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 MAINE PUBLIC UTILITIES COMMISSION

BRIEF OF INTERVENOR

OFFICE OF THE PUBLIC ADVOCATE

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INTRODUCTION

Snakeroot Solar, LLC (Snakeroot) fails to address the key word in the amended net energy billing (NEB) law: "may." By using the word "may" instead of "must" in the statute, the Legislature vested the Public Utilities Commission (Commission) with sole discretion to decide petitions for good cause exemptions. Because the Commission is under no obligation to grant good cause exemptions, the appeal can be rejected without reviewing the Commission's analysis. This Court reached this conclusion in *Friedman v. Board of Environmental Protection* and the instant appeal is indistinguishable from *Friedman*. But even if the Court were inclined to review the Commission's decision under its deferential standard of review, the Commission's decision must still be affirmed as the Commission reasonably interpreted the NEB statute in a manner that is consistent with legislative intent.

ARGUMENT

I. Snakeroot's appeal fails because the NEB statute allows, but does not require, the Commission to grant good cause exemptions.

There is no question the NEB statute vests sole discretion in the Commission to deny good cause exemptions because the Legislature has explicitly defined the operative word "may" used in the statute. The relevant statutory language reads:

> 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) (2024) (emphasis added). The Legislature has explicitly defined what it means when it uses the word "may" as opposed to "must" or "shall" in a statute: "'Shall' and 'must' are terms of equal weight that indicate a mandatory duty, action or requirement. 'May' indicates authorization or permission to act." 1 M.R.S. § 71(9-A) (2024). Accordingly, the Legislature has unambiguously vested sole discretion in the Commission to deny good cause exemptions.

The Court has previously concluded that the use of the word "may" in a statute governing an agency decision vested sole discretion in the agency. In *Friedman v. Board of Environmental Protection,* the Court considered an appeal of a Board of Environmental Protection (the Board) decision rejecting requests "to modify water quality certifications for a number of dams on the Androscoggin and Litle Androscoggin Rivers." 2008 ME 156, ¶ 2, 956 A.2d 97. The appellants argued that the Board's refusal to modify the certifications was, among other things, an abuse of discretion and a violation of state law. *Id.* ¶¶ 4-5. The Court quoted the relevant language in the statute as follows: "'the [B]oard may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the

Board finds that' any of seven listed standards have been met." *Id.* ¶ 5 (quoting 38 M.R.S. § 341-D(3)). After reviewing the definition of "may" in Title 1, the Court explained that "the Board has the authority to modify the certificate, but it is not required to do so." *Id.* ¶ 6. Thus, the Court concluded, "the Legislature has given the board the sole discretion to determine whether to modify any license pursuant to section 341-D(3)." *Id.*

Following *Friedman*, the Maine Superior Court relied on the same reasoning in dismissing a petition based on a statute governing DEP license revocation. *Getz v. Janis*, No. AP-13-37, 2013 WL 5628636, at *2 (Me. Super. Ct. Sept. 26, 2013). In that case, the Superior Court rejected petitioners' attempt to distinguish *Friedman* based on the facts, concluding that the Law Court's reasoning in *Friedman* "did not turn on specific facts but on statutory interpretation." *Id.* On appeal, this Court approved of the Superior Court's reasoning and concluded that the request was properly dismissed. *Getz v. Walsh*, 2014 ME 103, ¶ 3, 102 A.3d 756. In affirming the Superior Court, this Court declined to reach appellants' other arguments with respect to their petition for revocation. *Id.*

Snakeroot's appeal is indistinguishable from *Friedman*. Just as the statute at issue in *Friedman*, the NEB statute uses the word "may" instead of "must" or "shall." Accordingly, the Commission has "sole discretion" to determine whether to deny a good cause exemption just as the Board in *Friedman* had sole discretion to deny a request for the modification of a dam license. The Court therefore need not analyze

whether Snakeroot satisfies the "external delay" requirement of the NEB statute, just as the *Friedman* court did not analyze the seven factors identified in Section 341-D. The Commission's decision to deny Snakeroot a good cause exemption is entirely discretionary and therefore the appeal can be rejected without analyzing the substance of the Commission's decision.

II. If the Court reaches the substance of the Commission's decision, it should be upheld because the Commission's reasonable interpretation of the NEB statute is entitled to great deference.

A. The Commission's decision to interpret the good cause exemption language narrowly is consistent with the legislative intent behind the statutory milestones included in the NEB law.

The Commission's decision to interpret the good cause exemption language narrowly is entirely consistent with the legislative intent behind the amendments to the NEB law. This Court interprets statutes "to effectuate the legislative intent." *Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 7, 187 A.3d 609. In adopting the statutory milestones applicable to NEB projects, the Legislature intended to limit the overall rate impact of the NEB program. In doing so, the Legislature fully understood that including cut-off dates in the law would negatively impact some developers that already invested in projects, as acknowledged by one of the sponsors of the bill, Senator Lawrence, on the floor of the senate:

> This was a very difficult issue we had to deal with. Let me explain what this bill does. We passed solar power last session. It actually was sponsored by the Republican Floor Leader in this Legislature and we got an overwhelming response for it and we began to get concerned about what impact it would have on rates. So we put together this subcommittee and we tried to, I never like to do this because investors have already invested in developing these solar projects, but we tried to determine a cut-off point at which it would only allow projects that had completed that cut-off point to go ahead under the old rate system. We did a cut-off point. It was a little bit higher than what I had wanted but that's part of compromise.

Legis. Rec. S-1051-1052 (2021) (emphasis added). Notwithstanding the possible impact on investors in solar projects, the Legislature enacted the legislation due to its concern over the growing impact of NEB on electric rates.[1]

Such concerns are understandable given the enormous costs of the NEB program on other ratepayers. As shown by NEB reports[2] filed by Maine's two investor-owned electric utilities, Central Maine Power (CMP) and Versant Power (Versant), the costs of NEB at the time of the Commission's decision had grown to over $120 million per year. *Public Utilities Commission*, Inquiry Regarding Net Energy Billing Evaluation, No. 2020-00199 CMP Monthly NEB Report (Me. P.U.C. Mar. 11, 2024); *Public Utilities Commission*, Inquiry Regarding Net Energy Billing Evaluation, No.

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[1] Opposition to the bill was motivated by concerns that the bill did not go far enough to address the growing cost of NEB. Legis. Rec. S-1051 (2021). Thus, both supporters and opponents of the bill were concerned about the cost of NEB.

[2] At the request of the OPA, the Commission took official notice of the NEB reports as allowed by Maine's Administrative Procedures Act and Commission rules. 5 M.R.S. § 9058(1) (2024); 65-407 C.M.R. Ch. 110, § 10(E) (2012).

2020-00199 Versant Power Monthly NEB Report (Me. P.U.C. Mar. 15, 2024). Every project allowed to participate in the NEB program drives this figure higher.

In response to the growing cost of the program, the Legislature adopted an explicit goal of 750 MW for the development of generation capacity participating in NEB. Immediately following the good cause exemption language, the NEB statute as amended, now reads: "The goal for development of commercially operational distributed generation resources under this subsection and section 3209-B, subsection 7 is 750 total megawatts." 35-A M.R.S. § 3209-A(7) (2024). The Commission found that the capacity of operational and pending NEB projects was more than 1,100 MW at the time of its decision, far exceeding the 750 MW goal. (A. 24.) Accordingly, the Commission's conclusion that it should interpret the good cause exemption narrowly is fully consistent with the legislative intent by: (1) limiting the rate impact of NEB and (2) limiting the extent to which the capacity goal in the statute is exceeded.

B. The phrase "external delays outside of the entity's control" in the statute is ambiguous because it is susceptible to multiple, reasonable interpretations.

The Commission's decision is entitled to great deference because the term "external delays outside of the entity's control" in the statute can reasonably be interpreted in multiple ways. This Court has consistently emphasized the "great deference" it accords to an agency's interpretation of a statute it administers: "[a]n agency's interpretation of an ambiguous statute it administers is reviewed with great deference and will be upheld unless the statute plainly compels a contrary result."

Cent. Me. Power Co. v. Me. P.U.C., 2014 ME 56, ¶ 18, 90 A.3d 451 (quoting *Competitive Energy Servs. LLC v. Me. P.U.C.,* 2003 ME 12, ¶ 15, 818 A.2d 1039). A statute is ambiguous if it is "reasonably susceptible of different interpretations." *Id.*

Despite Snakeroot's assertion that the statutory language is unambiguous (Blue Br. 19), "external delays outside of an entity's control" as used in the NEB law is capable of multiple reasonable interpretations. In this context, external delays could have the meaning that Snakeroot urges on the Court, but it could also refer to events unrelated (i.e. "external") to project development altogether. If delays are alleged to have occurred due to interconnection studies triggered by grid congestion in the area where the project is sited, it is reasonable to conclude that such delays are either (1) not "external" to the project because they are part of the project's interconnection process or (2) not outside of an entity's control because the project owner chooses where to site the project. The language certainly does not "compel a contrary result."

Snakeroot's contention that the good cause language would be rendered superfluous under the Commission's interpretation is plainly incorrect. (Blue Br. 19.) As Snakeroot itself points out (Blue Br. 37-38), the Commission has granted petitions for good cause exemptions based on documented delays in the equipment procurement process. *Pembroke Solar*, *LLC*, Request for Approval of Good Cause

Exemption Pursuant to 35-A M.R.S. § 3209-A, No 2023-00304 Order (Me. P.U.C. June 20, 2024).[3]

In fact, under Snakeroot's broad interpretation of the good cause exemption language, virtually every project would be eligible for a good cause exemption. If the entire interconnection process and construction schedule were determined to be "external delays outside of an entity's control" then the statutory milestones would become meaningless, as projects would continue to come online for years after the statutory deadlines have passed. This would frustrate the Legislature's purpose in adopting the NEB amendments.

C. The Commission reasonably concluded that neither a lengthy cluster study process nor a lengthy construction schedule is an external delay for purposes of a good cause exemption.

Snakeroot argues that the cluster study was an external delay outside of its control. But Snakeroot concedes, as it must, that "the cluster study approval process has no deadlines and no timelines." (Blue Br. 22.) Without a deadline or timeline, the Commission reasonably concluded there can be no "delay." As the evidence before the Commission demonstrates, cluster studies simply take a long time. They also vary

[3] Snakeroot's argument that the Commission's decision to grant good cause exemptions to other projects but deny its own request constitutes an abuse of discretion, (Blue Br. 37-39), fails because the Commission's analysis is heavily fact-based and there are key distinguishing facts in the other cases in which the Commission granted good cause exemptions. For example, in the *Pembroke* case, the developer received a construction schedule from the interconnecting utility with an April 2024 commercial operation date. *Pembroke Solar LLC*, Request for Good Cause Exemption, No. 2023-00304 Order at 5 (Me. P.U.C. June 20, 2024). The Commission concluded that a subsequent delay in this construction schedule caused by a change in the expected procurement timeline for necessary equipment constituted an external delay for purposes of the statute. *Id.* at 6. This is clearly distinguishable from the present case in which Snakeroot never received a construction schedule with a 2024 commercial operation date from CMP.

in complexity based on the number of projects involved and the various issues that need to be studied. As part of the process, restudies are often required due to projects dropping out of the queue or changing the size or equipment of their projects. (A.18-19 (describing the cluster 06 study process).) Given these complications, there is no standard for how long a cluster study should last. Snakeroot's subjective expectation that the cluster study would have finished earlier does not require the Commission to find that a delay occurred.

Snakeroot also contradicts itself by criticizing the Commission for applying a foreseeability standard (Blue Br. 21) and then arguing that a foreseeability standard should in fact apply based on Snakeroot's expectations at the time it filed its interconnection application, (Blue Br. 25.) Snakeroot cannot have it both ways. Absent a foreseeability standard, which Snakeroot argues is not allowed by the statutory language, Snakeroot's expectation of the time required to interconnect its project is irrelevant.

With respect to the alleged delay in CMP's construction schedule for the required interconnection facility upgrades, the Commission reasonably found based on the evidence presented that there was no delay associated with the construction schedule. CMP estimated that construction of the interconnection facility upgrades needed to interconnect the Snakeroot project would take 24 to 30 months from the date interconnection payments were made. (A. 20.) CMP described this timeline as the current "industry standard" for completing the necessary upgrades. (A. 20.) Thus, the

Commission reasonably concluded that the construction schedule, although lengthy, was not delayed in any way. Again, Snakeroot's subjective desire for a faster process does not require the Commission to find that a delay has occurred.

The construction schedule alone renders Snakeroot's claims regarding other alleged delays moot. To have any reasonable chance of being operational before the end of 2024, Snakeroot would had to have made its transmission interconnection payments to CMP by the end of 2022 at the latest. Based on the evidence before the Commission, there is no realistic scenario in which this would have happened.

CONCLUSION

For the reasons discussed above, the OPA respectfully asks that the Court reject Snakeroot's appeal and affirm the Commission's decision denying the good cause exemption. The OPA notes that denying the good cause exemption does not prevent Snakeroot from continuing to develop its project outside of the NEB program. Denying the requested exemption does not impact eligibility for other state procurement programs, nor does it impact eligibility for state and federal tax benefits available to renewable generators.

Respectfully submitted on December 31, 2024.

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