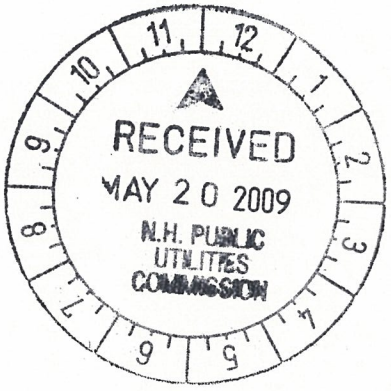
DE07-045

09- 0359

THE STATE OF NEW HAMPSHIRE

SUPREME COURT



No. _____

Briar Hydro Associates

v.

Public Service Company of New Hampshire

APPEAL BY PETITION UNDER RSA 541:6

From Orders of the

New Hampshire Public Utilities Commission

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APPEAL BY PETITION UNDER RSA 541:6

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

APPEAL OF BRIAR HYDRO ASSOCIATES BY PETITION UNDER RSA 541:6

Now comes Briar Hydro Associates ("Briar"), by and through its attorneys, Orr & Reno, P.A., and appeals to this Honorable Court, under RSA 541:6 and Supreme Court Rule 10, from the following orders of the New Hampshire Public Utilities Commission ("Commission") in DE 07-045 (Briar Hydro Associates v. Public Service Company of New Hampshire):

(i) Order Following Briefs, No. 24,804, issued November 21, 2007; and

(ii) Order Denying Motion for Rehearing, No. 24,960, issued April 22, 2009.

In support of this Appeal by Petition, Briar respectfully states as follows:

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(b) Rule 10(1)(b) Documents

Copies of the following documents relating to Commission proceeding DE 07-045 are included in the Appendix to this appeal (hereinafter "App."), in accordance with Supreme Court Rule 10(1)(b):

1. Order Following Briefs (Order No. 24,804), issued November 21, 2007, App. p.1;

2. Briar's Motion for Reconsideration and Rehearing, December 21, 2007, App. p. 19;

3. Public Service Company of New Hampshire's Objection to Briar's Motion for Rehearing, December 31, 2007, App. p. 38;

4. Order Denying Motion for Rehearing (Order No. 24,960), issued April 22, 2009, App. p. 46.

(c) Questions Presented for Review

1. The Appellant and Public Service Company of New Hampshire ("PSNH") are parties to a "Contract for the Purchase and Sale of Electric Energy" which does not include the term "capacity." The Commission, however, found that the contract included capacity. Did the Commission err when it: found that the key contractual terms "energy" and "output" were

ambiguous; failed to apply the plain and ordinary meaning of those terms; and failed to apply decisions from other jurisdictions (which the Commission specifically requested but then failed to apply or distinguish) which establish that, in the context of the electric industry, the term "output" is used as a measure of "energy" and does not include "capacity"?

2. Is the Commission's interpretation of the contract unlawful or unreasonable because it is contrary to the overwhelming weight of evidence in the record, ignores relevant case law, and instead relies on a reading of PSNH's "Policy Statement" that is both internally inconsistent and unsupported by any evidence in the record?

3. Did the Commission err when, after finding that the contract language was ambiguous, it denied Briar's request for an evidentiary hearing to consider fully all relevant extrinsic evidence relating to the parties' intent and the circumstances at the time the contract was executed, including sworn testimony from a signatory to the contract, as well as extrinsic evidence of the parties' post-contract course of dealings?

(d) <u>Constitutional Provisions, Statutes, Rules and Regulations</u>:

1. Amendment XIV to the United States Constitution, §1, provides in relevant part:

> ...nor shall any state deprive any person of life, liberty, or property without due process of law;...

2. Part 1, Art. 15 of the New Hampshire Constitution provides in relevant part:

> ...No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land;...

3. Federal Energy Regulatory Commission Order No. 69 in Docket No. RM 79-55 (Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978), Part III, §292.101, published at 45 F.R. 38, p.12216, February 25, 1980, differentiates between "energy" and "capacity" costs as follows:

> ... The costs which an electric utility can avoid by making such purchases generally can be classified as "energy" costs or "capacity" costs. Energy costs are the variable costs associated with the production of electric energy (kilowatt-hours). They represent the cost of fuel, and some operating and maintenance expenses. Capacity costs are the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities...

(e) <u>Provisions of Relevant Contracts and Other Documents</u>:

1. Articles 1, 2, and 3 of the April 28, 1982 "Contract for the Purchase and Sale of Electric Energy" between New Hampshire Hydro Associates (Briar's predecessor-in-interest) and Public Service Company of New Hampshire provide in relevant part as follows:

> <u>Article 1</u>. <u>Basic Agreement</u>.
> Subject to the terms, provisions, and conditions of this Contract, SELLER agrees to furnish and sell and PUBLIC SERVICE agrees to purchase and receive all of the **electric energy** produced by the Penacook Lower Falls hydroelectric generating facility owned and operated by SELLER...(emphasis added)

> Article 2. Availability.
> During the term hereof, SELLER shall endeavor to operate its generating unit to the maximum extent reasonably possible under the circumstances and shall make available to PUBLIC SERVICE the **entire net output in kilowatthours** from said unit when in operation...(emphasis added)
>
> Article 3. Price.
> The price charged by SELLER to PUBLIC SERVICE for sales of **electric energy** under this Contract shall be based on an index price of 9.00 cents per kilowatthour (KWH) and shall be determined as follows... (Price formula omitted) (emphasis added)

The entire Contract is appended. *See* App. pp. 58-66.

2. December 2006 Penacook Lower Falls invoice to PSNH, App. p. 67.

3. Excerpts from Settlement Agreement incorporated into FCM Order, including Section 11, Part VIII.B, Attachment 1-A (Definitions), and Section 11, Parts V.A, II.F.1 and III.O, App. p. 68.

4. Commission Report and Supplemental Order No. 13,744 in DE 78-232 and DE 78-233, July 23, 1979, App. p. 75.

5. Commission Report and Supplemental Order No. 14,280 in DE 79-208, June 18, 1980, App. p. 78.

6. Transcript of May 23, 2007 Pre-Hearing Conference, App. p. 88.

7. PSNH's November 5, 1981 "Policy Statement on Contract Pricing Provisions for Limited Electrical Energy Producers," App. p. 107.

8. December 21, 1981 letter from PSNH's John Lyons to NHHA's Richard Norman, with hand-written worksheets attached, App. p. 113.

9. December 29, 1981 Letter from NHHA's Warren Mack to PSNH's John Lyons, App. p. 117.

10. PSNH Intra-Company Business Memo from M.D. Cannata, Jr. to H.J. Ellis, dated September 9, 1981, App. p. 122.

11. December 19, 2007 Affidavit of Warren Mack, App. p. 124.

12. February 6, 1984 PSNH letter to NEPEX, App. p. 127.

13. May 14, 1990 letter from PSNH to NHHA with attached spreadsheet, App. p. 131.

14. Transcript of May 20, 2008 Oral Argument, App. p. 135.

(f) Statement of the Case:

This is an appeal from Commission orders construing a 1982 "Contract for the Purchase and Sale of Electric Energy" (the "Contract," App. pp. 58-66) between Briar's predecessor-in-interest (New Hampshire Hydro Associates, or "NHHA") and Public Service Company of New Hampshire ("PSNH"). The issue is whether the Contract included, in the sale to PSNH, the "capacity" represented by the hydroelectric generating facility owned and operated by NHHA and now Briar, or whether the parties bargained to purchase and sell only the "electric energy" generated by the facility during the term of the Contract. At the time the Contract was executed, "capacity" was clearly understood to be a different commodity from "energy," and the parties discussed at length and in detail whether "capacity" would or would not be included in the Contract. However, the Contract makes no mention of "capacity."

Background: The context of the 1982 agreement was a changing regulatory landscape, in which (a) regulated utilities that had traditionally been

reluctant to purchase power from independent small power producers were being required by federal and state statutes to buy the energy and/or capacity produced by independent generators at "avoided cost" rates[1] set by state regulators, but (b) the price and other terms of some power purchase agreements, including the one at issue here, were being negotiated between the utility and the small power producer independently of the new statutory framework.

Briar's affiliate and predecessor-in-interest, NHHA, developed the 4.1 megawatt Penacook Lower Falls Project ("the Project") on the Contoocook River in the early 1980's, and entered into the Contract with PSNH on April 28, 1982. Under Article 1 of the Contract, NHHA agreed to sell "all of the electric energy" produced by the Project to PSNH for a term of 30 years, at a variable price described in Article 3 and based on an index rate of 9.0 cents per kilowatt-hour ("kwh"). In 2002, Briar purchased the Project from NHHA, assuming rights to the Contract with PSNH's consent. Briar has continued to sell, and PSNH has continued to purchase, all of the electric energy produced by the Project, through the date of this appeal. Under the price formula set forth in Article 3 of the Contract, Briar currently receives a below-market rate of 3.53¢/kwh for energy sold to PSNH (*see* December 2006 Penacook Lower Falls invoice, App. p. 67.)

[1] The Public Utility Regulatory Policies Act of 1978 ("PURPA") and New Hampshire's Limited Electrical Energy Producers Act ("LEEPA") required regulated public utilities to purchase the energy and/or capacity produced by qualifying small power producers ("qualifying facilities," or "QFs") at "avoided cost" rates to be established by the state public utilities commission. PURPA Section 210(b), 16 U.S.C. §824a-3, and RSA 362-A:3 and 4. The 1980 PURPA regulations defined "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility..., such utility would generate itself or purchase from another source." 16 C.F.R. §292.101(b)(6). *See also* excerpt from FERC Order 69 in RM 79-55, quoted at Part (d) 3 above.

Capacity was not valued as highly in the early days of the independent power industry as it has come to be in the intervening years, and especially since the advent of the New England Forward Capacity Market ("FCM") in 2006. *See* Order Following Briefs, App. p. 11. The FCM was established under a June 16, 2006 order (the "FCM Order")[2] of the Federal Energy Regulatory Commission ("FERC"), as a means of insuring a reliable supply of electric power for New England. Under the FCM Order, existing electric generators in New England were to receive monthly "transition payments" for keeping their plants ready to generate energy on dispatch by ISO-NE, the grid administrator for the New England region. Transition payments under the FCM Order began on December 1, 2006 at the rate of $3,050/mw-month ($3.05/kw-month), escalating to $3,750/mw-month on June 1, 2008 and to $4,100/mw-month on June 1, 2009. App. pp. 70-71. Beginning in June 2010, existing and new generators who qualified and bid successfully to sell their capacity in a series of "Forward Capacity Auctions" administered by ISO-NE would receive monthly "capacity payments" for the generating capacity they agreed to maintain.

The issue that arose in late 2006 was whether Briar or PSNH should be entitled to the significant monthly transition and capacity payments attributable to reliable capacity from the 4.1 mw Penacook Lower Falls generating facility — which would amount to hundreds of thousands of dollars over the first few years of the FCM. As the Commission noted at p. 2 of its Order Following Briefs:

[2] *Devon Power LLC*, 115 FERC ¶61340 (June 16, 2006).

> ...The question is of interest to the parties in light of the approval by the Federal Energy Regulatory Commission (FERC) of the original FCM, which will yield income to the party with rights to the generating capacity of the facility at issue in this proceeding. *See Devon Power LLC*, 115 FERC ¶61340 (June 16, 2006) (approving settlement regarding creation FCM for New England, as a means of encouraging development of new generation capacity region-wide).

The Settlement Agreement incorporated into the FCM Order provides that a qualifying owner of generating capacity (a "Resource") will be entitled to monthly capacity payments, unless the owner of the generating unit has assigned the capacity represented by that unit to a "Load Serving Entity" (such as PSNH) by contract.[3]

Contract Terms: The Contract is, by its terms, a contract for the purchase and sale of "electric energy." Nowhere does it mention "capacity." Article 1 provides that "Seller agrees to furnish and sell and [PSNH] agrees to purchase and receive all of the **electric energy** produced by the Penacook Lower Falls hydroelectric generating facility..." (emphasis added). Article 3 provides a formula for the purchase price, based on sales of "**electric energy**" and expressed in cents per kilowatt-hour (kwh), a standard unit for measuring energy. By comparison, capacity is typically measured in kilowatts (kw) or megawatts (mw) and is sold at prices expressed in $/kw-month or mw-month.[4]

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[3] *See* excerpts from Settlement Agreement incorporated into the FCM Order, Attachment 1-A (Definitions), and Section 11, Parts V.A, II.F.1, and III.O, App. pp. 71-74.

[4] Although one not familiar with the electric industry might wonder whether the term "energy" could include "capacity," by 1982 "energy" and "capacity" were widely understood to be distinct power commodities, which could be bought and sold either separately or together. See, e.g. FERC Order 69, issued February 19, 1980 in Docket RM 79-55, implementing §210 of PURPA, and particularly Section III, §292.101 (excerpted at Part (d)3 above), in which FERC distinguished between the avoided costs for "energy" (variable costs associated with the production of electric energy in kilowatt-hours, and generally comprising the cost of fuel and some operating and maintenance expenses) and "capacity" (fixed capital

At a pre-hearing conference on May 23, 2007, the Commission expressed no interest in the essential contract terms calling for the sale of "electric energy," without mention of "capacity." Rather, it focused on the term "output," used in the recitals and in Article 2. At the end of the pre-hearing conference Chairman Getz said:

> It seems like one way of looking at this is there is a contract for output [sic] that now appears to have some greater value than may have been originally anticipated. And, if that's explored in New Hampshire law somewhere or if there are some general contractual principles from other states or treatises, whatever, I'd appreciate some exploration of that concept.

App. p. 106. It appears from this statement that Chairman Getz had already mistakenly equated "output" with "capacity."[5] Briar noted in its brief that no reported New Hampshire cases construed the term "output," but that Webster's Dictionary and a majority of cases from other jurisdictions equated "output" with "energy" rather than "capacity." The Commission, however, essentially disregarded the cited cases in its Order Following Brief.

Extrinsic Evidence: Rather than construing the plain meaning of the contract terms "energy" and "output" based on the dictionary definitions and case law, the Commission found that the contract terms were ambiguous, and would require the review of extrinsic evidence for their proper interpretation. App. p. 13. But in doing so, the Commission focused on just one piece of

---

costs associated with building the generating facility required to deliver energy). Beginning in 1979, the Commission had also recognized the distinction between "energy" and "capacity" in a series of orders governing the sale of energy or energy and capacity from qualifying small power producers to franchise utilities. *See*, e.g., Report and Supplemental Order No. 13,744 in DE 78-232 and DE 78-233, July 23, 1979, App. p. 75, and Report and Supplemental Order No. 14,280 in DE 79-208, June 18, 1980, App. pp. 78, 84-86.

[5] It is "capacity," not "output," that now has greater value than originally anticipated.

extrinsic evidence — PSNH's 1981 "Policy Statement" on contract pricing for limited electrical energy producers — and interpreted that one piece of extrinsic evidence in a manner inconsistent with the language of the Policy Statement itself. App. pp. 13-14. It also ignored the overwhelming weight of extrinsic evidence in the record that did not support its conclusion, including documentary evidence of the parties' intent during the contract negotiations, internal records of PSNH, and documentary evidence of the parties' post-contract course of dealing.

PSNH's Policy Statement, App. p. 107, presented three pricing options to small power producers selling energy to PSNH. Option I was the avoided cost rate set by the Commission from time to time under PURPA and LEEPA, which explicitly included both energy and capacity and which the Commission characterized as being, at that time, "8.2 cents per kwh for dependable capacity [sic][6] and 7.7¢ per kwh for energy in excess of dependable capacity." The Commission noted, fairly, at p. 13 of its Order Following Brief that:

> ...A fair interpretation of this approach to pricing is that PSNH, rather than employing a separate price per kw month for capacity, was paying for the capacity of a project at a rate of 0.5 cents per kwh up to the dependable capacity of the project. In other words, PSNH was using an all-in kwh price for both energy and capacity...

The Commission then said, without further explanation, that it would be "reasonable" to treat Options II and III as reflecting an "all-in price" for both energy and capacity as well, although (i) the only internal evidence within the

[6] Actually, it was 8.2 cents per kwh for energy produced in each hour up to the amount of dependable capacity, as audited by Commission engineers.

Policy Statement suggests exactly the opposite conclusion,[7] (ii) there is no documentary evidence or sworn testimony in the record supporting the Commission's interpretation, and (iii) other extrinsic evidence of the contract negotiations and the post-contract conduct of the parties also points in the opposite direction.

Options II and III were not "LEEPA contracts," i.e., they were not based on the avoided cost rates for energy and capacity set by the Commission from time to time under PURPA and LEEPA. Rather, they were 30-year contracts with negotiated provisions governing both the commodity sold and the pricing.

Option II provided a fixed 9¢/kwh price "for all **energy** purchased" by PSNH (subject to retention by PSNH of 10% of the purchase price during the first ten years of the contract, to be repaid to the seller during the second ten years of the contract) until such time as 96% of PSNH's "incremental **energy** cost" exceeded the 9-cent index rate, at which point the contract price would decline by 4% of PSNH's incremental energy cost per year (emphasis added). When the contract price had declined to 50% of PSNH's incremental energy cost, it would remain there for the balance of the 30-year contract term. "Incremental energy cost" was defined in an attachment to the Policy Statement, App. p. 110, to include essentially the avoided costs of "energy"

[7] Option II provides, at II.A.1: "For the first 10 years of the contract, PSNH will retain 10 percent (0.9 cents per kwh) for all energy purchased..." (emphasis added). And at II.B: "All payments varying from the index will be determined as a percentage of PSNH's incremental energy costs...If the price paid for the previous year is less than the appropriate percentage of PSNH's incremental cost for the previous year, an adjustment will be made for all energy sold to PSNH during that year..." (emphasis added). The term "capacity" appears only in the description of Option I; Option II refers only to "energy" being sold to PSNH, while Option III refers to the sale of a facility's "entire net output," which is a measure of energy, not capacity. *See also* PSNH's definition of "Incremental Energy Cost," attached to the Policy Statement, which makes clear that only energy cost component estimates figured into the calculation of the Option II and III pricing alternatives offered by PSNH.

described by FERC in Order 69 (*see* excerpt at Part (d)3 above), and none of the avoided costs associated with "capacity." Unlike Option I, Option II did not include any reference to "capacity."

Option III, which was elected by NHHA in order to allow for bank financing of the Project, was a variation on Option II that permitted a higher than 9¢/kwh rate in the early contract years so long as PSNH recovered any such overage through a lower rate in the out years (on a discounted basis equivalent to the present value of the stream of payments for energy provided under Option II). PSNH's letter of December 21, 1981, App. p. 113, makes clear that the Contract was for energy only: PSNH's John Lyons wrote, "...We are looking forward to purchasing the **energy** from your facility on a mutually beneficial basis" (emphasis added). The worksheets accompanying the letter, App. pp. 114-116, set forth the method by which PSNH calculated the Option III rates, and compares these rates to rates that would have been received under Option II. As these worksheets demonstrate, the basis for the Option III energy rates was PSNH's projected "IEC" (incremental energy cost).

Neither PSNH's Policy Statement description of Option III nor PSNH's letter of December 21, 1981 with the attached worksheets makes any mention of the purchase of "capacity." Although NHHA pressed to have capacity included in the Contract and suggested contract language to that effect (*see* Warren Mack's December 29, 1981 letter to John Lyons, App. p. 118), and although PSNH's own internal memos (which Briar did not see until the parties exchanged documents after the pre-hearing conference below) showed that the Penacook Lower Falls Project had a dependable capacity of 1.57 mw, App. p. 122, PSNH refused to include

capacity value in the calculation of the Contract rates. Rather, NHHA's Warren Mack remembers John Lyons insisting that in light of Seabrook, "the capacity of the Penacook Lower Falls Project had no value to PSNH, that PSNH would not pay for it, and that he would not include it in the contract." *See* Affidavit of Warren Mack, paragraph 5, App. pp. 125-126.

The Commission never explained why it would be "reasonable" to assume that because Option I involved an "all-in price" for energy and capacity, it must therefore follow that Options II and III also included an "all-in price" for both energy and capacity. While Option I explicitly includes both energy and capacity, neither Option II nor Option III ever mentions capacity. Options II and III were both priced based on PSNH's incremental **energy** cost, with no reference to its avoided **capacity** cost. The record – the documentary record and the offers of proof made by Briar on the record – simply does not support the Commission's unsubstantiated leap of logic. Rather, the clear preponderance of the evidence in the record (including notably the PSNH Policy Statement, App. p. 107, and PSNH's letter of December 21, 1981, App. p. 113), as well as the evidence that Briar was never allowed to present, strongly indicates that Options II and III involved the purchase of energy only, not capacity.

As summarized above, the record includes several kinds of extrinsic evidence that clearly supports Briar's position, relating to the intent of the parties at the time the Contract was negotiated. Although the Commission said it would need to "look to the documents associated with, and the circumstances underlying, the Contract," App. p. 13, it ignored these other documents which

are critical from an evidentiary standpoint because they were developed contemporaneously with the negotiation of the Contract, or represent sworn statements attesting to what was said during the negotiations.

The record evidence relating to the post-contract course of dealing between the parties also supports Briar's position rather than the Commission's interpretation of the Contract. Although PSNH made much of a letter from PSNH to NEPOOL (NEPEX) dated February 6, 1984, App. p. 127, in which PSNH claimed it was "adding to its hydro capacity 2.5 mw purchased from New Hampshire Hydro Associates," that letter was a unilateral representation by PSNH which was never copied to, must less assented to by, NHHA or Briar. When NHHA asked PSNH for a contract buy-out proposal in the spring of 1990, PSNH's calculation of the buy-out value was based solely on the value of the energy it was obligated to purchase under the Contract; no value was assigned to capacity. *See* App. pp. 131-133. Finally, the invoices for power sold by NHHA and then Briar under the Contract, which were prepared by PSNH, clearly provide that the only item being sold to PSNH is "energy;" there is no charge in these invoices for "capacity." *See* December 2006 Penacook Lower Falls invoice to PSNH, App. p. 67.

The Request for Rehearing. As noted above, Briar initially believed and continues to believe that the Contract is not ambiguous, and that it cannot reasonably be interpreted to include capacity. Briar initially offered to submit the issue on the briefs in a good faith attempt to avoid taking the Commission's time unnecessarily in a hearing on the merits, because it believed that the Contract was clear and that the issue should easily be resolved in its favor on

the pleadings. But after the Commission found that the Contract was ambiguous, Briar argued that the Commission could not reasonably deny Briar's request for a hearing to present all relevant testimony relating to the intent of the parties to the Contract from those who negotiated it, including NHHA's Vice President Warren Mack, who conducted much of the contract negotiation correspondence with PSNH, and NHHA's President Richard Norman, who participated in the negotiations and signed the Contract on behalf of NHHA.

The income stream represented by the FCM transition and capacity payments is a property right belonging to Briar. When the Commission found that the Contract was ambiguous, Briar timely raised its request for an evidentiary hearing both in its Motion for Rehearing, App. p. 19, and on multiple occasions during the oral argument of May 20, 2008 (Transcript, App. pp. 142, 153, 157-162, 170, 173 and 175). The Commission's denial of Briar's request for an opportunity to present relevant testimony from those who participated in the negotiation of the Contract represents a denial of basic due process. Although the Commission suggested that the testimony of two individuals who had actually negotiated the Contract on behalf of NHHA would be of "dubious value given the passage of twenty-seven years," App. p. 55, Briar respectfully suggests that that is a conclusion legitimately rendered only after hearing the testimony itself, in the context of an adversarial proceeding during which both competence and credibility can be tested by cross-examination and assessed by the trier of fact.

(g) Jurisdictional Basis for the Appeal

RSA 541:6.

(h) Reasons to Accept Appeal and Basis for Difference of Opinion on Questions Presented

1. The Commission strained to reach a conclusion on the meaning of the Contract terms that was unreasonable because it was not supported by: the plain language of the Contract itself; cases from other jurisdictions (cited in response to the Commission's request) construing a key term ("output") that the Commission thought was ambiguous; the only piece of extrinsic evidence considered by the Commission (the PSNH "Policy Statement"); several other pieces of documentary extrinsic evidence included in the record; and sworn testimony (written and oral) proffered by Briar but not accepted by the Commission. Together, these failures make the Commission's Orders unlawful and unreasonable, and require review by this Court.

2. The Commission's denial of Briar's request for an evidentiary hearing on the extrinsic evidence which would have aided in the interpretation of the Contract represented a violation of basic due process rights. Having found that the Contract was ambiguous, and that its interpretation required consideration of extrinsic evidence, the Commission denied Briar the opportunity to be fully heard on the very issues the Commission suggested it needed to consider, namely the intent of the parties and the circumstances underlying the Contract. The Commission's failure to afford Briar an evidentiary hearing was unfair and unreasonable. Moreover, because the

Commission's decision resulted in a deprivation of Briar's constitutionally protected property right to the capacity payments established under the Forward Capacity Market, without due process of law, it is unlawful. For all of the foregoing reasons, this honorable Court should accept this appeal.

(i) Issues Presented and Preserved

Every issue raised in this appeal by petition has been presented to the Commission in pleadings and has thus been properly preserved for appellate review.

Respectfully submitted,

BRIAR HYDRO ASSOCIATES

By its Attorneys,

ORR & RENO, P.A.

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Dated: May 12 2009

CERTIFICATE OF COMPLIANCE

I certify that copies of the foregoing Appeal by Petition were mailed on this 12 day of May, 2009, to all persons listed as parties and counsel of record, and to the New Hampshire Attorney General's Office.

Howard M. Moffett

Howard M. Moffett

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