STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 TERM

No. 2009-0359

Briar Hydro Associates v. Public Service Company of New Hampshire
(New Hampshire Public Utilities Commission)

BRIEF OF RESPONDENT

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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STATEMENT OF FACTS

Public Service Company of New Hampshire ("PSNH") is subject to the Limited Electrical Energy Producers Act, RSA Chapter 362-A ("LEEPA") (Appendix to Brief of Respondent at 3-4) (hereinafter "PSNH App.") and the small power producers section of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §824a-3 (Appendix to Briar Hydro Associates' Brief at 148, *et seq.*) (hereinafter "App. Br."). In the late 1970's, under these two state and federal laws, the New Hampshire Public Utilities Commission ("PUC" or "the Commission") undertook to set rates for mandated purchases by electric utilities, including PSNH, from small power producers called "limited electrical energy producers" under LEEPA (RSA 362-A:1-a, 362-A:4) and "qualifying facilities" ("QFs") under PURPA (18 CFR §§ 292.101(b)(1) and 292.304 (App. Br. at 173)). In order to secure construction financing, many of theses projects needed a guaranteed revenue stream in the form of either a long term rate order issued by the PUC or a bi-lateral long term contract between the project and a utility. *See discussion, Appeal of Granite State Electric*, 121 N.H. 787, 789-790 (1981); *Appeal of Public Service Company*, 130 N.H. 285, 287 (1988).

In March, 2007, Briar Hydro Associates ("Briar Hydro") filed a petition with the PUC seeking a declaratory ruling whether the "output" sold under a 1982 contract entered into by and between PSNH and New Hampshire Hydro Associates ("NHHA") (NHHA being Briar Hydro's predecessor in interest) includes Briar Hydro's electric power plant's "capacity" as distinct from the electrical "energy" actually produced by that power plant, and which entity is entitled to payments for capacity in the New England Forward Capacity Market ("FCM") administered by

ISO New England ("ISO-NE").[1] The PUC opened Docket No. DE 07-045 to consider Briar Hydro's petition. On November 21, 2007, the PUC issued its decision and it:

> ORDERED, that PSNH has contracted to purchase all of the energy and capacity produced by the Penacook Lower Falls Hydroelectric Facility for a term of 30 years and may continue to claim that capacity for purpose of its capacity reserve requirements; and it is
>
> FURTHER ORDERED, that PSNH is entitled to receive transition capacity payments pursuant to the Forward Capacity Market Order for the capacity of the Penacook Lower Falls Hydroelectric Facility and any Forward Capacity Market payments for the capacity of the facility that may be available during the term of the contract.

NHPUC Order No. 24,804, slip op. at 18 (hereinafter the "Nov. 17, 2007 PUC Order") (a copy of which is contained in the Appendix to Appeal by Petition at 18) (hereinafter "App."). The NHPUC subsequently denied Briar Hydro's request for rehearing of the Nov. 17, 2007 PUC Order. *See*, PUC Order No. 24, 960, (April 22, 2009) (App. 46). This appeal ensued.

In 1981, PSNH issued a document entitled "Policy Statement, Contract Pricing Provisions Limited Electrical Energy Producers" (hereinafter the "Policy Statement") (App. Br. at 78-82). The Policy Statement was in essence an open offer to potential QF developers including, *inter alia*, NHHA regarding the purchase of output from their proposed power plant projects. The Policy Statement contained three pricing options. Option I was a codification of the then-existing PUC approved rates of 8.2 cents per kWh if the project had dependable capacity and "7.7 cents per KWH for all energy in excess of that generated by the dependable capacity (NH PUC Order No. 14280, June 18,1980)" (App. at 79). Option II offered a 9.0 cents per kWh rate for a period of thirty years. Option III provided for a front-end loaded rate above

[1] The PUC has indicated that "capacity" is the ability to provide energy at any instant at which it is demanded and "energy" is the ability to perform work over time. *Re New England Electric Transmission Corporation*, 67 NH PUC 409, 415 (1982). In essence, a electric power plant's capacity represents the amount of energy it can produce instantaneously. (PSNH App. at 14.)

the nine cent offer with the upfront adders to be repaid over subsequent years in the thirty year term. *Id.*[2]

NHHA developed and built a hydroelectric generating plant on the Contoocook River in the Penacook section of Concord and Boscawen, New Hampshire. The generating project was named Penacook Lower Falls (the "Project"). NHHA negotiated with PSNH for a long-term power purchase agreement which was memorialized by the Contract for the Purchase and Sale of Electric Energy ("Contract") in April 1982. (App. 58.) Because it could not finance development of its Project with the Option II 9¢/kWh option (*see* Briar Hydro Brief at 3), NHHA chose to negotiate a contract under Option III which provided more value in the early years. During contract negotiations, NHHA tried unsuccessfully to create that extra value through a separate price for capacity, but PSNH did not agree to that proposal. The negotiated Contract provides that NHHA "shall make available to PUBLIC SERVICE the entire net output in kilowatt-hours." *See*, Contract at 2, (App. Brief at 59).

The Project was completed and became operational in early 1984. In February 1984, PSNH informed the regional New England Power Pool ("NEPOOL") that PSNH was adding the Penacook Lower Falls Project to its inventory of hydroelectric generating capacity. *See*, PSNH Letter to NEPEX, (App. at 127-130). At that time, NEPOOL was a consortium of New England electric utilities that governed the scheduling of electric power facilities, including electric transmission lines and electric power plants.[3] Since that date in 1984, PSNH has purchased and

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[2] Nov. 17, 2007 PUC Order, *slip op.* at 13 (App. at 13.)

[3] NEPOOL has been described as "a regional power-pooling system" with a membership of approximately sixty New England utilities which collectively contain roughly ninety-eight percent of New England's electric generation capacity. NEPOOL's objectives "are to assure the reliability of the region's bulk power supply and to attain 'maximum practicable economy' through, *inter alia*, 'joint planning, central dispatching ... and coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants. ...'" *Appeal of Conservation Law Foundation of New England Inc.*,127 N.H. 606, 632 (1986) (citations omitted). ISO-NE has now taken over from NEPOOL the role of overseeing the scheduling of electric power facilities in New England.

taken credit for the entire output from the Penacook Lower Falls Project under the Contract. Briar Hydro purchased the interests of NHHA in 2002. (Briar Hydro Brief at 3.)

Beginning in 2006, the generating "capacity" of generating stations in New England had its own value as a result of the implementation of a new capacity market called the FCM.[4] As will be argued below, PSNH has always believed and has conducted itself with this belief that payment for the entire net output of the Penacook Lower Falls Project under the Contract included the sale of capacity, energy, and any other energy-related products of value that were produced by that Project. In 2006, as a result of the implementation of the new capacity market called the FCM, Briar Hydro asked PSNH to pay it for the Project's capacity. PSNH refused that request, taking the position that under the Contract PSNH had the right to the "entire net output" of the Project, which includes both the capacity and energy output from this Project. *See,* Nov. 7, 2006 memo from PSNH's John MacDonald to Richard Norman (App. BR at 9).

In what appears to be argument in its Statement of Facts, Briar Hydro attempts to characterize the Contract as unrelated to requirements under LEEPA or PURPA mandating purchases by utilities from QFs. It argues that the "privately negotiated" rate of the Contract does not fit the definition of an avoided cost;[5] therefore, PURPA and LEEPA provided only a "background". (Briar Hydro Brief at 5) The statement that the Contract is not a purchase and sale mandated by PURPA or LEEPA solely because its rate was not established by the PUC at PSNH's avoided cost is incorrect. The original PURPA regulations provided that any electric

[4] The PUC has stated, "New England regional and wholesale electricity markets underwent a major change in 2006 when a new capacity market was developed and implemented. In response to a FERC edict to ensure that New England 's long-term electric needs would be met, the Forward Capacity Market (FCM) was developed. The FCM was the result of months of negotiations between the various stakeholders in New England (electricity generators, transmission system owners, regulators, policymakers, customers/end-users, and ratepayers) and was approved by FERC in June of 2006." http://www.puc.state.nh.us/electric/wholesaleandregionalissues.htm

[5] Both LEEPA and PURPA envisioned that mandated purchases would be at rates determined by the state regulatory agency, in New Hampshire, the PUC, which approximated the cost a utility would otherwise pay. RSA 362-A:4; 18 CFR § 292.304 (*See*, App. 174). In 1982, RSA 362-A:4 did not include avoided cost language, only cents per kWh (PSNH App. at 3).

utility or *qualifying facility* could agree to rates that differed from rates or terms and conditions that would otherwise be required by the regulations. 18 CFR §292.301(b)(1); (App. Br. at 173) (emphasis added). This authority to negotiate and contract for purchase/sale arrangements which did not adopt the standard rates established by the state regulatory authorities did not take the PSNH-NHHA Contract out of the mandated-purchase realm of PURPA and LEEPA. Absent the enactment of the PURPA exemption from federal rate regulation for the Penacook Lower Falls power sales agreement, this Contract would have been subject to the jurisdiction and approval of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act, 16 U.S.C. §824, PSNH App. 8-9. The fact that such a FERC filing was never made and approval was never sought demonstrates that the Project had operated pursuant to the PURPA regimen exempting it from the Federal Power Act rate regulation. Similarly, Penacook Lower Falls has also been exempt from state regulation by the PUC as a result of its LEEPA exemption provided by RSA 362-A:2.

SUMMARY OF ARGUMENT

The PUC is the regulatory agency primarily charged with the implementation of LEEPA and PURPA in New Hampshire. The PUC is given deference in its policy choices and its interpretation of the statutes for which it is entrusted to administer. *Appeal of Campaign for Ratepayers Rights*, 145 N.H. 671, 675 (2001); *State Retirement System v. Sununu*, 126 N.H. 104, 108 (1985). 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); *Appeal of Stonyfield Farm*, No. 2008-897 (August 5, 2009), *slip op.* at 4; *see, Appeal of Verizon New England*, 153 N.H. 50, 56 (2005). There is not a clear preponderance of the evidence to overturn the PUC's decision interpreting the

Contract between NHHA and PSNH. Briar Hydro argued that the sale of capacity was not included in the Contract while PSNH argued that the contract price included the purchase of both energy and capacity. Finding that the Contract was not clear on this point, the PUC properly looked to extrinsic evidence and the context in which the contract negotiations took place.

The PUC focused on the same document relied upon by Briar Hydro, which was PSNH's Policy Statement of 1981 inviting proposals from QFs to enter into contracts for the purchase and sale of power. The PUC correctly found that all three Options under the Policy Statement included the sale of capacity.[6]

The PUC also examined the context in which the Contract was negotiated. It found that the relevant statutes in effect and the decisions by the PUC regarding purchases from small power plant owners at the time required a utility company like PSNH to purchase the entire output of an electric power plant like the Project. It also found that capacity and energy were customarily both included in a cents per kWh charge. Nov. 17, 2007 PUC Order, slip op. at 14-16 (App. 14-16). For this particular Contract, the PUC held that:

> As a result, in the legal and regulatory context prior to July 5, 1984, we find that the phrase "entire output" when applied to the contract in dispute here meant all of the energy and capacity NHHA was able to produce and that all of the generating capacity and the energy produced by that capacity are fully obligated to PSNH and are fully compensated through the all-in price specified by the contract.

Id. at 17, App. 17.

Two years after the Contract was signed, the PUC changed its policy of including capacity in all-in cents per kWh prices. For the first time the Commission differentiated between the price of capacity and energy by pricing capacity in a separate dollars per kilowatt per year price and energy in a cents per kWh price. *Id.* at 16; *Small Energy Producers and Cogenerators*, 69 NH PUC Reports 352, 358 (1984) (PSNH App. at 39). PSNH and NHHA could not have

[6] Nov. 17, 2007 PUC Order, slip op. at 13 (App. at 13).

entered into a contract for the purchase of just energy because PSNH was required to purchase both the energy and capacity from the qualifying facility. 18 CFR §292.303(a) (App. Br. 148). If NHHA truly had reserved its capacity to sell to a third party or in to the FCM in 2006, then Penacook Lower Falls would have lost its exemption from FERC and PUC regulation.

For twenty-five years, PSNH has always included the Penacook Lower Falls facility as part of its capacity resources. PSNH registered the facility with NEPOOL as part of its hydroelectric assets as soon as it became operational. PSNH Letter to NEPEX (App. at 127). NHHA and Briar Hydro knew or should have known that since 1984 PSNH was claiming the capacity of Penacook Lower Falls at NEPOOL. Briar Hydro has waited too long to make any claim for ownership of the capacity value of the Project. NHHA (which is Briar Hydro's predecessor) agreed to a long term contract that included dependable capacity at a single price far above the prevailing 8.2 cents per kWh price. It now seeks to add a new, separate payment for capacity; a term which PSNH rejected during negotiations leading to the Contract.

In its Petition for Declaratory Ruling and its statements to the PUC at the prehearing conference, Briar Hydro was willing, even insisting, that this case be decided on the pleadings and documents submitted.[7] The PUC acceded to that recommendation. Only after learning that the PUC had ruled against its position did Briar Hydro request an evidentiary hearing. Briar Hydro Motion for Reconsideration and Rehearing at 2 (App. at 20). There is no basis to reverse the procedural methodology that was requested by Briar Hydro and adopted by the PUC. Briar Hydro has not shown any good cause as to why the PUC and PSNH should be required to re-hear

[7] At the PUC's prehearing conference, counsel for Briar Hydro argued, "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 of May 23, 2007, PUC Docket No. DE 07-045, p. 11 (App. at 98).

this entire proceeding, or why any relevant evidence could not have been presented before the PUC issued its decision. *Appeal of Gas Service*, 121 N.H. 797, 801 (1981). This case is not a case of ordinary contract interpretation. The Contract arose out of a nascent process of determining rates and terms to be included in purchases by regulated electric utilities like PSNH from small power plant owners like NHHA/Briar Hydro that were mandated by state and federal laws. It was justly and reasonably decided by the PUC in that context.

ARGUMENT

I. STANDARD FOR REVIEW

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. *See* RSA 541:13 (1997); *Appeal of Stonyfield Farm*, No. 2008-897 (August 5, 2009), *slip op.* at 4 (hereinafter, "*Stonyfield, slip op.*"); *see also Appeal of Pinetree Power*, 152 N.H. 92, 95 (2005). Findings of fact by the PUC are presumed *prima facie* to be lawful and reasonable. RSA 541:13; *Stonyfield, slip op.* at 4-5; *Pinetree Power*, 152 N.H. at 95. "When we are reviewing agency orders which seek to balance competing economic interests[,] our responsibility is not to supplant the PUC's balance of interests with one more nearly to our liking. We give the PUC's policy choices considerable deference." *Appeal of Campaign for Ratepayers Rights, supra*, 145 N.H. at 675; *see also, Appeal of Verizon*, 153 N.H. at 56; *Stonyfield, slip op.* at 2-3.

II. THE PUC CORRECTLY CONCLUDED THAT THE CONTRACT REQUIRES BOTH ENERGY AND CAPACITY TO BE SOLD TO PSNH.

The question on appeal is whether the PUC reasonably determined that when PSNH and NHHA entered into a Contract for the "entire output" of the Project, PSNH purchased both the energy and capacity from the Project. "In interpreting a contract, we give words their ordinary meaning *unless it appears from the context that the parties intended a different meaning*." *Merrimack School District v. National School Bus Service, Inc.* 140 N.H. 9, 13 (1995), *citing, Appeal of Berlin Board of Education*, 120 N.H. 226, 229 (1980) (emphasis added).[8] The PUC's interpretation of terms should be given deference. *See generally, Stonyfield, slip op.*

In the Nov. 17, 2007 PUC Order, the PUC used a two prong approach to interpreting the Contract. The PUC first interpreted the Contract language. It then relied on the regulatory context in which the Contract was negotiated. First the PUC examined the Contract language, stating that:

> The dispute between the parties concerns the proper interpretation of the terms "entire output" and "energy" and variations thereof used in the contract. Both parties assert that the plain meaning of the contract supports their contrary positions. We conclude, however, that within the four corners of the contract we cannot resolve the question of whether "entire output" includes energy and capacity; or whether "energy" was meant to be used in a general sense, which would include capacity, or in a technical sense, which would be distinguished from capacity. Another formulation of the dispute goes to the issue of whether the pricing in the contract was an all-in price for both energy and capacity, or a price for energy only. To interpret the contract we therefore look to the documents associated with, and the circumstances underlying, the contract.

Nov. 17, 2007 PUC Order, slip op. at 12 -13 (App. at 12-13).

[8] Similar principles apply to statutory construction. "Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning." RSA 21:2.

The PUC examined the same pivotal document that Briar Hydro emphasized in its filings with the PUC, which is PSNH's Policy Statement. (App. Br. at 78, *et seq.*) The Policy Statement was essentially an offer sheet to the small power plant developers at the time whereby PSNH would agree to contracts other than at the standard rates approved by the PUC. Option I reflected the then-current prices approved by the PUC, which was 7.7 cents per kWh for output with no reliable capacity and 8.2 cents per kWh for projects with dependable capacity. These rates were available for the life of the electric power plant. *See, Re: Small Power Producers and Co-Generators*, Order No. 14,280, 65 NH PUC 291, 299, (1980) (PSNH App. at 15).[9] These rates were long-term because they could last for the life of the LEEPA or PURPA facility. The "market price" for capacity from small power producers was established by the PUC at 0.5 cents per kWh, which reflects the difference between the all-in price of 8.2 cents per kWh for projects with dependable capacity and the price of 7.7 cents per kWh for projects without dependable capacity. These prices were all expressed in cents per kWh prices, notwithstanding the fact that capacity is normally measured in megawatts or kilowatts (as opposed to kWhs).

There is no leap of logic on the part of the Commission in concluding that Options II and III were also based on prices which included the purchase of capacity. All-in prices for both

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[9] The PUC stated that:

> Because of the PUC's concern that alternative energy be developed as quickly as possible, coupled with our recognition that the advent of Seabrook places an entirely new variable into the avoided cost calculation, the PUC finds that the rate set in this proceeding will be applicable as a minimum to all small power producers presently operating qualifying facilities and to all small power producers who activate qualifying facilities between the date of this order and the date of initial generation at Seabrook I, for the life of the qualifying facilities. In essence, those small power producers, with qualifying facilities either under PURPA or LEEPA, will be grandfathered to the rate set in this proceeding as a minimum if the qualifying facility begins generation prior to electrical generation at Seabrook I.
>
> The rate grandfathered for the aforementioned qualifying producers is the staff proposal of 7.631 cents per kwh for energy and 8.131 cents per kwh [for energy and capacity] rounded upwards to 7.7 cents and 8.2 cents respectively to account for the conservative assumptions taken by staff and the unquantified externalities.

65 NH PUC 298-299 (PSNH App. at 9).

capacity and energy were the norm in 1982. Nov. 17, 2007 PUC Order, slip op. at 14-16 (App. 14-16). Not until two years after the Contract was signed did the PUC move away from its policy of including capacity in the all-in cents per kWh prices. *Id.* at 16; *Small Energy Producers and Cogenerators*, 69 NH PUC Reports 352, 358 (1984) (PSNH App. at 39). The nine cent per kWh offer in Option II was almost 17% above the energy-only base price of 7.7 cents per kWh and included a term of thirty years. The 10 cent per kWh rate agreed to by the parties for the Contract negotiated under Option III is almost 30% higher than the base price. Briar Hydro argues that PSNH agreed to pay NHHA a 30% higher price for the entire output of Penacook Lower Falls but acquired less, i.e. no capacity. This argument has no logic.

The preamble of the Contract concisely resolves any purported ambiguity. The second recitation of the Contract's preamble reads, "WHEREAS, SELLER [now Briar] desires to sell its entire generation output to PUBLIC SERVICE." Similarly, the fifth recitation reads, "WHEREAS, SELLER is willing and able to sell its entire output to PUBLIC SERVICE for thirty years." Contract at 2 (App. at 58). The Contract clearly expresses the intent of the parties that for the considerations set forth therein, NHHA was selling the "entire generation output." The PUC correctly found that the entire generation output included both energy and capacity and pointed out that "once PSNH has purchased Briar Hydro's entire output [from the Penacook Lower Falls Project], Briar Hydro retains no ability to generate power for any other purpose." PUC Order Denying Motion for Rehearing, Order No. 24,960, slip op. at 10 (April 22, 2009) (App. at 55). The PUC correctly concluded that the Project's capacity was part of its entire generation output.

III. THE REGULATORY CONTEXT WITHIN WHICH THE CONTRACT WAS DEVELOPED ALSO SUPPORTS THE PUC'S DETERMINATION THAT THE CONTRACT AUTHORIZES PSNH TO RECEIVE THE PROJECT'S ENERGY AND CAPACITY.

More important to a thorough understanding of what the parties agreed to in the Contract is the statutory and regulatory context in which the Contract was negotiated. "In addition to giving the language its reasonable meaning, the court must read the contract, as a whole and consider the circumstances and the context in which the agreement was negotiated." *Ryan James Realty v. Villages at Chester Condo. Assoc.*, 153 N.H. 194, 197 (2006), *cited in*, PUC Order Denying Motion for Rehearing, Order No. 24,960, slip op. at 8 (App. at 53). The market for purchases by electric utilities from QFs under PURPA or from limited electrical energy producers under LEEPA was in its nascent period in New Hampshire when the Contract was negotiated. LEEPA was effective on August 22, 1978 (PSNH App. at 5); and PURPA became effective November 9, 1978 (App. Br. at 152). The pricing structure in the small power producer market in 1982 when the Contract was negotiated did not provide for separate energy and capacity prices. All these prices were expressed in terms of cents per kWh.

A. Under PURPA, Briar Hydro May Not Separate Sales of Energy from Capacity.

Even if the terms of the Contract alone are not deemed conclusive evidence of PSNH's entitlement to the capacity produced by the Penacook Lower Falls Project, the Contract does not exist in isolation; it is the manifestation of the underlying statutory and regulatory framework within which it was written. That legal foundation clearly demonstrates that NHHA could not then, and Briar Hydro cannot now, sell its energy to PSNH, and at the same time sell its capacity to ISO-NE under the new capacity market called the FCM. If NHHA had attempted to separate

its sale of energy from the capacity, Penacook Lower Falls could not maintain its exemption from FERC rate jurisdiction under the Federal Power Act.

Under the Federal Power Act, a transaction between the owner of an electric power plant and an electric utility company like PSNH is normally subject to regulation at the federal level by the Federal Energy Regulatory Commission ("FERC"). *See,* 16 U.S.C. §§824(b)(1), (d) and (e) (PSNH App. at 9). An exception to this rule was carved out for "qualifying facilities" or "QFs" by Congress in PURPA, which is codified in 16 U.S.C. §824a-3(e) (App. Br. 149). Owners of electric generating plants falling within the definition of a "qualifying facility" could sell their output to the local electric utility company like PSNH under rates established by the state regulatory commission. Federal regulation in 18 C.F.R. §292.303 requires electric utility companies like PSNH to purchase all of the capacity and energy that was made available from each qualifying facility. 18 C.F.R. §292.303(a) states:

> (a) *Obligation to purchase from qualifying facilities.*
> Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility....(App. Br. 148)

This federal regulation mandates that PSNH purchase <u>any energy and capacity</u> which is made available from a qualifying facility, such as the Penacook Lower Falls Project. This provision is clearly inclusive – the purchase mandate applies to <u>any energy ***and*** capacity.</u> If NHHA believed that PSNH was refusing to purchase the capacity from Penacook Lower Falls, it could have petitioned the PUC to require PSNH to purchase that capacity. RSA 362-A:5 (1978) (PSNH App. at 4) . The actual outcome of the negotiations was PSNH's unwillingness to pay a separate price for capacity above and beyond price offered of nine cent per kWh price plus the one cent front-end load. NHHA ultimately relented because the Contract was attractive enough to permit them to finance their Project.

Contrary to Briar Hydro's position, PSNH could not, and did not, contract to buy only energy from the Project. Any attempt to deviate from PURPA's regulatory scheme by a QF like Briar Hydro would have caused the Project to lose its above-described exemption from federal regulation by FERC under the Federal Power Act. If Briar Hydro or any other QF lost its exemption from FERC regulation, it would then be required to comply with all applicable requirements of the Federal Power Act, which includes FERC's regulation and approval of sales of energy and capacity from the Project. Briar Hydro has never made any such application to FERC for approval of its supposed deviation from the mandate of 18 C.F.R. §292.303, nor would PSNH, as a party to the Contract, have consented to such an action if it were proposed by Briar Hydro.

This court has twice read the state and federal laws, LEEPA and PURPA, to be consistent. *Appeal of Granite State Electric*, 121 N.H. 787, 789 (1981); *Appeal of PSNH*, 130 N.H. 285, 287 (1988).[10] After the court's decision in *Appeal of Granite State Electric, supra*, the PUC stated the following:

> The regulations of the Federal Energy Regulatory Commission (FERC) promulgated pursuant to PURPA § 210 provide in pertinent part:
>
> > Each electric utility shall purchase … any energy and capacity which is made available from a qualifying facility … 18 CFR § 292.303(a). See also, PSNH Prefiled Testimony, Exh. 3, Attachment 2 at 12235.
>
> Accordingly it is clear that an electric utility must purchase the entire output of a qualifying facility. . . . Since the above federal law can operate to pre-empt inconsistent state law, Federal Energy Regulatory Commission v Mississippi, supra, we must, where offered a choice, construe state law as being consistent with federal law.

[10] "In a rare instance of State and federal legislative coincidence, the New Hampshire Legislature and the United States Congress each enacted similar provisions in 1978 designed to diversify electrical power production through the encouragement of small power producers and cogenerators." *Appeal of Public Service Company of New Hampshire*, 130 N.H. 285, 287 (1988).

Re: Small Power Producers and Co-Generators, Docket No. DE 83-62, Fourth Supplemental Order No. 16,619, 68 NH PUC 531, 537 (1983) (PSNH App. at 30).

Reading PURPA and LEEPA consistently together, the entire generation output, energy and capacity, was purchased by PSNH through the Contract with NHHA in 1982. The parties could not have done otherwise.

B. <u>The Contract is Inextricably Linked to the Regulatory Framework of the Time.</u>

PSNH and NHHA did not simply approach each other at arm's length to negotiate the Contract with a blank sheet of paper. If they had negotiated such a contract, it would have been a FERC-regulated contract as described above. The Contract is one of several long-term contracts negotiated as a result of the Policy Statement, all of which were formed within the context of regulation by the PUC of QF electric power plant owners under PURPA. In relating the early history of this regulatory subject matter the PUC stated:

> Following the passage of the LEEPA and PURPA legislation in 1978, the Commission set rates and established interconnection standards, first for PSNH as the state's only generating utility and subsequently for the state's non-generating utilities. *These early orders determined short term buy back rates for energy and capacity* for all utilities, and offered non-generating utilities the option of either paying their generating suppliers' avoided cost or wheeling to their suppliers at no charge.
> *Although the Commission also encouraged utilities to negotiate long term purchase power agreements with developers, only PSNH responded, signing long term contracts primarily with small hydro-electric facilities.* Between 1978 and 1983, 57 facilities achieved commercial operation; they were predominantly run of the river hydro-electric (41), but also residential wind (1), wood/cogeneration (4) and photovoltaic (1).

Re: Public Service Company of New Hampshire, Docket No. DR 86-41, Order No. 19,052, 73 NH PUC 117, 123 (1988) (PSNH App. at 50) (Emphasis added).

The 1982 Contract with NHHA was one of these long-term purchase power agreements that the PUC had encouraged the utility companies like PSNH to negotiate with small power plant owners like NHHA. Each contract was part and parcel of the early history of the small power producer market – a market which the PUC clearly noted included the sale of *energy and capacity*.

C. The Standard in 1982 Was a Cents Per Kilowatt-Hour Rate for Both Capacity and Energy.

The LEEPA statute in effect at the time the Contract was executed consisted of only five short sections. *See*,1978 N. H. Laws 32 (PSNH App. at 3-4). RSA 362-A:4, which was in effect in 1978, stated that:

> **362-A:4 Payment by Public Utilities for Purchase of Output of Limited Electrical Energy Producers.** Public utilities purchasing electrical energy in accordance with the provisions of this chapter shall pay rates per kilowatt hour to be set from time to time by the Commission.

The statutory framework at the New Hampshire level did not yet contemplate avoided costs or a separate price for the purchase of capacity from a QF. Only in 1983 did the legislature add language to RSA 362-A:4 involving avoided costs. *See*,1983 N. H. Laws 395:1 (PSNH App. at 5-6). The only recognized pricing structure in 1982 for the sale of the entire output from a QF was expressed in cents per kWh. The pricing structure advanced by NHHA in its attempts to have a capacity charge in the Contract, i.e. dollars per kilowatt, was not permitted under the then-current RSA 362-A:4 and was contrary to the pricing structure that the PUC had established for sales with and without dependable capacity.

In 1984, the PUC concluded a comprehensive review of rates paid to small power producers and co-generators in Docket DR 83-62. Only then did the PUC abandon its policy of

incorporating both energy and capacity in a single cents per kWh price.[11] The long-term rate orders having separate capacity and energy payments were the result of PUC Order No. 17,104, which was decided almost a year and a half after the NHHA Contract was executed. Nov. 17, 2007 PUC Order, slip op. at 16 (App. at 16). The PUC abandoned its standard practice of including capacity and energy in a single per kWh rate for future rate orders, but it did not abrogate those existing arrangements where compensation for energy and capacity had previously been included in the single cents per kWh rate.

D. The Parties' Long-Term Course of Dealing Under the Contract Demonstrates that PSNH Is Entitled to the Value of the Capacity.

Briar Hydro complains that the PUC failed to consider the parties' post-Contract dealings. Briar Hydro Brief at 29. Briar Hydro argues that the course of dealing between the parties evidences that no capacity was included in the sale. The PUC chose to decide the issue based upon the Contract language, the record in the proceeding before the PUC, and the regulatory context in which the Contract was executed; and, as a result, it was unnecessary for the PUC to examine the course of dealings by the parties. Nov. 17, 2007 PUC Order, slip op. 17

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[11] The PUC's 1984 decision in Docket No. DE 83-62 states that:

> B.5. Capacity Component of the Rate
>
> [7] Although the magnitude of avoided capacity costs may be quite different depending upon the number of years to which the SPP is committed, several aspects of the capacity component of short and long-term rats are the same. The first is that the expression of the capacity values will remain in $/KW/YR and *will no longer be translated into /KWH and added to the energy rate.* The PUC notes that the existing short term rate translated a capacity value of $22 per KW year into a /KWH adder by spreading the $/KW year value over the number of hours SPPs were assumed to operate during the year. The PUC assumed a 50% capacity factor, with the resulting capacity payment of 0.5/KWH ($22).0.5/KWH .50x8760
>
> Payment on a per kilowatt hour basis meant that to the extent that a SPP had a capacity factor greater (or less) than 50%, and operated more (or less) than 4380 hours, it was being overpaid (or underpaid) for its capacity value. Payment on a $/KW/Yr basis will provide a more direct correlation between cost and rate components and facilitates administrative policies.

Docket No. DE 83-62, Order No. 17,104, 69 NHPUC Rep. 352, 358 (1984) (PSNH App. at 33).

(App. 17). The PUC's decision to rely on the Contract language, the record and the context of the time when the Contract was executed is fully justified.

Nevertheless, if this court believes the PUC ought to have addressed the course of dealings of the parties, the overwhelming record evidence of the parties' action and inaction after the Contract was executed leads to the conclusion that that the Project's capacity belongs to PSNH. 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 (1996). Briar Hydro points to the fact that PSNH complied with the Contract and paid a cents per kWh price all these years. (Briar Hydro Brief at 29.) This point is unpersuasive because, as pointed out above, that cents per kWh price included capacity. *See discussion*, sections II. III. A., B. and C., *supra.* Since 1984, PSNH has included and continues to include the capacity in its capability responsibility reported to NEPOOL and ISO-NE. This conduct is evidenced by PSNH's 1984 notice to NEPOOL. As soon as the Penacook Lower Falls Project was operational, PSNH instructed NEPOOL to add the new addition to PSNH's capacity. App at 127-128. PSNH is a utility company that is responsible for having sufficient capacity in place to meet its customers' electricity needs, and therefore, PSNH has always counted Penacook Lower Falls as an asset in meeting PSNH's capacity requirements. Briar Hydro would have the court believe that it never investigated the status of its valuable capacity. (Briar Hydro Brief at 29.)

Since the Contract was executed, neither Briar Hydro nor NHHA ever attempted to sell capacity from Penacook Lower Falls into the New England markets, although there have been periods when the NEPOOL capacity market or the ISO-NE clearing price have been attractive. *See*, Historical ISO New England Capacity Market Clearing Prices (App. Br. 106-108.) The reason that Briar Hydro and NHHA never sold the Penacook Lower Falls Project's capacity into

the market is because PSNH had already been purchasing that capacity from the Project since it began generating. As PSNH is the rightful purchaser of Penacook Lower Falls' capacity, any value for that capacity, including transitional payments under the new capacity market called the FCM, rightfully should be paid to PSNH and ultimately credited to PSNH's retail electric customers via the PUC's ratemaking process.

PSNH sent a letter to NHHA on May 14, 1990 discussing the topic of a buyout of the Contract. *See*, Letter from S. B. Wicker to Tom Tarpey (App. Br. 109-111). PSNH proposed that Briar Hydro would have to pay back the front-end loading in the Contract. The letter contained a table of computations where the Marginal Value of Electricity was expressed in both energy and capacity (PSNH Marginal Energy and PSNH Short Term Capacity) with a column showing what Penacook Lower Falls would have been paid if purchases had been made at the Marginal Value. This letter is instructive in that it evidences that PSNH has always deemed the Contract to cover both energy and capacity from the Project. The 1990 proposed buy-out subtracted both the marginal value of energy and the short term capacity values from the payments made to NHHA in order to compute the premium Penacook Lower Falls had been paid over the Marginal Value of Electricity.

PSNH has always acted as the owner of the capacity of Penacook Lower Falls under the Contract, and neither NHHA nor Briar Hydro has ever evidenced a right of ownership to the capacity prior to 2006 when it made its demand on PSNH. Interesting is the fact that Briar Hydro wants capacity payments by way of its contractual relationship with PSNH as opposed to seeking them directly from ISO-NE. Briar Hydro cannot have it both ways, by denying the Contract calls for the sale of capacity to PSNH, then demanding for the first time separate and new compensation for capacity through the same Contract.

IV. BRIAR HYDRO WAITED TOO LONG TO MAKE ITS CLAIM TO ANY COMPENSATION FOR CAPACITY.

PSNH's claim to capacity of the Penacook Lower Falls Project was regularly reported to NEPOOL and later ISO-NE. PSNH makes reports to the PUC every month concerning is purchases from small power producers like Briar Hydro. Mr. Richard Norman, his colleagues and his various corporate entities own and operate many hydroelectric power plants here in New Hampshire and in other states. Mr. Norman is not a silent partner but has been an active manager. Mr. Norman actively participates in legislative matters and PUC proceedings. It is beyond belief that Briar Hydro did not know of PSNH's claim to the capacity from 1984 through 2006. (Briar Hydro Brief at 29.) By exercise of ordinary diligence, Briar Hydro should have kept a close watch on its valued capacity asset that it claims was reserved to NHHA under the Contract.

V. BRIAR HYDRO WAIVED ITS RIGHT TO AN EVIDENTIARY HEARING AND FAILED TO DEMONSTRATE THAT THERE WAS GOOD CAUSE FOR HOLDING AN EVIDENTIARY HEARING AFTER A FINAL ORDER.

Briar Hydro filed a Petition for Declaratory Ruling under N.H. Code Admin. Rule Puc §§ 207.01 and 202.01. Counsel for Briar Hydro was quite sure that this declaratory ruling proceeding was simply a case of contract interpretation, and no evidentiary hearing was required.

> 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 of Pre-Hearing Conference, May 23, 2007, (App. at 98). *See also*, Petition for Declaratory Ruling. (App. Br. 3).

The PUC adopted the procedure proposed by Briar Hydro. The PUC ultimately issued its Order Following Briefs . *See,* Nov. 17, 2007 PUC Order (App. 1, *et seq.*). Throughout the procedure that had been requested by Briar Hydro, no party raised an issue in the course of the informal discovery that required oral testimony, and no party requested a hearing at which testimony would be provided. Only after a final order was rendered in favor of PSNH's customers, did Briar Hydro decide that an evidentiary hearing was required. Briar Hydro first sought an evidentiary hearing in its December 21, 2007 Motion for Rehearing, which was filed 30 days after it had lost its PUC case.

Following the filing of Briar Hydro's Motion for Rehearing and PSNH's Objection thereto, the PUC offered oral argument to the parties where they might make offers of proof as to what would be presented at an evidentiary hearing. *See*, PUC Transcript, May 20, 2008 (App. 135). As part of his oral argument, counsel for Briar Hydro repeatedly beseeched the PUC to allow him to put Mr. Richard Norman on the stand to explain his case. The PUC properly resisted these entreaties. PUC Transcript, May 20, 2008 at 8 (App. at 142).[12]

Briar Hydro presented no good reason why the testimony of Mr. Norman and Mr. Warren Mack was not offered prior to the PUC's issuance of its Nov. 17, 2007 Order. *Appeal of Gas Service Inc.*, 121 N.H. 797, 801 (1981). Unlike the record in *Dumais v. State,* 118 N.H. 309, 312 (1978), in this case there was no new evidence to present after the Nov. 17, 2007 PUC Order. Briar Hydro certainly could have offered Mr. Norman's and Mr. Mack's twenty-five year old recollections before it lost its case. The only reason why testimony was being offered by Briar

[12] An affidavit from a Mr. Warren Mack, dated December 7, 2007, was appended to the Motion for Rehearing. (App. 35-37) Although Briar had waived any right to present testimony in its original Petition for Declaratory Ruling and in its statements at the pre-hearing conference, it attempted through its Motion for Rehearing to introduce an affidavit and presumably to offer Mr. Mack as a witness at a future evidentiary hearing.

Hydro after issuance of the Nov. 17, 2007 PUC Order was that it had lost. That is not sufficient reason to grant rehearing once a final decision has been rendered.

CONCLUSION

For the reasons stated above, the court should find that Briar Hydro has not met its burden to show that the Nov. 17, 2007 PUC Order issued by the Commission was unjust, unreasonable or unlawful and should dismiss the appeal.

REQUEST FOR ORAL ARGUMENT

Public Service Company of New Hampshire, Respondent and Appellee, requests oral argument not to exceed fifteen minutes. Gerald M. Eaton will present oral argument.

Respectfully submitted,

Public Service Company of New Hampshire

_____ By:_____

Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served on the persons listed on the attached Service List.

_____ _____

Date Gerald M. Eaton