STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PUC-24-322

SNAKEROOT SOLAR, LLC
Appellant

v.

PUBLIC UTILITIES COMMISSION
Appellee

On Appeal from the Public Utilities Commission

BRIEF OF AMICUS CURIAE INDUSTRIAL ENERGY CONSUMER GROUP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE DOCUMENTS

INTRODUCTION

This Court should affirm the Maine Public Utilities Commission (the "Commission")'s denial of Appellant Snakeroot Solar, LLC ("Snakeroot")'s petition for a good cause exemption ("GCE") as a proper exercise of the Commission's discretion under 35-A M.R.S. § 3209-A(7).

The statute's plain language, legislative history, and context leave no doubt that the Legislature granted the Commission discretion to deny a GCE regardless of whether a project meets the basic statutory criteria. Snakeroot's argument challenging the Commission's interpretation of the GCE standard in 35-A M.R.S. § 3209-A(7) ignores the statute's operative word—"may." Use of the word "may" reflects the Legislature's intent to allow the Commission to weigh relevant factors, apply its expertise, and tailor its decisions to the circumstances of each case. The Commission appropriately did so here and correctly denied Snakeroot's GCE petition.

BACKGROUND

During the 2021 legislative session, the Maine Legislature enacted amendments to the 2019 Net Energy Billing ("NEB") program that were designed to protect ratepayers from harm.[1] Ratepayers have been harmed by

[1] *See* P.L. 2021 ch. 107 ("An Act to Improve Customer Protections for Community Solar Projects"); ch. 390 ("An Act To Amend State Laws Relating to Net Energy Billing and the

the obligation to pay hundreds of millions of dollars in subsidies each year to the "wave" of NEB projects that ensued since 2019. In particular, *An Act to Amend State Laws Relating to Net Energy Billing and the Procurement of Distributed Generation* retroactively created mandatory project development milestones, a narrow framework for exceptions to those mandatory milestones, and a 750 megawatt NEB project development goal, each codified at 35-A M.R.S. § 3209-A(7).

As the Commission explained:

> The Legislature has clearly recognized that the NEB program, as expanded in 2019, motivated a wave of projects to seek to interconnect in Maine with the result of raising stranded costs by hundreds of millions of dollars a year. The Legislature then set a goal of 750 MW and set the development milestones in both the 2021 Act and 2023 Act as a means of limiting ratepayer costs associated with the NEB program. This means the Commission has an obligation to consider both the interests of developers and the interests of ratepayers when determining good-cause exemptions.

(A. 24.) The Legislature's overarching goal in 2021 was to protect ratepayers from high costs, not to protect NEB developers at the expense of ratepayers.

Snakeroot's characterization of the GCE provision as "a safe harbor" that "enables" otherwise ineligible projects to participate in NEB whenever the GCE thresholds are met is wrong. The Legislature was aware of the untenable

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Procurement of Distributed Generation"); ch. 659 ("An Act To Reduce Volatility in the Net Energy Billing Program and To Define 'Competitive Electricity Provider'").

ratepayer costs imposed by the NEB program, tightened program requirements to limit such costs, and created a narrow means for projects with extenuating circumstances to appeal to the Commission's discretion to grant a GCE. To stop the "wave," the Legislature wisely granted the Commission limited authority to approve, and full discretion to deny, GCEs.

INTEREST OF AMICUS CURIAE

Amicus Curiae Industrial Energy Consumer Group ("IECG") is a non-profit Maine trade association formed in 1985 for the purpose of representing the interests of industrial energy consumers before regulatory and legislative bodies.

ARGUMENT

A. The Commission is not required to grant a GCE and has discretion to reject petitions.

Snakeroot misinterprets the GCE provision to require automatic approval if the two threshold statutory standards are met, by completely ignoring the word "may." This fundamental flaw permeates each of Snakeroot's arguments.

Snakeroot incorrectly refers to the GCE provision as a "safe harbor" and accuses the Commission of "violat[ing] . . . an unambiguous statutory mandate." (Blue Br. 16-17.) But the GCE exception is neither an automatic safe harbor nor a statutory mandate. After listing five statutory milestones that projects must meet to be eligible for NEB, the statute goes on to state:

> An entity proposing the development of a distributed generation resource that does not meet one or more of the requirements of this subsection may petition the commission for 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) (emphasis added). According to the plain meaning of its "may/if" structure, the statute provides the Commission with conditional discretionary authority to grant GCEs and unconditional discretionary authority to deny GCEs.

The operative word in the statute is "may." Title 1 M.R.S. § 71(9-A) defines the term "may" as "indicat[ing] authorization or permission to act," as distinguished from the terms "shall" and "must," which "indicate a mandatory duty, action or requirement." As this Court has held, relying on the statutory definition of "may," as well as the New Oxford American Dictionary definition and the Maine Legislative Drafting Manual, the word "may" in a statute is permissive, especially in the context of "forceful use of language like 'shall' or 'must' in other parts" of a statute. *Cassidy Holdings, LLC v. Aroostook Cty. Comm'rs*, 2023 ME 69, ¶¶ 14-16, 304 A.3d 259.

Here, the Legislature intentionally used the word "may" to authorize the Commission's use of discretion and did not obligate the Commission to grant GCEs under any circumstances. The permissive language in the GCE provision

contrasts with other forceful mandates in the same statute, including that a project "must reach commercial operation" "on or before December 31, 2024." 35-A M.R.S. § 3209-A(7). Because the Legislature used the word "may," not a word like "shall" or "must," the statute cannot be read, as Snakeroot suggests, to somehow require the Commission to grant a GCE.

The authority granted to the Commission emphasizes its role as gatekeeper and its obligation to consider harm to ratepayers. "The Legislature did not direct that the Commission *shall* grant a good-cause exemption upon a finding of good cause, nor did it direct the Commission to do so in almost all cases . . . ." *Naples Roosevelt Trail Solar 1, LLC*, Petition for Good Cause Exemption Pursuant to 35-A M.R.S. § 3209-A, No. 2021-00215, Order (Me. P.U.C. Mar. 2, 2022) ("Naples Good Cause Order") at 12. Instead, it placed an initial burden on the project developer to petition the Commission and to persuade the Commission that it meets two threshold standards: establishing that there have been "external delays outside of the entity's control" and that "without the external delays, the entity could reasonably have been expected to meet the requirements." (A. 43.) Only if the Commission finds such thresholds have been met does the Commission have legislative permission to grant a GCE. If either of these requirements is not met, the Commission does not possess authority to grant a GCE.

Under this statutory construct, and with the operative word "may," the Legislative design is clear. The Legislature erected a wall to stop the wave of NEB projects and designed a small gate for exceptions. If the threshold GCE standards are not met, access *to the gate* is denied. If the standards are met, a project may access the gate. At this point, through its intentional use of the word "may," the Legislature handed to the Commission the keys to the gate, entrusting it to use its specialized expertise to allow a project through the gate or to keep the gate closed, at the Commission's sole discretion.

Immediately following Section 3209-A(7)'s narrow GCE exception, the statute provides that "[t]he goal for development of commercially operational distributed generation resources under this subsection and section 3209-B, subsection 7 is 750 total megawatts." The Commission correctly concluded that this goal is properly interpreted as part of the remedial action taken by the Legislature to limit ratepayer damage caused by the "wave" of NEB projects triggered in 2019, which "requires the Commission to consider requests for good cause exemptions narrowly." (A. 25.)

In an earlier GCE case, the Commission explained, with regard to the 750 MW goal, that:

> as of the time that the Legislature enacted the amendment to the NEB statute, it was aware that the number of megawatts in the development queue was far more than 750. The logical reason for

> establishing milestones was to reduce the number of projects that could participate in the NEB program as a means to limit the cost consequences to utility ratepayers. The Commission should not ignore that statutory goal, which would render it completely meaningless.

(Naples Good Cause Order at 12.) The Commission then properly concluded that:

> The target *simply reinforces the discretion the Legislature gave the Commission in deciding these cases*. By including language that the Commission *may* grant a good-cause exemption, the Legislature made clear that it expected the Commission to exercise its discretion and grant an exemption not only if the facts supported the 'good cause' basis, but also with consideration of the stated MW goal.

(*Id*. (emphasis added).)

By including the 750 MW goal, the Legislature tempered the Commission's already-limited discretion to open the gate by giving it a specific reason to keep the gate closed.

In sum, Snakeroot is wrong when it argues that "[t]he unambiguous language of the statute in question plainly states that a good cause exemption is available to an NEB project where deadlines were missed due to 'external delays outside of the entity's control.'" (Blue Br. 19.) What is unambiguous based on the Legislature's use of the word "may" is that the Commission has sole discretion to deny a GCE, even if the statutory standards are met. Based on the Commission's limited discretion to grant a GCE, and the specific reason

provided by the Legislature to deny a GCE (the 750-MW goal), the Commission's construction of the GCE standard is reasonable and its denial should be upheld.

B. The Commission's denial was based on a reasonable interpretation and application of the GCE statute.

The Commission's narrow construction of Section 3209-A(7)'s "external delays" language—through what Snakeroot calls a "foreseeability standard"—is consistent with the Commission's discretionary gatekeeper function under the statute and other relevant considerations like harm to ratepayers and the 750-MW goal. And the Commission's application of the standard is reasonable and supported by record evidence.

The Commission appropriately interpreted the statute it was tasked with administering by considering whether Snakeroot had demonstrated that delays were "clearly external and beyond their control" and that "but for those delays, the project in issue would have reached commercial operation by December 31, 2024." (A. 25 (emphasis added).) To the extent this created a "foreseeability standard," such a standard is a reasonable exercise of the discretion afforded to the Commission by the Legislature and is consistent with legislative intent for a narrow GCE exception that balances harm to ratepayers. What developers knew or should have known about interconnection in Maine is a logical basis upon

which the Commission may determine whether a developer exerted some form of control over and assumed the risk of a certain type of delay, or whether such delay was truly uncontrollable.

Snakeroot goes to great lengths to convince this Court to view the facts differently than the Commission, emphasizing its lack of control over the cluster study's scope and timing. Snakeroot asserts that "the cluster study was administered solely by CMP based upon guidance from and consultation with ISO-NE" (*id.* at 22), that "the cluster study approval process has no deadlines and no timelines" (*id*.), that the "process – and the amount of time it takes – is controlled entirely by entities *other than* Snakeroot" (*id*.), and that "not even the Commission has jurisdiction over the cluster study rules" (*id*.).

None of that matters, however, for the simple reason that Snakeroot exerted the ultimate form of control when it decided when and where to seek to interconnect its project, with full knowledge at the time that "a cluster study is a discretionary interconnection impact study implemented by CMP, according to the Independent System Operator-New England (ISO-NE) Transmission, Markets, and Services Tariff ("ISO-NE Tarriff (sic)")." (Blue Br. 4.) By seeking to interconnect in 2019 in CMP's service territory within the ISO-NE footprint, and under the paradigm accurately described by Snakeroot, Snakeroot

unequivocally assumed the risk that a cluster study would occur and that CMP and ISO-NE would lawfully exercise their authority within that paradigm.

As the Commission found, "ISO-NE ultimately sets the parameters of a transmission cluster study through its Tariff as part of its oversight of the transmission grid. Notably, and unlike the Chapter 324 interconnection process governed by Chapter 324 of the Commission's rules, the ISO-NE I.3.9 approval process does not contain deadlines or expected timelines." (A. 21. (emphasis added).) The ISO-NE approval process is not a new development since 2019. Snakeroot voluntarily chose to play by ISO-NE rules when it first submitted its interconnection application.

Furthermore, the Commission found that "[n]o party has presented evidence that CMP deviated from the rules of the ISO-NE Tariff or deviated from ISO-NE instructions or practices. There is nothing in the record which suggests that Petitioners received any sort of hard deadline or commitment from ISO-NE to complete the study within a particular time frame." (*Id*.) As such, Snakeroot in 2019, with full knowledge of there being no definitive timelines and of ISO-NE's mandate to ensure grid reliability, accepted indefinite risk associated with the scope and timing of a cluster study performed in accordance with the rules.

The risk assumed by Snakeroot was particularly heightened in 2019 because the Legislature had drastically expanded the NEB program to

effectively create a modern day "gold rush." Snakeroot could not have reasonably expected to be the only gold miner, even if it was the first to seek interconnection at a particular substation. That other developers quickly lined up behind Snakeroot at the same substation, and ultimately caused the need for a cluster study to ensure grid reliability, is not proof of external delay beyond Snakeroot's control; it is evidence that multiple sophisticated developers surveyed the same topography and rushed to the same gold deposit, at roughly the same time, and for the same reasons. This was entirely foreseeable. As Snakeroot points out, cluster studies became more complicated "because of the nature of the system in Maine and the extent of inverter-based resources in the area." (Blue Br. 32 (citing CMP).) Again, it is Snakeroot that determined when, where, and what (*i.e.*, an inverter-based resource) to interconnect. Snakeroot, along with many other developers with the same gold fever, chose the same area of the grid to interconnect the type of resource, helping to create the cluster it now alleges is the problem. And it did so having already accepted that risk.

The federal standard in the ISO-NE Tariff exists precisely to ensure grid reliability and safety in the event of "gold rushes" on the grid. The fact that Snakeroot in 2019 controlled when and where to interconnect, and assumed the risk that CMP may exercise its discretion to perform a cluster study

ultimately controlled by ISO-NE, means that any specific cluster study delays experienced by Snakeroot were within Snakeroot's control, absent a showing that CMP or ISO-NE did not follow the rules. In this case, there is no evidence that "CMP deviated from the rules of the ISO-NE Tariff or deviated from ISO-NE instructions or practices" or that ISO-NE committed "to complete the study within a particular time frame." (A. 21.) The Commission acted well within its discretion in determining that the cluster study was not a delay that was clearly external and beyond Snakeroot's control.

Having accepted cluster study risk, Snakeroot received its ISO-NE approval on August 31, 2023. Only then were Snakeroot's interconnection "upgrade equipment and design requirements" "finally cemented." (A. 29.) At this point, Snakeroot had 16 months to reach commercial operation under the statute. Assuming the two-year window for completion of CMP system upgrades (A. 30), the length of the cluster study appears to have foreclosed any possibility of Snakeroot reaching commercial operation by December 31, 2024. Two years from August 2023 is August 2025—eight months beyond the statutory deadline. Even assuming that CMP could have performed system upgrades quicker than expected, say in one year, there is no evidence in the record that Snakeroot could or would have completed construction of its project on time. Snakeroot appears to have "paused" construction after only

installing groundscrews (A. 002, Item 84, at 9), making the business decision to leave nearly all significant aspects of construction to chance. Thus, the Commission again acted well within its discretion and with support of record evidence in concluding that Snakeroot had "not demonstrated that, but for the delay experienced by Cluster 06 projects, [Snakeroot] could have reasonably expected to reach the December 31, 2024 commercial operation date." (A. 25.)

CONCLUSION

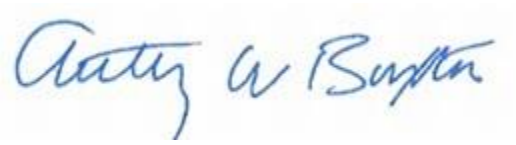
Snakeroot's failure to reach commercial operation by the mandatory statutory deadline (December 31, 2024) is a result of its choice to interconnect its project when and where it did, with full knowledge and acceptance of the risk that a cluster study of indefinite timing and scope could occur within the rules to ensure grid reliability. That Snakeroot did not receive its ISO-NE approval until August 2023 was likely fatal to its ability to timely reach commercial operation, given CMP's two-year estimate for performing grid upgrades. And the fact that Snakeroot chose not to proceed with construction of the project sealed its fate. Snakeroot has not met its burden to prove otherwise.

Because Snakeroot failed to meet the standards that are prerequisite to the Commission granting a GCE, the Commission did not abuse its discretion in denying Snakeroot's request. Even if the Commission erred in determining that Snakeroot did meet the GCE standards, which it did not, such error was

harmless, as the Legislature endowed the Commission with plenary discretion to deny a GCE. Thus, in light of the Commission's discretion and clear duty to reduce ratepayer harm, the Court should affirm the denial of Snakeroot's GCE.

Dated: December 30, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

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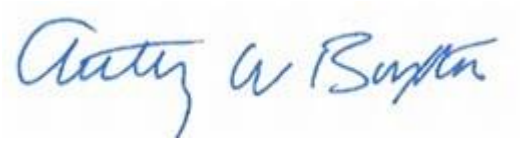

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