

STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITY COMMISSION

Briar Hydro Associates' Petition for Declaratory Ruling

Docket No. DE 07-045

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO
BRIAR HYDRO'S MOTION FOR RECONSIDERATION AND REHEARING**

Public Service Company of New Hampshire ("PSNH") hereby objects to the Motion for Reconsideration and Rehearing ("Motion") filed by Briar Hydro Associates ("Briar") on December 21, 2007. Briar has not stated good reasons for granting a rehearing or advanced any new grounds or evidence which could not have been presented earlier. In support of its motion, PSNH says the following:

I. Standards for Rehearing

The standards for granting rehearing of an administrative order have been clearly delineated by this Commission and the New Hampshire Supreme Court:

New Hampshire RSA 541:3 provides that the Commission may grant rehearing when in the Commission's opinion "good reason for the rehearing is stated in the motion." RSA 541:4 provides that a motion for rehearing must set forth grounds by which the decision is either unlawful or unreasonable. Motions for rehearing direct attention to matters "overlooked or mistakenly conceived" in the original decision and require an examination of **the record already before the fact finder**. *Dumais v. State Personnel Comm'n*, 118 NH 309, 312 (1975). . . . Good reason is also shown when a party demonstrates that **new evidence exists that was unavailable at the original hearing**. *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), *cited in*, *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC 334 (2002). (Emphasis added.)

The Commission need not grant a request for rehearing "so that a party has a **second chance to present evidence that it could have presented earlier**." *LOV Water Company*, 85 NH PUC 523, 524 (2000). Further, if the arguments raised on rehearing had been fully considered during the hearings, the Commission need not grant rehearing. *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC

334, 339 (2002); *Re Investigation as to Whether Certain Calls are Local*, Docket Nos. DT 00-223 and DT 00-054, Order No. 24,466, 90 NH PUC 195, 197 (2005). (Emphasis added.)

II. Conduct of the Initial Proceeding and the Need for a New Evidentiary Hearing.

Upon Briar's proposition, this proceeding was conducted based only on its petition, the documents exchanged and the briefs filed by the parties. In its March 28, 2007 Petition for Declaratory Ruling, Briar expressly stated:

Briar believes this issue can be decided without extensive evidentiary hearings, on the basis of written pleadings and exhibits, including notably the attached Contract, and the parties' written explanations of their positions on the issue of contract interpretation.

Petition, para. 7, pg. 3.

Prior to the filing of memoranda, PSNH and Briar had exchanged documents which had remained in their files concerning the negotiations surrounding the formation of the contract. The parties used these documents in their briefs. Briar was allowed to file the final brief in reply to PSNH's brief. At the suggestion of Attorney Moffett, the proceeding did not include extensive discovery or evidentiary hearings:

We really feel this is an issue of contract interpretation. And, unless there are discovery issues that turn up later in the case, we are not aware at this point of any factual issues that would require oral testimony before the Commission. So, we would be prepared to submit this on the paper record, unless, as I said, some party -- some party raises an issue that requires oral testimony in the course of possible discovery. Transcript, Prehearing Conference, at 11 (May 23, 2007).

"No party has requested a hearing and accordingly we make our decision based on the petition and subsequent pleadings." Order 28,204, slip op. at 2. The Commission should not now conduct an evidentiary hearing after deciding this issue and issuing an Order, after Briar has waived such a hearing, and after Briar itself noted that a hearing was unnecessary.

As noted in the standards for rehearing set forth at the start of this Objection, the Commission should not re-open this matter to take evidence which could have been presented before it rendered its decision. No evidence is needed, nor was any evidence previously unavailable; therefore, the Motion should be decided based upon the record already before the Commission. *Dumais v. State Personnel Commission, supra*.

III. The Decision is Fully Supported by an Adequate Record.

The Commission found that the meaning of the terms “entire output” and “energy” could not be resolved within the language of the agreement alone; therefore, the Commission looked to the documents associated with the agreement and the circumstances surrounding the formation of the contract. Order No. 24,804 at 12 – 13. This type of extrinsic evidence is more reliable than hearsay testimony concerning negotiations taking place in 1981-1982 because the documents did not change over time. The Commission would be “justified in examining the parties’ past practices and other extrinsic evidence in discerning the intent of the parties. *Wheeler v. Nurse*, 20 N.H. 220, 221 (1849)” *Appeal of New Hampshire Department of Safety*, 155 N.H. 201, 208 (April 17, 2007).

In its Memorandum filed on June 15, 2007, PSNH argued that the conduct of the parties since 1983 is extrinsic evidence on which the Commission could rely that the parties always conducted themselves with the understanding that PSNH was entitled to the value of the capacity. In its Reply Memorandum of June 29, 2007, Briar suggests that it was shocked to learn that PSNH had been taking credit for the Penacook Lower Falls capacity since the inception of the agreement. As evidenced by the letters attached to Briar’s June 29, 2007, Reply Memorandum, Mr. Mack repeatedly tried to have PSNH include payments for the capacity from Penacook Lower Falls in the agreement. Reply Memorandum, Attachments 4 and 5. Despite their belief that capacity had value at the inception of the contract, Briar now asks the Commission to believe that Briar’s predecessor, New Hampshire Hydro Associates (“NHHA”) and Briar had no knowledge of how this valuable

capacity was being treated from 1984 through 2006. This position is unsupportable. All of PSNH's capacity filings were public records. Mr. Norman's organization and his many businesses are major players in the small power producer market. In the exercise of due diligence, Briar knew or should have known that PSNH claimed the capacity from Penacook Lower Falls. PSNH had no obligation to inform NHHA or Briar that it was reporting capacity values from Penacook Lower Falls to NEPOOL and later ISO-New England because PSNH was entitled to make that claim. As the Commission has found in Order No. 24,804, NHHA sold the entire output of Penacook Lower Falls to PSNH, including the capacity.

IV. Jurisdiction and the Greenwood Decision.

Briar raises for the first time in its Motion the issue of the Commission's jurisdiction to decide this dispute. The Commission clearly has jurisdiction to decide this matter and rehearing is not necessary on that ground.

The Motion chides the Commission for not first addressing the issue of jurisdiction (Motion at 3); however, it would be difficult for the Commission to know if jurisdiction was an issue unless and until it had been raised by one or more parties. Briar is the party that chose the Commission has the proper venue to hear this matter. By its action of filing its petition for declaratory ruling pursuant to N.H. Code Admin. Rule § 207.01(a), it has already conceded that the Commission has jurisdiction to act on its filing:

Puc 207.01 Declaratory Rulings.

(a) A person seeking a declaratory ruling on any matter **within the jurisdiction of the commission** shall request such ruling by submitting a petition pursuant to Puc 203. (Emphasis added.)

First and foremost, this matter involves the meaning and interpretation of a contract entered into under the auspices of the Commission pursuant to the Limited Electrical Energy Producers Act ("LEEPA") and the Public Utility Regulatory Policy Act of 1978 ("PURPA"). As Penacook Lower Falls is a Limited Electrical Energy Producer ("LEEP") as defined by RSA Chapter 362-A, the

Commission has jurisdiction to resolve this dispute.¹ Under RSA 362-A:5, “Any dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication.” Briar referred this dispute to the Commission.

For more than twenty years PSNH included the capacity in its capability responsibility reported to NEPOOL and ISO New England, and Briar ignored it. The conduct of the parties to the contract is strong evidence as to the question of to whom the capacity belonged. *Prime Financial Group, Inc. v. Masters*, 141 N.H. 33, 37-38 (1996). Under both state and federal law, Briar could not have sold energy to PSNH and capacity to some other entity without losing its status as a LEEP or Qualifying Facility under PURPA. Under each legislative scheme, Briar was required to sell its entire output to a purchaser such as PSNH.²

Briar now asks this Commission to reconfigure the original contract, executed pursuant to PURPA and LEEPA, an action which is clearly barred by the *Freehold Cogeneration* case.³ “*Freehold Cogeneration* stands simply for the proposition that a state regulatory commission may not revisit a previous long-term rate order for the purpose of revising its terms in light of changed circumstances.” *Re: Public Service Company of New Hampshire, Petition for Clarification and Interpretation of Commission Orders*, Docket No. DE 05-153, Order No. 24,679 (October 16, 2006). “The structure of the New England power market has changed with the introduction of the FCM.” Briar Reply Memorandum, June 29, 2007 at 17. Capacity now is much more valuable in the Forward Capacity Market. This change in circumstances has prompted Briar to ask this Commission to ignore the regulatory context from which the contract arose and the course of dealing of the parties. As noted by the Commission in Order No. 24,679, *Freehold* prevents the Commission from revisiting this matter as a result of these changed circumstances.

¹ Notably, as a Limited Electrical Energy Producer, Briar is a public utility under RSA 362:2 subject to the Commission’s jurisdiction. *Bridgewater Steam Power Co.*, 71 NH PUC 20 (1986).

² See discussion in PSNH’s Memorandum in Opposition to Briar Hydro Associates’ Petition for Declaratory Ruling Re: 1982 Power Sales Agreement at 3-4 (June 15, 2007).

³ *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of New Jersey*, 44 F.3d 1178 (3d Cir. 1995).

Briar argues that as a general rule, the question of contract interpretation is left to the courts. PSNH has argued three times in the superior court, twice successfully, that the Commission has primary jurisdiction to resolve disputes between PSNH and small power producers. New Hampshire has long recognized the doctrine of “primary jurisdiction” for its encouragement of the exercise of agency expertise; the preservation of agency autonomy; and judicial efficiency. *N.H. Div. Of Human Services v. Allard*, 138 N.H. 604, 606-07 (1994); *Metzger v. Brentwood*, 115 N.H. 287, 290 (1975); “a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it.” *Appeal of Osram Sylvania, Inc.*, 142 NH 612, 616, 706 A.2d 172 (1998).

Briar goes on to say that the Commission's adjudicative power is limited to acting as arbiter of the interests of public utilities and utility consumers, relying solely on RSA 363-17-a. Motion at 5. The Commission's powers are far broader than merely acting as a referee.

The establishment of the Public Utilities Commission was for the purpose of providing comprehensive provisions for the establishment and control of public utilities in the state. "It created the public service commission [now public utilities commission] as a state tribunal, imposing upon it important judicial duties and endowing it with large administrative and supervisory powers." *Parker-Young Co. v. State*, 83 N.H. 551, 556; *Lorenz v. Stearns*, 85 N.H. 494; *State v. New Hampshire Gas & Electric Co.*, 86 N.H. 16. *Petition of Boston & Maine Corp.*, 109 N.H. 324, 326 (1969).⁴

⁴ The growth of administrative boards with dual governmental functions has long been accepted as not inconsistent with the provisions of our Constitution requiring separation of the legislative, executive and judicial powers. N.H. Constitution, Pt. I, Art. 37th; *Boody v. Watson*, 64 N.H. 162; *American Motorists Ins. Co. v. Garage*, 86 N.H. 362; *Welch Co. v. State*, 89 N.H. 428, 437. Certain administrative duties have been exercised by the judiciary from earliest times and are not now open to question. *Attorney General v. Morin*, 93 N.H. 40; *Opinion of the Justices*, 102 N.H. 195. However, the courts may not be required to undertake administrative duties of an extensive nature belonging to the executive branch of the government (*Opinion of the Justices*, 85 N.H. 562); nor may an administrative board be charged with determining disputes between private individuals unrelated to its regulatory functions. *Opinion of the Justices*, 87 N.H. 492. See also, *In re Land Acquisition, LLC*, 145 N.H. 492 (2000).

Any reliance on the *Alden Greenwood v. NH PUC* decision is misplaced given the facts of this case.⁵ In *Greenwood* the Commission reduced the term of an existing rate order by ten years. The Commission took that action concerning Greenwood three years after having originally approved a thirty year rate order. *Greenwood*, slip op. at 3. In this proceeding, the Commission was asked by Briar to interpret—not change--the terms of a negotiated contract. The Commission is not conducting utility type ratemaking. *Greenwood*, slip op. at 6. PSNH is not asking the Commission to rescind or amend a rate order or contract negotiated under the provisions of LEEPA or PURPA based upon changed circumstances. Briar is the petitioner in this case, and is actually asking the Commission to reverse twenty plus years of PSNH's claimed capacity and rule that Briar is entitled to the capacity because the FCM has changed the circumstances. *Freehold* prohibits such an action by this Commission. The parties to the contract, NHHA/Briar and PSNH, disagree on what the term "entire output" means. An interpretation of that term adverse to the position of Briar does not constitute the Commission amending or rescinding a PURPA contract. The Commission merely acted on Briar's petition for declaratory ruling and disagreed with Briar's interpretation.

V. Conclusion.

Briar conceded the jurisdiction of this Commission when it filed its Petition for Declaratory Ruling. Now, after receiving an unfavorable decision, it challenges the Commission's jurisdiction to render the declaratory ruling that it sought. There is no jurisdictional infirmity, and the Commission's Order should stand.

Furthermore, Briar is not entitled to a rehearing in order to present evidence which could have been presented earlier. Briar itself conceded that "this issue can

Implicit in the dual character of administrative boards is that some of their acts are within the legislative or administrative area and others have the effect of a judgment. "The judicial quality inherent in a finding or verdict by such a body does not necessarily signify a justiciable inquiry."

⁵ *Alden T. Greenwood v. New Hampshire Public Utilities Commission*, Civil No. 06-cv-270-SM Opinion No. 2007 DNH 088 (July 19, 2007).

be decided without extensive evidentiary hearings”; it would be inefficient and unjust to now grant Briar a “do-over” or a “Mulligan”.⁶

Respectfully submitted,

Public Service Company of New Hampshire

December 31, 2007
Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Objection to Briar Hydro Associates’ Motion for Reconsideration and Rehearing to be served on the persons listed on the Service List pursuant to Puc §203.11(a).

December 31, 2007
Date

Gerald M. Eaton (CMB)
Gerald M. Eaton

⁶ In golf, a Mulligan is a shot not counted against the score, permitted in unofficial play to a player whose previous shot was poor.