



THE STATE OF NEW HAMPSHIRE
SUPREME COURT

**In Case No. 2009-0359, Appeal of Briar Hydro Associates,
the court on June 25, 2010, issued the following order:**

Having considered the briefs and the record submitted on appeal, we conclude that a formal written opinion is unnecessary for the disposition of this appeal. The petitioner, Briar Hydro Associates (Briar Hydro), appeals orders of the New Hampshire Public Utilities Commission (PUC) interpreting a 1982 contract between Public Service Company of New Hampshire (PSNH) and Briar Hydro's predecessor, New Hampshire Hydro Associates (New Hampshire Hydro). We affirm.

The record evidences the following facts. The contract at issue concerns the Penacook Lower Falls Hydroelectric Project, a hydroelectric generation station on the Contoocook River. In 1982, New Hampshire Hydro and PSNH entered into an agreement under which New Hampshire Hydro agreed to sell, and PSNH agreed to purchase, "all of the electrical energy produced" by the Penacook facility. Although the Penacook facility is in the service territory of Unitil Energy Systems, under the agreement, New Hampshire Hydro agreed to "wheel" the power from the facility to PSNH. The agreement was for a term of thirty years. Briar Hydro bought the facility in 2002 and assumed New Hampshire Hydro's obligations under the agreement.

The issue in this case is whether the "electrical energy produced" by the Penacook facility and purchased by PSNH includes that facility's "capacity." As of September 1981, this facility had an estimated "dependable capacity" of 1.57 megawatts as compared to its "nominal generating capacity" of 4.1 megawatts. We understand the term "dependable capacity" to mean, "[l]iterally, capacity which can be depended upon." EnergyVortex.com, Energy Dictionary, http://www.energyvortex.com/energydictionary/dependable_capacity.html. "The dependable capacity of a generating facility or transmission system is a fluctuating value that depends upon the available energy, the demand for that energy, the capability of the system to deliver that energy at a given moment, and the facilities available to handle increased capacity should the need arise." *Id.*; see A. Chambers & S. Kerr, *Power Industry Dictionary* 78 (1996) (defining dependable capacity as "[t]he load-carrying ability of a station or system under adverse conditions for a specified time"). The parties have not defined the term "nominal generating capacity," and we have been unable to locate a general definition for the term. Accordingly, we assume, without deciding, that the capacity to which the parties refer is dependable capacity.

The parties' dispute arises because of a new "forward capacity market" that recently has been developed in New England. "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." NRG Power Marketing v. Maine Public Utilities, 130 S. Ct. 693, 697 (2010). In the forward capacity market, "annual auctions [will] set capacity prices; auctions [will] be conducted three years in advance of the time when the capacity [will] be needed." *Id.* Each energy provider must purchase enough capacity to meet its share of the "installed capacity requirement," which is "the minimum level of capacity needed to maintain reliability on the grid." *Id.* (quotation omitted). "For the three-year gap between the first auction and the time when the capacity procured in that auction would be provided," capacity-supplying generators are entitled to a "series of fixed, transition-period payments." *Id.*

The parties dispute whether Briar Hydro or PSNH is entitled to these and other forward capacity market payments. If, under the 1982 agreement, PSNH purchased the Penacook facility's dependable capacity, then PSNH argues that it is entitled to the forward capacity market payments. If, on the other hand, PSNH did not purchase the Penacook facility's dependable capacity, then Briar Hydro contends that it is entitled to the forward capacity market payments.

In March 2007, Briar Hydro petitioned the PUC for a declaratory ruling that the purchase did not include the Penacook facility's dependable capacity, and, therefore, Briar Hydro was entitled to the forward capacity market payments. After a hearing, the PUC ruled that "the contract at issue . . . had the effect of assigning to PSNH not simply the actual energy generated by the Penacook facility but also the capacity associated with the facility." Thereafter, Briar Hydro moved for reconsideration and rehearing, which the PUC denied in April 2009. This appeal followed.

A party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. RSA 541:13 (2007). Findings of fact by the PUC are presumed *prima facie* lawful and reasonable. *Id.* The appealing party may overcome this presumption only by showing that there was no evidence from which the PUC could conclude as it did. Appeal of Pennichuck Water Works, 160 N.H. ___, ___ (decided March 25, 2010).

Because the proper interpretation of a contract is ultimately a question of law for this court, we review the PUC's interpretation of the contract *de novo*. See Appeal of State of N.H., 147 N.H. 426, 429 (2002); cf. Appeal of Verizon New England, 158 N.H. 693, 695 (2009) (applying *de novo* review to PUC's tariff interpretation). When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole. Appeal of State of N.H., 147 N.H. at 429. Absent ambiguity, the

parties' intent will be determined from the plain meaning of the language used. Id. Only when the parties to a contract reasonably disagree as to its meaning will the contract's language be deemed ambiguous. Id. Whether a provision or clause in an agreement is ambiguous is a question of law for this court to decide. See Appeal of N.H. Dep't of Safety, 155 N.H. 201, 203 (2007).

The pertinent provisions of the agreement are as follows:

WHEREAS, [New Hampshire Hydro] is engaged in the business of generation of electrical energy,

WHEREAS, [New Hampshire Hydro] desires to sell its entire generation output to [PSNH],

WHEREAS, [PSNH] is engaged in the business of the generation, transmission, and distribution of electrical energy,

WHEREAS, [PSNH] has determined it would be beneficial to secure a reliable supply of electrical energy for a period of not less than thirty years,

WHEREAS, [New Hampshire Hydro] is willing and able to sell its entire output to [PSNH] for thirty years;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, [New Hampshire Hydro] and [PSNH] hereby agree as follows:

Article 1. Basic Agreement.

Subject to the terms, provisions, and conditions of this Contract, [New Hampshire Hydro] agrees to furnish and sell and [PSNH] agrees to purchase and receive all of the electrical energy produced by the Penacook . . . facility

Article 2. Availability.

During the term thereof, [New Hampshire Hydro] shall endeavor to operate its generating unit to the maximum extent reasonably possible under the circumstances and shall make available to [PSNH] the entire net output in kilowatthours from said unit when in operation.

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Article 3. Price.

The price charged by [New Hampshire Hydro] to [PSNH] for sales of electric energy shall be based upon an index price of 9.00 cents per kilwatthour (KWH) and shall be determined as follows.

A. For the first eight (8) years of the Contract, the Contract rate shall be 11.00 cents per KWH. This rate exceeds the index price by 2.00 cents per KWH; and all payments made by [PSNH] to [New Hampshire Hydro] which exceed the index price must be recovered by [PSNH], during the later Contract years

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C. At such time that 96 percent of [PSNH]’s incremental energy cost exceeds the index, . . . the contract rate will be based on 96 percent of [PSNH]’s incremental energy cost for a period of one year. For each subsequent year, the percentage of [PSNH]’s incremental energy cost to be paid will be reduced by 4 percent . . . until the incremental energy cost is reduced only 2 percent to reach 50 percent of [PSNH]’s incremental energy cost. At such time, the contract rate will remain at the 50 percent rate for the remainder of the contract term.

[PSNH]’s incremental energy cost, for any hour, is equivalent to the marginal cost of providing energy for that hour. The marginal cost, for any hour, is the energy cost of the most expensive unit or purchased energy supplying a portion of [PSNH]’s load during that hour and includes all costs in the New England Power Exchange (NEPEX) bus rate for the incremental unit. . . .

(Emphases added.)

We agree with the PUC that the contract is ambiguous as to whether the price PSNH paid included the facility’s capacity. The parties attach different meanings to the applicable contract terms. While Briar Hydro argues that the fact that the contract does not use the term “capacity” means that the price did not include it, PSNH contends that the facility’s “entire output” is a term of art that, in 1982, included both the facility’s energy produced and dependable capacity. Contrary to Briar Hydro’s assertions, both parties’ interpretations are reasonable. See Restatement (Second) of Contracts § 202(3)(b) (1981) (“Unless a different intention is manifested, . . . technical terms and words of art are given their technical meaning when used in a transaction within their technical field.”); New England Box Co. v. Flint, 77 N.H. 277, 279 (1914) (“The liberal rule . . . is today conceded, practically everywhere, to permit resort in any case to the usage of a trade or locality, no matter how plain the apparent sense of the word to the ordinary reader.” (quotation omitted)).

“If the agreement’s language is ambiguous, it must be determined, under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean.” Behrens v. S.P. Constr. Co., 153 N.H. 498, 503 (2006). “This process necessarily involves factual findings,” to which we defer if they are supported by the evidence. N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 141 (2001); see Behrens, 153 N.H. at 500-01. Here, the PUC determined that the contracting parties, under an objective standard, mutually understood the purchase and sale to include the Penacook’s facility’s capacity. The record, which includes a November 1981 document that PSNH provided to New Hampshire Hydro during the contract negotiations, supports this finding.

The November 1981 document offered three pricing options to limited electrical energy producers such as the Penacook facility. The first option was

a rate that was set by the PUC or other regulatory authority. At the time, that rate was “8.2 cents per kilowatthour (KWH) for dependable capacity and 7.7 cents per KWH for all energy in excess of that generated by the dependable capacity.” The second option used an index price of nine cents per KWH that escalated over a thirty-year term, and the third option provided for a rate higher than the index price of nine cents per KWH during the contract’s initial years. This document supports the PUC’s finding that, when the 1982 agreement was reached, energy and capacity were paid for in one price per KWH. While Briar Hydro points to conflicting evidence, as the trier of fact, the PUC could accept or reject such portions of the evidence as it found proper, and was not required to believe even uncontroverted evidence. Appeal of Pennichuck Water Works, 160 N.H. at _____. It is the PUC’s duty to determine the proper weight to be given to evidence. *Id.* at _____. This court does not sit as a trier of fact when reviewing PUC orders. *Id.* at _____.

Additionally, contrary to Briar Hydro’s assertions, the PUC’s finding in this regard is not unlawful, but rather is entirely consistent with its own orders from the 1980’s. These orders demonstrate that, when New Hampshire Hydro and PSNH were negotiating their contract, the phrase “entire output” referred both to a facility’s energy and its capacity, see Re: Small Energy Producers and Cogenerators, 68 NH PUC 531, 537 (1983), and that, at that time, “energy” and “capacity” were paid for in a single price per kilowatt hour, see Re: Purchases for Nongenerating Utilities, 67 NH PUC 825, 825 (1982); Re: Small Energy Producers and Cogenerators, 69 NH PUC 352, 355, 358 (1984). Because the PUC’s finding with regard to the contracting parties’ intent is supported by evidence in the record, and as Briar Hydro has failed to persuade us that it is either unreasonable or unlawful, we uphold it.

Briar Hydro next contends that the PUC erred because it failed to consider the parties’ post-contract dealings to interpret the meaning of the 1982 contract. We defer to the PUC’s decision regarding the evidence admitted at the proceeding. See Appeal of Pennichuck Water Works, 160 N.H. at _____.

Finally, Briar Hydro argues that the PUC erred when it denied Briar Hydro’s request, raised for the first time in its motion for reconsideration and rehearing, for a hearing at which it would present new evidence. We conclude that the PUC did not err in this regard.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN, HICKS and CONBOY, JJ., concurred.

**Eileen Fox,
Clerk**

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