STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. PUC-25-60

ELLSWORTH ME SOLAR, LLC

Appellant

v.

PUBLIC ADVOCATE ET AL.

Appellees

ON APPEAL FROM

THE MAINE PUBLIC UTILITIES COMMISSION

BRIEF OF APPELLEE

OFFICE OF THE PUBLIC ADVOCATE

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INTRODUCTION

In *Snakeroot Solar v. Public Utilities Commission*, 2025 ME 64, 340 A.3d 99, this Court interpreted statutory language identical to that in this appeal. The Court concluded that the language was ambiguous, it deferred to the Commission's reasonable interpretation, and it upheld the denial of the good cause exemption based on a finding that a lengthy interconnection process is not an external delay for purposes of a good cause exemption. The same result holds in this case.

ARGUMENT

I. This Court has construed identical statutory language and deferred to the Commission's reasonable interpretation of the requirements for a good cause exemption.

A. In Snakeroot*, the Court found that the phrase "external delays outside of the entity's control" was ambiguous.*

In *Snakeroot*, the Court concluded that the statutory good cause exemption language was "reasonably susceptible of different interpretations" and therefore deferred to the Commission's interpretation. *Snakeroot*, 2025 ME 64 ¶ 30, 340 A.3d 99. Technically, the Court in *Snakeroot* interpreted a different subsection of 35-A M.R.S. § 3209-A,[1] but the good cause language in 35-A M.R.S. § 3209-A(9) relevant to this appeal

[1] The *Snakeroot* appeal involved the good cause exemption language in 35-A M.R.S. § 3209-A(7), applicable to projects between 2 and 5 MW. The instant appeal involves a project between 1 and 2 MW and therefore the relevant good cause exemption language is in 35-A M.R.S. § 3209-A(9).

is substantively identical. Thus, the relevant statutory language is also ambiguous and this Court should therefore defer to the Commission's interpretation.

B. Similar to the 2021 amendments at issue in Snakeroot*, the Legislature was concerned about the cost of net energy billing (NEB) at the time it passed the 2023 amendments.*

Not only is the language of the good cause exemption provision identical to that in *Snakeroot*, but the legislative purpose behind it is also the same. 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 *Snakeroot*, this Court extensively reviewed the legislative history of the 2021 NEB amendments and concluded that those amendments were motivated by a concern about the rising costs of NEB and its impact on ratepayers. *Snakeroot*, 2025 ME 64, ¶¶ 31-33, 340 A.3d 99. Accordingly, the Court concluded that the Commission's narrow interpretation of the good cause exemption provision was reasonable. *Id.* ¶ 33.

The legislative history of the 2023 NEB amendments shows that the Legislature continued to be concerned about the cost of NEB and its impact on ratepayers. For example, debate on the floor of the Senate revolved around whether the proposed changes would result in sufficient ratepayer savings. Legis. Rec. S-1427-1433 (1st Spec. Sess. 2023). In the House, one

supporter explained that the bill would reduce costs "by tightening eligibility requirements to ensure ratepayer savings." Legis. Rec. H-1057 (1st Spec. Sess. 2023).

In *Snakeroot*, the Court found that in adopting the 2021 NEB amendments, the Legislature "fully appreciated that imposing mandatory milestones could adversely affect some developers . . . .". *Snakeroot*, 2025 ME 64, ¶ 32, ___ A.3d ___. Given the above legislative history of the 2023 NEB amendments, it is equally clear that the Legislature understood that making the commercial operation deadline applicable to projects between 1 and 2 MW might adversely impact solar projects under development but opted to do so anyway due to its concerns over the rising costs of the program.[2]

It is true that the 750 MW development target included in 35-A M.R.S. § 3209-A(7) was not included in 35-A M.R.S. § 3209-A(9). *See Snakeroot*, 2025 ME 64, ¶ 31, ___ A.3d ___ (referencing 750 MW development target). But this is likely because by 2023 when the NEB program was being debated in the Legislature, it was obvious that the target would be exceeded by a

[2] Ellsworth does not argue that the commercial operation deadline in Section 3209(A)(9) is unconstitutional as applied to it. Any such suggestion is without merit as Ellsworth did not have vested rights at the time the 2023 NEB amendments were passed. *See Kittery Retail Ventures LLC v. Town of Kittery*, 2004 ME 65, ¶ 24, 856 A.2d 1183 ("[M]ere reliance on the language of an existing ordinance, or the incurrence of preliminary expenses to satisfy application requirements, is not sufficient to establish vested rights."); *see also NECEC Transmission, LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 44, 281 A.3d 618 (explaining that constitutional protection of "vested rights" turns on whether a project acquired a cognizable property right).

significant margin. For example, in testimony to the Energy, Utilities and Technology Committee of the Legislature in April 2023, the OPA estimated that by 2025, 1200 MW of NEB projects would be operational at a cost of approximately $220 million per year to ratepayers.[3] *An Act to Eliminate the Current Net Energy Billing Policy in Maine: Hearing on L.D. 1347 Before the J. Standing Comm. on Energy, Utils. & Tech.*, 131st Legis. 3 (April 13, 2023) (testimony of William Harwood, Public Advocate). Given this reality, it would have been futile to include a specific capacity target in the amendment. The Legislature's concern was not to achieve a certain level of development but to further tighten eligibility requirements for the program.[4] The Commission's narrow interpretation of the good cause provision in Section 3209-A(9) is therefore consistent with legislative intent.

[3] According to reports filed by Central Maine Power and Versant Power, as of July 31, 2025 there were approximately 1237 MW of operational NEB projects with an estimated annual cost to ratepayers of approximately $233 million. *See Public Utilities Commission*, Inquiry Regarding Net Energy Billing Evaluation, No. 2020-00199 CMP and Versant July 2025 NEB Reports (Me. P.U.C. Aug. 13, 2025). At the OPA's request, the Commission took official notice of these reports in a September 19, 2024 Procedural Order. (CMS #26, 9/19/24 Procedural Order – Briefing Schedule.)

[4] Since the passage of the 2023 NEB amendments, the cost of the program has continued to increase, prompting more legislative reform including the recently passed LD 1777. *See* P.L. 2025, ch. 430.

C. The Commission reasonably concluded that lengthy equipment procurement timelines are inherent in the interconnection process and therefore do not constitute an "external delay" for purposes of a good cause exemption.

Having established that the statutory language is ambiguous, this Court will accord the Commission's interpretation "great deference" and uphold it "unless the statute plainly compels a contrary result." *Snakeroot*, 2025 ME 64, ¶ 30, 340 A.3d 99 (quoting *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 2014 ME 56, ¶ 18, 90 A.3d 451).

In *Snakeroot,* the Court deferred to the Commission's finding that a lengthy interconnection study and construction process "were inherent in, not external to, and well within the bounds of the complicated regulatory process in this area." *Snakeroot*, 2025 ME 64, ¶ 38, 340 A.3d 99. In particular, the Court found that lengthy equipment procurement lead times were not abnormal and therefore the Commission reasonably concluded that no external delay had occurred for purposes of a good cause exemption. *Id.* ¶ 39.

The Court's analysis in *Snakeroot* is dispositive. The fact that Ellsworth received a utility interconnection construction schedule with a lengthy equipment procurement timeline does not mean that Ellsworth experienced an external delay. Lengthy equipment procurement timelines are inherent in the interconnection process. As the Court reasoned in *Snakeroot*, if the

Commission were to conclude that a lengthy interconnection construction schedule satisfied the external delay requirement, it would frustrate the Legislature's intent in reducing the costs of the program. *See Snakeroot*, 2025 ME 64, ¶ 38, 340 A.3d 99 ("The interpretation urged by Snakeroot, on the other hand, potentially opens the door wide to any project experiencing the vicissitudes of the normal interconnection process."). Accordingly, the Commission reasonably found that the project's lengthy utility equipment procurement timeline did not constitute an external delay.

II. The Commission's decisions in *Pembroke Solar* and *Ellsworth Renewables* are easily distinguishable because the developer in those cases received a construction schedule with a 2024 commercial operation date.

Ellsworth claims that the facts of this case are nearly identical to the facts in *Pembroke Solar* and *Ellsworth Renewables*, cases in which the Commission granted good cause exemptions based on changing lead times for equipment procurement. (Blue Br. at 31.) But the facts of these two cases are easily distinguishable. As this Court explained the *Pembroke* case, "Pembroke experienced an eleventh-hour unanticipated change in the utility's equipment procurement schedule . . . ." *Snakeroot*, 2025 ME 64, ¶ 42, 340 A.3d 99; *see also Pembroke Solar*, *LLC*, Request for Approval of Good Cause Exemption Pursuant to 35-A M.R.S.§ 3209-A, No 2023-00304, Order at 5 (Me. P.U.C. June 20, 2024) (referencing utility interconnection

construction schedule that projected a commercial operation date by April 24, 2024). The project in *Ellsworth Renewables* experienced a similar last-minute change to the utility procurement schedule. *See Ellsworth Renewables, LLC*, Request for Good Cause Exemption Pursuant to 35-A M.R.S. § 3209-A, No. 2023-00333, Order at 5-6 (Me. P.U.C. Sept. 25, 2024) ("Ellsworth Renewables received an initial construction schedule estimate from Versant with an in-service date of April 17, 2024."). In each of these cases the developer received a written interconnection construction schedule created specifically for each project that showed the project would achieve commercial operation in the first half of 2024. The Commission reasonably concluded that a subsequent change to the utility interconnection schedule was an external delay that caused the project to miss the statutory commercial operation deadline.

By contrast, Ellsworth's first detailed interconnection construction schedule projected a commercial operation date in 2025. Accordingly, unlike Pembroke and Ellsworth Renewables, Ellsworth did not experience a delay that caused it to miss the statutory commercial operation deadline. Rather, as the Court explained in *Snakeroot*, Ellsworth's "extended upgrade construction schedule" was simply "inherent in, not external to, and well

within the bounds of the complicated regulatory process in this area." *Snakeroot*, 2025 ME 64, ¶ 38, 340 A.3d 99.

III. The Commission's findings of fact are supported by substantial evidence in the record.

In an appeal of an agency decision, this Court will "affirm findings of fact if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 13, 989 A.2d 1128. Under the substantial evidence standard, "[a]dministrative agency findings of fact will be vacated only if there is no competent evidence in the record to support a decision." *Id.* ¶ 14.

Ellsworth initially claimed in its filings to the Commission that it received a construction schedule with a 2024 commercial operation date in March 2023. (CMS Filing #28, 10/3/24 Pet. Br. at 3 ("In March 2023, Ellsworth Solar received an interconnection schedule from Versant indicating an expected in service date ('ISD') in November 2024.").) But the evidence provided during the proceeding showed that the March 2023 construction schedule was never shared with the project until April 2024 and was provided only in response to an information request made for purposes of the project's regulatory filing. Presumably, the March 2023 construction

schedule was for internal use by Versant and never intended to be shared with the project.

Ellsworth now implicitly concedes that it never received an operative construction schedule with a 2024 commercial operation date. It now argues on appeal that Versant orally shared the substance of the March 2023 construction schedule and that the Commission erred by concluding that "only utility interconnection schedules shared in writing are worthy of reliance." (Blue Br. 41.) There are two problems with this argument: (1) as discussed above, the Commission has consistently and reasonably found that only projects that received a written construction schedule with a commercial operation date prior to the statutory deadline can demonstrate an external delay occurred due to extended procurement lead times and (2) there is ample evidence in the record that contradicts Ellsworth's claim that detailed construction schedule information was shared before June 2023.

With respect to the latter point, Ellsworth's argument that "there is absolutely no evidence" to contradict its assertion that "the substance of the March 2023 schedule . . . was discussed on numerous occasions between March 2023 and June 2023", (Blue Br. 46), is not just hyperbole, it is patently false. The evidence shows that during a May 10, 2023 kick-off meeting, Versant notified the project "about long lead times for the tariff

meter and regulator." (A. 92.) In a June 5, 2023 email from Versant's project manager to the project, Versant stated that "equipment procurement is ongoing – more to come on this as we receive the estimated deliver [sic] dates back from our vendors." (A. 92.) Versant confirmed that the "initial project schedule" was then provided to the project on or around June 21, 2023. (A. 92.) This construction schedule included a projected 2025 commercial operation date. (A. 94.) Ellsworth does not identify any instance in all the written emails exchanged between Versant and the project between March and June 2023 in which Versant shared a projected 2024 commercial operation date. [5]

The simplest interpretation of the evidence is that Versant apprised Ellsworth of long lead times for critical equipment and that when a schedule was created for the specific circumstances of the project, it included a 2025 commercial operation date.[6] Accordingly, the Commission reasonably found that the project had failed to produce evidence that any construction schedule was shared prior to the initial construction schedule in June 2023 (A. 12.)

[5] The OPA encourages the Court to review the full email chains provided under protective order in response to ODR-001-003. The full context of these emails undermines Ellsworth's claims that detailed scheduling information was shared by Versant prior to the June 2023 construction schedule.

[6] There were subsequent revisions to the initial construction schedule but at no point did Versant provide the project with an operative construction schedule that contained a commercial operation date in 2024.

IV. The Court should not consider the Versant affidavit or supplemental documents attached to Ellsworth's Petition for Reconsideration because they were never admitted into the evidentiary record.

Having failed to meet its burden of proof during the proceeding, Ellsworth sought to introduce new documents into the record after the Commission's decision was issued. (A. 44-66.) The Commission took no action on Ellsworth's request and therefore those documents are not part of the evidentiary record. The OPA opposed consideration of the supplemental documents in its opposition to Ellsworth's Petition for Reconsideration because, among other things, admitting sworn statements would violate the Maine Administrative Procedure Act, which requires that an affiant be subject to cross examination, except for good cause shown. 5 M.R.S. § 9057(5) (2025).

Beyond the clear legal problems with Ellsworth's attempt to rely on documents outside of the evidentiary record, the documents themselves provide conflicting information. For example, the statement in the affidavit that the construction schedule was shared during an April 5, 2023 call at 9:30am, (A. 60), conflicts with an internal project email written at 9:55am on the same day, which states that Versant would "be providing a schedule in 3 weeks." (A. 62.)

For these reasons, the documents attached to Ellsworth's Petition for Reconsideration should not be considered on appeal. But even if they were, it does not change the analysis. The Versant affidavit does not state that a written construction schedule was provided to the project before June 2023. Thus, even if taken at face value, the affidavit does not undermine the Commission's key finding that the project never received an operative construction schedule with a 2024 commercial operation date.

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

As the Court noted in *Snakeroot*, the good cause exemption provision includes the discretionary word "may" rather than the mandatory "must" or "shall." *Snakeroot*, 2025 ME 64, ¶ 34, 340 A.3d 99. Accordingly, a developer has no entitlement to a good cause exemption. *Id.* Indeed, the Court has previously concluded that use of the word "may" vests sole discretion in an agency to act. *Friedman v. Bd. of Env't Prot.*, 2008 ME 156, ¶¶ 14, 16, 956 A.2d 97. The permissive statutory language in the good cause exemption provision provides an alternative basis on which to uphold the Commission's decision.

CONCLUSION

For the reasons discussed above, the OPA respectfully asks that the Court reject Ellsworth'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 Ellsworth 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 September 16, 2025.

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