STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PUC-25-51

BERWICK SOLAR, LLC,

Appellant

V.

MAINE PUBLIC UTILITES COMMISSION, et al.,

Appellees

On appeal from the Maine Public Utilities Commission

BRIEF OF APPELLANT BERWICK SOLAR, LLC

Edward W. Gould - Bar No. 2603
GROSS, MINSKY, & MOGUL, P.A.
23 Water Street - P.O. Box 917
Bangor, ME 04402-0917
(207) 942-4644

Dennis Duffy, Esq.
ENERGY MANAGEMENT, INC.
20 Park Plaza, Ste. 1101
Boston, MA 02116
(401) 258-9172

Attorneys for Berwick Solar, LLC

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I. INTRODUCTION

Berwick Solar, LLC ("Berwick") appeals the January 15, 2025 order of the Maine Public Utilities Commission ("PUC") issued in its Docket No. 2024-00186, "Request for Commission Adjudication of Dispute Resolution" (the "Order"[1]) involving a contractual dispute between Berwick and Central Maine Power Company ("CMP") regarding the interpretation and effect of the terms of the Interconnection Agreement ("Agreement"[2]) between the parties for the interconnection of Berwick's solar energy facility to the system of CMP. The Agreement provides a 90-day window following project completion within which CMP is allowed to make a "Final Accounting" to assess Berwick for additional interconnection costs. It is undisputed that CMP made no accounting or assessment of additional interconnection costs within that window of time, but purported to do so seven months after the close of the period without supplying any supporting invoices or purchase orders. Berwick contested such charges as (i) beyond the allowed time period and (ii) inclusive of "pooled charges" beyond the scope of adjustments permitted under the Final Accounting Clause. The contractual dispute

[1] Included as App. at 5.
[2] Included as App. at 60.

was submitted to the PUC pursuant to Article 8 ("Dispute Resolution") of the Agreement, which references and adopts the dispute resolution process of Section 17 of Chapter 324 of the PUC's Small Generator Interconnection Rules (the "Interconnection Rules"),[3] which process resulted in the Order now under appeal.

In an unexplained reversal of its prior position that the 90-day period establishes a "deadline" for assessing incremental interconnection charges, and with no acknowledgement or reasoned analysis of the change or reference to the cited contrary case law, the PUC in a cursory two-page discussion rejected Berwick's position that the 90-day provision should be given force and effect as a "deadline" precluding subsequent assessments. The PUC's Order and interpretation of the Agreement is incorrect as a matter of law, arbitrary and capricious and in violation of the Change-In-Policy Doctrine.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

On March 6, 2020, Berwick and CMP entered into the Agreement to interconnect Berwick's facilities to CMP's system. Section 5.1 of the Agreement calls for CMP to make a "final accounting" for any "actual costs incurred to complete construction and interconnection" of Berwick's facilities above the estimates of those costs stated in the Agreement. CMP made no accounting or assessment of additional charges

[3] C.M.R. 65, 407, ch. 324 - SMALL GENERATOR INTERCONNECTION PROCEDURES. 407c324-2023-233 (AMD).docx

within that time period, but did issue a "Reconciliation Statement" seven months after the close of the period showing an "Amount Due" of $37,418.50.[4] The most recent of CMP's three subsequent "Reconciliation Statements" was issued to Berwick on March 29, 2023, restating the Amount Due as $27,655.83.[5] Berwick contested all such reconciliations assessing additional interconnection costs as beyond both the timing and scope of assessments allowed under the Agreement.

On May 13, 2024, Berwick provided CMP with its "Notice of Dispute and Request for Good Faith Negotiation and Dispute Resolution"[6] as provided at Article 8 of the Agreement ("Dispute Resolution") and the Interconnection Rules. CMP's Statement of Position[7] was submitted to the PUC on June 14, 2024, and Berwick filed its response to that statement to the PUC on June 24, 2024.[8] On July 8, 2024, an informal dispute resolution conference with PUC staff was held under Section 17b of the Interconnection Rules where the parties did not reach a resolution. On July 18, 2024, Berwick filed its request to proceed to the PUC's formal adjudication process under Section 17c of the Interconnection Rules.

On July 24, 2024, the PUC issued a Notice of Proceeding in Docket No. 2024-00185, pursuant to which the parties submitted briefs on August 14, 2024, and the

[4] Included as App. at 79.
[5] Included as App. at 80.
[6] Included as App. at 13.
[7] Included as App. at 82.
[8] Included as App. at 92.

PUC held a hearing on the matter on August 27, 2024. On November 8, 2024, PUC staff issued its Recommended Decision, to which Berwick submitted its Exceptions to the Recommended Decision. On January 15, 2025, the PUC issued the Order and on May 9, 2019, Berwick filed its Notice of Appeal and Statement of Issues on Appeal. On March 10, 2025, Berwick's appeal was docketed in this Court as Docket No. PUC-25-51.

III. STATEMENT OF ISSUES FOR REVIEW

1. Did the Commission act arbitrarily and err as a matter of law by reversing its prior position, without acknowledgement or reasoned explanation of the change, to interpret the 90-day provision of Section 5.1.2 of the Agreement to have no force and effect and to render the provision meaningless and mere surplusage?

2. Did the Commission act arbitrarily and err as a matter of law by failing to follow or reference the cited authorities of Maine law holding that contracts are to be interpreted where possible to give force and effect to all contractual provisions and render none a meaningless or mere surplusage?

3. Did the Commission act arbitrarily by failing to reference the cited case law recognizing the importance in utility transactions of contractual provisions providing financial closure and repose?

4. Did the Commission act arbitrarily by admittedly failing to address the contested issue of CMP's assessment of "pooled costs" not incurred to complete the construction and installation of Berwick's interconnection facilities?

5. Did the Commission act arbitrarily and err as a matter of law by ordering that CMP is not required to provide purchase orders or invoices supporting its claimed assessment of actual interconnection costs?

IV. STANDARD OF REVIEW

Berwick as appellant has "the burden of showing that the [Commission's] action was arbitrary or based on an error of law." Cent. Maine Power Co. v Pub. Utils. Comm'n, 2014 ME 56, 90 A.3d 451 (2014). However, here the issue is a question of law regarding contract interpretation and questions of law are subject to de novo review. Public Advocate v. Pub. Utils. Comm'n, 718 A.2d 201, 203 (Me.1998) ("We review questions of law de novo….") And, as in this case, when an agency decision reverses its prior position, the agency's decision "is 'entitled to considerably less deference' than a consistently held view." Kokojo v. F.E.R.C., Respondent, CMP, Intervenor, 873 F.2d 419, 420 (1st Cir. 1989). Further, when the reversal of position is done without acknowledgment or reasoned explanation of the change, the agency action is arbitrary and capricious and not entitled to deference. Encino Motor Cars, LLC v. Navarro, 579 U.S. 211, 223 (2016) ("'[U]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.' An arbitrary and capricious regulation of this sort is itself unlawful and receives no Chevron deference.")[9]

[9] Notably, the referenced decision in Chevron U.S.A. v. N.R.D.C., 467 U.S. 837 (1984) has been overruled in Loper Bright Enterprises v. Raimondo, 603, U.S. 369, 410 (2024), with the Supreme Court finding that the discarded deferential Chevron standard became "a license authorizing an agency to change positions as much as it likes" that "fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty." The same concerns regarding "unwanted instability" of agency position apply in this case involving unexplained changes in policy, as discussed below.

V. THE DISPUTED CONTRACTUAL PROVISIONS.

The dispute and this appeal turn upon the interpretation and effect of Section 5.1 of the Interconnection Agreement ("Billing, Payment and Final Accounting") and the corresponding terms of Section 15.J ("Cost Reconciliation") of Chapter 324 of the Interconnection Rules (each a "Final Accounting Clause") that limit, as to both timing and scope, the ability of CMP to make assessments of costs through a "Final Accounting" or "Reconciliation" of actual construction and installation costs in excess of the estimates of those costs identified in the Agreement. Section 5.1 of the Agreement provides a limited window for a "Final Accounting" of ninety (90) days from CMP's completion of utility system upgrades, as follows:

> 5.1.2 Within ninety (90) days of completing the construction and installation of T&D Utility's Interconnection Facilities and Distribution Upgrades described in the Exhibits to this Agreement, T&D Utility shall provide the Interconnection Customer with a final accounting report of any difference between (1) the actual cost incurred to complete the construction and installation and the budget estimate provided to the Interconnection Page 1 of 11 Customer and a written explanation of any significant variation, [and] (2) the Interconnection Customer's previous deposit and aggregate payments to T&D Utility for such Interconnection Facilities and Distribution Upgrades.

Section 15.J. of the Interconnection Rules similarly provides as follows:

> 15.J. Cost Reconciliation. Within sixty (60) Business Days after issuance of the later of (i) T & D Utility's formal Notice of Approved Operation, or (ii) submittal of final as-built drawings to

> the T&D Utility, the T&D Utility shall prepare and submit to the Applicant a final reconciliation statement of its actual costs less any Payment of System Modifications made by the Applicant, with a detailed breakdown of costs for review by the Applicant. The details of the breakdown should match the Distribution Upgrades identified in any detailed design provided by the T&D Utility. ….

There is no dispute that the specified adjustment period[10] expired well prior to CMP's attempt to assess additional interconnection costs, as CMP approved Berwick's "Certificate of Completion" on May 5, 2021, but did not issue its first of its four "Reconciliation Statements" assessing additional charges until seven months later, on February 24, 2022, with CMP providing no invoices or purchase orders supporting such additional charges. Order, at 5. Notably, Berwick and a third-party lender closed a refinancing transaction in the window of time after the close of the 90-day period (and thus within the intended period of economic repose) and CMP's issuance of the first Reconciliation Statement asserting CMP's right to assess additional charges.[11]

[10] There is no effective difference between the 90-day period of the Agreement (expiring August 3, 2021) and the corresponding 60-business day period of Section 15.J. (expiring July 31, 2021), as CMP did not issue any adjustment within the stated period calculated under either standard.

[11] Pre-filed Testimony of James Gordon, at 3 ("[N]either project lenders nor equity investors could effectively evaluate the financial position of project lenders if faced with the possibility of incurring additional expenses in unknowable amounts at any time (or times over a six (6) year period.")

The essential issue is whether the foregoing timing provisions regarding "Final Accounting" are to be given effect (as Berwick maintains) or given no effect (as CMP and the PUC now maintain). CMP's position below, as adopted by the Order, is that the timelines of the Final Adjustment Clause are without any remedy or effect: "Chapter 324 sets forth timelines for a utility to issue final reconciliations and invoices; however, the rule does not afford a remedy for not doing so…."[12] CMP accordingly took the further position that the only timing limitation on its assessment of additional interconnection charges is the six-year statute of limitation: "[S]uch a debt would only be extinguished if the applicable statute of limitations period has been exceeded, which period is 6 years under Maine law. See 14 M.R.S. § 752." [13] Berwick maintains to the contrary that under the terms of the Agreement CMP had only 90 days from project completion to assess additional charges. Rather than giving effect to the finality and economic repose plainly intended by such terms, the PUC's Order adopted CMP's position to give no effect to such provisions, thereby exposing Berwick to assessment of additional charges at any time (or times) over the six-year statutory limitation period, an unquantifiable contingent liability that imposes an unreasonable and unanticipated impediment in the project-financed renewable industry sector.

[12] CMP's Statement of Position, June 14, 2024, at 3. App. at 82, ViewDoc.aspx

[13] CMP's September 13, 2024 Record Request Response. ViewDoc.aspx

VI. ARGUMENT

A. The PUC acted arbitrarily and capriciously by reversing its position without acknowledgment or reasoned explanation.

1. The PUC's prior position was that the Final Accounting provision established a "deadline" beyond which no further assessments could be charged.

Prior to the Order, CMP and the PUC both interpreted the same final accounting clause in similar agreements as establishing a "deadline" beyond which no further adjustments may be made absent a prior grant of exemption. In a series of related proceedings, CMP and the PUC expressly characterized such clauses as establishing a "deadline" that defines the last point in time when additional assessments are allowed, and the plain meaning of "deadline" is "a date or time before which something must be done," "a time by which something must be done" and "the latest time for finishing something." [14]

On September 24, 2021, CMP filed with the PUC a "Request For Waiver" that acknowledged that the final accounting clause established a "deadline" for assessing interconnection costs and that "Section 13(J) *requires* a T&D Utility to provide an Interconnection Customer within sixty (60) business days after the later of (i) T&D Utility's formal Notice of Approved Operations, or (ii) submittal of final as-built

[14] Deadline Definition & Meaning - Merriam-Webster; DEADLINE Definition & Meaning; Dictionary.comhttps://dictionary.cambridge.org/us/dictionary/essential-american-english/deadline.

drawings to the T&D Utility" and that "CMP will, in certain cases, be unable to meet the Chapter 324 Section 13(J)[15] *deadline*…." CMP accordingly stated that it required the requested waiver "to allow additional time to reconcile the [specified portion of interconnection] costs."

In its responsive "Order Granting Waiver" in Docket N0. 2021-00306 (December 16, 2021,)[16] the PUC granted CMP's request, stating that the final accounting clause "specifically requires" that final cost reconciliation "must" be made within the stated time period and thus establishes a "deadline" for making any such adjustments:

> Section 13(J) *specifies the timeframe within which a Transmission & Distribution Utility (Utility) must reconcile the costs o*f System Modifications performed to interconnect a small generator and specifically requires a Utility to provide an Interconnection Customer with a final reconciliation of the actual costs *within sixty (60) Business Days* after issuance of the later of the (i) Utility's formal Notice of Approved Operation, or submittal of final as-built drawings to the Utility. *** In the case of [interconnection] costs, CMP will, in certain cases, be unable *to meet the deadline*….

[15] Note that the former Section 13(j) was renumbered as 15(j) without substantive revision.

[16] Maine PUC Order Granting Waiver, Docket No. 2021-00306 (December 16, 2021). ViewDoc.aspx

On September 30, 2022, the PUC in that same docket subsequently issued an "Order Granting Temporary Extension of Waiver"[17] noting that "CMP stated that, in certain cases, it would be unable to meet Chapter 324 Section 13(j) ***deadline***…." Further, the Commission's grant of only a partial waiver in those orders (limited in scope to only a specified portion of interconnection costs and for only a limited period of time) confirms that the "deadline" for all other interconnection charges and time periods remained in effect to preclude subsequent assessment of additional charges.

The PUC's prior orders and CMP's prior requests for prospective waivers confirm the PUC's prior position that, absent a prior Commission waiver, no charges could be assessed subsequent to the "deadline" under the applicable Final Accounting Clause. Notably, it is uncontested that CMP (i) did not obtain or request any waiver from the Commission, and (ii) there was no agreement with Berwick for it to waive the Final Adjustment Clause. See, Tr. 8/27/24, at pp. 28-29.

2. The PUC's reversal of position is arbitrary and capricious and an error of law violating the Change-in-Position Doctrine.

It is a well-established principle of administrative law that when an agency reverses its position, it must both acknowledge the change and provide reasoned analysis supporting the change, and here the PUC has done neither. The United

[17] Maine PUC Order Granting Temporary Extension of Waiver, Docket No. 2021-00305, September 30, 2022. ViewDoc.aspx

States Supreme Court recently articulated those requirements under the change-in-policy doctrine as follows:

> The change-in-position doctrine asks two questions. The first is whether an agency changed existing policy.[5] And we have suggested that this occurs when an agency acts "inconsistent[ly]" with an "earlier position," *id.*, at 224, 136 S.Ct. 2117, performs "a reversal of [its] former views as to the proper course," *Motor Vehicle Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S., at 41, 103 S.Ct. 2856, or "disavow[s]" prior "inconsistent" agency action as "no longer good law," *Fox Television*, 556 U.S., at 517, 129 S.Ct. 1800 (internal quotation marks omitted).
>
> Once a change in agency position is identified, the doctrine poses a second question: Did the agency "display awareness that it is changing position" and offer "good reasons for the new policy"? Fox Television, 556 U.S., at 515, 129 S.Ct. 1800. (quoting *Fox Television*, 556 U.S., at 515, 129 S.Ct. 1800).

Food and Drug Adm'n v. Wages and White Lion Investments, LLC, 145 S.Ct. 898, 918 (April 5, 2025). The Maine Supreme Court similarly articulated the applicable agency change-in-policy requirements in Cassidy Holdings, LLC v. Aroostook County Commissioners, 2023 ME 69 ¶16, 304 A.3d 259, n. 4 (Me 2023):

> An agency is free to change its mind in its interpretation of a statute. See Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993). But if it does so, *the agency must acknowledge that it is making a change, explain why, and give due consideration to the serious reliance interests on the old policy.* Charles Koch, Jr. & Richard Murphy,

Admin. L. & Prac., Review of policy changes § 11:30.25, Westlaw (database updated February 2023) (At the time Cassidy had to decide where to appeal, the agency was indicating it could go to the Commissioners). See also FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) ("*An agency may not ... depart from a prior policy sub silentio.*"); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221-22, 136 S.Ct. 2117, 195 L.Ed.2d 382 (2016) (noting that *agencies must acknowledge the fact of change, offer good reasons for the change, take cognizance of reliance interests,* and explain why they are "disregarding facts and circumstances that underlay or were engendered by the prior policy" (quoting Fox Television Stations, Inc., 556 U.S. 502, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738)); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) ("sudden and unexplained change" or "change that does not take account of legitimate reliance on prior interpretation" may be arbitrary); Nat'l Lab. Rels. Bd. v. Lily Transp. Corp., 853 F.3d 31, 36 (1st Cir. 2017) (noting that the Justices in Fox were unanimous in their "acceptance of the view, often expressed, that an agency is not forever bound by an earlier resolution of an interpretive issue, but that *a change must be addressed expressly, at least by the agency's articulate recognition that it is departing from its precedent"* and that "an about-face on a rule owing to facts changed from those underlying the prior view requires that the new facts be addressed explicitly by reasoned explanation for the change of direction.")

Id. (emphasis added.) Under those well-established requirements of administrative law, the PUC acted arbitrarily and capriciously in reversing its prior position *sub silentio* without providing any articulated acknowledgment of the reversal, any reasoned explanation for the change or any consideration of the associated reliance interests. The Order should thus be reversed and vacated.

B. The PUC's failure to consider or follow Maine law holding that contracts are to be interpreted to give effect to all provisions was arbitrary and capricious and an error of law.

The essential issue in dispute is whether the timing provision of the Final Accounting Clause is to be given effect or rendered a nullity. By interpreting the Agreement to render the timing clause meaningless and of no effect, the PUC erred by neither discussing nor following the well-established case law of Maine (as was cited by Berwick below) holding that contractual arrangements should be interpreted "to give force and effect" to all provisions and render no provisions meaningless, as the Supreme Court of Maine has held:

> [W]hen interpreting a contract, a court needs to look at the whole instrument. Peerless Ins, Co., 564 A.2d at 384-385. Furthermore, a contract should "be construed to give force and effect to all of its provisions" and not in any way that renders any of its provisions meaningless. Buck, 2000 154, 756A.2d at 517.

American Protection Ins. Co. v. Acadia Ins. Co., 814 A.2d 989, 991 (Me. 2003). The First Circuit has similarly applied Maine law to interpret contracts to give force to all provisions and render no provisions meaningless or "mere surplusage":

> A contract ordinarily should be interpreted so as to give force to all of its provisions. Blackie, 75 F.3d at 722; Acadia Ins. Co. v. Buck Constr. Co., 756 A.2d 515, 517 (Me.2000). It follows that an inquiring court should, whenever possible, avoid an interpretation that renders a particular word, clause, or phrase meaningless or relegates it to the category of mere surplusage. Acadia Ins., 756 A.2d at 517. Here, the fatal flaw in Bolduc's argument is that it renders nugatory paragraph 4's reference to the letter agreement.

Crowe v. Bolduc, 365 F.3d 86, 97 (1st Cir. 2004); also see, OfficeMax, Inc. v. Levesque, 658 F.3d 94, 98 (First Cir. 2011)("The district court's interpretation, therefore, reads this clause out of the contract in contravention of the fundamental principle of contract interpretation that 'a contract should be construed to give force and effect to all of its provisions and not in a way that renders any of its provisions meaningless.' Am. Protection Ins. Co. v. Acadia Ins. Co., 814 A.2d 989, 993 (Me.2003) (internal quotation marks and citation omitted).")

The PUC's Order reversing its prior position and giving no effect to the Final Accounting Clause, without referencing, following or providing reasoned analysis of the cited law of Maine that contracts are to be interpreted to give effect to all provisions, was arbitrary and capricious and an error of law. The interpretation of

the Agreement that comports with Maine law is that, while one provision gives CMP the right to assess charges, that provision is *subject to* the timing limitation of the Final Accounting Clause, the interpretation that gives force and effect to *both* provisions of the Agreement. The Court should thus reverse and vacate the Order and issue a decision interpreting the Agreement to give effect to all provisions thereof, including the timing limitation clause in question, thereby precluding the assessment of additional interconnection charges after the close of the applicable time period and requiring the appropriate refund of any such additional costs that have been received by CMP.

C. The PUC's failure to reference the cited case law giving effect to time limitations in public utility transactions was arbitrary and capricious.

The PUC further acted arbitrarily and capriciously by failing to reference or discuss the cited judicial decisions in the specific context of public utility transactions giving force and effect to timing clauses as essential provisions for ensuring utility industry stability and furthering the public interest. In the leading case in this Circuit, Boston Edison Co. v. F.E.R.C., 856 F.2d 361 (1st Cir. 1988), the court gave effect to the timing clause of a utility supply agreement to preclude subsequent billing adjustments that would otherwise have been permitted under other provisions of the agreement. In giving effect to both provisions, the court found the timing clause to be an "integral part of the bargain" that "enhances economic

equilibrium" and "promotes stability" that is "essential to the health" of the utility industry and that "serves the public interest,"[18] as follows:

> The claims limitation clause seems, by any reckoning, an integral part of the bargain struck by the contracting parties. More to the point, it represents precisely the sort of contractual commitment which is completely consistent with the filed rate and thus protected under Mobile Sierra.[19] The linchpin of Mobile is the idea that the law, by maintaining the integrity of contracts, "permits the stability of supply arrangements which all agree is essential to the health of the . . . industry." 350 U.S. at 344, 76 S. Ct. at 380. A reasonable claims limitation clause — and no one asserts that Paragraph C-8.3 is unconscionable, overweening, or otherwise unreasonable — *clearly enhances economic equilibrium by bringing certainty to the parties' dealings after the passage of an adequate period of time*. Just as statutes of limitations and of repose help to keep the litigious world outside the ratemaking environment on an even keel, *a balanced incontestability provision promotes stability within that environment.* Both the utility and its wholesale customer know where they stand. The former need not worry about refund liability after the limitation period has expired; the latter is on fair notice that it must examine submitted charges in an expeditious fashion or forever hold its peace. From the regulatory perspective, *preserving the ability of the supplier to count its chickens once customer claims have been afforded a realistic chance to hatch seems to us to serve the public interest.*

[18] In giving effect to contractual provisions, the Court thereby made favorable reference the landmark Supreme Court case of United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373 (1956,) stressing the importance of maintaining contractual and economic stability in the public utility industry as a matter of public policy

***

> In our view, the policies enunciated by Congress are in no way demeaned by requiring primary energy distributors and their wholesale customers alike to exercise reasonable self-interested vigilance and to act promptly to protect their respective positions.

Id., at 372 (emphasis added). The court further noted that it would be unprecedented for FERC to not have given effect to a reasonable limitations clause:

> It is not without significance that neither FERC nor the intervenors can point to any precedent squarely permitting the Commission retroactively to override a reasonable claims limitation clause. Id.

The similar result was reached in a recent decision of the United States Circuit Court of Appeals for the District of Columbia involving a situation markedly similar to the current dispute regarding a utility's assessment of additional interconnection costs after the expiration of the applicable period. In Oklahoma Gas & Elec. Co. v. FERC, et al., 11 F.4th 821 (D.C. Cir. 2021), the Court upheld FERC's order giving effect to a contractual provision limiting the time period for the utility (the Southwest Power Pool or "SPP") to bill customers for additional generator interconnection costs, holding that, once the time period had run, the clause precluded the utility's assessment of interconnection costs that would otherwise have been allowed under a separate provision, with the Court thereby upholding "the

agency interpretation that gives effect to both tariff provisions" and providing a remedy against out-of-time cost adjustments:

> Under [the utility's] interpretation, however, SPP can collect the upgrade charges set forth in Attachment Z2 regardless of the [time period] billing requirements of Section I.7.1. By contrast, *the [FERC's] interpretation gives effect to both tariff provisions, allowing SPP to collect the upgrade charges set forth in Attachment Z2, but only by following the billing requirements of Section I.7.1.*
>
> The petitioners finally suggest that FERC incorrectly elevated the "non-rate" terms about billing over the rates specified in Attachment Z2. Because utilities relied on that rate when sponsoring transmission upgrades, the rate should be implemented with retroactive billing, irrespective of the timing requirements in Section I.7.1. The Commission reasonably concluded, however, that rate certainty cut the other way because the enforcement of Section I.7.1's [limitation period] requirements "assures customers that a utility cannot assess them new charges after the one-year timeframe for doing so lapses." 170 FERC ¶ 61,125, slip decision at 12 ¶ 25. A plain reading of Section I.7.1 establishes that SPP could not bill for upgrade charges more than one year after the charges were incurred by the upgrade users.

Oklahoma G&E, supra at 828 (emphasis added).

While the Order apparently accepted CMP's argument that the limitation period should not apply because the untimely adjustment was due to delays in CMP's internal processes (CMP Statement of Position at 5-6), the Court of Appeals considered and rejected the same argument made by SPP that the time limit should

not apply because the utility's billing delays were due to internal process delays, including the development of special software, with the Court holding that the timing clause contained no such exemption and that an allowance for the utility's internal delays, or its failure to take required actions (including billing of charges when specified) would permit an "end run" of the contractual timing provisions:

> As the Commission explained, Section I.7.1 contains "no exception for processes or services that may take longer than one year to implement." 170 FERC ¶ 61,125, slip decision at 11 ¶ 24. Moreover, *it would permit an end run around the monthly billing requirement* and the one-year prohibition on adjustments if SPP could avoid both those obligations by never providing an initial bill.

Oklahoma, at 829 (emphasis added). Here, as there, there is no contractual exception for internal delays that would nullify the timing provisions of the Final Accounting Clause or allow utility failure to act to result in an open-ended tolling of its provisions. Finally, the Court of Appeals in affirming FERC's decision noted its prior holding that, once the time period had run, "bygones are bygones":

> FERC was therefore prohibited from waiving Section I.7.1 for the historical period at issue. The Commission "may not disinter the past merely because experience has belied projections, whether the advantage went to customers or the utility; bygones are bygones." Associated Gas Distribs. v. FERC, 898 F.2d 809, 810 (D.C. Cir. 1990) (Williams, J., concurring in the denial of rehearing and rehearing en banc). The filed rate requirement is stringent and admits of no equitable adjustments by the Commission or this court.

Oklahoma, at 832. The PUC's failure to reference or consider the foregoing utility industry-specific case law that was cited below was arbitrary and capricious and grounds for reversing and vacating the Order.

D. The PUC Order was arbitrary and capricious and an error of law by ordering assessment of undocumented costs beyond the scope permitted under the Final Accounting Clause of the Agreement.

Even assuming, arguendo, that the additional adjustments were not time-barred, the PUC erred in ordering the assessment of costs outside the scope of charges for which a Final Accounting could be assessed. In this regard, Section 5.1.2 limits the scope of adjustments to "any difference between (i) the *actual cost incurred to complete the construction and installation* and the budget estimate provided to the Interconnection Customer and a written explanation of and significant variation, [and] (2) the Interconnection Customer's previous deposit and aggregate payments to T&D Utility…." Section 15.J. in turn limits adjustments to "actual costs less any Payment of System Modifications made by the Applicant," with a detailed breakdown of costs for review by the Applicant that should "match the Distribution Upgrades identified in any detailed design provided by the T&D Utility." The PUC acted arbitrarily and capriciously by ordering a Final Accounting including costs other than the "actual cost incurred to complete the construction and installation" of Berwick's facilities, and that were never supported with documentation to evidence eligibility for assessment.

1. Project-specific cost assessments were not justified as within the permitted scope of the Final Accounting Clause.

With respect to project-specific interconnection costs, Berwick requested but did not receive any supporting purchase orders or invoices relating to the additional cost assessments, information that is essential to establishing eligibility under the Final Accounting Clause as "actual costs incurred to complete construction and installation" of Berwick's facilities. In any commercial setting the provision of supporting purchase orders and invoices is a reasonable and customary condition to establishing the eligibility and propriety of assessments for "actual costs incurred." In the absence of that information, neither Berwick nor the PUC has a reasoned basis to determine the eligibility or propriety of the assessed costs. In the absence of the "written explanation," "detailed breakdown of costs" or cost information to "match the Distribution Upgrades" required by the Final Accounting Clause, the PUC's Order unreasonably and capriciously grants CMP a "blank check" to assess charges that cannot be reviewed or challenged for propriety or eligibility for assessment under the terms of the Agreement.

2. The Assessment of "Pooled Costs" incurred on a "Generalized Basis" unrelated to Berwick's facilities is Not Allowed Under the Final Accounting Clause.

The Order upheld CMP's assessment to Berwick of allocated portions of CMP's "pooled" costs incurred on a "generalized basis," i.e., costs that were not

"actually incurred to complete the construction and installation" of Berwick's Interconnection and Distribution Facilities, and which are thus beyond the permitted scope of assessments allowed by the Final Accounting Clause. As discussed above, under Maine law contracts are to be interpreted where possible to give effect to all provisions. Here the proper interpretation of the Agreement is that, even if CMP were otherwise allowed to assess such charges, that allowance is *subject to* the provisions of the Final Accounting Clause that limit the scope of permitted adjustments to only those costs "actually incurred to complete the construction and installation" of the Berwick's facilities, an interpretation that gives force and effect to ***both*** provisions in accordance with Maine law. The PUC's contrary holding allowing charges for "pooled" costs" outside the scope permitted by the Final Accounting Clause is arbitrary and capricious and incorrect as a matter of law and grounds for vacating the Order.

That conclusion is heightened by the PUC's admitted failure to address Berwick's position that "pooled" costs are beyond the scope of assessable charges with the Order stating, without explanation, that "The Commission will not address Berwick's argument with respect to the appropriateness of assessing 'pooled costs' because it is not necessary to decide his dispute." Order, at 6, n. 3. To the contrary, however, whether "pooled cost" charges were inappropriately assessed is an essential contested issue that goes to the heart of the dispute. Moreover, the PUC

went on to state without explanation or support that "the pooled cost approach resulted in reduced costs for Berwick" (Id.), implying that *adding* those cost to Berwick's assessment somehow *reduced* Berwick's assessment, an untenable conclusion further demonstrating arbitrary action.

E. The PUC acted arbitrarily by failing to address the uncontroverted testimony regarding the adverse impact of allowing additional interconnection charges beyond the 90-day period of the Agreement.

The PUC further acted arbitrarily by failing to address the uncontroverted testimony of the adverse impact of allowing additional interconnection charges beyond the 90-day period of the Agreement and thereby creating an unquantifiable contingent liability for the full six-year statutory limitation period, as Berwick's witness testified:

> CMP's position would be a serious impediment to the project financing or refinancing of the new facilities needed to meet Maine's clean energy policy goals by effectively imposing an unquantifiable contingent liability for the entire six (6) year period. Rather than the period of repose and certainty of the stated adjustment periods, neither project nor equity investors could effectively evaluate the financial position of projects if faced with the possibility of incurring additional expenses in unknowable amounts at any time (or times) over a six (6) year period.

Gordon Pre-filed Testimony, App. at 2-3. Berwick's witness further testified that Berwick "obtained long-term debt for the project more than ninety (90) days *after*

the commencement of commercial operations, but prior to receipt of any of the CMP reconciliation statements" (Id. at 2), indicating the type of reliance that third parties placed upon financial closure and project valuation, a factor requiring consideration under the Change-in-Policy doctrine discussed above.

VII. Conclusion.

For the foregoing reasons, Berwick respectfully requests the Court to reverse and vacate the Order and issue a decision interpreting the Agreement to give force and effect to the timing provisions of the Final Adjustment Clause as precluding additional assessment(s) of interconnection costs after the expiration of the stated period and accordingly order CMP to refund the contested amount of $27,655.83 that was paid by Berwick.

Dated: June 27, 2025

Respectfully submitted,

Edward W. Gould, Esq. Bar No. 2603
GROSS, MINSKY, & MOGUL, P.A.
23 Water Street - P.O. Box 917
Bangor, ME 04402-0917
(207) 942-4644

Dennis Duffy
Energy Management, Inc.
20 Park Plaza, Ste. 1101
Boston MA 02116
(401) 258-9172

CERTFICATE OF SERVICE

I hereby certify that I have served two copies of the above Brief of Appellant Berwick Solar, LLC upon the following parties in the above-described matter by U.S. First Class Mail with all charges prepaid.

Rikka Strong
MPUC
18 State House Station
Augusta, ME 04333-0018

Carlisle Tuggey
Avangrid/CMP
18 Edison Drive
Augusta, ME 04330