

DE 01-090

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petition for Approval of Renegotiated Power Supply
Arrangements with Bio-Energy Corporation**

Order Approving Stipulation of Settlement

O R D E R N O. 23,816

October 19, 2001

APPEARANCES: Robert A. Bersak, Esq. for Public Service Company of New Hampshire; Michael J. Blasik, Esq. and Nixon Peabody LLP by Robert L. Dewees, Esq. for Edison Mission Marketing and Trading, Inc.; Brown, Olson & Wilson, P.C. by Robert A. Olson, Esq. for Bio-Energy Corp.; Jasen A. Stock for the New Hampshire Timberland Owners Association; Meredith A. Hatfield, Esq. for the Governor's Office of Energy and Community Services; Office of Consumer Advocate by Michael W. Holmes, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

Public Service Company of New Hampshire (PSNH) began this proceeding on April 19, 2001 by filing with the New Hampshire Public Utilities Commission (Commission) a petition seeking its approval of a renegotiated power purchase arrangement concerning Bio-Energy Corporation (Bio-Energy). Bio-Energy operates a 9 megawatt wood-fired cogeneration facility in West Hopkinton, New Hampshire. Pursuant to the federal Public Utility Regulatory Policies Act (PURPA) and the New Hampshire Limited Electrical Energy Producers Act (LEEPA), the Commission on June 25, 1985 entered a Rate Order approving

an agreement whereby PSNH is obligated to purchase energy and capacity from Bio-Energy through June 2015. See *Bio-Energy Corporation*, 70 NH PUC 557 (Order No. 17,687, June 25, 1985). As required by PURPA and LEEPA, the rates approved in 1985 were based on PSNH's then-current avoided costs, i.e., "the incremental costs [to PSNH] of electric energy or capacity, or both which, but for the purchase from [Bio-Energy, PSNH] would generate itself or purchase from another source." *Id.* at 559 n.3 (citation omitted). Those rates are significantly above current regional wholesale market rates.

The instant petition concerns two agreements. The first is between PSNH and CP Power Sales Seventeen, L.L.C. (CP Seventeen), a special-purpose affiliate of Edison Mission Marketing and Trading, Inc. (EMMT).¹ The second agreement is between CP Seventeen and Bio-Energy. Under its agreement with Bio-Energy, CP Seventeen would acquire the existing power agreement between Bio-Energy and PSNH for an agreed-upon

¹ EMMT, in turn, is a wholly owned subsidiary of Edison Mission Energy (EME), whose parent company is Edison International, owner of Southern California Edison. According to EMMT, certain provisions in EME's articles of incorporation and by-laws insulate EME from financial difficulties experienced by its parent as a result of the difficulties that have beset the electric industry in California over the past year. EMMT is in the business of power trading, risk management, fuel marketing and third-party power contract restructuring of the type at issue in this proceeding.

payment to Bio-Energy. In turn, CP Seventeen and PSNH have agreed that CP Seventeen would supply PSNH with the wholesale energy formerly furnished by Bio-Energy, at prices significantly lower than those approved in the 1985 Rate Order. The agreement between CP Seventeen and PSNH further calls upon PSNH to enter into an Amended and Restated Interconnection Agreement that would permit Bio-Energy to sell its power into wholesale markets via PSNH's transmission facilities.

The Commission initially treated this docket as consolidated with proceedings arising out of two similar petitions filed by PSNH on the same date: Docket Nos. DE 01-089 (concerning Hemphill Power and Light Company) and DE 01-091 (Whitefield Power and Light Company). Pursuant to an Order of Notice entered on June 5, 2001, parties seeking intervenor status were required to submit a petition to that effect by June 12, 2001 and a Pre-Hearing Conference was scheduled for June 15, 2001. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers, pursuant to RSA 363:28. The Pre-Hearing Conference took place as scheduled and the Commission granted timely intervention petitions submitted by the New Hampshire Timberland Owners Association (NHTOA), EMMT, Bio-Energy and

the Governor's Office of Energy and Community Services (ECS). See Order No. 23,763 (August 23, 2001).

Following the Pre-Hearing Conference, the parties and Commission Staff (Staff) submitted a proposed procedural schedule that would have resulted in a hearing conducted in all three dockets on September 6, 2001. A series of preliminary disputes related to discovery, document confidentiality and interventions in Docket No. DE 01-091 prompted a request from the parties and Staff for a delay in all three proceedings.

On August 23, 2001, the Commission entered Order No. 23,763. This Order granted a joint request of PSNH and EMMT for confidential treatment of the agreement between PSNH and CP Seventeen in this docket, as well as two similar agreements in the companion proceedings. As granted, the motion for confidential treatment also included exhibits detailing the proposed restructuring of the existing power supply agreements. The Commission also deferred a motion to compel discovery submitted by the NHTOA.² Finally, the Commission approved a revised procedural schedule that called for a

² Order No. 23,763 also denied a motion to compel the addition of certain additional parties in Docket No. DE 01-091. The issues that arose in connection with that motion are not germane to this docket.

period of discovery followed by merits hearings in all three dockets on October 22 and 23, 2001.

On September 12, 2001, the parties and Staff appeared for a hearing in connection with the NHTOA's motion to compel discovery. Hearings Examiner Edward N. Damon presided at the hearing and ultimately submitted a report and recommendation on September 28, 2001. As noted in Mr. Damon's report, the crux of the NHTOA's discovery motion was its view that it should not be required enter into a confidentiality agreement with PSNH in order to gain access to certain documents for which PSNH had already obtained or was seeking confidential treatment by the Commission. Mr. Damon recommended denial of the NHTOA motion as well as the granting of two pending motions of PSNH and EMMT for confidential treatment. The Commission voted to adopt the hearing examiner's report at its public meeting on October 18, 2001.

Discovery proceeded according to the schedule established in Order No. 23,763. On October 10, 2001, PSNH filed a Settlement Stipulation to which all parties except ECS had agreed, resolving all outstanding issues with regard to the Bio-Energy proceeding. With the agreement of the parties, and in the interest of capturing additional ratepayer savings associated with the renegotiated arrangements with Bio-energy,

the Commission advanced the date of the merits hearing in this proceeding to October 15, 2001. The hearing took place as rescheduled; Stephen Hall of PSNH testified in support of the Stipulation of Settlement.

II. POSITIONS OF THE PARTIES AND STAFF

A. Public Service Company of New Hampshire

PSNH submitted the pre-filed testimony of Messrs. Stephen Hall and S.B. Wicker, Jr. in support of the original petition. They began by explaining why PSNH opted to use a third party for the renegotiation of its power purchase arrangements with Bio-Energy, Whitefield Power and Light and Hemphill Power and Light. According to Messrs. Hall and Wicker, EMMT has experience in transactions of this sort that PSNH lacks and PSNH wanted to provide a "signal" to the independent power producers "that it was serious in its negotiations, and the use of a third party whose motivation was to close a deal was a demonstration of PSNH's commitment to the negotiation process."

The PSNH witnesses then addressed the savings to be achieved under the renegotiated arrangement. They pointed out that, because PSNH would continue to purchase from CP Seventeen the same amount of energy it currently purchases

from Bio Energy, the savings will be the price differential adjusted for the estimated value of Bio-Energy's capacity, which would not be replaced by CP Seventeen.

Messrs. Hall and Wicker point out that, by statute and pursuant to the PSNH Restructuring Settlement Agreement approved by the Commission in Docket No. DE 99-099, PSNH would retain 20 percent of the savings and the remainder would be passed through to ratepayers by reducing PSNH's recoverable stranded costs. According to Messrs. Hall and Wicker, PSNH proposes to calculate the savings achieved in each quarter and then add its 20 percent share to what are defined under the PSNH Restructuring Settlement Agreement as "Part 2" stranded costs, which are fully recoverable by the Company.

According to Messrs. Hall and Wicker, Bio-Energy does not presently have the right to sell at least 10 megawatts of energy and capacity to PSNH. Therefore, they assert, Bio-Energy is not a "listed facility" within the meaning of RSA 362-A:4-c and thus the proposed renegotiation is not subject to the restrictions imposed by that statute.

Next, Messrs. Hall and Wicker take up the factors that the Commission is required to consider in assessing the petition pursuant to RSA 362-A:8, II. Those factors are:

- (1) The economic impact upon the state, including, but not limited to, job loss or creation through the

utilization of indigenous fuels for electric generation.

(2) The community impact including, but not limited to, property tax payments and job creation.

(3) Enhanced energy security by utilizing mixed energy sources, including indigenous and renewable electrical energy production.

(4) Potential environmental and health-related impacts.

(5) The impact on electric rates.

Id.

In addressing these factors, Messrs. Hall and Wicker invoke a series of findings made by the Legislature. See 1996 Laws 129:1, II (legislative finding, in connection with enactment of Electric Utility Restructuring Act, that New Hampshire's "extraordinarily high electric rates" disadvantage all customer classes and that "these high rates are causing businesses to consider relocating or expanding out of state and are a significant impediment to economic growth and new job creation in this state"); RSA 369-A:1, X(g) (determining in 1999 that "further renegotiations" between PSNH and seven independent power producers, including Bio-Energy, "should be encouraged" in order to reduce customer costs); and RSA 369-B:1, XI (determining, in context of approval in 2000 of securitization of certain recoverable PSNH stranded costs,

that such renegotiations are "in the public interest in order to reduce the total cost to ratepayers of these obligations").

According to Messrs. Hall and Wicker, approval of the Bio-Energy renegotiation would not adversely affect New Hampshire's energy security because New Hampshire presently enjoys a capacity surplus and two new large gas-fired plants, in Londonderry and Newington, are under construction. They point out that PSNH's generation resources "include a varied and balanced fuel mix" that is 37 percent nuclear, 36 percent coal, 7 percent oil and/or gas, 5 percent hydro and 15 percent from other independent power producers. They further note that, to the extent that other energy sources replace that which is presently purchased from Bio-Energy, this energy would likely come from gas-fired facilities, which are responsible for lower air emissions than wood-fired facilities are.

Finally, Messrs. Hall and Wicker state that approval of the renegotiation of the Bio-Energy arrangement would "absolutely" result in lower electric rates for New Hampshire customers.

B. Summary of the Settlement Agreement

The Stipulation of Settlement presented for approval in this docket recommends that the Commission find that the

agreement between PSNH and CP Seventeen is just and reasonable as well as consistent with the public interest. The Agreement further recommends that the Commission make certain explicit determinations required under the terms of the agreement between PSNH and CP Seventeen. Specifically, the PSNH-CP Seventeen Agreement contemplates the entry of a Commission Order that:

1. orders and approves, subject to the closing under the Purchase Agreement, the transfer to and acquisition by CP Seventeen of all of Bio Energy's rights, obligations, title and interests in and to the Existing Power Agreement (excepting only the Interconnection Study attached thereto) as of the Effective Time[;]
2. orders and approves, subject to the closing under the Purchase Agreement, the cancellation and release of all obligations and liabilities of Bio Energy relating to or arising from the Rate Petition, and the Existing Power Agreement, including without limitation obligations or liabilities of Bio Energy related to or arising from NHPUC dockets DE 83-62, DR 85-215, DR 91-149, DR 96-293, the Public Utility Regulatory Policies Act, RSA 362-A, and all regulations and orders of the State issued thereunder[;]
3. terminates NHPUC dockets DR 96-293 and DR 96-149 in favor of Bio Energy with prejudice[;]
4. imposes no costs on Bio Energy or otherwise imposes any liability or obligation on Bio Energy, the Facility or its owners other than provided for under the Purchase Agreement, if any[;]
5. states that all claims, causes of action and theories of liability, against or pertaining to Bio Energy or the Facility and arising out of or related to the Rate Petition or the Existing Power Agreement, are hereby discharged, resolved, settled, and, if pending, dismissed with prejudice upon the consummation of the Purchase Agreement transactions[;]
6. assuming the Closing occurs, acknowledges Bio Energy's right to sell power to PSNH and be paid for such sales from the Facility by PSNH pursuant to the Existing Power Agreement up to the Effective Time and if the Closing does not occur, acknowledges that the Order does not affect any existing Bio-Energy rights with respect to the Existing Power Agreement[;]

7. to the extent required by Law, approves the Replacement Interconnection Agreement[; and]

8. acknowledges that the Required Order by itself does not effectuate the assignment or transfer of the Existing Power Agreement from Bio Energy to CP Seventeen, but such transfer is conditioned upon the occurrence of the Closing Date under the Purchase Agreement.³

The Settlement Stipulation further contains a proposed methodology for calculating the savings resulting from the CP Seventeen agreements. Specifically, each month, PSNH would add to its Part 2 stranded costs 20 percent of the Total Net Savings for the month. "Total Net Savings" would be defined as

the Total Savings for the month, less an adjustment for loss of capacity value. The capacity value will be equal to 9,000 kilowatts times \$1.25 per kilowatt per month (\$11,250 per month). The adjustment for loss of capacity value is necessary because PSNH will not receive any capacity value from ISO-NH for the energy that it purchases from CP Power Sales Seventeen, L.L.C., whereas PSNH receives capacity value for its purchases from Bio-Energy.

"Total Savings" is defined as

the difference between what PSNH would have paid to Bio-Energy and what PSNH actually pays to CP Power Sales Seventeen, L.L.C. The amount that PSNH would have paid to Bio-Energy will be calculated by taking the kilowatt-hours sold by CP Power Sales Seventeen,

³ Terms such as "Purchase Agreement," "Existing Power Agreement," "Effective Time," "Rate Petition" and "Closing" all have specific definitions in the agreements CP Seventeen has entered into with PSNH and Bio-Energy. For the sake of simplicity, those definitions are not reproduced here.

L.L.C. to PSNH in a particular month and applying the rates under the Bio-Energy rate order to those kilowatt-hours.

The Settlement Stipulation contains an explicit statement that Bio-Energy does not object to this formulation but takes no position on the issue of savings calculation.

The Settlement Stipulation further includes an agreement by Bio-Energy that, for a period of 1,095 days (i.e., three years) from the date of the closing of the transactions between it and CP Seventeen, assuming that Bio-Energy continues to operate its generation facility, Bio-Energy

annually shall use a wood fuel mix which for up to 9 MWs of output (assuming operations at that output level) consists of fifty percent whole tree chips, and other biomass material and Bio-Energy shall undertake commercially reasonable efforts to use that wood fuel mix for up to 11MWs of output (assuming operations at that output level or portion thereof during the above noted Term.

Further, in the event of a "shortfall in this fuel mix in any year," the Stipulation of Settlement permits Bio-Energy "to remedy the shortfall by increasing the next year's wood fuel mix by the amount of the shortfall." Finally,

[f]or each 365 day period in the Term, Bio-Energy shall provide a written statement to the Timberland Owners Association identifying the percentage of whole tree chips and other biomass material used by Bio-Energy during that 365 day period for up to 9 MWs of output and up to 11 MWs of output assuming

operations at those levels, and that such percentages were from sources within the country. This provision is for the sole benefit of the Timberland Owners Association and no other party, person, or entity shall have any rights, or (except for Bio-Energy), obligations under this provision.

The Stipulation of Settlement bears the signature of a representative of the Staff as well as each party, with the exception of ECS. At hearing, ECS made clear that it did not oppose the Stipulation of Settlement as it has been submitted.

III. COMMISSION ANALYSIS

This docket requires us to consider whether it is appropriate to set aside our 1985 Rate Order as to Bio-Energy and replace it with the arrangements proposed here by PSNH and EMMT. We are explicitly authorized to do so by statute, after notice and hearing. See RSA 365:28. Our conclusion is that it is consistent with the public interest for us to take such action and grant the petition, as conditioned by the Stipulation of Settlement now before us.

As PSNH has correctly pointed out, the Legislature has determined in several contexts that the renegotiation of the existing power purchase arrangements involving Bio Energy and several other independent power producers is in the public interest because it will serve to reduce PSNH's retail rates by reducing recoverable stranded costs. It is, of course, not

possible to ascertain whether PSNH has negotiated every possible savings that could have been extracted from Bio Energy, but we note that no party has come forward to contend that the PSNH proposal is not sufficiently ratepayer-favorable. The energy cost savings made possible by the new arrangements are significant.

We must further consider the consequences of the elimination of Bio-Energy's capacity obligation to PSNH, because after Seabrook is sold, if PSNH were to be the provider of last resort for all but a small percentage of its customers, it would have to go in to the market to procure capacity to meet this default obligation. While capacity costs are quite low in the short term, we may reasonably expect that as reserves rise and fall with the ordinary investment cycle in a commodities market such as electricity, capacity values will fall and rise as well. Mr. Hall testified that \$1.25 per kw-month represents a reasonable estimate of the levelized net present value of future capacity in the New England market over the remaining term of the contract. No party disputed this estimate. For the purposes of evaluating this proposed new contract for energy, we accept the Company's estimated levelized capacity value. In these circumstances, we conclude that the rates PSNH has agreed to

pay CP Seventeen are reasonable.

Likewise, we find that the straightforward methodology proposed for calculating the savings to be passed along to ratepayers and to PSNH is reasonable and consistent with the statute providing PSNH with a 20 percent share. As PSNH notes, because it retains a power purchase obligation under this agreement, savings calculation is a simple matter because other than the capacity value adjustment there is no need to project future market prices and compare them to what PSNH would have paid for Bio-Energy's output. We have analyzed the impact of higher capacity values, and the new contract's savings are not sensitive to large increases in those values.

In evaluating whether these transactions are in the public interest, we must consider the factors laid out in RSA 362-A:8, II(b). These factors include statewide economic impacts, local "community" impacts, the objective of enhancing the state's energy security by utilizing mixed energy sources, the potential environmental and health impacts and the impact on electric rates.

Given the high likelihood that Bio Energy will continue to operate, this is not a situation in which reduced electric rates, which inure to the benefit of PSNH customers,

are offset by job losses, reductions in tax base or impacts on the timber industry resulting from lowered demand for indigenous fuel. In essence, the only likely impact is that PSNH will pay less to CP Seventeen than it presently pays to Bio-Energy, lowering recoverable stranded costs without appreciable countervailing impacts.⁴ We find this result to be favorable and in the public interest.

In this regard, we note and credit the explanation of the NHTOA, given at hearing, as to why it has endorsed the Stipulation of Settlement now before us. The NHTOA explained that it credits Bio Energy's expressed (although non-binding) commitment to continued operation, that NHTOA does not wish to be obstructionist in the face of what it acknowledges to be significant ratepayer savings, and that Bio-Energy's impacts on the timber industry are relatively small in any event because the plant is New Hampshire's smallest wood-fired facility and has historically used whole tree chips as only half its fuel.

⁴ It is worth explicitly noting, for the benefit of those who may not be familiar with the PSNH Restructuring Settlement Agreement, that the savings will not result in an immediate reduction in retail rates. This is because, under the Restructuring Settlement Agreement, rates do not decline until PSNH has completed the amortization of so-called "Part 3" stranded costs, which are stranded costs to which PSNH has agreed to share the risk of non-recovery with ratepayers.

We are aware of the difficulties that have thwarted previous efforts to renegotiate power purchase arrangements previously approved under PURPA that are now significantly less favorable to PSNH than market rates would be. Accordingly, we commend the parties here for their diligence and willingness to compromise in the interest of furthering the public good.

Based upon the foregoing, it is hereby

ORDERED, that the Stipulation of Settlement entered into by Public Service Company of New Hampshire, Edison Mission Marketing & Trading, Inc., the Office of Consumer Advocate, the New Hampshire Timberland Owners Association, Bio-Energy Corporation and the Staff of the New Hampshire Public Utilities Commission is APPROVED;

FURTHER ORDERED, that Order No. 17,687, entered on June 25, 1985, is set aside to the extent necessary to effectuate the purposes of this Order; and it is

FURTHER ORDERED, that the required determinations and findings enumerated in Exhibit A to the "PSNH Execution Agreement" entered into between Public Service Company of New Hampshire and CP Power Sales Seventeen, L.L.C and as recited in the text of this Order are hereby adopted.

By order of the Public Utilities Commission of New
Hampshire this nineteenth day of October, 2001.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary