STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. PUC-24-322

SNAKEROOT SOLAR, LLC

Appellants

v.

PUBLIC UTILITIES COMMISSION

Appellees

On Appeal From the Order of the
Public Utilities Commission

Reply Brief of Appellants Snakeroot Solar, LLC

Jonathan M. Dunitz, Bar No. 007752
Hans C. Eysenbach, Bar No. 006015
Attorneys for Appellants Snakeroot Solar, LLC

VERRILL DANA, LLP
One Portland Square
Portland, ME 04101
(207) 774-4000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The Maine Public Utilities Commission (the "Commission") and the Office of the Public Advocate (OPA) agilely avoid the key issue in this case: whether delays external to and beyond the control of Snakeroot Solar, LLC ("Snakeroot") caused it's solar project to miss the December 31, 2024 COD Deadline.[1] Instead, the briefs of the Commission and the OPA provide legislative history and background irrelevant to this Court's interpretation of an unambiguous statute and conspicuously replace the word "delay" with multiple euphemisms. The logical conclusion is that neither the Commission nor the OPA can identify any record evidence to contradict Snakeroot's position that the Commission's denial of Snakeroot's good cause exemption petition was an abuse of discretion. As such, the denial of Snakeroot Solar's good cause petition should be vacated.

II. ARGUMENT

A. The Court Need Not Rely on Legislative or Other Non-Statutory Sources to Interpret an Unambiguous Statute

1. *The Statute is unambiguous.*

According to the OPA, the Commission's interpretation of the statute is entitled to broad deference because it is ambiguous. A statute is ambiguous only

> if it is reasonably susceptible of different interpretations. In other words, if a statute can reasonably be interpreted differently in more than

[1] For efficiency and to avoid duplication, Snakeroot files a single brief in response to the briefs of the Commission and OPA.

> one way and comport with the actual language of the statute, an ambiguity exists.

Gaeth v. Deacon, 2009 ME 9, ¶ 15, 964 A.2d 621.

Notably, the Commission disagrees with the OPA. First, the Commission ruled long ago that the statute is unambiguous. *Order Denying Good Cause Petition of Naples Roosevelt Trail Solar 1, LLC.*, Docket No. 2021-00215 (March 2, 2022) at p. 11 ("the Commission does not consider the statutory standard requiring an exemption to be based on 'external delays outside of an entity's control' to be ambiguous or reasonably susceptible to different interpretations"). Every subsequent good cause decision is based on the premise that the statute is unambiguous. On appeal, the Commission maintained its position that the statute is unambiguous. (Commission Br. at 23-26). This is because the statute is not *reasonably* open to multiple interpretations, nor can it be *reasonably* interpreted in multiple that "comport with the actual language of the statute."

According to the OPA, the phrase "external delays outside of the entity's control"[2] is ambiguous. The test for ambiguity does not permit cherry picking a single phrase from a statute to find ambiguity. Rather, statutory interpretation requires consideration of the entire statutory scheme. While there is nothing

[2] At page 10 of its brief, the OPA incorrectly quotes the statute as "external delays outside of an entity's control." The statute uses the word "the" not "an" to qualify "entity."

ambiguous about the phrase "external delays outside of the entity's control," there is certainly no ambiguity when read in the context of the entire statute.

The OPA first posits that that the phrase is ambiguous because it could mean that grid congestion where the project is sited is part of the project's interconnection process and, as such, not "external." But "external delays" is modified by "outside of the entity's control." Future sources of grid congestion are not within the control of any one entity, and, as such, any *reasonable* reading of the statute belies the OPA's purposefully stilted, and non-contextual reading of the statute. The OPA then argues that delays are within an entity's control because the project owner chooses where to locate the project.[3] This interpretation is patently unreasonable, as it would render the entire good cause provision superfluous. This theory eviscerates the good cause provision because no project could be eligible for good cause – regardless of the source of the delay – if it were in any way related to the location. According to the OPA's interpretation, if a tree falls on the project during construction and causes delay, it is because of the location. The OPA would argue, as was the case here, that if a developer is first to seek interconnection at a substation, but other developers follow suit, it is because of the

[3] Notably, the Commission's Brief undercuts this argument, stating that the Commission "does *not* expect Snakeroot Solar, or any developer, to know or predict with precision the exact path of interconnection at the time it selects its site and submits an interconnection application." (Commission's Brief at p. 27) (emphasis added). Thus, the agency tasked with interpreting the statute explicitly disagrees that the OPA's siting argument supports the decision at issue.

location and the developer should have been psychic. The OPA's interpretation is the equivalent of saying a car accident is a driver's fault because he or she chose to drive and picked the route, even though the accident was caused by another driver's brake failure. No *reasonable* reading of the statute permits such a contrived interpretation of the good cause provision.

Moreover, the OPA did not argue below that the Commission's prior decisions finding the statute unambiguous were incorrect. Despite the OPA intervening in numerous good cause proceedings before the Commission, the OPA did not cite to a single decision in which the Commission reversed its holding that the statute was unambiguous.[4] The most likely explanation is that the OPA has no argument that the subject delays were both external to Snakeroot and outside of its control, leaving the OPA few options but to argue that the statute is ambiguous. Given the Commission's own finding that the statute is unambiguous and the OPA's failure to raise the issue below, the Court need not address this late and unfounded argument. *See Foster v. Oral Surgery Assocs., P.A.,* 2008 ME 21, ¶ 22, 940 A.2d 1102 (issues first raised on appeal are not properly preserved for

[4] As recently as December 20, 2024 and January 10, 2025, the OPA filed a brief and reply brief, respectively, in a good cause matter before the Commission, but did not raise the specter of the good cause statute's ambiguity. *See Lincoln ME 2, LLC Request for Approval of Good Cause Exemption Pursuant to 35-A M.R.S. § 3209-A,* PUC Docket No. 2024-00208, Item Nos. 20 and 23. Given the OPA's argument here that the statute is ambiguous, it is surprising that the OPA did ask the Commission to reconsider its interpretation of the statute.

appellate review). In short, the OPA's last-minute attempt to find ambiguity in the good cause provision of the statute is meritless.

2. The Court need not resort to statutory history or underlying policy where the statute is unambiguous.

The Law Court only looks "beyond the plain language of the statute and the context of the whole statutory scheme to indicia of legislative intent such as the statute's history and its underlying policy" if a statute is ambiguous. *HL 1, LLC v. Riverwalk, LLC*, 2011 ME 29, ¶ 17, 15 A.3d 725; *see also Guildford Transp. Industries v. Me. Pub. Utils. Comm'n*, 2000 ME 31, ¶ 11, 746 A.2d 910 (where "the statute is plain" the Law Court "give[s] effect to the unambiguous intent of the legislature) (citations omitted); *Agro v. Me. Pub. Utils. Comm'n*, 611 A.2d 566, 569 (citations omitted) (the Law Court "look[s] to the wording of the statute and the legislative objective of the statute").

As early as 2022, the Commission found that the good cause provision of the statute was unambiguous. *Naples Roosevelt Trail Solar 1, LLC.*, Docket No. 2021-00215 (Me. P.U.C. March 2, 2022) at p. 11. In its brief, the Commission acknowledges that it "adopts a plain language reading of" the good cause provisions of the statute. (Commission Br. at pp. 23-26). As the subject statute is unambiguous, the Court considers only the plain language of the statute. Therefore, reliance on legislative history (Commission Br at 10-11; OPA Brief at p. 7-9) and the underlying policy goals (Commission Br at 10-12; OPA Brief at 8-9) is

misplaced. The Law Court need not consider the legislative history, or any other extraneous material. Rather, the focus is on the plain meaning of the statute and context of the statutory scheme to derive the legislature's intent.

B. The Commission Abused its Discretion by Failing to Apply the Plain Language of the NEB Statute When it Denied Snakeroot Solar's Petition for a Good Cause Exception to the COD Deadline

1. *The Commission Does Not Have Unfettered Discretion to Deny Good Cause Petitions*

Both the Commission and the OPA posit that the Commission has unconstrained discretion and that it need not grant a good cause exemption regardless of the circumstances. (Commission Br. at 44-45; OPA Br. at 4-7).[5] This ignores that the Law Court's deference to an agency "is not a toothless standard." *Central Maine Power v. Me. Pub. Utils. Comm'n*, 436 A.2d 880, 885 (Me. 1981). Indeed, neither the Commission nor the OPA acknowledge that the Court's deference yields to the determination of the legislative intent as found in the

[5] The OPA takes the extreme view that the Law Court need not consider the Commission's analysis and can simply reject the appeal. (OPA Br. at 4-7). According to the OPA, *Friedman v. Bd. of Env't Protection* "vests sole discretion in the Commission to deny good cause" simply because the good cause provision uses the word "may." (OPA Br. at pp. 4-7). The OPA's reliance on *Friedman* is inapt. First, not even the Commission argues that its denial is unreviewable by this Court. Second, in *Friedman* the BEP opted not to modify a water quality license, which is akin to an executive enforcement action, while the issue here is a question of whether to waive a statutory deadline. Third, *Friedman* relies on 1 M.R.S. § 71(9-A) for its interpretation of the word "may." 2008 ME 56, ¶ 14, 956 A.2d 97. Notably, 1 M.R.S. § 71's preamble includes an exception that permits the Court to ignore the definitions if "such construction is inconsistent with the plain meaning of the statute." As is discussed herein, and in Snakeroot's Blue Brief and brief in reply to the *amicus curiae*, unfettered discretion is "inconsistent with the plain meaning of the" good cause provision of the statute.

language of the statute. *Id.*, (citing *Mundy v. Simmons*, 424 A.2d 135, 138 (1980) (emphasis added)). Thus, an agency's interpretation of a statute is given deference only if its "interpretation is consistent with the legislative intent and avoids absurd, illogical, or inconsistent results." *Mosher v. State Harness Racing Com'n.*, 2016 ME 104, ¶ 8, 144 A.3d 42 (citing *FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot.*, 2007 ME 97, ¶ 12, 926 A.2d 1197).[6] Under the established rules of statutory construction, the Court first looks to the statute's plain meaning "to discern the real purpose of the legislation." *Tenants Harbor General Store, LLC v. Dep't of Envtl Prot.*, 2011 ME 6, ¶ 9, 10 A.3d 722 (citations omitted). This principle of statutory

[6] Snakeroot Solar understands that agencies are given significant deference because the agencies, such as the Commission, have subject matter expertise and are experienced administering and interpreting statutes addressing the subject matter delegated to the particular agency. *See S.D. Warren Co. v. Board of Envtl. Prot.*, 2005 ME 27, ¶ 5, 868 A.2d 210. Even with that deference, the Law Court still determines whether any agency's conclusion is reasonable and consistent with the legislature's intent. *FPL Energy Me. Hydro LLC*, 2007 ME 97, ¶ 24, 926 A.2d 1197. While there is good reason for the Law Court to defer to agencies on matters related to their subject matter, that deference is arguably less applicable where, as here, the question is purely a legal issue. In this instance, the subject matter expertise involves whether the Maine electrical grid will be negatively affected if Snakeroot's project is connected. Snakeroot is not asking the Court to make that determination, and no party has argued that the efficacy of the grid is related to good cause. Indeed, the safety and reliability of the grid was the purpose of the cluster study and I.3.9 approval is dependent on the connection not causing harm. Through the cluster study, ISO-NE and CMP identify upgrades to be paid by developers that will protect grid from potential issues related to the interconnection. As such, this appeal does not call upon the Court to question the Commission on matters related to its expertise. Instead, the appeal asks the Court to determine whether, as a matter of law, Snakeroot should have been granted a good cause exception for missing a certain milestone. This is purely an issue of law, which is within the Court's unique expertise and one that does not require unfettered discretion for the Commission. *Accord Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412, 144 S.Ct. 2244, 2273 (2024) (citations omitted) (questions of legal interpretation have been emphatically the province and duty of the judicial department for centuries) (overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.* 467 U.S. 837, 104 S.Ct. 2278 (1984)).

construction looks to "the plain, common, and ordinary meaning of its terms, and…avoid[s] absurd, inconsistent, illogical, or unreasonable results." *Id.* (citations omitted). Elucidation of the plain meaning also considers "the structure of the statute and the placement of the statute in context to generate a harmonious result." *Id.* The "goal is to give effect to the Legislature's intent in enacting the statute." *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 19, 107 A.3d 621.

As has been identified in each brief in this appeal, where an entity such as Snakeroot is unable to meet one of the deadlines in the NEB statute, it may seek

> a good cause exemption due to external delays outside of the entity's control, which the commission may grant if it finds that, without the external delays, the entity could reasonably have been expected to meet the requirements.

35-A M.R.S. § 3209-A(7). This language was inserted into the NEB statute concurrently with the legislature amending it to institute new, and in some cases retroactive, eligibility deadlines for NEB projects. The intent of the legislature in adding the good cause provision concurrently with the new deadlines, as well as in placing it after those deadlines, indicates the legislature's intent to provide a safety net for entities unable to meet the deadlines for external reasons beyond their control. To construe this provision and the word "may" as permitting the Commission to deny good cause regardless of the facts is inconsistent with the plain meaning of the statute.

In short, rather than unfettered discretion, the legislature intended the statute to guide Commission's discretion to grant or deny exemptions. An exemption may not be issued when a project's delays were internal to the project and/or within its control. Conversely, where the project meets all of its requirements, and does all that is within its control, it should not be required to forfeit its investments due to delays external to the entity and beyond its control.

2. The Record Evidence Demonstrates Numerous Delays External to Snakeroot and beyond its control.

The Commission's abuse of its discretion is made obvious by the timeline set forth in its brief and the euphemisms it uses to avoid calling a delay a delay. In its brief, the Commission states:

> On January 12, 2021, CMP set a cluster closure date of February 1, 2021, for projects in Cluster 06. (Id.) Following the cluster closure date, CMP estimated an ISO-NE approval date of March 2022. (Id.)

(Commission Br. at 15) (emphasis added). Despite ISO-NE approval not occurring until August 31, 2023, i.e., a *delay* of 17 months, the Commission and OPA deny that a delay exists. Instead, there were "schedule changes," "analyses and other mitigation issues," "ISO-NE require[ing] CPM to redo PSCAD analyses," "untimely delivery of models," CMP not receiving models from other generators (i.e. generators other than Snakeroot), and "in March 2023, two participants withdrew from Cluster 6 and one participant downsized, which required a new PSCAD analysis of Cluster 6." (Commission Br. at 16-17). In addition, "the cluster

study [wa]s put on hold" while a generator in the FERC queue was studied and "the interconnection of smaller…projects . . . lead to the need to restudy" the larger projects. (*Id.* at n. 23 and n. 24, respectively).

The Commission does not – because it cannot – cite record evidence showing that any of these *delays* were internal to, or within the control of, Snakeroot. Moreover, referring to delays as "normal," "schedule changes," additional or redone "analyses" and "other mitigation issues," "untimely delivery of models," a "hold" on the cluster study or using any other euphemism to describe why the completion date moved from March 2022 to August 31, 2023, does not change the fact there were multiple delays. This is precisely the type of situation the legislature envisioned addressing by adding the exemption to the newly established eligibility deadlines in the NEB statute.

3. The Commission's Interpretation of what constitutes the entity's control leads to unreasonable and absurd results.

Commission precedent precludes as unripe any petition for exemption that does not assert a specific date of anticipated interconnection, even where there is a good faith belief the petitioning facility will miss the statutory deadlines. For example, in *TPE Development, LLC Petition for Good Cause Exemption*, the Commission dismissed the petition, without prejudice, as unripe. Docket No. 2022-00099 (August 3, 2022). According to the Commission, the petition was premature because, at the time, the deadline for commercial operation was more than two

years away. *Id.* In its Brief in this case, the Commission argues that a project that stays in the interconnection queue has control over its fate because it could simply drop out when there is any potential that the milestone will be missed. (Commission Brief at 32 (asserting Snakeroot controlled any future delays as of "August 2020 at the latest" because it knew it would be subject to a cluster study and "armed with this knowledge…still elected to execute its [Interconnection Agreement] and move forward with this project"), 36-37 (as of September 2022, when ISO-NE rejected the draft cluster study report and in November 2022, when CMP informed the Cluster that I.3.9 approval would not be possible before March 2023, Snakeroot should have reevaluated whether it was reasonable to stay in the queue), 41-42 (when I.3.9 approval occurred on August 31, 2023, and Snakeroot was "making decisions as to whether to go forward with the construction")).[7]

Taken together, these positions eliminate the good cause exemption and create a scenario that could never have been the legislature's intent. Under *TPE Development*, a petition is not ripe until the deadline cannot be met. In the Commission's appellate brief, once a project has even an inkling that the project cannot meet the deadline – regardless of the reason – it may exercise control over

[7] Notably, the first juncture cited by the Commission in its brief is August 2020, which is two years before it found that TPE Development's petition was not ripe. If a good cause petition was not ripe in 2022 because timely interconnection remained a possibility, it seems unlikely that the mere prospect of a cluster study in mid-2020 should have given a developer pause. This is particularly true because August 2020 was before the COD deadline existed, so there would have been no reason for Snakeroot to believe it could face exclusion from the NEB program.

the delay by withdrawing, but the failure to withdraw eliminates its grounds for a good cause exemption. There is simply no daylight between these two positions. If a petition is not ripe until it is impossible to meet the deadline, but too late once it is evident the deadline will be missed within the project's control (because remaining in the queue is, according to the Commission), the good cause exemption ceases to exist. Under this reasoning, the legislature intended the exemption to invite continued project investments while there was still a chance of success, but to deny good cause once delays of any sort became clearly fatal to the project. The legislature could not possibly have intended a policy that encourages investment of time and money in Maine, without any chance of interconnecting.

4. *The Good Cause Exemption Provision Does Not Require Evidence of Errors on the Part of CMP or ISN-NE*

The Commissioner's Brief also notes that there is no evidence of "errors on the part of CMP or ISO-NE in conducting the study…." (Br. at 38) This is apparently in reference to the Order below that found no deviation from ISO-NE Tariff Rules or its instructions or practices. (A. 13). The plain language of the good cause provision does not, however, impose any such requirement. There is no reference to the fault of CMP, ISO-NE or any other party. The *only* requirements are that the delay be external to the project and beyond its control. In fact, the Commission has granted petitions based upon delays in procurement due to supply chain issues, without any reference to errors on the part of any party. *Pembroke*

Solar, LLC, Request for Approval of Good Cause Exemption Pursuant to 35-A M.R.S. §3209-A, Docket No. 2023-00304 (Me. P.U.C. June 20, 2024) As such, it is irrelevant that the record lacks definitive evidence of errors by CMP.

5. But for the Delay, Snakeroot Would Have Met the Deadline

The Commission it abused its discretion by concluding it was "very unlikely" the Snakeroot would have satisfied met the COD deadline by incorrectly calculating the extent of external delays to Cluster 6. The Commission and OPA briefs avoid this issue by ignoring the Commission's bad math. Omitting discussion of basic math errors undermines their argument that the record demonstrates the cluster study here consumed a "normal" length of time. Rather, when correctly calculated, the record supports the conclusion that the Project would likely have achieved the deadline if its cluster study concluded according to the average timelines that existed when cluster 6 began.

While the Commission argues that "Snakeroot Solar knew, or should have known, by August 2020 at the latest, that it would be subject to a cluster study," (Commission Br. at 32), it then resorts to factors only available through hindsight. Leaving aside whether a "knew or should have known" standard constitutes foreseeability, once the Commission argues that Snakeroot is responsible for what it "knew or should have known" on a given date, decision making should be based on what Snakeroot reasonably knew or should have known on that date. The

timeline for cluster studies in August 2020 was undisputedly shorter than it was in mid-2024. Neither the petitioner, CMP, nor anyone else, could have known how much longer cluster 6 would last compared to the average length transmission study in 2020 or 2021 when cluster 6 began. All record evidence and the concession by the Commission that the applicable standard is not a foreseeability test underscore how severely the decision's mathematical errors led to an unsupported denial of good cause.

The record is dispositive, and all agree, that CMP studied and re-studied cluster 6 for nearly 31 months. Using the Commission's purported standard-- "information available . . . at each step of the interconnection process"-- the average cluster study time when Cluster 6 began was 1.4 years (17 months). (MPUC Br. at 27). Had Cluster 6's study lasted just 17 month--the average or "normal" time in early 2021--the Project would have received I.3.9 approval in July of 2022. That would have given Snakeroot Solar ample time to complete "transmission interconnection payments to CMP by the end of 2022 at the latest," and, as the OPA agrees (OPA Br. at 13), that satisfies the second prong of the good cause standard. Upon payment for the transmission upgrades by November 2022, CMP could have completed the 23-25 month upgrade process, the Project commenced operation by the deadline. Therefore, absent the external delays to cluster 6 the project would have reasonably expected to satisfy the deadline.

6. The Goal of 750 Total Megawatts is Not Pertinent.

The OPA and the *amicus curiae* incorrectly argue that the 750-megawatt goal found in the NEB statute requires a narrow interpretation of the good cause statute or is grounds to deny any and all good cause petitions. This is incorrect. First, the Commission notes that "it was not a salient factor" in its decision. (Commission Br. at 24, n. 27).[8] Second, the statute states "the *goal*" is 750 MW. If the legislature had intended this as a maximum or cap, it would have so designated it. Thus, this policy goal is simply not relevant to this analysis.

III. **CONCLUSION**

For the reasons discussed herein, the Order of the Public Utilities Commission does not apply the plain language of the subject statute, is not supported by the evidence, and is an abuse of discretion. For these reasons it should be vacated and remanded to the Commission, together with such other and

[8] In footnotes 9 and 27, the Commission cites data "as of the submission" of its brief. The Court can disregard that data, as December 2024 information is not and was not part of the record for a decision that was issued by the Commission on June 24, 2024. Even if the goal was relevant to the analysis, the applicable figure was the amount of commercially operational projects in the record below, which the Commission acknowledges, was not "salient" to the decision.

further relief as this Court deems appropriate.

Dated at Portland, Maine this 21st day of January 2025.

Jonathan M. Dunitz, Bar No. 007752
Hans C. Eysenbach, Bar No. 006015
Attorneys for Appellants Snakeroot Solar, LLC

VERRILL DANA, LLP
One Portland Square
Portland, ME 04101
(207) 774-4000

CERTIFICATE OF SERVICE

I, Jonathan M. Dunitz, hereby certify that I have this day served copies of Appellants' Reply Brief by electronic mail to counsel of record as follows:

Daya J. Taylor, Esq.
Maine Public Utilities Commission
18 State House Station
Augusta, ME 04333-0018
Daya.Taylor@maine.gov

Richard P. Hevey, Esq.
Maine Office of the Public Advocate
112 State House Station
Augusta, ME 04333-0112
Richard.P.Hevey@maine.gov

Katherine McDonough, Esq.
Avangrid/CMP
18 Edison Drive
Augusta, ME 04330
Katherine.mcdonough@avangrid.com

Joseph G. Donahue, Esq.
Preti Flaherty
PO Box 1058
Augusta, ME 04332-1058
jdonahue@preti.com

Dated: January 21, 2025

Jonathan M. Dunitz, Bar No. 007752
Hans C. Eysenbach, Bar No. 006015
Attorneys for Appellants Snakeroot Solar, LLC

VERRILL DANA, LLP
One Portland Square
Portland, ME 04101
(207) 774-4000