STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

City of Nashua: Petition for Valuation Pursuant to RSA 38:9

Docket No.: DW 04-048

RESPONSE TO MOTION FOR LEAVE TO REPLY

NOW COMES the City of Nashua and responds to Pennichuck Water Works, Inc.'s *Motion for Leave to Reply* and, in support hereof, states as follows:

1. Pennichuck requests leave to respond to Nashua's September 3, 2008 *Objection to Pennichuck's Motion to Strike*. For the reasons stated in Nashua's *Objection* and the cases cited therein, New Hampshire law is clear that when the terminal day for rehearing falls on a Sunday, a motion for reheating is timely if filed on the following business day. *See also Re Global Naps, Inc.*, 89 N.H. PUC 517, 518 (2004); *Re Alden Engineering Company*, 91 NH PUC 283 (2006).
2. However, Nashua does not object to Pennichuck's request for leave to reply, insofar as: (a) the law remains clear notwithstanding Pennichuck's response; and (b) Nashua's consent to Pennichuck's request will allow the Commission to focus on the substantive issues in this and other proceedings.

Respectfully submitted,

CITY OF NASHUA
By Its Attorneys
UPTON & HATFIELD, LLP

Date: September 22, 2008

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent this day by e-mail and first class mail to all persons on the Commission's official service list in this proceeding.

Date: September 22, 2008

Justin C. Richardson, Esq.

NH.PUC*06/22/06*[PURbase 152661]*91 NH PUC 283*Alden T. Greenwood dba Alden Engineering Company

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91 NH PUC 283

Re Alden T. Greenwood dba Alden Engineering Company

DE 05-150
Order No. 24,638

New Hampshire Public Utilities Commission

June 22, 2006

ORDER denying rehearing of Order No. 24,613 in this docket (91 NH PUC 170, *supra*) in which the commission had determined that a 30-year hydropower facility contract approved in 1985 was no longer valid. Commission reiterates that a subsequent decision in 1988 had amended the contract term to 20 years, which modification the facility owner had acceded to and which decision had not been appealed on its merits. Commission thus again holds that the facility owner is barred under the doctrine of *res judicata* from now challenging the 20-year contract term.

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1. PROCEDURE, § 32

[N.H.] Rehearing — Necessity of showing good cause for — Doctrine of *res judicata* as a factor — Qualifying facility power purchase contract dispute. p. 285.

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2. COGENERATION, § 4

[N.H.] State commission jurisdiction — To hear qualifying facility (QF) contract disputes — To modify or amend existing agreements — Upon QF's waiver of right to be heard in federal forum. p. 285.

3. CONTRACTS, § 7

[N.H.] Commission jurisdiction — To change or modify — Pursuant to contract dispute — As to power purchase agreement with qualifying facility (QF) — Necessity of QF waiving its right to be heard in federal forum first. p. 285.

4. RATES, § 217

[N.H.] Rate contracts — Change or modification of — Pursuant to commission action — As to power purchase agreement with qualifying facility (QF) — Reduction in term from 30 to 20 years — QF's acquiescence to both shorter term and state commission authority to review contract as a factor. p. 285.

5. COGENERATION, § 19

[N.H.] Power purchase contract with qualifying facility (QF) — Long-term agreement — Reduction in term from 30 to 20 years — Affirmation of reduced term — Factors — QF's acquiescence to both shorter term and state commission authority to review contract. p. 285.

6. COGENERATION, § 6

[N.H.] Qualifying facility (QF) status — Under the Public Utility Regulatory Policies Act (PURPA) — Small hydroelectric facilities — Associated QF rate contract — Ability of QF to accept less than PURPA-based rates. p. 285.

7. RATES, § 321

[N.H.] Electric rate design — Special rate contracts — Power purchase contract with qualifying facility — Change or modification of — Pursuant to commission action — Reduction in term from 30 to 20 years — QF's acquiescence to both shorter term and state commission authority to review contract as a factor. p. 285.

8. PROCEDURE, § 36

[N.H.] Doctrine of *res judicata* — As assuring finality in proceedings — Subject matter jurisdiction as a factor — Qualifying facility power purchase contract dispute. p. 285.

BY THE COMMISSION:

ORDER

On April 13, 2006, the New Hampshire Public Utilities Commission (Commission) issued Order No. 24,613, dismissing a petition filed by Alden T. Greenwood d/b/a Alden Engineering Company (Alden) that sought a declaratory order with respect to three hydroelectric projects owned by Alden in the service territory of Public Service Company of New Hampshire (PSNH). Pursuant to RSA 541:3, Alden filed a timely motion for rehearing on May 15, 2006. PSNH submitted a pleading in opposition to the rehearing motion on May 26, 2006.

The underlying petition sought a determination that a 30-year rate order approved by the

Commission, governing purchases of power by PSNH from Alden under the federal Public Utility Regulatory Policies Act (PURPA), remained in full force and effect through its originally stated expiration date in 2015. The Commission rejected the request, invoking the doctrine of *res judicata* in light of *Lakeport Hydroelectric Corp.*, 73 NH PUC 504 (1988) (Order No. 19,257), that shortened the effective period of the rate order by ten years. Alden appeared as a party in the proceedings that led to the *Lakeport* order, conceding on the record that the Commission had acted within its authority by taking the very action Alden now seeks to avoid.

On rehearing, Alden contends that dismissal of the petition on *res judicata* grounds

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was inappropriate. According to Alden, invoking the same New Hampshire Supreme Court decision relied upon by the Commission in Order No. 24,613, *Osman v. Gagnon*, 152 N.H. 359 (2005), the 1988 ruling of the Commission cannot be *res judicata* because the Commission lacked the subject matter jurisdiction to make the determination reflected in the *Lakeport* order. According to Alden, the fact that Mr. Greenwood appeared in 1998 and conceded that rescission of the rate orders was appropriate is of no consequence because parties cannot waive issues related to a tribunal's subject matter jurisdiction.

In opposition to the rehearing motion, PSNH concedes that, as noted in Order No. 24,613, the decision of the U.S. Court of Appeals for the Third Circuit in *Freehold Cogeneration Associates v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1995), established that once a state utility commission exercises its authority to enter a long-term PURPA rate order, it is not free to revisit the rate determination at a later date in light of changed circumstances. But, according to PSNH, the U.S. Supreme Court in *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981), has made clear that the consequences of a final judgment on the merits are not altered by the fact that the judgment may have been wrong or may have rested on a legal principle subsequently overruled in an unrelated case. PSNH also invokes the equitable doctrines of laches and estoppel in support of its position.

[1-8] RSA 541:3 authorizes the Commission to grant rehearing of a previously entered order upon a showing of good cause for such relief. For the reasons that follow, Alden has not shown good cause for rehearing in this instance.

When the U.S. Court of Appeals for the Third Circuit held that our counterpart agency in New Jersey was preempted under PURPA from modifying a previously approved power purchase agreement between a generator and a utility, the Court pointed out that an independent power producer qualifying for a PURPA rate could waive its statutory rights and legally consent to have disputes arising out of such a rate heard in a state as opposed to federal forum. *Freehold*, 44 F.3d at 1187 (citing 18 CFR § 292.301(b)(1)). The cited rule of the Federal Energy Regulatory Commission (FERC) states that nothing in the federal PURPA regulations "[l]imits the authority of any electric utility or qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differs from the rate or terms or conditions which would otherwise be required" under the FERC regulations implementing PURPA.

What thus becomes clear is that the legal principle established in *Freehold* cannot have the

effect of rendering null and void, because of the lack of subject matter jurisdiction, every determination of a state utility commission that changes or affects a previously approved PURPA rate. The New Hampshire statute that confers upon the Commission the authority to hear cases involving qualifying small power producers as a matter of state law, the Limited Electrical Energy Producers Act, RSA Chapter 362-A, explicitly provides that "[a]ny dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication." RSA 362-A:5. Although, as *Freehold* subsequently made clear, Alden could have withheld his acquiescence and likely argued with success that he had a right to a federal forum, he also had the right under both state and federal law to let the Commission proceeding advance to binding final judgment. Accordingly, Alden's present argument that the Commission lacked subject matter jurisdiction, rendering its 1988 ruling ineffective, is without merit.

Because it is clear that the Commission had subject matter jurisdiction in 1988, and that its *Lakeport* decision can appropriately have *res judicata* effect, we need not address PSNH's other arguments. In particular, we express no view as to whether it is appropriate for an administrative agency to invoke equitable doctrines like laches or estoppel to reject an otherwise legally sound petition.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Alden T. Greenwood d/b/a Alden Engineering Company for rehearing of Order No. 24,613 is DENIED.

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By order of the Public Utilities Commission of New Hampshire this twenty-second day of June, 2006.

EDITOR'S APPENDIX

Citations in Text

[N.H.] Re Alden T. Greenwood dba Alden Engineering Co., DE 05-150, Order No.24,613, 91 NH PUC 170, Apr. 13, 2006.

NH.PUC*09/02/04*[PURbase 143745]*89 NH PUC 517*Global NAPs, Inc.

[Go to End of PURbase 143745]

89 NH PUC 517

Re Global NAPs, Inc.

Respondent: Verizon New Hampshire

DT 01-127
Order No. 24,367

New Hampshire Public Utilities Commission

September 2, 2004

ORDER denying reconsideration of Order No. 24,336 in this docket (89 NH PUC 335, *supra*), in which the commission had ruled that an incumbent local exchange telephone carrier need not pay reciprocal compensation to a competitive local carrier (CLC) for traffic routed to Internet service providers. Commission explains that the CLC's motion for reconsideration fails to provide any new information or evidence that would refute the commission's original findings that the CLC does not have a central office switch physically located in New Hampshire, which was a requirement for reciprocal compensation under the terms of the carriers' approved interconnection agreement.

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1. PROCEDURE, § 34

[N.H.] Rehearing or reconsideration — Time limits — 30-day filing period — Meeting of deadline via facsimile transmission. p. 519.

2. PROCEDURE, § 22

[N.H.] Necessity of notice — In supplemental or further proceedings — Filing of motions for rehearing or reconsideration — Notice requirements for all parties on service list. p. 519.

3. PROCEDURE, § 33

[N.H.] Rehearing or reconsideration — Grounds for granting — Good reason shown — Offering of new evidence or information not previously available — But no reassertion of prior arguments. p. 519.

4. TELEPHONES, § 2

[N.H.] Construction and equipment — Switching facilities — As installed by competitive local carrier — Effect of out-of-state location of switch — As negating duty to pay reciprocal compensation under approved interconnection agreement — Affirmation. p. 520.

5. SERVICE, § 467

[N.H.] Telecommunications — Switching

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facilities — As installed by competitive local carrier — Effect of out-of-state location of switch — As negating duty to pay reciprocal compensation under approved interconnection agreement — Affirmation. p. 520.

6. TELEPHONES, § 14

[N.H.] Connecting carriers — Negotiated interconnection agreement — Reciprocal compensation terms — Factors affecting actual duty to pay — Physical location of competing carrier's switch — Effect of out-of-state location — As negating duty to pay reciprocal compensation — Affirmation. p. 520.

BY THE COMMISSION:

ORDER

The New Hampshire Public Utilities Commission (Commission) by Order No. 24,336 (June 18, 2004) denied a petition from Global NAPs, Inc. (GNAPs) requesting payment from Verizon New Hampshire (Verizon) of reciprocal compensation. GNAPs had claimed compensation was due under the terms of an interconnection agreement (Agreement) with Verizon. On July 19, 2004, GNAPs filed a Motion for Reconsideration [1] [(1)] (Motion), in response to which Verizon filed an Objection on July 27, 2004.

I. POSITIONS OF THE PARTIES

GNAPs claims that the Commission's conclusion that GNAPs does not hand off traffic to internet service providers (ISPs) located in New Hampshire was "factually wrong." Motion at p. 2. GNAPs argues, first, that because the Federal Communications Commission has established

that internet-bound calls have no distinct start or termination point, the Commission cannot determine conclusively that the traffic passed from Verizon to GNAPs went either "down the street in Concord or across international boundaries." Motion at p. 3. Second, GNAPs argues that the Commission should infer from GNAPs' presence in New Hampshire that some traffic must have been carried for the benefit of New Hampshire customers. Third, GNAPs contends the Commission should consider the fact that GNAPs terminates calls from Verizon customers which makes Verizon itself a GNAPs customer located in New Hampshire.

GNAPs also claims the Commission was wrong to conclude that GNAPs had failed to prove its switching facilities existed in New Hampshire prior to March 1, 2001, another prerequisite for the payment of the disputed reciprocal compensation. According to GNAPs, because Verizon sent traffic to GNAPs without blockage, the equipment must have existed. Further, GNAPs reasons the existence of the equipment is proven because the testimony it filed in this docket asserted the presence of switching equipment at GNAPs facilities on or before March 1, 2001, an assertion that, GNAPs points out, Verizon did not challenge as perjury. GNAPs also contends that the Commission is incorrect to limit the interpretation of "central office switch" so as to exclude packet switching and require the provision of dial tone to end users in New Hampshire. Finally, GNAPs disputes arguments made by Verizon that its witness's testimony was inconsistent with prior testimony and that its New Hampshire switching equipment's Common Language Location Identifier (CLLI) code constitutes proof of geographic location.

Verizon requests that the Commission deny GNAPs' Motion, claiming it fails to meet either the procedural or substantive requirements of RSA 541. Procedurally, Verizon raises two issues. First, Verizon asserts that GNAPs failed to comply with the requirement of RSA 541:3 that an application for rehearing be filed within 30 days of the order's issuance. Verizon calculates that the Motion was filed two days late. Next, Verizon asserts that GNAPs failed to serve its counsel with a copy of the Motion, in violation of N.H. Admin. Rule Puc 202.18(d). Puc 202.18(d) requires that motions for rehearing must be served on all parties in such a way as to ensure that parties receive the motion on the same day it is filed with the Commission.

Verizon states that its counsel received the motion from another Verizon representative.

Substantively, Verizon argues that GNAPs' Motion does not meet the standard of RSA 541 and applicable case law. According to Verizon, GNAPs failed to identify any matter the Commission overlooked or misconceived in the record that would require a further examination pursuant to New Hampshire law. *Dumais v. State*, 118 N.H. 309, 312, 386 A.2d 1269 (1978). Further, Verizon avers that GNAPs has failed to provide the Commission with good reason for the requested rehearing, as required by RSA 541:3. In Verizon's opinion, GNAPs has put forth neither new evidence nor new arguments regarding the dispute and the order. *See, Connecticut Valley Electric Company/Public Service of New Hampshire*, DE 03-330, Order No. 24,189 (July 3, 2003), *Verizon New Hampshire*, 87 NH PUC 334 (1992), *LOV Water Co.*, 85 NH PUC 523 (2000).

Verizon further argues that GNAPs' Motion proves the truth of the Commission's conclusion in Order No. 24,336 that GNAPs does not come within the provisions of the Agreement. In support, Verizon points to admissions by GNAPs that it does not provide dial tone to New Hampshire customers, thus GNAPs does not originate calls, and that its switch is not a circuit switch.

II. COMMISSION ANALYSIS

[1, 2] We address first Verizon's assertion that procedural defects in GNAPs' filing should result in its dismissal. Verizon asserts that the motion was not timely filed. We disagree. Order No. 24,366 was issued on June 18, 2004, thus bringing the filing deadline for a motion for rehearing to July 19, 2004. *See* Puc 202.03(b) for standards applied when calculating filing dates. In the case of motions for rehearing filed pursuant to RSA 541:3, the Commission allows use of facsimile copies. Puc 202.18(a). GNAPs' facsimile version of the Motion was date stamped by the Commission on Monday, July 19, 2004, and, therefore, was timely filed.

Verizon further asserts that GNAPs violated Puc 202.18(d) for its failure to serve counsel on the same day it served the Commission. We agree. According to Puc 202.18(b), a party using facsimile filing must also submit service copies by facsimile to the parties, which GNAPs failed to do. In addition, Puc 202.18(d) requires that a motion for rehearing must be served on the parties on the same day it is served on the Commission, which GNAPs failed to do.

Finally, Verizon asserts service was improper because GNAPs failed to serve two of the people most involved in the docket, Alan S. Cort and Victor D. Del Vecchio, Esq. The July 20, 2004 paper version of the Motion indicated that copies were sent to the "Appended Service List." Although the Commission's file does not contain a copy of that Appended Service List, the filing does contain a signed Certificate of Service stating that service was made on July 19 by Federal Express overnight mail to Keefe Clemons, Esq., and Donald Boeke, Esq., at Verizon, 185 Franklin Street, Boston, Massachusetts. Mr. Clemons and Mr. Boeke are on the Service List appended to the Commission's Order No. 24,336, along with Mr. Del Vecchio, also at 185 Franklin Street and Mr. Cort of Manchester, New Hampshire. GNAPs should have served all people listed on the service list, particularly given the short response time for Objections to motions for rehearing, and a request from Verizon for a waiver of the five day objection response would likely have been granted in these circumstances, pursuant to Puc 201.05. We do not find GNAPs' omission of two of the four Verizon names on the service list, however, to constitute a violation of our rules.

Though we find that GNAPs violated Puc 202.18(b) and (d), we will not dismiss the motion on procedural grounds. GNAPs is advised, however, to strictly conform to our administrative rules in any future proceedings with the Commission.

[3] We turn instead to the merits of the Motion. To grant such a motion, the movant must demonstrate "good reason" that the relevant order is unlawful or unreasonable. RSA 541:3, 541:4 and 541:13. Good reason may be shown by new evidence that was unavailable at

the original hearing, or by identifying specific matters were either "overlooked or mistakenly conceived." *Dumais v. State*, 118 N.H. 309, 386 A.2d 1269 (1978). As Verizon correctly noted, this must be more than merely reasserting prior arguments and requesting a different outcome. *See, Connecticut Valley Electric Company/Public Service of New Hampshire*, DE 03-330, Order No. 24,189 at p. 3 (July 3, 2003).

[4-6] We find no good reason to reconsider or rehear our determinations in Order No. 24,336. GNAPs makes no new arguments and raises no new evidence that was unavailable during the course of this docket. Moreover, we find that no factual matter was overlooked or mistakenly conceived. GNAPs' argument regarding the nature of internet traffic is irrelevant to the factual determination that it was unable to provide any credible evidence of actual customers in New Hampshire or of switching facilities in New Hampshire during the necessary period. We will not infer the existence of ISP customers or facilities, particularly when GNAPs itself appears unable to identify such customers or facilities in actuality. Therefore we deny GNAPs' Motion.

Based on the foregoing, it is hereby

ORDERED, that the motion of Global NAPs, Inc., for reconsideration is DENIED.

By order of the Public Utilities Commission of New Hampshire this second day of September, 2004.

FOOTNOTES

[1] Although GNAPs styled it as a Motion for Reconsideration, the pleading was filed pursuant to RSA 541:3 which governs motions for rehearing, and will be treated as such.

EDITOR'S APPENDIX

Citations in Text

[N.H.] Re Connecticut Valley Electric Co., DE 03-030, Order No. 24,189, 88 NH PUC 355, July 3, 2003.

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Endnotes

1 (Popup)

[1] Although GNAPs styled it as a Motion for Reconsideration, the pleading was filed pursuant to RSA 541:3 which governs motions for rehearing, and will be treated as such.

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