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

REPLY BRIEF OF APPELLANT BERWICK SOLAR, LLC

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I. The PUC and CMP briefs cite to a standard of review inapplicable to changes in agency position.

a. The PUC changed its position on the effect of the Final Adjustment Clause.

The PUC and CMP on brief assert incorrectly that the PUC has not changed its position on the effect of the 90-day "deadline" established by the Final Adjustment Clause. While the PUC and CMP do not contest that both the PUC and CMP have consistently regarded the Final Adjustment provisions as establishing a "deadline" (Berwick's Brief, at 13-15), both appellees now assert that the PUC had taken no prior position on the effect of that deadline, and the PUC has thus not changed its position. That contention is plainly incorrect.

CMP has, in advance of the adjustment deadlines, consistently sought waivers to "allow" it to assess additional charges after the deadline and the PUC has consistently followed the regulatory practice of affirmatively granting relief to "allow" CMP to assess charges subsequent to those deadlines, as shown in the examples set forth below and the attached footnote:

> The PUC's May 6, 2021, Order Granting Waiver in Docket No. 2021-00082 stated that its waiver "will ***allow*** CMP to … allocate" interconnection costs subsequent to the otherwise applicable time limit. ViewDoc.aspx
>
> The PUC's November 29, 2022, Order Granting Temporary Extension of Waiver in Docket No. 2021-00306 stated that "CMP had requested a waiver ***allowing*** CMP to complete cost allocations" subsequent to the

deadline because CMP had stated that "***it would be unable to meet the Section 324 Section 13(j) deadline***." ViewDoc.aspx[1]

If assessments after the "deadline" were already "allowed," there would have been no reason for the PUC to grant the affirmative relief to "allow."

The PUC's current position to the contrary is plainly a reversal of position and established agency practice.

b. The Order improperly changed agency position without the required acknowledgment and explanation of change and recognition of reliance issues.

The PUC and CMP on brief do not contest Berwick's statement of the Change in Position Doctrine, as articulated by the federal courts and adopted by the Supreme Court of Maine in Cassidy Holdings, LLC v. Aroostook County Commissioners, 304 A.3d 259, n.4 (Me. 2023), which summarized the requirements for a change in agency position, as follows: "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." The Order, however, failed to reference or to take any of those steps required for its change in position; the PUC did not acknowledge the change, it did

[1] See: The PUC's May 6, 2021, Order Granting Waiver in Docket No. 2021-00082 stated that its waiver **"*will allow CMP to … allocate*"** interconnection costs subsequent to the otherwise applicable time limit; ViewDoc.aspx the PUC's September 30, 2022, Order Granting Temporary Extension of Waiver in Docket No. 2021-00306 stated that "CMP had requested a waiver ***allowing CMP to complete cost allocations***" subsequent to the deadline because CMP had stated that "***it would be unable to meet the Section 324 Section 13(j) deadline.***" ViewDoc.aspx

not explain why it made the change, and it did not give any consideration of the serious reliance issues of the former position. The PUC and CMP simply deny that a change in position has occurred, an untenable position in light of the plain shift in the PUC's position, and that change violated the Change in Position Doctrine.

c. Changes in agency position are subject to a more stringent standard of review and a change made without the requisite acknowledgement, explanation or consideration or reliance issues is itself arbitrary and capricious.

The PUC and CMP briefs argue for a highly deferential standard of review that is inapplicable to changes in agency position, especially changes that are neither acknowledged nor explained. Notably, neither appellee's brief references or contests Berwick's position (Brief, at 9) that a "considerably less deferential" standard of review applies to changes in agency position, as articulated by the courts as follows: "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation '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), quoting I.N.S. v. Cardoza-Fonseca, 480 U.S. 434, 446 (1987).

Further, where, as here, the reversal of position is done without acknowledgment, reasoned explanation or consideration of reliance interests, the agency action is itself arbitrary and capricious and entitled to no deference, as the

Supreme Court explained in 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." See, e.g., Citizens Awareness Network, Inc. v. U.S., 391 F.3d 8 (1st Cir. 2004) ("An agency must, however, offer a reasoned explanation for the change. If the agency fails to furnish such an explanation, or if the proffered explanation fails to demonstrate that the agency fully considered its new course, the revised rules must be set aside.")[2]

Notably, neither the appellee briefs nor the Order below make reference to the authorities cited by Berwick regarding the Change in Position Doctrine, its requirements or its principle that changes in agency position are reviewed with considerably less deference and where, as here, that change is unacknowledged and unexplained, the agency action itself is arbitrary and capricious and not entitled to deference. That conclusion is especially strong here, where the change in position

[2] See, e.g., 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*"); Greater Boston Television v. FCC, 444 f.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute"); Penobscot Air Services, Ltd. v. F.A.A., 164 F.3d 713, n. 12 (1st Cir. 1999)("[T]he FAA is bound by its own interpretation of the Act, unless it clearly states that it is deviating from its prior interpretation and articulates a reasonable explanation for the change.")

was not articulated until 2025, but was applied *retroactively* to a deadline occurring in 2022.

d. The cases cited by the PUC and CMP do not support a a different standard of review.

The cases cited by the PUC and CMP briefs regarding the standard of review do not involve a comparable change in agency position and thus do not conflict with the foregoing authorities applying "considerably less deference" to changed positions and no deference to an unacknowledged or unexplained change in agency position.

The PUC's citation to Kolbe v. BAC Home Loans Servicing, 738 F.3d 432 (1st Cir. 2013) in fact support's Berwick's position, as the court there interpreted a government-drafted contract based upon the government's intent at an earlier point in time (i.e., "*when it drafted the regulation,*") rather than at the subsequent time of the dispute. Id. at 437. In this case the intention occurring closer to the time of drafting is the PUC's former position (i.e., that the deadline did not allow subsequent assessments) and not its contrary position that was not articulated until 2025. Further, consistent with the authorities cited above by Berwick, the Kolbe court stated that courts apply "deference proportional to the 'thoroughness evident in the [agency's] consideration'" and "its *consistency with earlier pronouncements*." Applying that standard to this case supports Berwick's position, as the Order

provided only one-and-a-half pages of discussion (i.e., showing an absence of "thoroughness of consideration") and took a position plainly inconsistent with its earlier agency practice and position. Id. at 453.

CMP's citation to Doe v. Board of Osteopathic Licensure, 242 A.3d 182 (Me. 2020), is also not on point, as the case does not involve a change in agency position and deals with the procedure and scope of regulatory jurisdiction rather than a contractual issue. Further, the Doe court held that the agency did not lose its regulatory jurisdiction because the statutory provision in question (that the agency "shall" act in a timely manner) was, unlike the Final Adjustment Clause, "directory, not mandatory," so that failure to comply did not wrest jurisdiction from the agency.[3]

Central Maine Power v. Public Utilities Comm'n., 90 A.3d 451, 456 (Me. 2014), is also not applicable because there "[t]he Commission changed the rule … well before the time period in dispute," whereas here the change in agency position was in the 2025 Order, years after the close of the adjustment period in 2022 and applied *retroactively* to that time four years earlier.

II. The PUC and CMP briefs interpret the contractual terms contrary to common and prevailing meanings.

CMP cites to Guilford Transp. Industries v. Public Utilities Comm'n, 746 A.2d 910 (Me. 2000). While that case does not address changes in agency positions,

[3] Notably, here CMP does not maintain that the Final Adjustment Clause is merely "directory;" if it were, CMP's attempt to retroactively declare itself in default would certainly be precluded.

it does explain that the Maine court "interpret[s] language in a contract by its 'generally prevailing meaning,'" with reference to standard dictionary definitions of the contested term. Id. at 914. That statement is consistent with Cassidy Holdings, cited by Berwick above, holding that "[w]ords and phrase shall be construed according to the common meaning of the language'" and "[w]e often look to dictionaries to identify that common meaning." Cassidy Holdings, 304 A.3d, at 262.

In this case all parties agree that the Final Adjustment Clause establishes a "deadline," but the dispute turns upon the meaning of that term. As stated at page 13 of Berwick's Initial Brief, the plain meaning of "deadline" as confirmed by referenced dictionaries, 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." [4] That meaning is plain and unambiguous and the PUC and CMP have not offered any conflicting definition. The court should thus issue an order in accordance with the unambiguous meaning of "deadline" as establishing the final point in time for the assessment of additional charges.

[4] Also see, e.g., Dictionary.com: *"The time by which something must be finished or submitted; the latest time for finishing something."* https://www.dictionary.com/browse/deadline
Collins Dictionary: *"The time by which something must be finished or submitted; the latest time for finishing something."* https://www.collinsdictionary.com/us/dictionary/english/deadline; Britannica Dictionary: *"A date or time when something must be finished: the last day, hour, or minute that something will be accepted"* https://www.britannica.com/dictionary/deadline.

III. The PUC and CMP briefs misstate the import of the leading public utility cases cited by Berwick regarding time limits.

The PUC and CMP briefs incorrectly dismiss as irrelevant the leading public utility case law cited at pages 20-25 of Berwick's Brief, which case law was afforded no consideration or even referenced in the Order. The relevant point of Boston Edison Co. v. F.E.R.C., 856 F.2d 361 (1st Cir. 1988), is that the court gave effect to a time limitation as an "integral part of the bargain" that "enhances economic equilibrium" and "promotes stability" and "serves the public interest," important points that should have been addressed below.

Both briefs also attempt to dismiss Oklahoma Gas & Elec. Co. v. FERC, et al, 11 F.4th 821 (D.C. Cir. 2021), but miss the essential point of the case: there the court disallowed the *otherwise permissible* assessment of additional interconnection costs *because* the utility failed to fulfill its earlier *obligation* to render its billing by the applicable deadline, thereby giving effect to *both* provisions. Notably, the Court held that allowing a utility to later benefit from its failure to take a required action by the stated time would allow an impermissible "end run" of timing provisions. Oklahoma, at 829. Here, as there, is no provision for a tolling of timing provisions following the utility's failure to take action when required, and to thereby make an "end run" around the timing clause (by later declaring itself in breach or otherwise). The PUC's failure to consider or even reference the cited cases in the Order to

consider or even reference the cited cases was unreasonable, arbitrary and capricious.

IV. The PUC and CMP briefs misapply the principle that all provisions should be given contractual effect.

The PUC and CMP on brief effectively argue that the deadline under the Final Adjustment Clause should have no contractual impact, a position contrary to the well-established principle of Maine law that contracts should be interpreted "to give force and effect" to all of their provisions and render none "meaningless." See, e.g., Berwick Brief at 18-20. The interpretation of the Agreement that comports with Maine law is that, while one provision of the Agreement 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.[5]

V. The PUC and CMP briefs do not justify undocumented costs or costs beyond the scope of the Agreement.

The appellees on brief offer no reasonable basis for costs unrelated to Berwick's project and the PUC at p. 36 would now require *the customer* to somehow provide evidence that unidentified costs are *not* eligible for assessment. A patently

[5] Notably, that is the rationale whereby the Oklahoma court held the timing clause of the agreement to preclude assessments otherwise allowable under other clauses, thereby upholding the "interpretation that ***gives effect to both tariff provisions***," and allowing the utility to collect charges allowed under one provision, "but **only by following the billing requirements** of [another provision.] Oklahoma at 828.

acknowledged at the hearing, neither Berwick nor the PUC had information necessary to understand costs or determine eligibility: "I think we need the backup behind invoices to understand this." Tr. at 41. Further, the PUC's admitted refusal to address an essential issue (i.e., "Berwick's argument regarding the appropriateness of assessing 'pooled costs'") was unexplained in the Order (Berwick at 27) and may not now be justified by new and after-the fact rationalizations. The assessment of undocumented and unrelated costs is both unreasonable and arbitrary.

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CERTIFICATE OF SERVICE

We hereby certify that on this date we have served two copies of the Reply 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.

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