

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

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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