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The Northeast Utilities System

<b>ORIGINAL</b>	
N.H.P.U.C. Case No.	DE 07-122
Exhibit No.	1
Witness	Panel
<b>DO NOT REMOVE FROM FILE</b>	

September 2, 2008

Debra A. Howland  
Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301-2429

Re: Petition for Clarification and Interpretation of Commission Orders Regarding  
Hemphill Power and Light Company  
Docket No. DE 07- 122

Dear Secretary Howland:

Enclosed please find original and six copies of a Motion to Approve Settlement. Following the Prehearing Conference in this proceeding, representatives of Public Service Company of New Hampshire (PSNH) and Hemphill Power and Light Company met to discuss settlement. The results of those discussions is the Settlement Agreement accompanying this Motion . PSNH also encloses the Prepared Direct Testimony of Carl N. Vogel which describes the Settlement Agreement.

No procedural schedule has been developed for examination of this Settlement Agreement. PSNH proposes to include the cost of the settlement with its 2009 Energy Service Costs; therefore, we respectfully requests that a hearing be scheduled before the end of the year. PSNH will ask the Staff of the Commission and the Office of Consumer Advocate to confer upon a schedule for discovery and any testimony responding to Mr. Vogel's testimony or commenting upon the Settlement Agreement. No other persons intervened in this proceeding.

Copies have been provided to the persons on the attached service list per Commission Rule Puc §203.11.

Very truly yours,

Gerald M. Eaton  
Senior Counsel

Enclosures  
cc: Service List

**Service List**  
**Docket DE 07-122**

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THE STATE OF NEW HAMPSHIRE  
before the  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire  
Petition for Clarification and Interpretation of Commission Orders Regarding  
Hemphill Power and Light Company

Docket No. DE 07-122

PUBLIC SERVICE COMPANY'S MOTION TO APPROVE SETTLEMENT AGREEMENT

NOW COMES Public Service Company of New Hampshire ("PSNH") and respectfully moves for approval by the New Hampshire Public Utilities Commission ("Commission") of a Settlement Agreement between Hemphill Power and Light Company ("Hemphill") and PSNH (collectively "the Parties"). If the Settlement Agreement is accepted by the Commission, it will resolve all issues in this proceeding and the concurrent proceeding in Hillsborough County Superior Court. In support of its Motion, PSNH says the following:

A. On April 2, 1985, the New Hampshire Public Utilities Commission ("Commission") entered Order *Nisi* No. 17,524 (the "Rate Order") approving Hemphill's long-term rate filing as amended. The Rate Order entitled Hemphill to sell and required PSNH to buy Hemphill's on-peak and off-peak energy and its capacity for a term of twenty years at rates prescribed for each year.

B. A dispute arose between Hemphill and PSNH over whether the Rate Order expired on October 26, 2006, or October 26, 2007. Hemphill's position with respect to damages is that October 27, 2006, through October 26, 2007 was the twentieth year of Hemphill's rate order term. Hemphill asserts that it was entitled to be paid at the 2006 rate order rates for that year. PSNH maintains that Hemphill did not come online until October 26, 1987, and PSNH was required to begin paying the 1988 rates because the 1988 rate year had begun on September 1, 1987. PSNH bases its position on the Generic Order No. 17,104 in *Re Small Energy Producers and Cogenerators*, Docket DE 83-62 (67 NH PUC Rep. 352, 365) (1984). Therefore, PSNH maintains that even if the rate order did not expire in Oct 2006, there was no rate to pay to Hemphill in that twentieth year. Hemphill maintains that there is no Commission order saying that the result of a delayed online date

is a forfeiture of a year of rates and that PSNH did not receive Commission approval to pay 1988 rates for Hemphill's first year of production. PSNH asserts that it implemented rate changes in a fashion that was consistent with the above referenced Generic Order and that Hemphill always approved the billing invoices that used these rate changes. PSNH claims Hemphill never objected to the rates applied by PSNH until it learned that PSNH intended to terminate rate order payments in October 2006. Hemphill maintains that on at least two occasions PSNH informed the Commission that Hemphill's rate order expired in October 2007, not October 2006. These representations by PSNH were made as part of applications by PSNH in 1985 for approval of settlement agreement to buydown of Hemphill's rate order.

C. On April 30, 2007, Hemphill instituted an action against PSNH in the Hillsborough Superior Court, Northern District (the "Superior Court"), entitled Hemphill Power & Light Company v. Public Service Company of New Hampshire, Docket No. 07-C-294 (the "Litigation"), seeking damages and declaratory and injunctive relief against PSNH for terminating payments to Hemphill under the Rate Order after nineteen years of generation.

D. On or about June 29, 2007, PSNH filed with the Superior Court an answer to the Hemphill action including a counterclaim in the Litigation asserting a right to an offset against any recovery eventually awarded to Hemphill (the "Counterclaim"). Hemphill disputes PSNH's calculation of damages from the Counterclaim. First, Hemphill maintains that under RSA 508:4, PSNH can recover only the present value of payments based on premature rate changes made three years or less before PSNH filed its counterclaim in superior court in June 2007. PSNH maintains that it had no knowledge of any dispute over the rate order payments made by PSNH until Hemphill protested PSNH's cessation of payments under the rate order; therefore, no counterclaim arose until a claim had been made by Hemphill. Second, Hemphill maintains that the correct discount rate to apply to any such recovery is that prescribed by RSA 336:1, II. To compute the Counterclaim, PSNH used the discount rate of 13.43% that was used to compute the levelized rates.

E. On or about November 9, 2007, PSNH filed a petition with the Commission seeking a determination of the rights and obligations of Hemphill and PSNH with respect

to Hemphill's claim to a twentieth year of rate order rates for its generation. The Commission opened this proceeding and issued an Order of Notice. A procedural hearing was held on January 7, 2008 followed by a technical session. . During the procedural hearing, Counsel for Hemphill preserved its right to question the Commission's jurisdiction. If the Commission decided to assert jurisdiction, Hemphill maintained it would appeal that decision to the federal courts. *See* attached Report of Hearing Examiner, F. Anne Ross, Esq.(January 10, 2008). The Parties, the Office of Consumer Advocate and Staff agreed to a stay of these proceedings and a stay of the superior court proceedings while Hemphill and PSNH explored settlement. *See* attached Report of the Technical Session, Donald M. Kreis (January 7, 2008).

F. The Parties have come to an agreement to settle all the outstanding issues including the Counterclaim and the Litigation. Copies of the Settlement Agreement are attached along with the pre-filed testimony of Carl N. Vogel. The Parties have agreed that upon approval of the Settlement Agreement and the exhaustion of any appeal rights from that approval, PSNH will pay Hemphill three million five hundred thousand dollars (\$3,500,000). This payment will settle and extinguish all claims under the Litigation by Hemphill and the Counterclaim by PSNH.

G. Hemphill's litigation position with respect to damages is that October 27, 2006, through October 26, 2007, was the twentieth year of Hemphill's rate order term. Hemphill maintains that it was entitled to be paid at the 2006 rate order rates for that year. Given Hemphill's production for that year, the total amount that would be due Hemphill is \$7,002,114. This amount represents the total revenue Hemphill claims it should have been paid (\$14,847,304) less what it was paid by PSNH at the short-term rate (\$7,845,190).

H. PSNH's litigation position is that Hemphill did not meet the online date in its petition and therefore PSNH was required by Commission rules to pay the second year rates during the Projects first year of operation. In addition, PSNH maintains that even if the rate order expired in Oct 2007, there were no rates to pay to Hemphill for a twentieth year. In its counterclaim at the superior court, PSNH argued that if Hemphill prevailed on the issue of what rates PSNH should have initially applied to the first year of deliveries,

Hemphill had been enriched by receiving the scheduled increase in the schedule of rates one year earlier than it was entitled over the course of the rate order rates. The Parties, in order to avoid the risks of prolonged litigation have agreed to a settlement amount of \$3.5 million, which is \$3,502,114 less (approximately 50%) of the net recovery Hemphill claims it should have been paid.

I. Because the settlement is conditioned on Commission approval, neither party can make concessions as to the strength of the other's arguments. On the other hand, both parties have made significant concessions in their positions on damages in arriving at a settlement, and the Commission can fairly infer the parties' risk calculus from the amount of the settlement. The settlement avoids significant litigation costs in the Commission, the superior court, and the federal district court, as well as any appeals to the U.S. Court of Appeals for the First Circuit or the N. H. Supreme Court. If this dispute were to be tried in the superior court or federal district court, it is likely that the Parties would be encouraged to reach a settlement in those proceedings as well.

J. "Informal settlement of matters by nonadjudicative processes is encouraged". RSA 541-A:38. There is no way to predict how a litigated outcome in this or another forum would turn out. The results reached in a different forum would likely come before the Commission for review and approval in one way or another.

WHEREFORE, PSNH respectfully requests that the Commission

- I. Approve the Settlement Agreement without material conditions altering the economic and regulatory expectations of either of the Parties;
- II. Allow PSNH to recover the payment under the Settlement Agreement to Hemphill through rates in a just and reasonable manner; and
- III. Order such further relief as may be just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

September 2, 2008  
Date

By: Gerald M. Eaton  
Gerald M. Eaton  
Senior Counsel  
Energy Park, 780 North Commercial Street  
Post Office Box 330  
Manchester, New Hampshire 03105-0330  
(603) 634-2961

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Motion to Approve Settlement Agreement to be served pursuant to N.H. Code Admin. Rule Puc §203.11 to the persons on the attached Service List..

September 2, 2008  
Date

Gerald M. Eaton  
Gerald M. Eaton

**STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
INTER-DEPARTMENT MEMORANDUM**

Date: January 10, 2008

**TO:** Commissioners  
**FROM:** F. Anne Ross, Hearing Examiner  
**RE:** DE 07-122 Public Service Company of New Hampshire  
Petition re Hemphill Power and Light Co.

**HEARING EXAMINER'S REPORT**

At your request, I presided over the January 7, 2008 prehearing conference in the above referenced case. On December 20, 2007, Commissioner Getz informed the parties by letter that he would not participate in this docket stating that his decision was consistent with his earlier decisions in Dockets DE 05-150, Alden T. Greenwood and DE 05-153, Public Service Company of New Hampshire.

On January 24, 1985, Hemphill Power & Light Company (Hemphill) requested Commission approval of a twenty-year rate order. On April 2, 1985, the Commission approved Hemphill's long term rates by Order Nisi. *Hemphill Power and Light Company*, 70 NH PUC 142 (1985) (Order No. 17,524) (Rate Order). Hemphill operates a 12,500 kilowatt wood-fired generation facility pursuant to 16 U.S.C. § 824a-3, the Public Utility Regulatory Policies Act (known as PURPA) and New Hampshire's state counterpart, RSA Ch.362-A, the Limited Electric Policy Act (known as LEEPA).

Pursuant to the Rate Order PSNH has been purchasing power produced by Hemphill since the facility began operating on October 27, 1987. On October 26, 2006, PSNH made its final payment to Hemphill under the Rate Order and since that date has been paying the short term rate for Hemphill's power. PSNH argues that the Rate Order ends on October 26, 2006, because that is the last year shown on the rate schedules attached to the Rate Order. Hemphill, on the other hand, claims that the Rate Order ends on October 26, 2007, twenty years after the facility became operational. This dispute concerns the termination date, as well as the appropriate rates to be paid by PSNH, if the rate order continues past October 26, 2006.

**Hillsborough County Superior Court Action Docket 07-C-294**

Hemphill filed a Writ of Summons on May 14, 2007, in Hillsborough County Superior Court, Northern District (Docket 07-C-294) (Superior Court Case) seeking both damages and declaratory relief. PSNH filed a Motion to stay the Superior Court Case on November 9, 2007. On November 20, 2007, Hemphill filed an Objection to PSNH's Motion to Stay and a Cross Motion to Enjoin PSNH's pursuit of Commission Docket DE 07-122. On November 29, 2007, the Superior Court set a hearing on pending motions for January 11, 2008.

## **Commission Docket DE 07-122**

On November 9, 2007, PSNH filed a Petition for Clarification and Interpretation of Commission Orders Regarding Hemphill Power & Light docketed as DE 07-122. The Office of Consumer Advocate filed a letter on November 27, 2007, indicating its intent to participate in Docket DE 07-122. The Commission issued an Order of Notice on November 29, 2007, setting a prehearing conference for December 27, 2007. On December 14, 2007, Hemphill filed a Motion to Intervene and a Motion to Continue the prehearing conference. The Commission granted Hemphill's continuance and issued a supplemental Order of Notice, setting a prehearing conference for January 7, 2008.

On December 27, 2007, Hemphill filed a motion to stay the proceedings before the Commission. Hemphill's motion to stay was not assented to and argues that Docket DE 07-122 should be held in abeyance pending a decision by the Superior Court on Hemphill's motion to enjoin PSNH from proceeding before the Commission.

The prehearing conference was conducted as provided in the Order of Notice, but was limited to: 1) petitions to intervene and objections thereto; and 2) arguments in support and in opposition to Hemphill's motion to stay. In addition, I confirmed that the prehearing conference notice had been published as required and I discussed generally the parties' and Staff's view of the proper venue for this dispute.

### **Appearances**

Gerald M. Eaton for PSNH  
Bryan K. Gould for Hemphill  
Meredith A. Hatfield for Office of Consumer Advocate  
Donald M. Kries for Commission Staff

### **Intervention Requests**

Hemphill is a signatory to the Rate Order and is directly affected by the outcome of this docket. There were no objections to Hemphill's intervention,

### **Motion to Stay**

In its motion to stay, Hemphill argued that only the Superior Court has jurisdiction to decide all of the issues raised in the Superior Court writ. Specifically, the writ includes a request for jury trial, and claims for damages and declaratory relief. Also, in the Superior Court Case PSNH has raised a defense of unjust enrichment. Hemphill claimed in its motion, and again during the prehearing conference, that the Commission should stay this proceeding to promote judicial efficiency and as a matter of comity toward the Superior Court.

At the prehearing conference, PSNH opposed the stay and argued that the Commission has primary jurisdiction to determine the meaning of its own Rate Order. PSNH disputed Hemphill's

right to a jury trial and explained that there is no right to jury trial in New Hampshire when there is a statutory scheme to provide for adjudicating disputes outside of the courts. Further, PSNH asserted that Hemphill should have exhausted its administrative remedies before the Commission prior to filing suit in Superior Court. PSNH claimed that the Commission has jurisdiction to order PSNH to pay Hemphill appropriate rates under the Rate Order and can therefore grant the relief sought by Hemphill in its Superior Court Case.

At the prehearing conference, the Office of Consumer Advocate opposed the motion to stay and supported PSNH's petition for relief in this docket.

At the prehearing conference, Staff opposed Hemphill's motion to stay and also raised the question of whether the Commission has jurisdiction to interpret the Rate Order. Staff argued that by seeking a determination from this Commission the parties have arguably waived challenges to the Commission's jurisdiction. Staff also pointed out that the Superior Court, in two other similar cases, has deferred to the Commission for an interpretation of a long term rate order. Finally, Staff asserted that the disputes in this docket are amenable to resolution by settlement and offered to facilitate settlement discussions among the parties.

Hemphill responded to Staff's discussion of two prior Superior Court decisions by distinguishing both based upon: 1) Hemphill's request for jury trial; and 2) the Court's failure in the prior cases to consider arguments that only the Court and not the Commission could provide all of the forms of relief sought.

### **Commission Jurisdiction**

I asked the parties to comment on the question of the Commission's jurisdiction. PSNH stated that jurisdiction to decide the issues in its petition belongs to the Commission. Staff stated that the assumption has always been that the Commission has jurisdiction to interpret the terms of long term rate orders. Staff noted, however, that the question of whether the Commission is preempted by federal law from interpreting long term rate orders is currently unresolved.

Hemphill stated that it had not waived any arguments that the Commission lacks jurisdiction, but that it had not asserted such arguments yet because it believed those arguments are premature. Hemphill indicated that if the Commission decides to go forward with this docket and asserts jurisdiction over the matter, then Hemphill would appeal that decision to the federal courts. Hemphill stated that the question of the Commission's jurisdiction to interpret Hemphill's Rate Order should be briefed before the Commission makes any decision on its jurisdiction.

### **Technical Session**

As reported by Staff, by letter of January 7, 2008, the parties met in a technical session following the prehearing conference and explored the potential for a settlement. Staff reiterated that Hemphill intends to file suit in federal court to contest the Commission's jurisdiction if this docket is not stayed. Staff expressed the hope that before January 11, 2008, the parties would ask both the Commission and the Superior Court to stay their respective proceedings in order to allow for ongoing settlement negotiations.

**PSNH Letter regarding Settlement**

On January 9, 2008, prior to my completion of this report, PSNH filed a letter requesting that the Commission hold this docket in abeyance pending further settlement discussions among the parties. PSNH also indicated that it would be joining Hemphill in seeking a stay of the Superior Court proceeding in order to allow settlement discussions to proceed.

**Recommendations**

I recommend that Hemphill be granted intervention without condition.

In view of PSNH's and Hemphill's request to stay this docket and pursue settlement discussions, I recommend that the Commission suspend further proceedings pending settlement discussions and memorialize that decision by issuing a secretarial letter.

As to questions concerning the Commission's ability to hear this matter, I recommend that the Commission's secretarial letter include a statement that the Commission will defer addressing federal preemption issues until the parties reach a settlement, or alternatively, notify the Commission that further litigation will be necessary.

By  \_\_\_\_\_  
F. Anne Ross, Hearing Examiner

THE STATE OF NEW HAMPSHIRE



**PUBLIC UTILITIES COMMISSION**

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January 7, 2008

Ms. Debra A. Howland  
Executive Director and Secretary  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301

Re: Docket No. DE 07-122  
Public Service Company of New Hampshire  
Petition re Hemphill Power and Light Co.

Dear Ms. Howland:

Please treat this letter as Staff's report of the technical session that followed today's prehearing conference in the above-referenced docket.

In addition to Staff, participating in the technical session were representatives of Public Service Company of New Hampshire (PSNH), Hemphill Power and Light Co. (Hemphill) and the Office of Consumer Advocate (OCA). The focus of the discussion was the potential for seeking a negotiated resolution of the dispute while motions to stay are pending at the Commission and in Superior Court, where parallel civil litigation instituted by Hemphill is pending and where at least some discovery has already been conducted.

The discussion was inconclusive because counsel to PSNH indicated that he would have to confer with officials of his client before stating whether PSNH would be willing to participate in settlement discussions at this time. The PSNH attorney agreed to provide an answer to that query to the other participants by Wednesday. He also agreed to provide Staff and OCA with copies of the discovery materials furnished by Hemphill to PSNH in the civil case. Hemphill did not object to PSNH taking that step.

As noted at the prehearing conference, the Superior Court has scheduled a hearing for Friday, January 11, 2008 in connection with PSNH's motion to stay the civil case and Hemphill's countervailing motion that the Court enjoin PSNH from proceeding before the Commission. As also noted at the prehearing conference, should the proceedings

Ms. Debra A. Howland  
Docket No. DE 07-122  
January 7, 2008  
Page 2

here not be stayed, Hemphill intends to file suit in federal court to contest the Commission's jurisdiction on the ground of federal preemption.

In Staff's judgment, such legal jousting, potentially before three different tribunals, seems a poor use of resources for all concerned. It is therefore Staff's hope that we, OCA, PSNH and Hemphill will, prior to Friday, be in a position to ask both the Superior Court and the Commission to hold this dispute in abeyance pending settlement discussions. In Staff's opinion, there is reason to believe settlement can be achieved.

I am available at 603.271.6006 if there are any questions about the foregoing.

Sincerely,

A handwritten signature in cursive script, appearing to read "Donald M. Kreis".

Donald M. Kreis  
General Counsel

Cc: Service List