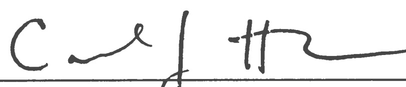
A. Grant its Objection to Motion for Determinations of Law;

B. Suspend the cap as required by SB 577; and

C. Grant such further relief as may be just and proper.

Respectfully Submitted,

BERLIN STATION, LLC,
By its attorneys,



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Dated: September 27th, 2018

Certificate of Service

I hereby certify that a copy of the foregoing Objection to Motion for Determinations of Law on behalf of Berlin Station, LLC, has on this 27th day of September, 2018 been sent to the Public Utilities Commission by overnight mail. Electronic service will be made electronic mail to the service list in DE 10-195 once the pleading arrives at the Public Utilities Commission on September 28, 2018.

By:
Carol J. Holahan

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