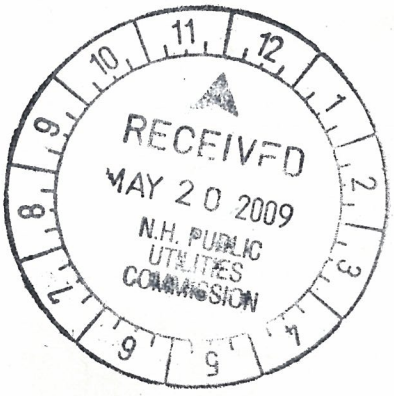
DE07-045

09- 0359

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

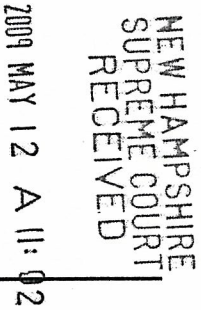


No._____

Briar Hydro Associates

v.

Public Service Company of New Hampshire



APPENDIX TO APPEAL BY PETITION UNDER RSA 541:6

From Orders of the

New Hampshire Public Utilities Commission

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Briar Hydro Associates
v.
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APPENDIX TO APPEAL BY PETITION UNDER RSA 541:6

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 07-045

BRIAR HYDRO ASSOCIATES

Petition for Declaratory Ruling

Order Following Briefs

ORDER NO. 24,804

November 21, 2007

APPEARANCES: Orr & Reno, P.A. by Howard M. Moffett, Esq. for Briar Hydro Associates; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Office of Consumer Advocate by Meredith A. Hatfield, Esq. on behalf of residential ratepayers and F. Anne Ross of the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On March 28, 2007 Briar Hydro Associates (Briar) filed a petition seeking a declaratory ruling with respect to a 1982 contract for the purchase and sale of electric energy. The 1982 contract was between New Hampshire Hydro Associates (NHHA) and Public Service Company of New Hampshire (PSNH), covering the sale to the utility of the entire output of the Penacook Lower Falls Hydroelectric Project for a term of 30 years. The present petition raises the question of whether the "output" sold under the contract includes the facility's generation capacity as distinct from the energy actually produced and which entity is entitled to payments for capacity in the New England Forward Capacity Market (FCM) administered by ISO New England.

The Penacook facility is a 4.1 megawatt capacity hydroelectric generation station on the Contoocook River in Penacook and Boscawen. Briar purchased the Penacook facility in 2002 and, following the sale, assumed NHHA's rights and obligations under the agreement. Briar seeks a determination that it owns the right to the facility's capacity. PSNH's position is that the

contract entitles the utility, rather than Briar, to both the energy produced by the facility and the capacity associated with it. The question is of interest to the parties in light of the approval by the Federal Energy Regulatory Commission (FERC) of the regional 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 Penacook Lower Falls Hydroelectric Project is a qualifying facility (QF) within the meaning of section 210 the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, which, in relevant part, required PSNH to enter into a long term power purchase arrangement such as the one at issue here.[1] Generally, QFs are small power producers (SPPs) that are independent of the local electric utility and rely on alternatives to fossil fuel and nuclear power.

On April 17, 2007, we issued an order of notice scheduling a prehearing conference for May 23, 2007. On April 19, 2007, the Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers. At the prehearing conference, PSNH requested intervention as a full party, the parties gave initial positions on Briar's petition and the parties recommended a discovery and briefing schedule for the docket. At the close of the hearing, we granted PSNH's request for intervention and approved the discovery and briefing schedule.

Following discovery, PSNH filed a memorandum in opposition to Briar's petition on June 15, 2007, and Briar filed a reply memorandum on June 29, 2007. No party has requested a hearing and accordingly we make our decision based on the petition and subsequent pleadings.

[1] QFs typically exercise their PURPA rights by requiring their local utility to purchase their power. In this instance, the Penacook facility is actually in the service territory of Unitil Energy Systems, Inc. but sells its power to PSNH pursuant to 18 CFR 292.303(d), a FERC regulation giving a QF and its local utility the option of wheeling the power to another utility for purchase.

In so doing, we note our understanding that by requesting a declaratory judgment here, Briar is waiving any right it may enjoy to have this dispute resolved elsewhere. *Cf. Alden T. Greenwood v. New Hampshire Public Utilities Comm'n*, 2007 WL 2108950 (D.N.H.) (refusing to find such a waiver of rights, in dispute over rates applicable to small power producer in PSNH service territory).[2]

II. POSITIONS OF THE PARTIES

A. Briar Hydro Associates

In seeking to establish that the contract at issue here does not entitle PSNH to the facility's capacity as distinct from its energy output, Briar noted that the language of the 1982 agreement refers to "sales of electric energy" and "a reliable supply of electrical energy," but nowhere refers to electric generating capacity. Briar further asserted that the distinction between electric energy and capacity was well known at the time the 1982 agreement was signed, as evidenced by a 1980 Federal Energy Regulatory Commission (FERC) Order implementing section 210 of PURPA[3] and also by four Commission orders issued in 1979, 1980 and 1981.[4]

Briar pointed to the fact that PSNH invoices issued to Briar under the 1982 agreement have all been expressed in cents per kilowatt-hour (kWh) and have not mentioned any separate charge for capacity. Briar distinguished the 1982 agreement from numerous other long term rate orders approved for QFs in New Hampshire that provide for separate energy and capacity payments. Briar contrasts the 1982 agreement with an earlier contract dated August 21, 1980

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[2] The cited decision of the U.S. District Court for the District of New Hampshire is presently on appeal to the U.S. Court of Appeals for the First Circuit.

[3] Final Rule Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214 (Feb. 25, 1980).

[4] *New Hampshire Electric Cooperative.*, 64 NH PUC 82 (1979); *New Hampshire Electric Cooperative,.*, 64 NH PUC 244 (1979); *Small Energy Producers and Cogenerators*, 65 NH PUC 291 (1980); and *Small Power Producers and Cogenerators*, 66 NH PUC 83 (1981).

between PSNH and QF owner Rollinsford Manufacturing Co., Inc. in which there were separate prices for "each KW [kilowatt] of dependable capability generating during an hour," and for "each KW generated during an hour in excess of the dependable capability." Briar took the position that had PSNH bargained for the purchase of both energy and capacity it could have done so in the same manner it had done with Rollinsford.

B. PSNH

In its memorandum in opposition to Briar's petition, PSNH pointed to the fact that NHHA agreed to sell the "entire generation output" from the Penacook facility under the 1982 agreement. PSNH contended that the parties intended that phrase to include both energy and capacity from the Penacook facility. PSNH maintained that the 9 cent-per-kWh rate in the 1982 agreement covered both energy and capacity. Citing applicable FERC regulations, specifically 18 CFR § 292.303(a), PSNH maintained that PURPA required the Penacook facility and other QFs to sell, and the local electric utility to purchase, "any energy and capacity which is made available from a qualifying facility," language PSNH views as precluding PSNH from simply purchasing energy as opposed to energy and capacity.

Moreover, PSNH drew the Commission's attention to the fact that its purchases from the Penacook facility also implicate 18 CFR §292.303(d), the FERC rule allowing a QF to wheel its power to a utility that is not the one in whose service territory the QF is actually sited. According to PSNH, unlike subsection (a) discussed above, subsection (d) of the rule explicitly allows for separate sales of energy and capacity – but requires the interconnecting utility to authorize such arrangements, which effectively gives the utility the right of first refusal.

PSNH observed that both PURPA and its counterpart in New Hampshire law, the Limited Electrical Energy Producers Act (LEEPA), RSA 362-A, required the incumbent utility to

purchase the entire output of a qualifying facility, including both energy and capacity. *See Appeal of Granite State Electric Co.*, 121 N.H. 787, 789 (1981); *Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 287 (1988); and *Small Power Producers and Cogenerators*, 68 NH PUC 531, 537 (1983). The utility asks the Commission to view the agreement at issue in the context of the regulatory framework that existed at the time of the contract. According to PSNH, the Commission established avoided cost rates that required payments of 7.7 cents per kilowatt-hour to projects without reliable capacity and 8.2 cents to facilities with such reliable capacity. PSNH explained that the agreement at issue here, providing for an index price of 9 cents per kilowatt hour for 30 years, was front-loaded and, thus, consistent with the Commission's then-applicable, standard 8.2-cent rate that, according to PSNH included both energy and capacity.[5] PSNH states that the Commission later abandoned the cents-per-kWh pricing for both energy and capacity and adopted separate energy and capacity payments, but did so without purporting to abrogate any existing contracts such as the one with the Penacook facility.

PSNH also suggested that the parties' course of dealing supports an interpretation of "entire output" as including both energy and capacity. PSNH pointed to the fact that for the entire term of the contract to date, now more than 20 years, PSNH has claimed the capacity of the Penacoook facility as part of its generating capacity, and that until 2006 Briar and its predecessor, NHHA, never questioned nor challenged PSNH's claim to the capacity. According to PSNH, the parties had considered the value of the facility's capacity and had discussed a separate price for capacity, but PSNH had rejected that proposal and opted to purchase the

[5] "Front-loaded" refers to the fact that, under the Commission's approach to longterm PURPA rates, a QF could enter into a longterm contract with PSNH with rates that escalated over time, as projections of PSNH's avoided costs increased, or the QF could adjust the rate schedule, as long as the net present value of the overall revenue stream remained equal. Because this adjustment resulted in a rate that would be higher in the initial years of the agreement than would otherwise be applicable, the contract was said to be front-loaded. Such an arrangement was attractive to lenders and thus the Commission authorized them as a means of achieving PURPA's objective of encouraging the development of new energy alternatives.

capacity as part of the all-in 9 cent price. Further, PSNH produced a 1990 letter in which PSNH proposed terms for an early buyout of the 1982 contract. PSNH Memorandum at Attachment D. In the attachments to that letter were references to what the Penacook facility would have been paid if it had received the marginal value of electricity. PSNH contended that the spreadsheet column showing short-term capacity rates evidences that both NHHA and PSNH viewed the 1982 agreement as including energy and capacity.

C. Office of Consumer Advocate

On June 28, 2007, OCA filed a letter supporting the positions taken by PSNH in its memorandum in opposition to Briar's petition. OCA argued that the language "entire generation output" included both energy and capacity. Further, OCA agreed that, under PURPA, NHHA could not separate its sales of energy and capacity. OCA urged the Commission to find that the 1982 Agreement included both energy and capacity.

D. Briar Hydro Associates' Reply to PSNH

In its reply memorandum, Briar reiterated its argument that the 1982 Agreement does not contain the word capacity and therefore the phrase "entire generation output" is properly understood as including only electric energy. Briar's discussion begins with a series of references to reported contracts cases of the New Hampshire Supreme Court, to the effect that decision makers must give the language used by the parties its reasonable meaning, in light of the circumstances and context in which the agreement was negotiated, must read the document as a whole and must construe contracts of adhesion against the drafter. While disclaiming any intent to allege that the contract at issue here is one of adhesion, Briar noted that PSNH was the drafter of the agreement and thus asked the Commission to resolve any ambiguities in Briar's favor.

Briar directed the Commission's attention to the general definition of the word "output" in *Webster's Third New International Dictionary* as "something that is put out or produced." According to Briar, capacity does not meet this definition because it is the instrument of production rather than anything that is itself "produced." Thus, Briar argued that the phrase "entire generation output" in the agreement can only refer to electric energy and not to capacity. Briar claimed that PSNH was not willing to recognize any capacity value for the project in its pre-contract negotiations.

Briar noted that there are no New Hampshire cases interpreting the meaning of "entire generation output." Therefore, Briar relies principally, as supporting its position that capacity either cannot be deemed part of output or is not necessarily included in output, on cases from New York and Virginia: *Energy Tactics, Inc. v. Niagara Mohawk Power Corp.*, 219 A.D.2d 577 (N.Y. App. Div. 1995) *Westmoreland-LG & E Partners v. Virginia Electric and Power Co.*, 486 S.E.2d 289 (Va. 1997); and the unreported *Gordonsville Energy L.P. v. Virginia Electric & Power Co.*, 1996 WL 1065548 (Va. Cir. Ct. 1996).

Briar disagreed with PSNH's contention that PURPA precluded Briar or its predecessor from separating sales of energy from capacity. According to Briar, both the PURPA regulations and the New Hampshire statute that parallels PURPA, LEEPA, allow such separate arrangements. Briar took the position that under PURPA regulations a purchasing utility must purchase "any energy and capacity made available by the QF at the utility's avoided costs – but if the QF offered only energy (either because it had no reliable capacity, or because it didn't want to sell it, or because the parties couldn't agree on a price), the utility would still be required to purchase whatever energy the QF made available, up to and including its entire generation output." Briar Reply Memorandum at 8. Briar also pointed to a provision of LEEPA that

differentiates between energy and capacity: "RSA 362-A:8, II (a) provides that 'energy *or* energy and capacity provided by qualifying small power producers ... under commission orders or negotiated power purchase contracts are part of the energy mix relied on by the commission to serve the present and future energy needs of the state ...'(emphasis added)" and concluded that "LEEPA confirms that QF sales can be either for energy, or energy and capacity" and the "1982 NHHA Contract specified the former." Briar Reply at 8.

Briar further described the context in which NHHA and PSNH were negotiating the 1982 Agreement. According to Briar, NHHA did not have the "luxury" of relying on the standard 7.7 cent and 8.2 cent avoided cost rates for energy and energy and capacity set by the Commission[6] because NHHA needed to provide its lender with the security of a long-term contract with significant front-loading in order to finance the construction of the facility. *Id.* at 9. Briar asserted that PSNH "refused to entertain any credit for the Project's capacity under the Contract." *Id.* According to Briar, NHHA therefore never made the Penacook facility's capacity available to PSNH.

Next, in response to a request posed at the prehearing conference, Briar took up the question of whether the FERC in its FCM order considered the question of who could claim ownership of the capacity credit that becomes a valuable (and eventually a tradable) commodity pursuant to the order. According to Briar, the settlement agreement approved by the FERC in its FCM decision makes clear that the owner of capacity entitled to FCM payments can assign away such capacity by contract. But, Briar reported, the FERC did not otherwise make any determinations that would resolve the present dispute.

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[6]These standard rates, and the basis for them, are set forth in *Small Energy Producers and Cogenerators*, 65 NH PUC 291 (1980). Later orders superceded these rates, as already noted.

According to Briar, the Commission's generic approval of a higher rate for energy associated with dependable capability, as distinct from energy without such dependable capability, does not lead to the inevitable conclusion that the single, undifferentiated rate ultimately agreed to by PSNH and NHHA included the sale of capacity. Rather, according to Briar, had PSNH wished to purchase capacity from NHHA all PSNH had to do was either accept the seller's offer to that effect or get the seller to agree explicitly that the single undifferentiated rate included capacity.

Briar next drew the Commission's attention to internal PSNH memoranda obtained in discovery and attached to Briar's reply memorandum. According to Briar, these documents establish that PSNH knew from the outset of the contract that the Penacook facility had reliable capacity value to the purchasing utility, even as PSNH was claiming to NHHA that the capacity was valueless.

Briar asked the Commission to consider a policy statement NHHA received from PSNH in 1981, announcing PSNH's willingness to enter into three types of contracts with hydroelectric QFs: (1) a short term-contract for dependable capacity at 8.2 cents per kWh plus any excess energy to be purchased at 7.7 cents, (2) a 30-year contract based on a 9 cent "index price" with future adjustments, and (3) a front-loaded variation on the second option, with prices above 9 cents early in the contract and lower rates later. Briar noted that in this instance PSNH and NHHA settled on the third option, given NHHA's interest in near-term income so as to attract financing. According to Briar, what is relevant here is that only the first option explicitly assigned a higher value to energy accompanied by dependable capacity. According to Briar, NHAA sought to sell its capacity to PSNH, but NHHA's understanding at the time was that capacity had no value to PSNH and was not of interest.

Briar disagreed emphatically with PSNH's characterization of the course of dealing that followed the signing of the contract. According to Briar, PSNH never gave Briar or NHHA written notice that it was claiming rights to the Penacook facility's capacity with the New England Power Pool (NEPOOL), then the operator of the regional electricity grid. Briar noted that neither it nor NHHA were parties to capacity filings made with NEPOOL. Furthermore, according to Briar, although capacity had been traded at ISO New England (the independent grid operator that assumed NEPOOL's responsibilities in 1998 once FERC mandated open access to the grid), and although the Penacook Facility's capacity had at least some value to PSNH and its customers between 1998 and FERC approval of the FCM in late 2006, PSNH claimed this value at the ISO "without the knowledge or concurrence of NHHA or Briar." Briar Reply at 16-17. Briar stated that it is not here claiming that pre-FCM capacity value and, in fact, is willing to waive any such claim as long as Briar is allowed to recover the capacity value of the Penacook facility from December 1, 2006 forward.

In response to PSNH's argument that its contract buyout proposal to NHHA in 1990 evidenced the parties' understanding that the 30-year contract included both energy and capacity, Briar pointed out that, although the spreadsheet attached to PSNH's May 14, 1990 letter included a column for capacity values, PSNH did not include any capacity value in its buyout proposal. Finally, Briar attached a recent invoice from PSNH to its reply memorandum, pointing out that it explicitly references "energy" and does not contain the word "capacity."

III. COMMISSION ANALYSIS

Upon a careful review of the parties' pleadings, as well as applicable state and federal law, we find that the contract at issue in this case had the effect of assigning to PSNH not simply the actual energy generated by the Penacook facility but also the capacity associated with the

facility. The applicable regulatory framework has changed significantly since 1982 in a manner that places more emphasis on, and assigns a greater economic value to, the generation capacity of QFs and other energy producers in the region. But, as we explain fully below, the concept of capacity nonetheless played a role in the regulatory framework under which the contract was negotiated. When considered against that backdrop, the contract must be understood as granting to PSNH the rights to both the energy and the capacity of the facility.

A. Contract Formation

To the extent this case turns on principles of contract interpretation, the parties invoke New Hampshire law in their pleadings. We agree that, although this case arises under LEEPA and PURPA, basic state-law contracts principles provide relevant guidance. In particular, although "the parties' intent will be determined from the plain meaning of the language used in the contract," when a contract contains ambiguous language a New Hampshire tribunal "give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." *Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n*, 153 N.H. 194, 197 (2006) (citations omitted).

During 1981 and 1982, NHHA was attempting to finalize a purchase commitment from PSNH at pricing sufficient to satisfy NHHA's lender. From the pleadings, it appears that the lender was financing capital improvements needed to make the Penacook Facility operational. At the time the contract was negotiated, the Commission-approved short term rates of 8.2¢ per kWh for energy and dependable capacity and 7.7¢ kWh for energy without capacity were reportedly insufficient for NHHA's financing requirements. In order to satisfy its lender, NHHA

sought a long term, front-loaded contract with higher payments in the first eight to ten years of the 30-year term.

The parties provided copies of two PSNH memos, dated July 31, 1981, and September 9, 1981, reflecting PSNH's analysis of the Penacook Facility's projected energy production and dependable capacity. Briar Reply Memorandum at Attachments B 1 and B 2. Also included was PSNH's letter of November 20, 1981 to NHHA attaching the pricing policy PSNH had developed for SPPs, which set forth three pricing options. Briar Reply Memorandum at Attachment B 3. The PSNH policy statement noted that it was attempting to "pursue all viable new supplemental energy sources in order to reduce its dependence on foreign oil, delay construction of future baseload power plants for as long as possible, and provide the best possible service to its customers at the lowest reasonable cost." *Id.*

Briar produced documents indicating that NHHA had attempted, through several written proposals to PSNH, to obtain additional payment for the capacity of the Penacook Facility beyond the options contemplated in the Policy Statement. Briar Reply Memorandum at Attachments B 4, B 5 and B 6. Based on these communications, Briar argues that because the contract did not include a separate capacity payment or separate capacity pricing, PSNH had declined NHHA's offer of capacity and that NHHA had therefore retained ownership of the capacity of the Penacook facility.

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.

Of primary relevance to our inquiry is PSNH's policy statement on contract pricing for limited electrical energy producers, which offered developers three pricing options and which PSNH provided to NHHA under cover of a letter dated November 20, 1981. Option I was a rate that changed from time to time and which, at that time, was 8.2 cents per kWh for dependable capacity and 7.7 cents per kWh for energy in excess of dependable capacity. Option II employed an index price of 9 cents per kWh that escalated over a 30-year term. Option III was a variation of Option II that provided for front-end loaded payments. The contract memorializes Option III.

Option I of the policy statement provided a price on a kWh basis that was higher, i.e., 8.2 cents per kWh, to the extent a project had dependable capacity, and lower, i.e., 7.5 cents per kWh, to the extent a project produced energy in excess of its dependable capacity.[7] 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 that project. In other words, PSNH was using an all-in kWh price for both energy and capacity. It is similarly reasonable to treat Options II and III, which are long term options employing a 9 cents per kWh index price, as reflecting an all-in price for both energy and capacity.

[7] As noted in PSNH's September 9, 1981 memorandum, the Penacook Facility had an estimated dependable capacity of 1.57 megawatts compared with its nominal or maximum generating capacity of 4.1 megawatts.

As for Briar's argument that NHHA, through letters dated December 29, 1981 and January 21, 1982, "offered" to sell its capacity to PSNH, which PSNH declined to purchase, the circumstances do not comport with Briar's characterization of the relevant documents. We start from the premise that Option III was an all-in price for both energy and capacity, and conclude that the better interpretation of the NHHA letters is simply as an attempt to negotiate a richer financial arrangement than provided for in the PSNH policy statement. Consequently, we find that PSNH offered a price for both energy and capacity, which NHHA ultimately accepted, and that NHHA did not retain any rights in the capacity of the Penacook facility by virtue of PSNH's apparent decision to not consider an additional payment for capacity.

B. Regulatory Context

The contract is between an SPP (NHHA) and an electric utility (PSNH), which was developed in the context of regulatory decisions of this Commission. Accordingly, we look also to the regulatory context in which the contract was executed for guidance in making our decision.

During the 1979-1982 timeframe, the Commission explicitly understood that capacity had economic and practical value because QFs that "supply capacity as well as energy can be used to satisfy reserve requirements," *New Hampshire Electric Cooperative*, 64 NH PUC at 87, the very reason the Forward Capacity Market was approved 27 years later. Nevertheless, when setting rates, the Commission described capacity for SPPs in terms of energy production and not as a stand-alone product. For example, in 1979 the Commission set SPP rates of 4.5 cents per kWh for "plants which produce[d] energy on a dependable capacity basis" and rates of 4 cents per kWh for "plants which produce[d] on a non-dependable basis." *Id.* at 89. Thus it was common practice in 1982 to describe capacity as a characteristic of energy and to price it with

energy on a per kWh basis. As a result, the references in the contract to "energy produced" do not mean that capacity was not also included.

We recognize as well that not all hydro facilities qualifying under LEEPA were capable of offering energy and capacity. When the Commission differentiated in 1979 between facilities with dependable capacity and those that would receive a lower rate because they lacked this attribute, the example given for the latter was run-of-the-river hydro plants. *Id.* In the 1982 time frame, therefore, an "entire output" contract for a run-of-the-river hydro would not have included capacity. However, an SPP such as the Penacook facility, which was capable of producing dependable capacity and estimated to have a dependable capacity of 1.57 MW, would have been obligated to provide that capacity as part of its energy production under an "entire output" arrangement.

LEEPA provided that utilities purchase the "*entire output of electric energy* of such limited electrical energy producers, if offered for sale." RSA 362-A:3 (emphasis added). This language was part of the original LEEPA statute enacted in 1978. Although Briar cited a provision of LEEPA that differentiates between energy and capacity, it is significant to note that RSA 362-A:8, as well as another differentiating between energy and capacity, RSA 362-A:4-a, were enacted as amendments to the LEEPA statute, in 1988 and 1989, respectively, well after execution of the 1982 NHHA contract. In 1982 there was no recognition of capacity as distinct from energy in LEEPA. Indeed, another original provision of LEEPA, RSA 362-A:4, entitled "Payment by Public Utilities for Purchase of Output," provided in 1982 that "Public utilities purchasing electrical energy in accordance with the provisions of this chapter shall pay a price

per kilowatt hour to be set from time to time by the public utilities commission." NH Laws of 1978, 32:1.[8]

In Docket No. DE 79-208, the Commission, among other things, established a minimum, grandfathered rate for qualifying facilities of 7.7 cents per kWh for energy and 8.2 cents per kWh for reliable capacity, the exact amounts subsequently reflected in PSNH's policy statement. In addition, the Commission noted in reference to Granite State Electric Company, that, since it had excessive capacity, qualifying utilities in its service territory would be awarded only "the energy component of 7.7 cents for all kwh." *Small Energy Producers and Cogenerators*, 65 NH PUC at 299 Furthermore, in direct reference to the 7.7 cents per kWh and 8.2 cents per kWh, the Commission stated in its 1980 order establishing avoided cost rates for all New Hampshire SPPs that "the aforementioned rates for *energy and capacity* will only apply to (1) cogenerators who offer to sell their *entire output* and buy back all their needs." *Id.* (emphasis added).

As additional support for our interpretation, we observe that, in Docket No. DE 83-62, the Commission acknowledged the then existing practice of paying for capacity as part of an all-in price. In that proceeding, the Commission explicitly determined that "the expression of the capacity values...will no longer be translated into cents/KWH and added to the energy rate." *Small Energy Producers and Cogenerators*, 69 NH PUC 352, 358 (1984) Subsequently, both short- and long-term rates contained an energy component expressed in cents per kilowatt-hour and a capacity component expressed in dollars per kilowatt-year. Generation capacity does not exist in the abstract entirely separable from the energy produced by a facility. Energy output is the result of using generating capacity over time. When the entire energy output of a facility is obligated to another party, as is the case here, there is no generating capacity available for other

[8] In 1983 the later part of this sentence was amended to read "shall pay rates per kilowatt hour to be set from time to time by the commission." 1983 N.H. Laws Ch. 395:4 (eff. Aug. 21, 1983).

purposes. Furthermore under the Article 2 of the 1982 NHHA contract in question here, NHHA/Briar is obligated to "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." 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.

C. Conclusion

Although over the course of the 25 years this "entire output" contract has been in existence, the definitions of, and markets for, capacity and energy have evolved, in 1982 the practice was to sell energy and capacity together on a cents per kWh basis. Hence, the language "entire output" in the contract described a purchase of all energy and capacity the Penacook facility was capable of producing. Inasmuch as we base our findings on the circumstances and context in which the contract was negotiated, we conclude that it is not necessary to address the various arguments regarding the subsequent course of dealings with respect to the contract.

We find that NHHA agreed to sell its electric energy and associated capacity exclusively to PSNH and to no other party. Having granted PSNH exclusive rights to purchase its entire output, NHHA and its successor Briar may not sell energy or capacity to any other party. As a consequence, PSNH, and ultimately its customers, are entitled to transition capacity payments pursuant to the Forward Capacity Market.

Based upon the foregoing, it is hereby

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..

By order of the Public Utilities Commission of New Hampshire this twenty-first day of November, 2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director

STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

DE 07-045

BRIAR HYDRO ASSOCIATES

Petition for Declaratory Ruling

BRIAR HYDRO ASSOCIATES' MOTION FOR RECONSIDERATION AND REHEARING

NOW COMES Briar Hydro Associates ("Briar") and, pursuant to RSA 541:3, respectfully moves the New Hampshire Public Utilities Commission ("the Commission") to reconsider and grant rehearing of Order No. 24, 804 ("the Order"). In support of this Motion, Briar states as follows:

I. STANDARD FOR REHEARING

The Commission is authorized by RSA 541:3 to grant a rehearing request when the moving party shows good reason for such relief. This may be demonstrated by new evidence that was not available at the original hearing, or by identifying specific matters that were either "overlooked or mistakenly conceived." *Dumais v. State,* 118 N.H. 309 (1978).

In this case, all of the above-stated grounds for reconsideration and rehearing exist. First, one of the matters that Order No. 24,804 overlooks and fails to substantively discuss or analyze is the threshold legal question of whether the Commission possesses authority to adjudicate the subject matter of this proceeding. Second, the Order, at page 3, mistakenly conceives the status of Briar's rights to have this dispute resolved

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elsewhere. The Order also mistakenly conceives the evidence and case law that supports Briar's position that its contract with Public Service Company of New Hampshire (PSNH) does not cover the sale of Briar's capacity to PSNH. In addition, new information exists that sheds more light upon the intent and conduct of the parties during the negotiation of the contract.

The Commission did not conduct an evidentiary hearing in this case. Thus, the Commission has not had the opportunity to hear testimony from witnesses who were involved in the negotiation and formation of the contract at issue here. Such a resort to extrinsic evidence is entirely appropriate given that the Commission has determined that it could not, from the plain meaning of "the four corners of the contract," resolve the proper interpretation of key contract terms, and thus the question of whether the contract covers the sale of capacity. Order, p. 12. Extrinsic evidence may be used by a trial court to aid in interpreting or explaining an ambiguous term of a contract. *See Ouellette v. Butler,* 125 N.H. 184, 187-88 (1984). Therefore, in the event that the Commission determines as a threshold matter that it possesses the authority to adjudicate this matter, the Commission should convene an evidentiary hearing to consider **all** of the extrinsic evidence relating to the contract, including parol evidence such as testimony from live witnesses (for example, Mr. Richard Norman) and/or affidavits such as the one from Mr. Warren Mack submitted herewith.

II. JURISDICTIONAL ISSUE

Briar recognizes that it is unusual for a party that initially elected to proceed in a particular forum to later contest that forum's jurisdiction. However, the fact that Briar initially filed for declaratory relief in this forum does not preclude it from challenging the

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Commission's jurisdiction at this time. "A challenge to subject matter jurisdiction may be raised at any time during the proceeding, including on appeal, and may not be waived." *Close v. Fisette,* 146 N.H. 480, 483 (2001). Briar is raising this jurisdictional question at this time for several reasons.

First, Order No. 24,804 does not contain a discussion or analysis of the Commission's jurisdiction. Contrary to the conclusory assertion on page 3 of Order No. 24, 804, Briar Hydro has not waived any right it may enjoy to have this dispute resolved elsewhere nor has it conceded that the Commission possesses exclusive jurisdiction over this matter. Briar's initial election to seek the Commission's assistance in resolving its contractual dispute with PSNH does not bar Briar from pursuing any other forms of redress it may have against PSNH concerning this matter (e.g. an action in Superior Court under RSA 491:22). This is so especially if the Commission is found to be without jurisdiction to adjudicate Briar's claims. *See Greenwood v. New Hampshire Public Utilities Commission*, Slip Copy, 2007 WL 2108950 (D.N.H.), 2007 DNH 088, p. 8.

Second, Briar has not previously raised the jurisdictional question in this case because the *Greenwood* decision highlighting the Commission's lack of authority to adjudicate QF ("Qualifying Facility") disputes of this type was issued subsequent to the filing of the Petition and the briefs in this case. In *Greenwood,* the United States District Court held that the Commission lacks authority "to amend or rescind a qualifying facility's rate order once it is approved and in place." *Greenwood,* Slip Copy, p. 6. While the instant proceeding involves the interpretation of a QF contract rather than a rate order, the principles articulated in *Greenwood* are nonetheless applicable, especially given that the contract between NHHA/Briar and PSNH was apparently executed without

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Commission involvement or approval in the first instance. *See Crossroads Cogeneration Corporation v. Orange & Rockland Utilities, Inc.*, 159 F. 3d 129, 138 (1998) (noting that New York Public Service Commission has recognized that its jurisdiction is limited to interpreting an order approving a QF contract and does not extend to interpreting the QF agreement itself).

Citing *Smith Cogeneration Mngt. v. Corporation Comm'n & Pub. Serv. Co,*. 863 P.2d 1227, 1240 (Okla. 1993), the *Greenwood* Court noted that "reconsideration" of long-term QF contracts imposes utility-type regulation over QFs which PURPA and FERC regulations seek to prevent. *Greenwood,* Slip Copy, p. 2. As discussed below, because of the manner in which the Commission has interpreted the meaning of the QF contract between Briar and PSNH, the Commission has, in effect, reformed the contract, which is expressly prohibited by *Greenwood* and the cases cited therein.

Third, in the past the Commission itself has recognized the impropriety of engaging in the exercise of QF contract review and interpretation. In *Re Connecticut Valley Electric Company,* 87 NH PUC Reports 150 (2002), the Commission found that it had jurisdiction to interpret its prior **order** concerning a QF power purchase agreement but, mindful of jurisdictional limitations imposed by federal case law such as the decision in *Freehold Cogeneration Assocs. v. Bd. of Regulatory Comm'rs,* 44 F.3d 1178 (3rd Cir. 1995), was careful to note that it was not interpreting or revisiting any questions as to the **power purchase agreement** itself, a document which, like the contract at issue in this case, had apparently never been submitted to the Commission for approval. *Re Connecticut Valley Electric Company,* 87 NH PUC at 165. Because Order No. 24,804 treads into territory that the Commission in the past has acknowledged it is prohibited

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from entering. good cause exists for either vacating the order or granting rehearing so that the Commission can address the question of whether it possesses the jurisdiction to decide this case.

Fourth, in a 2006 case involving a dispute as to the expiration date of "rate orders" issued to two wood-fired QF's, Pinetree Power Tamworth ("Pinetree") and Bridgewater Power Company ("Bridgewater"), the Commission indicated that the question of whether federal law preempts the Commission from "clarifying" its rate order would be left "to another day." *Public Service Company of New Hampshire,* Docket DE 05-153, Order No. 24, 679 (October 16, 2006), slip op. at 29. That day has apparently arrived for another qualifying facility, Hemphill Power & Light Company. In its Order of Notice issued November 28, 2007 in Docket DE 07-122, the Commission has raised the question of its jurisdiction to resolve Hemphill's dispute with PSNH over the expiration date of the rate order under which Hemphill sells energy to PSNH. Thus, given that the Commission has raised the question of its jurisdiction in the Hemphill case, Briar should be afforded the same opportunity as Hemphill to argue that issue here.

Fifth, as a general rule, the proper interpretation of a contract is a question of law for the courts, with the ultimate interpretative authority residing with the New Hampshire Supreme Court. *See Close v. Fisette,* 146 N.H. 480, 484 (2001). Although the Commission functions in a quasi-judicial capacity, it is an administrative agency which is not vested with plenary judicial power. Instead, the Commission is "granted only limited and special subject matter jurisdiction...." *Appeal of Amalgamated Transit Union,* 144 N.H. 325, 327 (1999) *quoting 4 R. Wiebusch, New Hampshire Practice and Procedure* §1.03, at 3 (2d ed. 1997). The Commission's adjudicative responsibilities are set forth in

RSA 363:17-a which provides: "[t]he commission shall be the arbiter between the interests of the customer and the interests of the regulated utilities as provided by this title and all powers and duties provided to the commission by RSA 363 or any other provisions of this title shall be exercised in a manner consistent with the provisions of this section."

As the foregoing statute makes clear, any power exercised by the Commission under Title XXXIV of the Laws of the State of New Hampshire, including any authority that may be derived from RSA 362-A:5 to resolve disputes arising under that Chapter, must be exercised in accordance with the specific provisions of RSA 363:17-a, which limits the Commission's role specifically to balancing the interests of customers with those of regulated utilities. Since Briar is a Qualifying Facility, it is neither a utility customer nor a regulated utility within the meaning of RSA 363:17-a. *See* RSA 362-A:2. Thus, Briar's interests-- either those reflected in its contract with PSNH or otherwise-- do not fall within the subject matter of the Commission's legislatively prescribed adjudicative authority.

Lastly, the question of whether the Commission possesses jurisdiction to interpret a QF contract such as the one at issue here is arguably not well settled. This view is shared by the Maine Public Utilities Commission. *See Benton Falls Associates v. Central Maine Power Company*, 828 A. 2d 759, 765, FN 5 (2003) ("It is unclear whether the Commission has jurisdiction to interpret or otherwise act to resolve disputes regarding existing QF contracts.") In these circumstances, the Commission's failure to consider and decide the issue of whether its authority extends to adjudicating the instant complaint constitutes good cause for rehearing.

Given the threshold nature of the jurisdictional issue, that question should be addressed prior to any further rehearing proceedings in this matter. "'The issue of jurisdiction is not only separate but also preliminary, and reasonable procedure demands that it be finally decided before other issues of the litigation are reached.'" *Barton v. Hayes*, 141 N.H. 118, 121 (1996) *quoting Morel v. Marable,* 120 N.H. 192, 193-194 (1980). Thus, in view of the foregoing, Briar submits that good cause exists for rehearing to allow the Commission to articulate the basis for its authority to issue Order No. 24,804.

III. REQUEST FOR REHEARING ON THE MERITS

In the event the Commission determines it possesses authority to adjudicate this case, the Commission should convene an evidentiary hearing to consider new evidence and matters that the Order overlooks and/or misconceives. No evidentiary hearing was held in this case. Briar did not request a hearing because it believed that its contract with PSNH was unambiguous, the case law clearly supported Briar's position, and therefore the matter could be decided on the pleadings. The Commission, on the other hand, has determined that the contract is ambiguous and it has resorted to extrinsic evidence in reaching its decision. However, the Commission has not considered all of the extrinsic evidence that bears on this controversy. The Commission has heard no testimony from any live witnesses who were involved in the negotiation or formation of the contract, nor has it had the opportunity to assess those witnesses' credibility. In addition, the parties have not had the opportunity to conduct discovery or cross-examine witnesses. Given the significant financial consequences of this case, due process requires that the Commission

grant rehearing and convene an evidentiary proceeding in order to fully develop the facts surrounding the parties' intent when the contract was negotiated.

Briar respectfully requests a rehearing of this matter with a full opportunity to present testimony and documentary evidence on contested issues. Briar believes that the Commission overlooked or disregarded significant factual evidence in the record that was not controverted by PSNH, that it failed to apply or distinguish legal precedents cited by Briar with respect to the meaning of the term "output," and that it made conclusory assumptions on several important issues that were neither supported by the record nor explained by the Commission.

In particular, Briar would like to present new evidence – including but not limited to the testimony of Richard Norman and the Affidavit of Warren Mack, attached – in support of one of its central contentions, i.e. that Alternative III in PSNH's Policy Statement was clearly based solely on PSNH's projections of its incremental energy costs, and included no value whatsoever for capacity, either as part of a single "all-in price" or otherwise.

In additional support of its request for rehearing, Briar draws the Commission's attention to the following points:

A. "Output" and "Energy". The Commission focused on the terms "output" and "entire generation output," which together were used three times in the contract (two of which were in the Preamble), but disregarded or overlooked the facts that (i) the contract was explicitly a "Contract for the Purchase and Sale of Electric Energy" (emphasis added), (ii) that throughout the contract important substantive references are to "energy", and (iii) that "capacity" is nowhere mentioned in the contract, despite the fact that PSNH,

Briar, the Commission and the entire electric industry clearly understood that "energy" and "capacity" were different commodities at the time the contract was being negotiated and signed. Equally troubling to Briar is the fact that the Commission, having asked for legal precedents on the meaning of the term "output" as used in power purchase agreements, failed to analyze, distinguish, or even discuss the several cases on that point that Briar cited in its brief – beyond noting in Section II. D of the Order at page 7 that the cases Briar principally relied on were from New York and Virginia.

The Commission also suggested that the term "energy" itself may be ambiguous – an assertion that even PSNH did not make. Nowhere did the Commission explain its statement on p. 12 of the Order that "within the four corners of the contract we cannot resolve the question of...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." With all respect, Briar is not aware that the term "energy" has ever been used – in the electric industry or generally – to include capacity. To the contrary, the use of the term "energy" is generally used in contra-distinction to the concept of capacity – and that is particularly true within the electric industry, and even more so with respect to use of the terms in power purchase agreements within the electric industry, since the late 1970's.

B. PSNH's Policy Statement and the Issue of "All-In Price." On page 13 of its Order, the Commission noted, appropriately, that "Of primary relevance to our inquiry is PSNH's policy statement on contract pricing for limited electrical energy producers, which offered developers three pricing options..." Summarizing, the Commission described Option I as "a rate that changed from time to time and which, at that time, was

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8 2 cents per kWh for dependable capacity and 7.7 cents per kWh for energy in excess of dependable capacity," Option II as employing "an index price of 9 cents per kWh that escalated over a 30-year term," and Option III as "a variation of Option II that provided for front-loaded payments." Referring to Option I, the Commission said,

> ...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 . . .

Fair enough, as far as it goes. But the Commission then made an unsupported leap of logic, saying, "It is similarly reasonable to treat Options II and III . . . as reflecting an all-in price for both energy and capacity."

Briar respectfully suggests that there is nothing in the evidentiary record to support this assumption, and in fact, the evidence points the other way. While PSNH asserts in its June 15 Memorandum that "The nine-cent per kilowatt hour rate PSNH offered in this long-term contract included the purchase of capacity" (page 2), and "The 30-year nine-cent contract negotiated between PSNH and NHHA . . . was consistent with the Commission's standard 8.2 cents per kilowatt hour rate for capacity and energy that ran for the life of the facility" (pp. 6-7), these assertions are not supported by any evidence in the record.

The record evidence is in PSNH's Policy Statement, attached as Appendix B-3 to Briar's June 29 Reply Memorandum. Alternative I (titled "LEEPA Contract Provisions") provided for purchases of both "energy" and "dependable capacity" – in a format that could fairly be expressed as a separate capacity premium of 0.5 cents/kWh as part of an "all-in price" of 8.2 cents for dependable capacity and the energy generated by that

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capacity, and a lower 7.2 cents for energy in excess of that generated by dependable capacity. But Alternatives II and III were for the purchase of energy only. Alternative II ("Fixed Rate – Future Escalating Contract") speaks in § A.1 of a single rate for "energy purchased" and "purchased energy," and in § A.2 ties the declining rate in the out years to a declining percentage of PSNH's "incremental energy cost." Section B of Alternative II refers to "all energy sold to PSNH during that year . . ." Alternative III is a front loaded variation on Alternative II, but it has to be "of equal value" and is based on the same conceptual foundation. "Capacity" simply does not figure in as a component of what PSNH would be buying under either Alternative II or III; it is not mentioned – and this in the same document that differentiates clearly between "energy" and "capacity" in Alternative I!

If there were any doubt about whether Alternatives II and III included a capacity component as part of an "all-in price," they should be resolved by a look at Exhibit 1 to the Policy Statement. Exhibit 1 is a worksheet prepared by Richard V. Perron of PSNH ("RVP"), dated 30 Sep. '81, showing in graphic form the derivation of the contract price for Alternative II ("Fixed Rate – Future Escalating Contract"), on which Alternative III was also based. Exhibit 1 ties the contract price in Alternative II (and by extension Alternative III) directly and solely to a percentage of PSNH's incremental energy cost. In the October 1, 1981 "Definition of Incremental Energy Cost," attached to the Policy Statement, "incremental energy cost" is defined as "the marginal cost of providing energy for that hour," which includes all costs in the NEPEX bus rate for the incremental unit – essentially the cost of fuel consumed. Nowhere in this definition or in the description of Alternatives II and III does the concept of "capacity" or capacity costs enter in.

Given this clear and uncontroverted evidence in the record, it is very difficult for Briar to understand how the Commission could simply conclude, at page 13 of the Order, " . . . It is similarly reasonable to treat Options II and III . . . as reflecting an all-in price for both energy and capacity."

C. Pre-Contract Negotiations. At page 14 of the Order, the Commission dismissed Briar's contention that it offered to sell its capacity to PSNH and PSNH declined to purchase it, based on the same unsupported and mistaken assumption noted above – i.e. that because Option I included an "all-in price" for dependable capacity and the energy generated by it, then Option III must as well. In response, Briar refers again to the evidence cited in Section III.B above, but also asks the Commission to reconsider based on new evidence in the form of the Affidavit of Warren Mack, who helped to negotiate the Contract for NHHA, and the testimony of Richard Norman, who also participated in the negotiations with PSNH. Mr. Mack's Affidavit, attached hereto as Exhibit 1, is testimony to the fact that John Lyons, PSNH's negotiator, repeatedly declined to purchase the capacity of the project on the grounds that PSNH had Seabrook and didn't need any more capacity. Mr. Lyons never suggested that the contract already included capacity. The necessary inference is that ultimately both parties agreed that NHHA would sell only energy to PSNH, and not capacity, at a price structure based on PSNH's Alternative III, which was expressly a price for energy only, not energy and capacity. Mr. Norman's testimony would be consistent with this understanding, but would also include an analysis of PSNH's energy cost projections and its post-contract dealings with NHHA and Briar.

D. Run-of-River Hydro Plants. At page 15 of the Order, the Commission said:

> . . . In the 1982 time frame, . . . an "entire output" contract for a run-of-river Hydro would not have included capacity. However, an SPP such as the Penacook facility, which was capable of producing dependable capacity and estimated to have a dependable capacity of 1.57 MW, would have been obligated to provide that capacity as part of its energy production under an "entire output" arrangement.

In fact, the lower Penacook facility is and always has been a run-of-river hydro plant, so under the Commission's guideline cited above the NHHA Contract would not have included capacity.

E. "Capacity" as Distinct from "Energy". At page 15 of the Order, the Commission said, "...In 1982 there was no recognition of capacity as distinct from energy in LEEPA," and at page 16, it added, "...Generation capacity does not exist in the abstract entirely separable from the energy produced by a facility...When the entire energy output of a facility is obligated to another party, as is the case here, there is no generating capacity available for other purposes..."

Respectfully, Briar suggests that this formulation of the issue misconceives and misstates the nature of the relationship between capacity and energy, and the legal distinction between the two that has been recognized by FERC since at least 1978 under the PURPA regulations and by the Commission itself in its orders under both PURPA and LEEPA since at least April 18, 1979, when it issued Order No. 13,589 in Docket No. 78,232, setting rates of 4 cents/kWh for purchases of energy from QF's without dependable capacity and 4.5 cents/kWh for energy produced by dependable capacity.

F. Post-Contract Dealings. In its Conclusion on page 17 of the Order, the Commission noted that, "Inasmuch as we base our findings on the circumstances and context in which the contract was negotiated, we conclude that it is not necessary to address the various arguments regarding the subsequent course of dealings with respect to the contract." In this statement, the Commission acknowledges that it did not consider the parties post-contract dealings as bearing on their intent in forming the contract. Briar respectfully asks for the opportunity to show why the evidence it submitted on post-contract dealings is in fact relevant and consistent with Briar's view of the contract.

IV. CONCLUSION

In conclusion, Briar finds it difficult to escape the impression that the Commission decided the contractual issue here on grounds of policy, rather than interpreting the contract according to its plain meaning, based on the facts and the law. This impression is formed, in part, by the Commission's statements in Order No. 24, 679 in DE 05-153 (October 16, 2006) relating to two wood-fired small power producers, Pinetree Power Tamworth, Inc. and Bridgewater Power Company LP. At page 36 of that Order the Commission said:

> In reaching this result, we are mindful of the fact that over the course of the long-term rates at issue PSNH's customers have paid significantly more to Pinetree and Bridgewater than they would have paid had PSNH been acquiring the power through various other means over the years. In this sense, customers have paid too much for the power, as the result of the Commission's approval, in 1984, of what turned out to be over projections of PSNH's long-term avoided costs. In these circumstances, the public interest requires us to be vigilant in limiting Pinetree and Bridgewater to recovering only what the law requires...

NHHA was paid an above-market rate (10 cents/kWh) for the first eight years of the 30-year contract in the present case, but in year 9 the rate dropped to 4.2 cents/kWh,

and since year 21 Briar has been receiving only 3.53 cents/kWh – hardly an above-market rate. So Briar does not assume that the Commission believes PSNH's customers have "paid too much" for power sold to PSNH under the contract. Yet, reading the Commission's Order in the present case against its statement in the Pinetree/Bridgewater Order, it appears that the Commission's expressed policy of limiting payments to QFs has influenced its decision here that Briar should not receive the forward capacity market payments associated with the Lower Penacook project. Thus, it appears that in furtherance of the policy articulated in the Pinetree/Bridgewater Order, the Commission has effectively rewritten the contract which is clearly prohibited by the holding in *Greenwood, supra.* and the cases cited therein.

WHEREFORE, for the reasons set forth above, Briar respectfully requests that the Commission, in the alternative, either:

1. Vacate its Order No. 24,804 on the grounds that it lacks jurisdiction to issue the order; or

2. Suspend the Order pending resolution of the threshold legal issue of jurisdiction; or

3. In the event that the Commission determines that it has jurisdiction over the subject matter and parties in this case, conduct a rehearing on the merits with a full opportunity for the parties to conduct discovery, present testimony and evidence on contested issues, and conduct cross-examination of witnesses.

Respectfully submitted,

BRIAR HYDRO ASSOCIATES

By its attorneys,

ORR & RENO, P.A.
One Eagle Square
P.O. Box 3550
Concord, NH 03302-3550
603-224-2381

Date: December 21, 2007 By: Howard M. Moffett
Howard M. Moffett

Susan S. Geiger

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2007 a copy of the foregoing Motion for Reconsideration and Rehearing has been sent by electronic mail to persons listed on the service list.

Susan S. Geiger

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STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

EXHIBIT 1

DE 07-045

Briar Hydro Associates' Motion for Rehearing

Affidavit of Warren W. Mack

I, the undersigned Warren W. Mack, a resident of the City of San Diego, San Diego County, State of California, hereby make the following representations under oath:

1. In 1980-82, I was employed by Essex Development Associates, Inc. ("EDA") as its Vice President for Development. In that capacity, among other tasks, I helped negotiate power sales contracts for various EDA affiliates, including New Hampshire Hydro Associates, ("NHHA").

2. I was principally responsible, along with Richard Norman, for negotiation of the April 22, 1982 NHHA contract with Public Service Company of New Hampshire ("PSNH"), which is the subject of this proceeding. During those negotiations, our counterpart at PSNH was John Lyons, Manager of Supplemental Energy Sources.

3. In order to secure financing for the Lower Penacook Project and make debt service payments, NHHA needed a purchase rate from PSNH that was front-end loaded for the term of the construction loan; i.e., NHHA was willing to accept lower rates at the back end of the 30-year contract term in return for higher payments in the early years. NHHA concluded that Alternatives I and II of PSNH's then existing power purchase options would not be sufficient for NHHA to obtain necessary financing. NHHA thus agreed to negotiate with PSNH within the framework of what PSNH called its "Alternative III – Optional Contract Provisions," which allowed pricing above its 9.0 cent per KWH "index rate" for a certain number of years at the beginning of the contract, with much lower rates later in the contract term. NHHA understood

that Alternative III represented an offer from PSNH, to begin negotiation of a power purchase contract, and that Alternative III was separate and distinct from the provisions of Alternative I. In these negotiations PSNH used as a frame of reference an index energy price of $0.09/KWH. This index price was separate and distinct from prices contained in Alternative I. NHHA agreed to accept $0.10/kwh for energy for the first 8 years of project operation, with reduced payments in contract years 9-30 to pay back the front end loaded effect of the contract. Payments in years 9-20 of project operation were reduced to $0.042/KWH, and the energy rate was further reduced to $0.0353/KWH for contract years 21-30. PSNH set a discount rate of 17.61% for use in calculating NHHA's payback obligation. BHA is now receiving 3.53 cents/KWH for energy, considerably below market rates. During our negotiations John Lyons used pricing formula spreadsheets prepared by PSNH to explain the 9.0 cent index price and NHHA's payback obligations. Those spreadsheets were provided to the Commission with BHA's Reply Memorandum of June 29, 2007.

The 9.0 cent index price was based entirely on PSNH's projections of its "incremental energy cost" over the 30-year contract term. The 9-cent index rate included no value for capacity nor was there any reference to Alternative I.

4. One of the difficult issues for NHHA in negotiating this contract with PSNH was the question of whether PSNH would recognize the potential capacity value of the project and to pay NHHA for that capacity, in addition to the front-loaded variation of the 9.0 cent index price for energy. I had several conversations with John Lyons about NHHA's interest in selling capacity to PSNH as well as energy, and wrote to him at least three times with formal proposals to include capacity in the contract. Those letters were provided to the Commission with BHA's Reply Memorandum of June 29, 2007.

5. In our conversations about the capacity issue, including those in response to my three letters, Mr. Lyons did not waver from his assertion that the capacity of the Lower Penacook Project had no value to PSNH, that PSNH would not pay for it, and that he would not include it

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in the contract. He referred to PSNH having Seabrook and therefore no need for additional capacity. Mr. Lyons on several occasions referred to the contract being negotiated as being a standard form of contract and that he was not going to change the contract form for NHHA. Notably, he did not state that PSNH was buying the capacity of the Lower Penacook Project nor did he otherwise suggest that the contract included capacity as well as energy -- we both understood clearly that it did not.

6. NHHA was under financial pressure to begin construction. Because a signed power contract was a necessary financing condition, and because NHHA had no other purchaser for its power, NHHA finally decided not to press further to include the sale of capacity in the contract. As a result, the contract committed NHHA to sell only its energy to PSNH, which is why capacity is nowhere mentioned in the contract.

Further the affiant sayeth not.

Dated: December 19, 2007

Warren W. Mack

STATE OF CALIFORNIA

SAN DIEGO, SS

Personally appeared the above-named Warren W. Mack, and made oath that the foregoing statements subscribed by him are true to the best of his knowledge and belief.

Dated: December 19, 2007

Notary Public/Justice of the Peace
My commission expires: 4-11-08

MICHELLE D. KLUSMAN
COMM. #1482612
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
My Comm. Expires April 11, 2008

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STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITY COMMISSION

Briar Hydro Associates' Petition for Declaratory Ruling

Docket No. DE 07-045

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S OBJECTION TO BRIAR HYDRO'S MOTION FOR RECONSIDERATION AND REHEARING

Public Service Company of New Hampshire ("PSNH") hereby objects to the Motion for Reconsideration and Rehearing ("Motion") filed by Briar Hydro Associates ("Briar") on December 21, 2007. Briar has not stated good reasons for granting a rehearing or advanced any new grounds or evidence which could not have been presented earlier. In support of its motion, PSNH says the following:

I. Standards for Rehearing

The standards for granting rehearing of an administrative order have been clearly delineated by this Commission and the New Hampshire Supreme Court:

> New Hampshire RSA 541:3 provides that the Commission may grant rehearing when in the Commission's opinion "good reason for the rehearing is stated in the motion." RSA 541:4 provides that a motion for rehearing must set forth grounds by which the decision is either unlawful or unreasonable. Motions for rehearing direct attention to matters "overlooked or mistakenly conceived" in the original decision and require an examination of **the record already before the fact finder**. *Dumais v. State Personnel Comm'n*, 118 NH 309, 312 (1975). . . . Good reason is also shown when a party demonstrates that **new evidence exists that was unavailable at the original hearing**. *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), *cited in*, *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC 334 (2002). (Emphasis added.)
>
> The Commission need not grant a request for rehearing "so that a party has **a second chance to present evidence that it could have presented earlier.**" *LOV Water Company*, 85 NH PUC 523, 524 (2000). Further, if the arguments raised on rehearing had been fully considered during the hearings, the Commission need not grant rehearing. *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC

334, 339 (2002); *Re Investigation as to Whether Certain Calls are Local,* Docket Nos. DT 00-223 and DT 00-054, Order No. 24,466, 90 NH PUC 195, 197 (2005). (Emphasis added.)

II. Conduct of the Initial Proceeding and the Need for a New Evidentiary Hearing.

Upon Briar's proposition, this proceeding was conducted based only on its petition, the documents exchanged and the briefs filed by the parties. In its March 28, 2007 Petition for Declaratory Ruling, Briar expressly stated:

> Briar believes this issue can be decided without extensive evidentiary hearings, on the basis of written pleadings and exhibits, including notably the attached Contract, and the parties' written explanations of their positions on the issue of contract interpretation.
>
> Petition, para. 7, pg. 3.

Prior to the filing of memoranda, PSNH and Briar had exchanged documents which had remained in their files concerning the negotiations surrounding the formation of the contract. The parties used these documents in their briefs. Briar was allowed to file the final brief in reply to PSNH's brief. At the suggestion of Attorney Moffett, the proceeding did not include extensive discovery or evidentiary hearings:

> 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, at 11 (May 23, 2007).

"No party has requested a hearing and accordingly we make our decision based on the petition and subsequent pleadings." Order 28,204, slip op. at 2. The Commission should not now conduct an evidentiary hearing after deciding this issue and issuing an Order, after Briar has waived such a hearing, and after Briar itself noted that a hearing was unnecessary.

As noted in the standards for rehearing set forth at the start of this Objection, the Commission should not re-open this matter to take evidence which could have been presented before it rendered its decision. No evidence is needed, nor was any evidence previously unavailable; therefore, the Motion should be decided based upon the record already before the Commission. *Dumais v. State Personnel Commission, supra.*

III. The Decision is Fully Supported by an Adequate Record.

The Commission found that the meaning of the terms "entire output" and "energy" could not be resolved within the language of the agreement alone; therefore, the Commission looked to the documents associated with the agreement and the circumstances surrounding the formation of the contract. Order No. 24,804 at 12 – 13. This type of extrinsic evidence is more reliable than hearsay testimony concerning negotiations taking place in 1981-1982 because the documents did not change over time. The Commission would be "justified in examining the parties' past practices and other extrinsic evidence in discerning the intent of the parties. *Wheeler v. Nurse*, 20 N.H. 220, 221 (1849)" *Appeal of New Hampshire Department of Safety*, 155 N.H. 201, 208 (April 17, 2007).

In its Memorandum filed on June 15, 2007, PSNH argued that the conduct of the parties since 1983 is extrinsic evidence on which the Commission could rely that the parties always conducted themselves with the understanding that PSNH was entitled to the value of the capacity. In its Reply Memorandum of June 29, 2007, Briar suggests that it was shocked to learn that PSNH had been taking credit for the Penacook Lower Falls capacity since the inception of the agreement. As evidenced by the letters attached to Briar's June 29, 2007, Reply Memorandum, Mr. Mack repeatedly tried to have PSNH include payments for the capacity from Penacook Lower Falls in the agreement. Reply Memorandum, Attachments 4 and 5. Despite their belief that capacity had value at the inception of the contract, Briar now asks the Commission to believe that Briar's predecessor, New Hampshire Hydro Associates ("NHHA") and Briar had no knowledge of how this valuable

capacity was being treated from 1984 through 2006. This position is unsupportable. All of PSNH's capacity filings were public records. Mr. Norman's organization and his many businesses are major players in the small power producer market. In the exercise of due diligence, Briar knew or should have known that PSNH claimed the capacity from Penacook Lower Falls. PSNH had no obligation to inform NHHA or Briar that it was reporting capacity values from Penacook Lower Falls to NEPOOL and later ISO-New England because PSNH was entitled to make that claim. As the Commission has found in Order No. 24,804, NHHA sold the entire output of Penacook Lower Falls to PSNH, including the capacity.

IV. Jurisdiction and the *Greenwood* Decision.

Briar raises for the first time in its Motion the issue of the Commission's jurisdiction to decide this dispute. The Commission clearly has jurisdiction to decide this matter and rehearing is not necessary on that ground.

The Motion chides the Commission for not first addressing the issue of jurisdiction (Motion at 3); however, it would be difficult for the Commission to know if jurisdiction was an issue unless and until it had been raised by one or more parties. Briar is the party that chose the Commission has the proper venue to hear this matter. By its action of filing its petition for declaratory ruling pursuant to N.H. Code Admin. Rule § 207.01(a), it has already conceded that the Commission has jurisdiction to act on its filing:

> Puc 207.01 Declaratory Rulings.
> (a) A person seeking a declaratory ruling on any matter **within the jurisdiction of the commission** shall request such ruling by submitting a petition pursuant to Puc 203. (Emphasis added.)

First and foremost, this matter involves the meaning and interpretation of a contract entered into under the auspices of the Commission pursuant to the Limited Electrical Energy Producers Act ("LEEPA") and the Public Utility Regulatory Policy Act of 1978 ("PURPA"). As Penacook Lower Falls is a Limited Electrical Energy Producer ("LEEP") as defined by RSA Chapter 362-A, the

Commission has jurisdiction to resolve this dispute.[1] Under RSA 362-A:5, "Any dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication." Briar referred this dispute to the Commission.

For more than twenty years PSNH included the capacity in its capability responsibility reported to NEPOOL and ISO New England, and Briar ignored it. 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, 37-38 (1996). Under both state and federal law, Briar could not have sold energy to PSNH and capacity to some other entity without losing its status as a LEEP or Qualifying Facility under PURPA. Under each legislative scheme, Briar was required to sell its entire output to a purchaser such as PSNH.[2]

Briar now asks this Commission to reconfigure the original contract, executed pursuant to PURPA and LEEPA, an action which is clearly barred by the *Freehold Cogeneration* case.[3] "*Freehold Cogeneration* stands simply for the proposition that a state regulatory commission may not revisit a previous long-term rate order for the purpose of revising its terms in light of changed circumstances." *Re: Public Service Company of New Hampshire, Petition for Clarification and Interpretation of Commission Orders,* Docket No. DE 05-153, Order No. 24,679 (October 16, 2006). "The structure of the New England power market has changed with the introduction of the FCM." Briar Reply Memorandum, June 29, 2007 at 17. Capacity now is much more valuable in the Forward Capacity Market. This change in circumstances has prompted Briar to ask this Commission to ignore the regulatory context from which the contract arose and the course of dealing of the parties. As noted by the Commission in Order No. 24,679, *Freehold* prevents the Commission from revisiting this matter as a result of these changed circumstances.

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[1] Notably, as a Limited Electrical Energy Producer, Briar is a public utility under RSA 362:2 subject to the Commission's jurisdiction. *Bridgewater Steam Power Co.,* 71 NH PUC 20 (1986).

[2] See discussion in PSNH's Memorandum in Opposition to Briar Hydro Associates' Petition for Declaratory Ruling Re: 1982 Power Sales Agreement at 3-4 (June 15, 2007).

[3] *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of New Jersey*, 44 F.3d 1178 (3d Cir. 1995).

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Briar argues that as a general rule, the question of contract interpretation is left to the courts. PSNH has argued three times in the superior court, twice successfully, that the Commission has primary jurisdiction to resolve disputes between PSNH and small power producers. New Hampshire has long recognized the doctrine of "primary jurisdiction" for its encouragement of the exercise of agency expertise; the preservation of agency autonomy; and judicial efficiency. *N.H. Div. Of Human Services v. Allard*, 138 N.H. 604, 606-07 (1994); *Metzger v. Brentwood*, 115 N.H. 287, 290 (1975); "a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by a specialized agency that also has jurisdiction to decide it." *Appeal of Osram Sylvania, Inc.*, 142 NH 612, 616, 706 A.2d 172 (1998).

Briar goes on to say that the Commission's adjudicative power is limited to acting as arbiter of the interests of public utilities and utility consumers, relying solely on RSA 363-17-a. Motion at 5. The Commission's powers are far broader than merely acting as a referee.

> The establishment of the Public Utilities Commission was for the purpose of providing comprehensive provisions for the establishment and control of public utilities in the state. "It created the public service commission [now public utilities commission] as a state tribunal, imposing upon it important judicial duties and endowing it with large administrative and supervisory powers." *Parker-Young Co.* v. *State*, 83 N.H. 551, 556; *Lorenz* v. *Stearns*, 85 N.H. 494; *State* v. *New Hampshire Gas & Electric Co.*, 86 N.H. 16. *Petition of Boston & Maine Corp.*, 109 N.H. 324, 326 (1969).[4]

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[4] The growth of administrative boards with dual governmental functions has long been accepted as not inconsistent with the provisions of our Constitution requiring separation of the legislative, executive and judicial powers. N.H. Constitution, Pt. I, *Art.* 37th; *Boody* v. *Watson*, 64 N.H. 162; *American Motorists Ins. Co.* v. *Garage*, 86 N.H. 362; *Welch Co.* v. *State*, 89 N.H. 428, 437. Certain administrative duties have been exercised by the judiciary from earliest times and are not now open to question. *Attorney General* v. *Morin*, 93 N.H. 40; *Opinion of the Justices*, 102 N.H. 195. However, the courts may not be required to undertake administrative duties of an extensive nature belonging to the executive branch of the government *(Opinion of the Justices*, 85 N.H. 562); nor may an administrative board be charged with determining disputes between private individuals unrelated to its regulatory functions. *Opinion of the Justices*, 87 N.H. 492. *See also, In re Land Acquisition, LLC,* 145 N.H. 492 (2000).

Any reliance on the *Alden Greenwood v. NH PUC* decision is misplaced given the facts of this case.[5] In *Greenwood* the Commission reduced the term of an existing rate order by ten years. The Commission took that action concerning Greenwood three years after having originally approved a thirty year rate order. *Greenwood,* slip op. at 3. In this proceeding, the Commission was asked by Briar to interpret—not change--the terms of a negotiated contract. The Commission is not conducting utility type ratemaking. *Greenwood,* slip op. at 6. PSNH is not asking the Commission to rescind or amend a rate order or contract negotiated under the provisions of LEEPA or PURPA based upon changed circumstances. Briar is the petitioner in this case, and is actually asking the Commission to reverse twenty plus years of PSNH's claimed capacity and rule that Briar is entitled to the capacity because the FCM has changed the circumstances. *Freehold* prohibits such an action by this Commission. The parties to the contract, NHHA/Briar and PSNH, disagree on what the term "entire output" means. An interpretation of that term adverse to the position of Briar does not constitute the Commission amending or rescinding a PURPA contract. The Commission merely acted on Briar's petition for declaratory ruling and disagreed with Briar's interpretation.

V. Conclusion.

Briar conceded the jurisdiction of this Commission when it filed its Petition for Declaratory Ruling. Now, after receiving an unfavorable decision, it challenges the Commission's jurisdiction to render the declaratory ruling that it sought. There is no jurisdictional infirmity, and the Commission's Order should stand.

Furthermore, Briar is not entitled to a rehearing in order to present evidence which could have been presented earlier. Briar itself conceded that "this issue can

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Implicit in the dual character of administrative boards is that some of their acts are within the legislative or administrative area and others have the effect of a judgment. "The judicial quality inherent in a finding or verdict by such a body does not necessarily signify a justiciable inquiry."

[5] *Alden T. Greenwood v. New Hampshire Public Utilities Commission,* Civil No. 06-cv-270-SM Opinion No. 2007 DNH 088 (July 19, 2007).

be decided without extensive evidentiary hearings"; it would be inefficient and unjust to know grant Briar a "do-over" or a "Mulligan".[6]

Respectfully submitted,

Public Service Company of New Hampshire

December 31, 2007
Date

By: Gerald M. Eaton (GME)
Gerald M. Eaton
Senior Counsel
780 North Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-2961

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Objection to Briar Hydro Associates' Motion for Reconsideration and Rehearing to be served on the persons listed on the Service List pursuant to Puc §203.11(a).

December 31, 2007
Date

Gerald M Eaton (GME)
Gerald M. Eaton

[6] In golf, a Mulligan is a shot not counted against the score, permitted in unofficial play to a player whose previous shot was poor.

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STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

RECEIVED
APR 24 2009

DE 07-045

BRIAR HYDRO ASSOCIATES

Petition for Declaratory Ruling

Order Denying Motion for Rehearing

ORDER NO. 24,960

April 22, 2009

I. INTRODUCTION

Petitioner Briar Hydro Associates (Briar Hydro, successor to New Hampshire Hydro Associates or NHHA) seeks rehearing pursuant to RSA 541:3 of Order No. 24,804 (Nov. 21, 2007), which resolved the question raised by this case in favor of Public Service Company of New Hampshire (PSNH). Briar Hydro owns the Penacook Lower Falls Hydroelectric Project, a 4.1 megawatt facility on the Contoocook River in Penacook and Boscawen. At issue is whether Briar Hydro or PSNH is entitled to payments arising out of the recently established regional mechanism for compensating generators for the capacity they make available to the New England electricity grid. In Order No. 24,804 we determined that, under the long-term power contract entered into by PSNH and the corporate predecessor to Briar Hydro in 1982, the entitlement belongs to PSNH. Briar Hydro filed its rehearing motion on December 21, 2007. PSNH submitted a pleading in opposition to the motion on December 31, 2007. A Secretarial Letter issued on May 1, 2008 scheduled oral argument on the rehearing motion for May 20, 2008. The Secretarial Letter indicated that we would resolve the jurisdictional issues raised by Briar Hydro on the papers, but that we would hear argument on the remaining issues and

expected the parties to come prepared with offers of proof with respect to the evidence they would produce should rehearing be granted.

Briar Hydro filed a letter on June 25, 2008 indicating that it was in need of additional time to respond to a request posed during the May 20, 2008 oral argument. Briar Hydro indicated that it had conferred with PSNH, OCA and Staff, with each assenting to Briar Hydro submitting responses, which were filed on July 10, 2008.

II. JURISDICTION

In its motion for rehearing, Briar Hydro asked to vacate Order No. 24,804 on the ground that the Commission lacked subject matter jurisdiction. Briar Hydro conceded that it was "unusual" for the party that first invoked the Commission's jurisdiction to argue later in the case that the tribunal lacks such jurisdiction. Briar Hydro Motion at 3. However, according to Briar Hydro, it could reasonably (1) choose the Commission as a forum for resolution of an energy-related dispute with a utility, (2) lose on the merits, and (3) argue only after not prevailing that jurisdiction was lacking – all because of what was then a recent decision of the U.S. District Court for the District of New Hampshire, *Greenwood v. New Hampshire Public Utilities Commission*, No. 2007 DNH 088 (D.N.H. July 19, 2007), 2007 WL 2108950, issued after Briar Hydro sought relief before the Commission. Briar Hydro argued that the federal district court's *Greenwood* decision highlighted "the Commission's lack of authority to adjudicate . . . disputes of this type" between a utility and a PURPA qualifying facility, i.e., an independent power producer that qualified as a generator from which PSNH is obliged to purchase power under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3. Briar Hydro Motion at 3.

Subsequent events have overtaken this argument. *See, Greenwood v. New Hampshire Public Utilities Commission*, 527 F.3d 8 (1st Cir. 2008) (vacating District Court decision and dismissing case with prejudice). Moreover, in *Druding v. Allen*, 122 N.H. 823, 826 (1982) the New Hampshire Supreme Court has held that "jurisdictional issues will be deemed to have been waived unless they are fully litigated prior to the determination of any substantive issues." *See also,* RSA 541:3 (authorizing administrative agencies to entertain rehearing requests "in respect to any matter *determined in the action or proceeding, or covered or included in the order*") (emphasis added) and *Appeal of Campaign for Ratepayers' Rights*, 133 N.H. 480, 484 (1990) (concluding that due process argument was thus waived for purposes of both rehearing and appeal) (citation omitted). These authorities establish that the question of the Commission's subject matter jurisdiction is not cognizable on rehearing in these circumstances.

One tangential jurisdictional argument made by Briar Hydro requires comment. According to Briar Hydro, we should vacate the order entered in this docket because it "treads into territory that the Commission in the past has acknowledged it is prohibited from entering." Briar Hydro Motion at 4-5 (citing *Connecticut Valley Elect. Co.*, Order No. 23,939 (March 29, 2002), 87 NH PUC 150). Briar Hydro misreads and misapplies the referenced decision.

In the *Connecticut Valley* order, the Commission asserted, rather than eschewed, jurisdiction to decide a controversy involving a previously approved PURPA rate order dating from 1983. *Connecticut Valley*, 87 NH PUC at 164-65. In any event, the 2002 decision was ultimately withdrawn and the underlying dispute was compromised as part of a broader agreement to transfer the utility's franchise. *See, Connecticut Valley Elect. Co.*, Order No.

24,176 (May 23, 2003), 88 NH PUC 288, 306. For the reasons set forth above, the contentions of Briar Hydro Associates about jurisdictional issues are rejected.

III. ARGUMENTS REGARDING MERITS OF ORDER NO. 24,804

Briar Hydro asks that we grant rehearing of Order No. 24,804 and convene an evidentiary hearing for the purpose of taking what Briar Hydro characterizes as "new evidence." Briar Hydro Motion at 7. Briar Hydro asserts that it did not request an evidentiary hearing in the first place because it believed the contract in question to be unambiguous and thus the dispute resolvable on the papers as a matter of law. Now that we have resolved the dispute based on the papers, Briar Hydro contends that we are obliged to receive additional evidence so as to shed light on the meaning of the contract.[1]

The "new evidence" identified in Briar Hydro's motion consists of the testimony of Richard Norman and the affidavit of Warren Mack, the latter attached to the motion. In the affidavit, Mr. Mack states that he and Mr. Norman were principally responsible for negotiating the contract at issue here on behalf of Briar Hydro's predecessor-in-interest, New Hampshire Hydro Associates (NHHA). *Inter alia*, Mr. Mack stated that in his discussions with John Lyons, who represented PSNH in the negotiations, "Mr. Lyons did not waver from his assertion that the capacity of the Lower Penacook Project had no value to PSNH, that PSNH would not pay for it, and that he would not include it in the contract." Affidavit of Warren W, Mack, Exh. 1 to Briar Hydro Motion, at ¶ 5, pp. 2-3. According to Mr. Mack, the PSNH representative "referred to PSNH having Seabrook and therefore no need for additional capacity." *Id.* At the time, PSNH

[1] In cursory fashion, Briar Hydro suggests that a failure to conduct an evidentiary hearing in these circumstances would raise due process issues. We do not address the constitutional question, deeming it to have been waived. *See, e.g., Keenan v. Fearon*, 130 N.H. 494, 499 (1988) (concluding that "off-hand" and "glancing" references to constitutional issues are insufficient to preserve them).

was slated to own 36 percent of the then-unbuilt nuclear facility, which would have yielded approximately 800 megawatts of capacity. Tr. 5/20/08 at 53.

At oral argument, Briar Hydro described what Mr. Norman would state if permitted to testify. According to Briar Hydro, the "central point" of Mr. Norman's testimony would relate to the "policy statement" of PSNH that Mr. Lyons sent to Mr. Norman on November 20, 1981 "as a way of PSNH indicating the various bases on which PSNH would be prepared to contract with New Hampshire Hydro Associates for the purchase of energy from the Penacook Lower Falls Facility."[2] Tr. at 13, 15. Order No. 24,804 referred to the PSNH policy statement as being "of primary relevance" to the case, noting that it set forth three pricing options that PSNH was willing to offer NHHA and other similarly situated generators from which PSNH was obliged to buy power. Order No. 24,804 at 13.

As noted in the Order, the policy statement offered power producers three contract options: (1) contract rates determined by the Commission under the state-law analog to PURPA, the Limited Electrical Energy Producers Act (LEEPA), RSA 362-A, which at the time were 8.2 cents per kilowatt-hour for dependable capacity and 7.7 cents per kilowatt-hour for energy in excess of dependable capacity, (2) a contract with a single "index price" of 9 cents per kilowatt-hour that escalated over a 30-year term, and (3) a variation on the second option, using the same index price but a payment schedule that was "front-end loaded" so as to increase the amount of the revenue stream in the early years of the contract without affecting its overall value. *Id.*

Noting that the first of these options offered an "all-in" price for both energy and capacity (and was, in effect, assigning a value of 0.5 cents per kilowatt-hour to capacity as distinct from

[2] The PSNH policy statement itself, with a cover letter addressed by Mr. Lyons to Mr. Norman, appears as an attachment to Briar Hydro's Reply Memorandum of June 29, 2007.

energy), Order No. 24,804 deemed it "similarly reasonable to treat Options II and III . . . as reflecting an all-in price for both energy and capacity." *Id.* This had outcome-determinative significance because it is undisputed that the contract at issue here was entered into pursuant to Option III. If the contract price is "all-in," then PSNH and not Briar Hydro owns the capacity.

According to Briar Hydro, it is the reasonableness of this inference about Options II and III in Order No. 24,804 that Mr. Norman would contradict in his testimony. At oral argument, Briar Hydro asserted that Mr. Norman would testify "that the only . . . pricing that was made available by PSNH under options II and III was an energy component. It did not include capacity in any way." Tr. 5/20/08 at 16. Briar Hydro also indicated that Mr. Norman would testify about "a series of cases analyzing the actual numbers that are used in Option II and Option III in the PSNH policy statement," because these analyses would demonstrate that . . . there should have been a higher contract price than there was in the actual contract." *Id.* at 20, referencing Exhs. B and C introduced at oral argument.

PSNH suggested that the Commission was justified in looking purely to the policy statement itself as a reliable source of extrinsic evidence to shed light on the meaning of an ambiguous contract. According to PSNH, "[t]his type of extrinsic evidence is more reliable than hearsay testimony concerning negotiations taking place in 1981-1982 because the documents did not change over time." PSNH Opposition of December 31, 2007 at 3. Overall, according to PSNH, the Commission's interpretation of the contract should not be revisited because it is fully supported by an adequate record.

At oral argument, PSNH was asked to address whether it could produce anyone to testify about the matters Messrs. Mack and Norman intended to address on behalf of Briar Hydro. PSNH replied:

> Mr. Lyons joined PSNH in 1948. He retired in 1990. We know that he is still alive, but he is at least in his late 80s, and may be approaching 90 years old. . . . [W]e have not contacted him, we have not asked him if he remembers this particular negotiations. And we think we're at a distinct disadvantage by the fact that this is someone who has left the Company almost 20 years ago and his recollection may not be good.

Tr. 5/20/08 at 43. PSNH indicated that it had spoken with a second former employee whose name appeared on the relevant PSNH documents, Richard Perron, but "he said he was mostly a person who didn't negotiate" but simply did calculations that Mr. Lyons used in the negotiations. *Id.* Rather than call Messrs. Mack and Norman to testify, PSNH suggested that the Commission reject such testimony as "entirely unreliable" given the amount of time that has elapsed. *Id.* at 45. Moreover, according to PSNH, Briar Hydro should not now be permitted to introduce additional evidence after having agreed the case could be decided on the papers and losing the case when it was so decided.

IV. CONCLUSION

RSA 541:3 authorizes the Commission to grant rehearing of a decision if it determines that "good reason for the rehearing is stated in the motion." RSA 541:4 requires the movant to demonstrate that the decision is unlawful or unreasonable. Good reason for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). Based on the arguments presented in the motion, the opposition to the motion, and the offers of proof presented at oral argument, we find that Briar Hydro has not stated good reason for rehearing of Order No. 24,804.

This proceeding concerns a contract dispute that the parties agreed to bring before us. In its petition, Briar Hydro stated that it "believe[d] this issue can be decided without extensive evidentiary hearings, on the basis of written pleadings and exhibits" but added that Briar Hydro "would certainly be willing to participate in more extensive hearings should PSNH request them and/or the Commission decide that they would be helpful in resolving this issue." Petition at 3. At the pre-hearing conference on May 23, 2007, Briar Hydro indicated that it was "not aware at this point of any factual issues that would require oral testimony" and "would be prepared to submit this on the paper record" unless "some party raises an issue that requires oral testimony in the course of possible discovery." Tr. 5/23/2007 at 11. In its final submission prior to Order No. 24,804, Briar Hydro did not request a hearing and continued to assert that the case "is ultimately about construing the plain meaning of contract language," which is a legal rather than a factual issue. Briar Hydro Reply Memorandum at 19.

As we observed in Order No. 24,804, at p. 12: "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 concluded that the meaning of the terms was not plain. Accordingly, consistent with *Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n*, 153 N.H. 194 (2007), we looked to the documents associated with, and the circumstances underlying, the contract.

It is a well-established principle of New Hampshire law that when a contract is ambiguous it is appropriate to look to extrinsic evidence for assistance in resolving the factual question of what meaning to assign to the ambiguous language. *See, e.g., Behrens v. S.P. Construction Co.*, 153 N.H. 498, 500 (2006). In our view, the ambiguity in this case was

resolved by reference to PSNH's so-called policy statement, which was essentially an offer sheet setting forth three pricing options for developers. Our conclusion was bolstered by our reading of letters from Briar Hydro to PSNH dated December 29, 1981 and January 21, 1982. We found that Briar Hydro accepted PSNH's Option III, which we concluded provided an all-in price for energy and capacity at an index price, with front-end loaded payments, for a period of thirty years. We essentially found that Briar Hydro had made a counter offer that PSNH did not accept, and that Briar Hydro ultimately accepted the offer contained in PSNH's policy statement.

In Order No. 24, 804, we explained the basis for our conclusion that Option I of the PSNH policy statement represented an all-in price for both energy and capacity and we found that it was reasonable to treat Options II and III as reflecting all-in pricing as well. Based on our understanding of the case, the meaning of Option III as recited in the PSNH policy statement is at the heart of the dispute and the record supports a finding that Option III of the PSNH policy statement included an all-in price such that a contract entered into pursuant to Option III includes the sale of both energy and capacity.

Briar Hydro concedes our finding that Option I reflects all-in pricing but it argues that we "made an unsupported leap of logic" in finding that Options II and III also reflected all-in pricing. Briar Hydro contends that PSNH provided in Option I for the purchase of energy and capacity through a cents per kWh payment, but that its use of a cents per kWh payment in Options II and III should be read to apply only to energy. The relevant question concerns whether Options II and III should be treated similarly to Option I or treated differently from Option I. We concluded in Order No. 24,804 that the options should be treated similarly in that PSNH would be purchasing the entire output, meaning both energy and capacity, under all three

options.[3] The papers do not support Briar Hydro's opposite contention that Options II and III, in the context of a thirty-year contract, were meant to exclude capacity.

Briar Hydro seeks to introduce testimony, which it characterizes as "new evidence," from two individuals involved in the negotiations in 1981 and 1982. Having decided not to present affidavits or testimony from its witnesses earlier in this proceeding, Briar Hydro may not simply change its strategy following an adverse decision and then present such evidence as a basis for a motion for rehearing. Briar Hydro has failed to explain why this evidence could not have been presented at the time Briar Hydro agreed to submit the dispute for resolution on the papers, and therefore this evidence does not constitute "new" evidence or a good reason for rehearing. *See, Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981) *citing O'Loughlin v. N.H. Personnel Comm'n.*, 117 N.H. 999, 1004 (1977)

Furthermore, the testimony now proffered by the two individuals has dubious value given the passage of twenty-seven years. Mr. Mack's affidavit, moreover, states that PSNH's representative, Mr. Lyons, "on several occasions referred to the contract being negotiated as being a standard form of contract and that he was not going to change the contract form for NHHA/Briar Hydro. Notably he did not state that PSNH was buying the capacity of the Lower Penacook Project nor did he otherwise suggest that the contract included capacity as well as energy – we both understood clearly that it did not." Putting aside the evidentiary issues raised

[3] This conclusion is bolstered by the circumstance that once PSNH has purchased Briar Hydro's entire output, Briar Hydro retains no ability to generate power for any other purpose.

by Mr. Mack's assertion as to Mr. Lyon's state of mind, we view Mr. Mack's testimony to be consistent with our conclusion in Order No. 24, 804 that NHHA/Briar Hydro attempted to negotiate a richer financial agreement and PSNH rejected NHHA/Briar Hydro's proposal. Finally, as to Mr. Mack's characterization of what Mr. Lyons did not say, it was not necessary for Mr. Lyons to state that PSNH was buying the capacity of Lower Penacook if PSNH were buying the entire output, i.e., energy and capacity, of the facility, which we concluded it was.

Rehearing and ultimately judicial review of Commission decisions turn on whether findings have adequate support in the record. *See, e.g., LUCC v. Public Serv. Co. of N. H.*, 119 N.H. 332, 340 (1979) ("The ultimate issue before the court on appeal is whether the party seeking to set aside the decision has demonstrated by a clear preponderance of the evidence that such order is contrary to law, unjust, or unreasonable.") The papers filed in this proceeding adequately support our decision. Briar Hydro has structured an argument that supports a contrary result but the essence of an ambiguous contract is that the disputed language is susceptible to alternative interpretations. Inasmuch as Briar Hydro has not, by a clear preponderance of the evidence, shown our decision to be unlawful or unreasonable; or shown that evidence was overlooked or misconstrued; or pointed to new evidence that was not available at the time of our decision, we deny the motion for rehearing.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Briar Hydro Associates for rehearing of Order No. 24,804 is DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of April, 2009.

Thomas B. Getz
Chairman

Graham J. Morrison (for)
Commissioner

Clifton C. Below
Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary

CONTRACT FOR THE PURCHASE AND SALE
OF ELECTRIC ENERGY

CONTRACT, dated April 28, 1982, by and between NEW HAMPSHIRE HYDRO ASSOCIATES, a New Hampshire Limited Partnership, with its principal office in Concord, New Hampshire (hereinafter referred to as SELLER), and PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, a New Hampshire corporation having its principal place of business in Manchester, New Hampshire (hereinafter referred to as PUBLIC SERVICE).

WHEREAS, SELLER is engaged in the business of generation of electrical energy,

WHEREAS, SELLER desires to sell its entire generation output to PUBLIC SERVICE,

WHEREAS, PUBLIC SERVICE is engaged in the business of the generation, transmission, and distribution of electrical energy,

WHEREAS, PUBLIC SERVICE has determined it would be beneficial to secure a reliable supply of electrical energy for a period of not less than thirty years,

WHEREAS, SELLER is willing and able to sell its entire output to PUBLIC SERVICE for thirty years;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, SELLER and PUBLIC SERVICE hereby agree as follows:

Article 1. Basic Agreement.

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 located in Penacook-Boscawen, New Hampshire on the Contoocook River. Since SELLER and PUBLIC SERVICE are interconnected through the system of the Concord Electric Company, PUBLIC SERVICE's obligation to purchase energy hereunder is conditioned upon SELLER obtaining the right to transmit power through the Concord Electric Company system to PUBLIC SERVICE and SELLER shall pay the cost, if any, of such transmission.

The point of delivery from the Concord Electric Company to PUBLIC SERVICE shall be the Garvins Substation metering point located in Bow, New Hampshire.

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.

It is agreed that SELLER shall have sole responsibility for operation and maintenance of its generating unit, including any relays, locks, seals, breakers, and other control and protection apparatus that are necessary, or which Concord Electric Company may designate as being necessary, for the operation of SELLER's generating unit in parallel with the system of Concord Electric Company and that SELLER will maintain said generating unit in good operating order and repair without cost to PUBLIC SERVICE.

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.

A. For the first eight (8) years of the Contract, the Contract rate shall be 11.00 cents per KWH. This rate exceeds the index price by 2.00 cents per KWH; and all payments made by PUBLIC SERVICE to SELLER which exceed the index price must be recovered by PUBLIC SERVICE, during later Contract years, in accordance with Section D.1., Article 3. This rate is subject to the adjustment provided for under Section D.2., Article 3. The provisions of Section C, Article 3, shall not override the provisions of this paragraph.

B. If, during the first eight Contract years, 96 percent of PUBLIC SERVICE's incremental energy costs has not exceeded the index price, the Contract rate beginning with the ninth contract year shall be the index price of 9.00 cents per KWH; and this rate shall remain in effect until superceeded by the provisions of Section C, Article 3. This rate is subject to the adjustment provided for under Section D.2., Article 3.

C. At such time that 96 percent of PUBLIC SERVICE's incremental energy cost exceeds the index, the rate to be paid under this contract will vary in accordance with the following provisions, subject to the provisions of Section D, Article 3.

As soon as 96 percent of PUBLIC SERVICE's incremental energy cost exceeds the index, the contract rate will be based on 96 percent of PUBLIC SERVICE's incremental energy cost for a period of one year. For each subsequent year, the percentage of PUBLIC SERVICE's incremental energy cost to be paid will be reduced by 4 percent (i.e. 96 percent, 92 percent, 88 percent, 84 percent, etc.), until the incremental energy cost is reduced only 2 percent to reach 50 percent of PUBLIC SERVICE's incremental energy cost. At such time, the contract rate will remain at the 50 percent rate for the remainder of the contract term.

PUBLIC SERVICE's incremental energy cost, for any hour, is equivalent to the marginal cost of providing energy for that hour. The marginal cost, for any hour, is the energy cost of the most expensive unit or purchased energy supplying a portion of PUBLIC SERVICE's load during that hour and includes all costs in the New England Power Exchange (NEPEX) bus rate cost for the incremental unit. The NEPEX bus rate costs are essentially the cost of fuel consumed. PUBLIC SERVICE's incremental energy cost, for the purposes of this Contract, will be expressed as a yearly average and will be calculated by averaging all 8,760 hourly incremental energy costs over the calendar year.

If the rate during any year is less then the appropriate percentage of PUBLIC SERVICE's incremental energy cost for that year, an adjustment will be made for all energy sold to PUBLIC SERVICE. The adjustment will consist of an additional payment for each KWH sold to PUBLIC SERVICE during said year based on the difference between the price paid and the appropriate percentage of PUBLIC SERVICE's incremental energy cost. The adjustment will be paid within one month after PUBLIC SERVICE's incremental energy cost for the previous year has been determined.

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If the rate during any year is more than the appropriate percentage of PUBLIC SERVICE's incremental energy cost for that year, an adjustment will be made for all energy sold to PUBLIC SERVICE. The adjustment will consist of a refund to PUBLIC SERVICE for each KWH sold during said year based on the difference between the price paid and the appropriate percentage of PUBLIC SERVICE's incremental energy cost. The refund will be made to PUBLIC SERVICE by applying one-twelfth of the total amount as a reduction to each month's payment by PUBLIC SERVICE during the current year. If for any month, no payment is due the SELLER, or the payment due is not equal to the refund, a payment to PUBLIC SERVICE will be made by SELLER so that the total recovery is achieved by PUBLIC SERVICE by the end of the current year.

D. The Contract rates described in Sections B and C, Article 3, are subject to the following provisions, in order to determine the Contract price to be charged by SELLER to PUBLIC SERVICE for sales of electric energy under this Contract.

1. Beginning with the ninth Contract year, and continuing for the term of the Contract, a recovery amount equal to 5.47 cents per KWH shall be deducted from the Contract rate. This deduction allows PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price.
2. For the first eight Contract years, the Contract rate shall be adjusted by subtracting 1.00 cents per KWH from the rate. For the ninth through the twentieth Contract years, the Contract rate shall be adjusted by adding 0.67 cents per KWH to the rate. The total of said additional payments, for any given year, shall not exceed one-twelfth (1/12) of the money subtracted during the first eight Contract years.

If proven necessary to PUBLIC SERVICE by SELLER and/or the project lenders, for amortization of the first cost of SELLER's facilities, PUBLIC SERVICE shall grant SELLER the option to extend the pricing under Section A, Article 3 through the ninth or tenth Contract year. If said pricing is extended through the ninth Contract year, the recovery amount under Section D.1., Article 3 shall be 6.84 cents per KWH and the recovery shall begin with the tenth Contract year; if said pricing is extended through the tenth Contract year, the recovery amount shall be 8.46 cents per KWH beginning with the eleventh Contract year.

Article 4. Metering.

The metering shall be configured so as to represent the generation delivered to PUBLIC SERVICE. The metering may be installed on the generation side of the transformer provided that transformer losses are subtracted from the measured generation by a suitable method.

SELLER will install, own, and maintain all metering equipment as specified in PUBLIC SERVICE's study of the SELLER's electric generating facility, which study is, or will be upon mutual consent of both parties, attached hereto as Attachment A. SELLER shall bear all costs associated with said equipment and its installation.

If at any time, the metering equipment is found to be in error by more than two percent fast or slow (+ or -2%), SELLER shall cause such metering equipment to be corrected and the meter readings for the period of inaccuracy shall be adjusted to correct such inaccuracy so far as the same can be reasonably ascertained, but no adjustment prior to the beginning of the preceding month shall be made except by agreement of the parties. All tests and calibrations shall be made in accordance with Section V-14 of the NHPUC Rules and Regulations Prescribing Standards for Electric Utilities in effect as of September 8, 1972, as amended. The meter shall be tested as prescribed in said Rules and Regulations.

In addition to the regular routine tests, SELLER shall cause the metering equipment to be tested at any time upon request of and in the presence of a representative of PUBLIC SERVICE. If such equipment proves accurate within two percent fast or slow (+ or -2%), the expense of the test shall be borne by PUBLIC SERVICE.

The SELLER shall allow PUBLIC SERVICE reasonable access to the meter located on the SELLER's premises. PUBLIC SERVICE reserves the right to secure or seal the metering installation, to require SELLER to measure electrical energy sold to PUBLIC SERVICE on an hour-by-hour basis, and to require SELLER to notify PUBLIC SERVICE once each day of SELLER's generation in kilowatthours for each hour during the prior 24 hours.

Article 5. Modifications.

If SELLER plans any modifications to its electric generating facility, SELLER shall give PUBLIC SERVICE prior written notice of its intentions. In the event that PUBLIC SERVICE reasonably determines that said modifications would necessitate changes to the metering equipment or would cause PUBLIC SERVICE to incur additional expenses associated therewith, the SELLER shall make such changes as reasonably required by PUBLIC SERVICE and reimburse PUBLIC SERVICE for said expenses before PUBLIC SERVICE is obligated to purchase any increased output.

If the interconnecting circuit is converted to a higher voltage in the future, the SELLER shall be responsible for all metering changes necessitated by the conversion and shall bear all costs associated with said conversion.

Article 6. Billing & Payment.

PUBLIC SERVICE shall read the meter, installed in accordance with Article 4, on or at the end of each month, and PUBLIC SERVICE shall send the SELLER a form showing the month's beginning and ending meter readings and total net kilowatthour generation.

SELLER shall then transmit to PUBLIC SERVICE a bill showing the amount due, which amount will be determined by multiplying the rate per kilowatthour specified in Article 3 times the number of kilowatthours delivered to PUBLIC SERVICE since the prior reading of the meter, and PUBLIC SERVICE will send to SELLER a payment for that amount within 20 days of receipt of SELLER's bill.

Article 7. Liability & Insurance.

a. Each party will be responsible for its facilities and the operation thereof and will indemnify and save the other harmless from any and all loss by reason of property damage, bodily injury, including death resulting therefrom suffered by any person or persons including the parties hereto, employees thereof or members of the public, (and all expenses in connection therewith, including attorney's fees) whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, caused by or sustained on, or alleged to be

caused by or sustained on, equipment or facilities, or the operation or use thereof, owned or controlled by such party, except that each party shall be solely responsible for and shall bear all costs of claims by its own employees or contractors growing out of any workmen's compensation law. SELLER shall indemify and save PUBLIC SERVICE harmless against any and all liability for claims, costs, losses, expenses and damages, including bodily injury and death, sustained by Concord Electric Company, its employees or agents, arising out of SELLER's performance of this Contract.

b. SELLER hereby agrees to maintain in force and effect, for the duration of this Contract, Workmen's Compensation Insurance, as required by statute, and Comprehensive General Liability Insurance for bodily injury and property damage at minimum limits of three million dollars ($3,000,000). Within sixty days of the effective date of this Contract, the SELLER agrees to provide PUBLIC SERVICE with a certificate of such insurance.

c. In no event shall PUBLIC SERVICE be liable, whether in Contract, tort (including negligence), strict liability, warranty, or otherwise, for any special, indirect, incidental, or consequential loss or damage, including but not limited to cost of capital, cost of replacement power, loss of profits or revenues or the loss of the use thereof. This provision, subsection c of Article 7, shall apply notwithstanding any other provision of this Contract.

Article 8. Force Majeure.

Either party shall not be considered to be in default hereunder and shall be excused from purchasing or selling electricity hereunder if and to the extent that it shall be prevented from doing so by storm, flood, lightning, earthquake, explosion, equipment failure, civil disturbance, labor dispute, act of God or the public enemy, action of a court or public authority, withdrawal of facilities from operation for necessary maintenance and repair, or any cause beyond the reasonable control of either party.

Article 9. Effective Date & Contract Term.

This Contract shall become effective between the parties as of the date hereof, provided that the metering equipment, as specified by PUBLIC SERVICE in accordance with the conditions set forth in Section 4 of this Contract, has been installed by SELLER.

If said equipment has not been properly installed, this Contract shall become effective between the parties as of the date of proper installation of said equipment or as of the date SELLER begins delivering energy to PUBLIC SERVICE, whichever occurs latest. As of the effective date of this Contract, the Contract shall remain in full force and effect for thirty (30) years.

In order for any modification to this Contract to be binding upon the parties, said modifications must be in writing and signed by both parties.

Article 10. Prior Agreements Superseded.

This Contract with Attachment A represents the entire agreement between the parties hereto relating to the subject matter hereof, and all previous agreements, discussion, communications, and correspondence with respect to the said subject matter are superseded by the execution of this Contract.

Article 11. Waiver of Terms or Conditions.

The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Contract shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

Article 12. General.

This Contract shall be binding upon, and inure to the benefit of the respective successors and assigns of the parties hereto, provided that SELLER shall not assign this Contract except to an affiliated company, without the prior written consent of PUBLIC SERVICE, which consent shall not be unreasonably withheld. The term "affiliated company" shall include any partnership in which SELLER or one of SELLER's subsidiaries or affiliates is a general partner or any corporation in which SELLER or one of its subsidiaries or affiliates owns or controls more than 50 percent of the voting stock or otherwise has operating control. In the event of an assignment to an affiliate, SELLER shall notify PUBLIC SERVICE within five (5) days of the effective date of the assignment.

Article 13. Applicable Law.

This Contract is made under the laws of The State of New Hampshire and the interpretation and performance hereof shall be in accordance with and controlled by the laws of that State.

Article 14. Mailing Addresses.

The mailing addresses of the parties are as follows:

SELLER: New Hampshire Hydro Associates
99 North State Street
Concord, New Hampshire 03301
Attn: Richard A. Norman, Partner

PUBLIC SERVICE: Public Service Company of New Hampshire
1000 Elm Street
P.O. Box 330
Manchester, New Hampshire 03105
Attn: Henry J. Ellis, Vice President

IN WITNESS WHEREOF, the parties have hereunto caused their names to be subscribed, as of the day and year first above written.

NEW HAMPSHIRE HYDRO ASSOCIATES
By ESSEX DEVELOPMENT ASSOCIATES,
A General Partner

(Witness)

By: Richard A. Norman
Name: Richard A. Norman
Title: Partner

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

(Witness)

By: Henry J. Ellis
Henry J. Ellis, Vice President

SMALL POWER PRODUCER GENERATION

Public Service of New Hampshire

Public Service of New Hampshire
Supplemental Energy Sources Department
PO Box 330
Manchester, NH 03105-0330

Penacook Lower Falls

SESD # 055
Billing Period: December 2006

New Hampshire Hydro Assoc
c/o Essex Hydro Assoc.
65 Union Street 4th Floor
Boston, MA 02108

Invoice Date 01/03/2007
Expected Payment Date 01/25/2007
Account # 8808160
Tel # 617-367-0032
Fax # 617-367-3796

Delivery Period: 12/01/2006 through 01/02/2007

Energy Component:

Meter Readings

	Total
Present Reading	17,921
Previous Reading	17,057
Difference	864
Multiplier	3,500
Total	3,024,000

Total Kwhrs Delivered 3,024,000

Energy Rate Calculations

	Energy (Kwhrs)	Rate	
1	3,024,000	3.53 ¢/Kwhr	$ 106,747.20
2	0	.00 ¢/Kwhr	$ 0.00
Total Kwhrs	3,024,000	Energy Payment	$ 106,747.20

Adjustments $ 0.00
Translation Fee $ 0.00

Total Payment Due $ 106,747.20

Notes None.

Approved by [signature] Date: 1/8/07

Please Approve and Submit this Invoice to:

Danielle Martineau
PSNH, PO Box 330
Manchester, NH 03105-0330

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Excerpts from Settlement Agreement

Incorporated Into FERC FCM Order

Devon Power LLC, 115 FERC ¶61340

June 16, 2006

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(Daily Gas Index for Gas Day scheduled flow date – Daily Gas Index for first Gas Day for which flow orders have been removed to allow the sale of the gas that was held for reserve service) x (Undispatched reserved gas volume).

The Daily Gas Index applicable to each gas-fired Resource shall be based on the index used by the Market Monitor for establishing Reference Levels for that Resource under Section III.A.5.6.1(b)(i) of Appendix A of Market Rule 1. The ISO shall establish a methodology for determining applicable prices from the appropriate index that are reasonably designed to reflect the difference between (1) prices on the scheduled flow date and (2) prices for the resale of gas scheduled to meet that Resource's binding obligations but not burned to generate electricity at the location of the affected Resource during Cold Weather Warnings and Cold Weather Events. The ISO shall communicate that methodology for determining prices from the applicable index to the Governance Participants for consideration pursuant to the stakeholder process for considering Market Rules and changes, and shall file the methodology with FERC pursuant to Section 205 of the FPA.

C. **Confirmations**. For days that the ISO forecasts Cold Weather Warnings and Cold Weather Events, sufficiently in advance of pipeline gas nominating deadlines, all gas-fired Resources shall confirm to the ISO that they will nominate sufficient fuel to be able to deliver the energy and Supplemental Reserves scheduled in the Day-Ahead Energy Market and initial RAA results respectively. Following the Initial RAA but no later than 6:00 p.m. of the day preceding the electric Operating Day, each gas-fired Resource shall provide to the ISO confirmation and evidence of gas volume nomination of sufficient fuel to be able to deliver the energy scheduled for such Resource in the Day-Ahead Energy Market and the Supplemental Reserves that were identified for that Resource in the initial RAA.

VIII. Agreements Regarding Transition Period.

A. The current UCAP products shall be retained for the period commencing on December 1, 2006 and ending on May 30, 2010 (the "Transition Period") as provided for in Part VIII.I. Payments will be made to UCAP entitlement holders, and made by UCAP obligation holders including wholesale standard offer suppliers in Rhode Island as under the current Market Rules and tariffs; it being understood that the agreement of wholesale standard offer suppliers in Rhode Island to make UCAP payments is contingent upon the agreement of the state of Rhode Island utility regulatory authorities to support the settlement.

B. All listed ICAP Resources shall receive the following fixed payments, based on their seasonal UCAP ratings:

December 1, 2006 to May 31, 2007	$3.05/kW-month
June 1, 2007 to May 31, 2008	$3.05/kW-month
June 1, 2008 to May 31, 2009	$3.75/kW-month

June 1, 2009 to May 31, 2010 $4.10/kW-month

These payments are fixed and shall not be adjusted for changes in UCAP quantity.

C. There shall be no PER adjustments to any of the above payments.

D. Availability shall be measured by a weighted EFORd approach, as follows:

Outage Period	**Weighting Factor**
Off-Peak Hour	0.0
On-Peak Hour	1.0
Seasonal Peak Hour	20.0
Shortage Hour	40.0

Outage Period definitions:

On-Peak	Hours-ending 8:00 a.m. through 11:00 p.m. on all non-NERC holiday weekdays.
Off-Peak	All hours that are not On-Peak hours.
Seasonal Peak	The 200 hours pertaining to the highest 100 hourly system loads during the Summer Period (for this purpose, June through September) and the highest 100 hourly system loads during the Winter Period (for this purpose, October through May).
Shortage Hour	Periods of system-wide OP4, Action 6 or 11 or OP7 implementation.

Weighting factor shall not be additive (i.e., a Shortage Hour does not have a weighting factor equal to 61). A Resource's availability factor for purposes of UCAP ratings (*i.e.*, UCAP settlement credit) in settlement shall be a rolling average of the unit's seasonal weighted EFORd, with seasons as defined in the Seasonal Peak provision above. In months in which the Resource is de-listed, the unweighted EFORd shall apply. Weighted EFORd shall be phased-in over the first two seasons of the Transition Period. For the first six calendar months of the Transition Period, corresponding to the remaining portion of the 2006/2007 winter season, the ISO will gather the data necessary to calculate weighted EFORd for this season. However, for payment purposes during this time, the availability score will be based on twelve-month rolling unweighted EFORd. During the 2007 summer season, the availability score will be calculated as 50 percent weighted EFORd from the 2006/2007 Winter Period (i.e, October 2006 through May 2007) and 50 percent unweighted EFORd, calculated using six

"Real-Time Energy Market" is the purchase or sale of energy, payment of congestion costs, and payment for losses for quantity deviations from the Day-Ahead Energy Market in the Operating Day.

"Reserve Constraint Penalty Factors" or **"RCPFs"** are rates, in $/MWh, that are used within the Real-Time dispatch and pricing algorithm to reflect the value of operating reserve shortages and are defined in Section III.2.8 of Market Rule 1.

"Resource" is a generating unit, a Dispatchable Load, an External Resource, or an External Transaction as defined in Market Rule 1.

"Resource Adequacy Assessment" or **"RAA"** is the assessment performed periodically by the ISO for each hour of each day in connection with system operations, as referred to in Section 11, Part VII.A of the Settlement Agreement.

"Seasonal Claimed Capability" is the maximum dependable load-carrying ability in kilowatts of a generating unit (or ISO-approved combination of units, as per OP 14) being rated, excluding capacity required for station use, for the Summer Period or Winter Period, as applicable.

"Self-Schedule" is the action of a Market Participant in committing and/or scheduling its Resource, in accordance with applicable ISO New England Manuals, to provide service in an hour, whether or not in the absence of that action the Resource would have been scheduled or dispatched by the ISO to provide the service.

"Self-Supplied FCA Resource" is defined in Section 11, Part II.F.1 of the Settlement Agreement.

"Self-Supply Option" is defined in Section 11, Part II.F of the Settlement Agreement.

"Settlement Agreement" is the Settlement Agreement Resolving all Issues dated March 6, 2006 in Docket No ER03-563-____.

"Settling Party" a party to the Settlement Agreement.

"Shortage Event" is defined in Section 11, Part V.C.1.d of the Settlement Agreement.

"Successful FCA" is a FCA that has not been found to have Insufficient Competition or Inadequate Supply.

"Summer Period" is for each Power Year the four-month period from June through September.

"Supplemental Reserves" are the additional 1,000 MW of NCPC scheduled in accordance with Section 11, Part VII.D of the Settlement Agreement by the ISO if and as needed.

3. De-listed Capacity may be offered into the Day-Ahead Energy Market and, if accepted, shall be subject to the same rules as all other Resources in that Market (including the obligation to follow the ISO dispatch instructions). Such De-listed Capacity may be self-scheduled for portions of units not accepted into the Day-Ahead Energy Market.

4. De-listed Capacity not offered into the Day-Ahead Energy Market must Self-Schedule in order to participate in the Real-Time Energy Market. Any De-listed Capacity, including any portion of a de-listed unit, that is offered into the Day-Ahead Energy Market but accepted neither in whole nor in part must also Self-Schedule to participate in the Real-Time Energy Market. The ISO may request that such a Resource provide Energy, but the Resource shall not be obligated to come on line and shall not suffer any performance or availability penalties if it does not come on line.

C. **Self-Supplied FCA Resource**. A Self-Supplied FCA Resource shall be subject to the same "Rights and Obligations" as any other capacity Resource that is accepted in the FCA.

V. Agreements Regarding Payments and Charges.

A. **Capacity Clearing Prices.** Capacity Clearing Prices shall be determined for each Capacity Zone in the FCA. Each capacity Resource clearing in the FCA, or otherwise covered by a multi-year commitment, but not a Self-Supplied FCA Resource, shall be entitled to monthly payments based on the product of its MWs of capacity cleared in the relevant FCA and the Capacity Clearing Price in the appropriate location in the New England Control Area (the "FCA Payment"); provided that FCA Payments to New Capacity shall be limited to the capability demonstrated as contemplated by either Part III.D.1 or Part III.D.4.a, as necessary. The FCA Payment shall be decreased for PER pursuant to Part V.B. below and adjusted for availability penalties or credits pursuant to Part V.C. below.

1. **Capacity with a one-year Commitment Period.** Capacity with a one-year Commitment Period (that is, Existing Capacity, Import Capacity and New Capacity electing a one-year Commitment Period) shall receive monthly capacity payments based on the FCA Capacity Clearing Price for the one-year Commitment Period.

2. **Capacity with a multi-year Commitment Period.** New Capacity with a multi-year Commitment Period (that is, New Capacity electing a Commitment Period of anywhere from two to five years, in one-year increments) shall receive monthly capacity payments based on the FCA Capacity Clearing Price that is associated with the first year of the Commitment Period for each of the years of its Commitment Period. After the first year of the Commitment Period, the price paid to that New Capacity shall be adjusted to account for inflation using an agreed-upon

agencies. The method shall consider that some Resources may best be integrated by ensuring that price signals are correct. Such Qualified Capacity shall not be subject to the same availability penalties and/or poorly performing Resource treatment as other Resources, so the method shall also propose how to address poorly performing demand response and energy efficiency Resources. The Market Rules will address how demand Resources will be defined as New Capacity in the FCA.

F. **Self-Supplied FCA Resources.**

1. **Qualification**. Prior to each FCA, a Resource or a portion of a Resource may be designated by a Load-Serving Entity ("LSE") pursuant to Market Rules as a self-supplied FCA Resource ("Self-Supplied FCA Resource"). The Self-Supplied FCA Resource must meet the same qualification standards as any other Resource that is allowed to participate in the FCA. The total quantity of designated Self-Supplied FCA Resources may not exceed the projected share of the ICR for the LSE designating that Resource pursuant to Market Rules. To be considered a Self-Supplied FCA Resource, that Resource must be offered into the FCA. If designated as a Self-Supplied FCA Resource, the Resource will clear the FCA pursuant to Part III.O (Agreements Regarding Auction Mechanics – Self-Supply Option) and offset an equal number of megawatts of the projected share of ICR in the Commitment Period for the LSE designating that Resource.

2. **Locational Issues**. In order to qualify as a Self-Supplied FCA Resource for purposes of fulfilling a Local Sourcing Requirement applicable to a load in an import-constrained region, the Self-Supplied FCA Resource must be located in the same Capacity Zone as the associated load, unless the self-supplied resource is a Pool-Planned Unit with a special allocation of Capacity Transfer Rights ("CTRs") up to the number of allocated CTRs. Although the ISO will continue to model any such Pool-Planned Units in their actual location, the combination of the physical asset and the CTRs will offset the financial obligation of the self-supplier.

G. **Financial Assurance.** The following general requirements shall apply to the FCA and annual reconfiguration auctions. Except where noted, the retention and return of financial assurance and the types of acceptable financial assurance will be governed by the Financial Assurance Policy ("FAP"). Financial assurance requirements for Municipal Market Participants will be consistent with Section III of the FAP.

1. **Load-Serving Entity Obligation**. The financial assurance requirement for capacity payments for each month of the Commitment Period will be equal to the amount that represents the actual credit exposure of the LSE

times its monthly FCA Payment for any month in that Commitment Period, consistent with Part V.C.2.b. No capacity Resource on the system can be charged availability penalties in excess of its annual FCA Payment for that Commitment Period. If a capacity Resource is de-listed, in part or in full, for part of the year, the annual cap on availability penalties is not prorated, except to the extent that the capacity obligation was transferred bilaterally as described in subpart (i) above.

N. **Interaction with Locational Forward Reserves Markets.** The Locational Forward Reserves Market ("LFRM") jointly filed by the ISO and NEPOOL in Docket No. ER06-613-000 shall not be changed by the Settlement Agreement. Parties retain their rights to address LFRM in proceedings before the FERC and retain their rights to address the interaction between the LFRM and the Forward Capacity Market in the stakeholder process that provides for consultation with state utility regulatory agencies and in proceedings before the FERC. The Parties agree to work to identify in the appropriate Market Rules how the LFRM and capacity markets will function together efficiently in the long run.

O. **Self-Supply Option.** As provided in Part II.F above, the Forward Capacity Market shall include a "self supply option," pursuant to which a LSE may designate as its FCA Resources Self-Supplied Capacity Resources that it owns or to which it has contractual rights. The amount of MWs of Resources so designated for a Capacity Zone may not exceed the LSE's projected ICR obligation for the applicable Commitment Period in that Capacity Zone.

P. **Bilateral Contracting.** Bilateral contracts shall be allowed up to the applicable Seasonal Claimed Capability of the Resource for that applicable month. Any Resource accepting a capacity obligation pursuant to a bilateral contract shall be subject to the qualification requirements of Existing or New Capacity, as applicable.

IV. **Agreements Regarding Rights and Obligations.**

A. **Listed Capacity.** Listed Capacity shall have the following rights and obligations, effective the first Commitment Period of the Forward Capacity Market.

1. The listed portions of Resources must offer into both the Day-Ahead and Real-Time Energy Markets whenever available. The current Day-Ahead Energy Market obligations of Intermittent and demand Resources are not changed by this Settlement Agreement.

2. Day-Ahead Energy Market offers from capacity Resources must either:

   a. have a sum of start time plus minimum run time plus minimum down time that is less than or equal to 72 hours; or,

less the customer has been sent written notice of the company's intention to disconnect at least twelve days in advance of such action.

In its petition, Walnut Ridge Water Company sought approval for a reconnection charge of $25, which we find excessive. However, we will approve a charge of $15 which is more in line with that approved for other water utilities in this state. Our conclusion in this matter is also based on the assumption that one man hour ($10 per hour) and a maximum travel distance of five miles (17 cents per mile) would be entirely adequate in all but the most unusual instances.

Our order will issue accordingly.

Supplemental Order

Upon consideration of the foregoing report, which is made a part hereof; it is

Ordered, that the revisions of its tariff, NHPUC No. 1 — Water, as filed by the Walnut Ridge Water Company, Inc. on January 2, 1979, which revisions were suspended by commission Order No. 13,464 dated January 10, 1979, be, and hereby are, rejected; and it is

Further ordered, that in accordance with the increase in rates authorized by this report and order, Walnut Ridge Water Company, Inc. file a new tariff, NHPUC No. 2, specifying an annual charge of $126; and it is

Further ordered, that this revised tariff shall include an orderly program for the installation of meters throughout the water system and only such other terms and conditions as are applicable to its operation and in accordance with this commission's standard for water utilities and such as noted in the accompanying report; and it is

Further ordered, that the revised tariff shall be filed to become effective with all bills rendered on or after July 18, 1979.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of July, 1979.

Re New Hampshire Electric Cooperative, Inc.

DE 78-232, DE 78-233, Supplemental Order No. 13,744
July 23, 1979

ORDER *setting standards to be met in qualification for sale of electric energy.*

Rates, § 321 — Rates and charges of particular utilities — Electric — Generally.

The commission adopted standards which were to be met by electrical energy producers in order to qualify to sell electric energy at the rates set by the commission for a 12-month period; according to the standards, producers must prove the capability to generate their claimed capacity and confirm the ability of their median flow to support that capacity.

By the COMMISSION:

Supplemental Report

On April 18, 1979, this commission issued Report and Order No. 13,589 in DE 78-232 and DE 78-233 setting forth the price for the next twelve months that franchised utility companies would pay to limited electrical energy producers. The order provided as follows:

"A. From plants which produce energy on a nondependable capacity basis (such as run-of-the-river hydro plants) — four cents per kilowatt-hour (kwh);

"B. From plants which produce energy on a dependable capacity — four and one-half cents per kilowatt-hour (kwh)."

The commission now finds it necessary to issue standards which will provide specific guidelines to both limited power producers and utilities in the determination of eligibility for each of those rates.

Accordingly, the following standards will be adopted:

1. A hydroelectric generating station will undergo an annual audit of its capability to generate its claimed capacity during the period November 1st through February 28th each year. The proof will consist of achieving the claimed capacity for a continuous two-hour interval during the period noted above. The audit will be performed under the direction of this commission.

2. A stream flow analysis for the previous twenty years will be made. Such analysis will be a mathematical computation to confirm that the median flow during that period would support the level needed to produce the capacity achieved during the two-hour test period. Such analysis will be performed under the direction of this commission.

3. Generation output will be recorded at least hourly. Monthly reports indicating each hourly production will be submitted to this commission.

4. Each producer shall implement procedures which will provide immediate notification to the purchaser in the event of a plant shutdown and restart.

All electricity generated during a 24-hour period up to and including the amount proved by the two-hour capacity audit shall be paid by the purchaser at the rate of four and one-half cents per kilowatt-hour.

All electricity generated in excess of that proven during the two-hour capacity test shall be paid at the rate of four cents per kilowatt-hour, subject to annual adjustments to be made by this commission.

This order shall apply to all public electric utilities purchasing electrical energy on and after May 1, 1979, from limited electrical energy producers operating plants in the utility's franchise area not involving the use of nuclear or fossil fuels, with a developed output capacity of not more than five megawatts.

Our order will issue accordingly.

Supplemental Order

Upon consideration of the foregoing report which is made a part hereof; it is

Ordered, that the following standards shall be met by limited electrical energy producers in consideration of qualification for sale of electric energy:

1. A hydroelectric generating station will undergo an annual audit of its capability to generate its capacity during the period November 1st through February 28th each year. The proof will consist of achieving the claimed capacity for a continuous two-hour interval dur-

in[illegible]he period noted above. The audit sl[illegible]e performed under the direction of this commission.

2. A stream flow analysis for the previous twenty years will be made. Such analysis will be a mathematical computation to confirm that the median flow during that period would support the level needed to produce the capacity achieved during the two-hour test period. Such analysis shall be performed under the direction of this commission.

3. Generation output shall be recorded at least hourly. Monthly reports indicating each hourly production shall be submitted to this commission.

4. Each producer shall implement procedures which will provide immediate notification to the purchase[illegible] the event of plant shutdown and res[illegible]

All electricity generated during a 24-hour period up to and including the amount proved by the two-hour capacity audit shall be paid by the purchaser at the rate of four and one-half cents per kilowatt-hour.

All electricity generated in excess of that proven during the two-hour capacity test shall be paid at the rate of four cents per kilowatt-hour, subject to annual adjustments to be made by this commission.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of July, 1979.

Re Hampton Water Works

DR 79-51, Supplemental Order No. 13,751
July 25, 1979

PETITION *of a water company for a temporary rate increase; granted.*

Rates, § 249 — Schedules, formalities, and procedure relating to — Effective date.

Where the commission was under a statutory mandate to set the effective date of a temporary rate increase only after hearing, it found that to allow such an increase granted to a water company to become effective as of the date that the company's petition was filed would violate both that directive and the procedural due process rights of the public to notice and reasonable opportunity to be heard; however, the company was permitted to recoup the difference between permanent and temporary rates from those seasonal customers whose billing dates occurred prior to the effective date of the rate order.

APPEARANCES: Joseph C. Ransmeier for the petitioner; Harold T. Judd for the Legislative Utility Consumers' Council.

By the COMMISSION:

Report

These proceedings were initiated on February 22, 1979, when Hampton Water Works, a New Hampshire corporation operating as a public utility in New Hampshire, filed revisions to its tariff, NHPUC No. 6 — Water, providing for an increase in its annual revenues of $218,867. The commission

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vs: to increase its authorized common stock, $5 par value, from 18 million to 27 million shares.

At the duly noticed hearing on the petition, held in Concord on June 11, 1980, the company submitted that at a meeting of the common stockholders of the company held on April 8, 1980, the stockholders voted to amend the articles of agreement of the company to increase its authorized common stock to the higher amounts set forth in the company's petition, and a certified copy of the authorizing votes was submitted.

Company witness Lampron testified that the increases in the authorized capital stock were necessary for proper corporate purposes, including the financing of the company's construction program over the next several years.

Based upon all the evidence, the commission finds that the increase in the company's capital stock in the amounts requested in the petition for proper corporate purposes, including the financing of the company's construction program, will be consistent with the public good and should be approved and authorized. Our order will issue accordingly.

Order

Upon consideration of the foregoing report, which is made a part hereof; it is

Ordered, that Public Service Company of New Hampshire be, and hereby is, authorized to increase its authorized capital stock as follows: common stock, $5 par value, from 18 million to 27 million shares.

By order of the Public Utilities Commission of New Hampshire this twelfth day of June, 1980.

Re Small Energy Producers and Cogenerators

Intervenors: Energy Law Institute, Franklin Falls Hydro-Electric Corporation, Public Service Company of New Hampshire, Newfound Hydroelectric Company, New Hampshire Electric Cooperative, Inc., Legislative Utility Consumers' Council, New Hampshire Hydro Associates, Bethelhem Mink Farm Inc., Governor's Council on Energy, Concord Electric Company, and Granite State Electric Company et al.

DE 79-208, Fifth Supplemental Order No. 14,280
June 18, 1980

INVESTIGATION *on commission motion, of rates charged electric utilities for energy generated by small power producers; rates fixed.*

Rates, § 321 — **Small electric energy producers and cogenerators — Avoided cost standard.**

Avoided costs used in fixing rates charged to electric utilities for energy generated by small power producers should not be based solely on average fuel costs. [1] p. 296.

Rates, § 250 — **Retroactive rates — Small power producers.**

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tive application of rates do not apply to small power producers since they are not designated as public utilities under either state or federal law. [2] p. 299.

Interstate commerce, § 79 — Federal and state regulation of small power producer rates — Charges to electric utilities.

Discussion of federal and state regulation of small power producer rates charged to electric utilities. p. 292.

Rates, § 321 — Small electric energy producers — Avoided costs.

Discussion of avoided costs used in fixing rates charged to electric utilities for energy generated by small power producers. p. 294.

APPEARANCES: Representative Eugene S. Daniell pro se; Peter Brown, Larry Smuckler, and Robert Olson for the Energy Law Institute; Robert Rowe for Franklin Falls Hydro-Electric; Philip Ayers for Public Service Company of New Hampshire; Joseph S. Ransmeier for Newfound Hydroelectric Company; John Pillsbury for New Hampshire Electric Cooperative; Gerald L. Lynch for the Legislative Utility Consumers' Council; Edward Forster, pro se; Charles A. Diamond, pro se; Gordon Marker for New Hampshire Hydro Associates; Robert C. Collman for Bethlehem Mink Farm, Inc.; Paul Ambrosino for the Governor's Council on Energy; Douglas MacDonald for Concord Electric Company; Philip H. R. Cahill and William G. Hayes for Granite State Electric; Gerald Beckman, pro se.

By the COMMISSION:

Report

I. Procedural History

On October 18, 1979, the commission on its own motion issued Order No. 13,869 (64 NH PUC 361), which initiated hearings under docket DE 79-208 pertaining to small power producers and cogenerators. Pursuant to NHRSA 363-A:4, Limited Electrical Energy Producers Act (LEEPA), and the Public Utility Regulatory Policies Act of 1978 (PURPA), Title II, § 210, this commission is empowered to determine a proper rate to be charged electric utilities for energy generated by a small power producer (SPP).

The commission devoted six hearing days for the presentation of testimony and exhibits from interested parties. The response to the commission's order was significant and positive as demonstrated by the list of appearances. These parties included a number of New Hampshire's present and potential small power producers, members of industry interested in small power production, representatives of various state and federal agencies, and representatives of the state's electric utility industry. Each sought to offer reasons for adjusting the present rate of four cents per kwh for energy and 4.5 cents per kwh for energy and capacity set by Order No. 13,589 in DE 78-232, DE 78-233 (64 NH PUC 82).

II. State Versus Federal Standards

The Public Utility Regulatory Policies Act (PURPA) sets forth a specific standard for determination of a proper small power producer's rate. This standard requires that electric utilities must purchase electric energy and capacity made available by qualifying cogenerators and small power producers at a rate reflecting the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than gen equivalent amount of energ purchasing the energy or cap other suppliers. This avoided dard has been the subject of terpretations by the parties.

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The FERC regulations imp § 210 of PURPA have elimi potential for conflict between and federal initiatives. Acc these rules, the states are fre to their own authority to ena regulations providing for ra result in even greater encoura the alternate energy tech However, states cannot promu or regulations which provide r than the federal standards. S ments would fail to provide th encouragement for these tec Volume 45 — *Federal Register* 12221 (February 25, 1980).

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these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers. This avoided cost standard has been the subject of various interpretations by the parties.

While PURPA has a defined standard, the state act, Limited Electrical Energy Producers Act (LEEPA), fails to provide any guidance or standard other than to require the commission to actively encourage the development of small scale and diversified sources of supplemental electrical power. RSA 362-A:1. As this commission has noted previously, the general overall theme of both legislative acts is to encourage the development of alternate energy generation.

The FERC regulations implementing § 210 of PURPA have eliminated any potential for conflict between these state and federal initiatives. According to these rules, the states are free pursuant to their own authority to enact laws or regulations providing for rates, which result in even greater encouragement of the alternate energy technologies. However, states cannot promulgate laws or regulations which provide rates lower than the federal standards. Such enactments would fail to provide the requisite encouragement for these technologies. Volume 45 — *Federal Register* No. 38, p. 12221 (February 25, 1980).

Further removal of any potential for conflict is provided in the FERC rules where state regulatory authorities are to be accorded great latitude in determining the manner of implementation of § 210. Volume 45 — *Federal Register* No. 38, p. 12230 (February 25, 1980).

The commission will generally adopt the avoided cost standard. However, due to the passage of LEEPA, the commission will recognize rates and measures where appropriate in excess of that allowed pursuant to the PURPA standard of avoided costs and the FERC rules. The only state statutory limitation as to allowance of rates in excess of avoided costs is that such an allowance can only be applied to facilities of five mw or less. Through this approach the commission will be in a position to honor the themes of both legislative enactments; namely, the rapid encouragement of alternate energy sources.

III. Energy Technologies Covered

Questions have arisen as to the applicability of the rate set in this proceeding to energy sources other than hydroelectric. Both PURPA and LEEPA are explicit as to the energy sources covered by the rates, rules, regulations and standards promulgated pursuant to the passage of each statute. Section 201 of PURPA defines a small power production facility as a facility which produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources or any combination thereof. Renewable resources have been further defined as including at a minimum wind, solar, and water.

Limited Electrical Energy Producers Act defines a qualifying limited electrical energy producer as one not involving the use of nuclear or fossil fuel. While LEEPA also has a capacity limitation different from that set forth in PURPA, the statutes are similar, in that the rate set covers small power producers using facilities with its primary source being biomass, waste, wind, solar, hydro, wood, or any combination thereof.

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IV. Avoided Costs

Public Utility Regulatory Policies Act states that in setting rates, state public utility commissions must not set a rate that exceeds the incremental cost to the electric utility of alternative electric energy, PURPA § 210(b). Congress delegated to the Federal Energy Regulatory Commission (FERC) the task of rule making within the incremental cost guidelines. PURPA § 210(a). The FERC, in its rule-making function, has substituted the term avoided cost for the term incremental cost. However, the FERC defined avoided cost as the "incremental cost to an electric utility of electric energy or capacity or both which but for the purchase . . . such utility would generate itself or purchase from another source." 45 *Federal Register* 12234 (February 25, 1980). The commission therefore finds that the term avoided cost is another way of expressing the concept of incremental cost. For purposes of uniformity with the FERC rules, the commission will use the term "avoided costs" with the understanding that the use of the term equates to the concept of "incremental costs."

The FERC envisioned that commissions would use data provided by the electric utilities pursuant to § 133 of PURPA. While the FERC initially indicated that consideration of this data was mandatory in development of an avoided cost rate under § 210, the final FERC rules clearly establish that this information is but one of the factors to be considered. 45 *Federal Register* 12218 (February 25, 1980). If state commissions await the filing of § 133 data in November of 1980, the congressional intent to have alternative energy in service as quickly as possible will be thwarted. Furthermore, state commissions which await the filing of this data will be frustrated in their attempts to complete a § 210 review prior to March, 1981, the deadline established by § 210(f).

Since this commission established a procedure whereby the avoided costs are to be determined prior to the submission of § 133 data, the parties have offered a proxy as an appropriate substitute. The proxy offered is Public Service Company's most recently constructed and most efficient oil generating station, Newington. Upon review, the commission finds that the proxy is reasonable as a starting point and that suitable adjustments can be made to arrive at the avoided costs for Public Service Company. (PSNH)

The parties, while in agreement as to the Newington proxy, differ substantially in the components to be considered in arriving at the incremental cost or the avoided costs at the margin. Public Service Company of New Hampshire has offered the average fuel cost at Newington for six months ending June 30, 1980, 47.4 mills. Public Service Company of New Hampshire has estimated the average 1980 fuel cost to be 52.7 mills. As to adjustments for operation and maintenance costs and inventory costs, PSNH contends that such costs are fixed and therefore should be excluded for purposes of calculating avoided costs. Additionally, PSNH argues that consideration should be given to the change that will occur in PSNH's avoided costs with the advent of Seabrook.

Granite State Electric (GSE) has adopted a similar approach. Granite State Electric Company stated that its average fuel costs as of December, 1978, was 28 mills and that as of December, 1979, this figure had increased to 48 mills. No GSE estimates were provided

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for 1980. Granite State offers the additional argument that it deserves additional consideration because of its present state of excess capacity. A GSE witness testified that its supplier of energy and capacity, New England Power, would not be in need of additional capacity until 1993.

Staff economist, Lisa Gertler, rejected the proposition that avoided costs should be solely based on fuel. While witness Gertler calculated a fuel component based upon the assumption that oil-fired electricity would be displaced, she also included calculations for other costs that would be avoided, inventory and operation and maintenance costs. Additionally, her calculations included a formula for calculating the additional value of a purchase from a small power producer which can meet an utility's daily peak loads thereby displacing the highest marginal cost generating sources.

Ms. Gertler agreed with the commission's prior determination of five mills as an additional allowance for those units that can provide capacity as well as energy. Due to the financing problems experienced by small power producers, Ms. Gertler recommended that in addition to setting a rate, the commission provide a long term incentive by "grandfathering" small power producers at the determined rate as the come on line. An additional recommendation was to instruct utilities to accept any contractual agreement offered by a small power producer unless the utility can prove unjust and unreasonable terms.

The following table illustrates Ms. Gertler's recommendation for avoided costs ending June 30, 1981:

Base Fuel Cost	61.81 mills per kwh
Adder for Daily Peak	6.18
Correction for Forced Outages	4.33
Inventory Cost	1.89
Operation and Maintenance	2.10
Total	76.31 mills per kwh

The total for energy and capacity would be 81.31 mills per kwh.

The Energy Law Institute (ELI) has provided substantial background into the legal and economic factors associated with setting a rate pursuant to § 210 of PURPA. Energy Law Institute witness Martin Ringo offered similar adjustments to the basic fuel component:adder for incremental cost differences from Newington, a correction for forced outages, operating and maintenance expenses and inventory cost. In addition, ELI cites the commission's attention to other components of avoided costs such as physical depreciation and externalities, which are unquantifiable on the basis of this record but nonetheless are argued to exist.

The ELI agrees with the quantifiable components found by staff with one exception, the adder for incremental cost differences from Newington. Stating that the staff projection is conservative ELI offers an adder of 10.82 mills per kwh in lieu of staff's 6.18 mills per kwh. Energy Law Institute proposes the adjustment in the first instance on the basis that Newington is PSNH's most efficient oil burning unit and as such it will be the first company-operated oil unit on line under NEPOOL's economic dispatch

system. Therefore, according to ELI when Newington is not on line because of either scheduled or unscheduled outage or when system demand exceeds capacity with only Newington and more economic units on line, the avoided cost will exceed the base fuel cost of Newington. Energy Law Institute's proposal differs from staff's in that consideration is given to the Schiller station and PSNH's NEPEX purchases.

Numerous existing and potential power producers testified at the hearings. One of the most complete offerings came from Newfound Hydroelectric Company. While in general agreement with the approach offered by Ms. Gertler, Newfound requests a rate of 80 mills per kwh for energy and 85 mills for units which can provide both energy and capacity.

While in disagreement with the narrow interpretation offered by PSNH and GS as to avoided costs, Newfound has applied recent increases in the price of oil to indicate the impropriety of the figures offered by the two aforementioned utilities. Newfound highlights the PSNH projection for 1980 which reveals a 27.3 per cent increase in the last six months of 1980. Applying this increase to the first six months of 1981, Newfound arrives at a rate of 70.9 mills per kwh under PSNH's scenario. Turning to Granite State's figures, Newfound focuses on the 75 per cent increase between December, 1978, and December, 1979, which carried forward to December, 1980, would yield a cost rate of 83.8 mills per kwh.

Another thorough presentation was provided by Gordon Marker of New Hampshire Hydro Associates. Mr. Marker has significant experience in the field of hydroelectric generation. Mr. Marker focused on the tremendous front end costs associated with small power projects. An observation supported by Dr. Gerald Beckman, Ted Larter, and Edward Forster. Mr. Marker offered that the commission should adopt a flexible approach and suggested that those small power producers familiar with utility accounting, ratemaking, and regulation should be treated as in essence a small utility.

Representative Eugene Daniell, the major proponent of LEEPA, cites our attention to the inability of small power producers to hire the necessary lawyers and accountants if the commission should proceed to set rates on a project by project basis. The real question according to Representative Daniell is what is necessary to increase the amount of alternate energy in the state. Representative Daniell asks the commission to consider the real costs of Seabrook if it should decide to adopt the approach of using the next plant on line.

The LUCC urges the commission to avoid overestimation of avoided costs. In particular, the LUCC suggests that there is not an adequate record for the inventory and operation and maintenance adjustments offered by staff witness Gertler.

Commission Analysis

[1] The position that avoided costs should be based solely on average fuel costs is rejected. The FERC rules clearly state that a determination of the avoided costs as to energy purchased from small power producers envisions costs in addition to fuel and operating and maintenance. Volume 45 *Federal Register* 12225 (February 25, 1980). The examination of a particular oil-fired generating station's fuel price cannot cease at the price of the fuel. A

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generating station like Newington represents the avoided fuel cost only when the plant is on line and only when following the system's load. It is necessary to develop an appropriate adder to reflect a purchasing utility's cost when the above two factors are not operative.

As to the development of an appropriate adder to the fuel cost, the commission will accept staff's adjustment. This adjustment is based on a formula which multiplies the factor for costs above Newington by the percentage of time the load exceeded Newington by the probability of such load being supplied by the small power producer. While there may be merit to the considerations offered by ELI as to other plants and system purchases, the record has not been significantly developed to measure the accuracy of the projections.

The fuel cost to which the adder is applied is the projected average price of a barrel of oil for Newington for the period July 1, 1980, to June 30, 1981. Recent activity by the oil producing nations together with past underestimations by PSNH indicate that the figure used is conservative.

The adjustment for forced outages is also accepted. Recent hearings in the fuel adjustment cases, DR 80-46, establish the existence as well as the frequency of these adjustments. These forced outages raise average avoided cost because a utility is required to substitute less economical units. The staff correction of 7 per cent for the unscheduled outage rate at Newington and the weighted cost of all units more expensive than Newington is justified.

The adjustment for inventory has been challenged on the basis that the amount of energy provided by the small power producers is so minute as to not be a factor in inventory. The commission finds that in theory the adjustment for inventory is justified. While the number of small power producers may very well impact on inventory, there is no question that this cost is an avoided cost. Since the rate set in this proceeding will encourage the development of alternative energy sources both in quantity and quality, to ignore this aspect of avoided cost would support circularity and frustrate the purpose of both PURPA and LEEPA. The staff adjustment based on the working capital component associated with financing fuel inventory divided by the corresponding annual output of the plants involved, is a reasonable method for approximating fuel inventory costs.

Staff's proposed adjustment for operation and maintenance expenses does not distinguish between fixed and variable expenses. While consistency may dictate a removal of certain fixed costs, it is equally clear that recognition must be provided for physical depreciation as suggested by ELI. Since the record does not reveal these subtle and possibly balancing adjustments, the commission will accept the adjustment proposed by staff.

The discussion up to this point has focused upon a small power producer selling strictly energy. However, when a small power producer can provide reliable capacity as well as energy, the avoided costs are higher. This additional benefit has been clearly recognized by this commission in its prior report and Order No. 13,589 (64 NH PUC 82) and the FERC in its recent promulgation of rules. Volume 45 *Federal Register,* 12216, 12225 (February 25, 1980).

The testimony in this proceeding as well as the former case has revealed the accuracy of a five mill adjustment for capacity. The criteria used in our

previous report and order is again adopted. While § 292.304(c) indicates that there are valid reasons for adopting different criteria for capacity adjustments depending on the alternative energy source used by the small power producer, there is not enough evidence in this record to adopt any further refinement.

The testimony of witnesses Larter, Harris, Forster, Marker, Beckman, Ambrosino, and Gertler all focus on a major problem faced by all small power producers, namely financing. Financial institutions do not have the necessary experience under either PURPA or LEEPA to properly evaluate the financial strength of a given project. Concern has been raised that the rate today may be lowered in the future which in turn would alter the economics and financial attractiveness of the projects. The record establishes the need to set not only a fair rate but some assurance that the rate will continue into the future.

Another factor that enters into this analysis is the next scheduled plant, Seabrook I. Substantial amounts of testimony and exhibits were devoted to answering the question of whether avoided costs will increase or decrease with the introduction of Seabrook I into the generation mix. Upon a review of the record it is simply impossible to forecast the effect Seabrook I will have on avoided costs of PSNH or GSE. While witnesses from these utilities initially used a total cost of $2.6 billion for completion of Seabrook I and II, this figure was later raised to $3.1 billion. Public Service Company of New Hampshire's most recent report to the commission raises the figure to $3.3 billion. This figure does not include decommissioning costs, nuclear waste storage costs, or additional costs resulting from the aftermath of Three Mile Island or the slowdown in construction. On a mills per kwh basis, certain assumptions are made as to the useful life of the plants, the outages, the system load as well as other factors that given different assumptions could change the mills per kwh rate. However, it is also clearly established that oil prices are rising at a phenomenal rate exceeding the consumer price index and fueling the fires of inflation. The differential between oil fuel costs and nuclear fuel costs continues to widen.

Whether or not the avoided costs of PSNH's system are more or less than the present with the advent of Seabrook depends largely on the assumptions made. While the commission has found the economics of Seabrook justify its construction, the impact of its construction on avoided costs in 1983 and beyond is not clear.

Because of the commission'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 commission 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 facitilites 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.

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aforementioned qualifying producers is the staff proposal of 7.631 cents per kwh for energy and 8.131 cents per kwh rounded upwards to 7.7 cents and 8.2 cents respectively to account for the conservative assumptions taken by staff and the unquantified externalities.

This rate will be applicable to all New Hampshire utilities, except for Granite State. Due to the commission finding that Granite State has excessive capacity, the commission for the present will only award the energy component of 7.7 cents for all kwh sold to Granite State by qualifying small power producers within its service territory.

In terms of application of the aforementioned rates to cogenerators, the commission is mindful of the fact that no cogenerator or party interested in cogeneration appeared in our proceedings. The aforementioned rates for energy and capacity will only apply to (1) cogenerators who offer to sell their entire output and buy back all their needs, (§ 292.304b) and (2) as to electrical generators utilizing portions of their own output and selling excess to the electric utility only the energy rate will apply minus the adder for daily peak or seven cents. The remainder of the cogeneration question will be resolved in subsequent hearings.

As each new small power producer is connected to a New Hampshire utility, an adjustment will be made to reflect any increased costs in the utility's basic rates or fuel adjustment.

Finally, although the commission sets a minimum today, such a finding does not foreclose additional increases in the future prior to Seabrook I. While the commission is prepared to have additional hearings in the future due to increased avoided costs, the commission does not have the resources or the capabilities to begin treating small power producers as utilities. Besides the strict prohibition as to such treatment in both PURPA and LEEPA, it would be impossible at this moment in regulation to begin seeking out comparable small power producers so as to apply the traditional cases of Hope and Bluefield to arrive at a reasonable return on common equity. While the idea has long term merit, the practicality of regulation forecloses use of this method.

V. Existing Producers and Effective Date

[2] The question has been raised as to whether or not it is fair to allow existing small power producers the new rate. Various parties have contended that an allowance of this new rate to existing small power producers will be a major windfall. Small power producer, Ted Larter, reacted by stating that to do otherwise would punish the highly skilled small power producer who achieved results before lesser talented or motivated small power producers began their operations. The question is resolved by examination of the FERC rules that clearly provide guidance that if the choice is between small rate reductions and help to the small power producer, the latter should prevail.

The commission does not examine the rate of return earned by other suppliers of energy to utilities. This factor together with the legislative restrictions on treating these small power producers independent of the regulatory system, but for pricing purposes, is of significant rationale to allow the rate found in this proceeding to be applied to existing small power producers.

There has been some discussion that the rates be applied retroactively to May

1, 1980. The small power producers are not designated as utilities under either state or federal law. Consequently, the statutes that allow for some retroactive application of rates do not apply. Therefore, the aforementioned rates will apply to all energy-capacity as of June 18, 1980, forward. Our order will issue accordingly.

Supplemental Order

Upon consideration of the foregoing report, which is made a part hereof; it is hereby

Ordered, that all qualifying small power producers will receive 7.7 cents per kwh for all energy sold to any New Hampshire electric utility; and it is

Further ordered, that all qualifying small power producers will receive 8.2 cents per kwh for reliable capacity provided to any New Hampshire electric utility except Granite State Electric, and it is

Further ordered, that qualifying cogenerators are only included to the extent discussed in the report, and it is

Further ordered, that all electric utilities within the state provide quarterly information as to amount of kwh's purchased from small power producers,

By order of the Public Utilities Commission of New Hampshire this eighteenth day of June, 1980.

Re Public Service Company of New Hampshire

DE 80-57, Order No. 14,282
June 20, 1980

PETITION *by electric company for authority to acquire an easement over private land to be used for transmission lines, and to determine a fair and reasonable price to be paid for the easement; damages fixed and awarded.*

Eminent domain, § 8 — Acquisition of easement — Award of damages.

An award of damages for an electric company's acquisition of an easement for the construction of transmission lines was based upon the testimony of the company's witnesses rather than upon the testimony of the landowner's witness.

APPEARANCES: Eaton W. Tarbell, Jr., 300 for the Public Service Company of New Hampshire; Steven Ells for Olde Mill Investments, Inc.

By the COMMISSION:

Report

The Public Service Company of New Hampshire, a public utility engaged in

the supply of electric service of New Hampshire, pursua sions of RSA 371, petitione Utilities Commission of New for permission to acquire rights of easements to certai area of Hampton, New Han lands to be used in conju transmission lines emanati Seabrook nuclear power further to determine damag for same. The petition v March 7, 1980, with a public hearing scheduled 1980, subsequently adjourn 22, 1980, at 2:00 P.M..

The petition prayed that sion determine that the nec taking had been predeterm prior approvals by state authorities under RSA 16 further sought that the determine a fair and reaso be paid for said easement.

The question of necessity early in the proceeding that issue of a certificate facility plus approval by Regulatory Commissio further challenge. The m was the only item remainir end, the petitioner prese nesses. The landowner witness.

Petitioner's witness Murray, provided the cor maps and plans on whic in question was isolated entered as Exhs P-1 and ly.

Petitioner's witness, Da dicated that he had property before the taki and after the taking at $6 in damages of $17,600. Su appraisal figures w

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

May 23, 2007 - 10:18 a.m.
Concord, New Hampshire

RE: **DE 07-045**
BRIAR HYDRO ASSOCIATES:
Petition for Declaratory Ruling.
(Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Connie Fillion, Clerk

APPEARANCES: **Reptg. Briar Hydro Associates:**
Howard M. Moffett, Esq.

Reptg. Public Service Co. of New Hampshire:
Gerald M. Eaton, Esq.

Reptg. Residential Ratepayers:
Meredith Hatfield, Esq., Consumer Advocate
Kenneth E. Traum, Asst. Consumer Advocate
Office of Consumer Advocate

Reptg. PUC Staff:
F. Anne Ross, Esq.

Court Reporter: Steven E. Patnaude, CCR

I N D E X

PROCEEDINGS

CHAIRMAN GETZ: Good morning. We'll open the prehearing conference in docket DE 07-045. On March 28, 2007, Briar Hydro Associates filed a petition seeking a declaratory order with respect to a 1982 power sale contract with Public Service Company of New Hampshire. The 1982 purchase contract has a term of 30 years, requires PSNH to purchase the entire output of the project, and the current price for that output is 3.53 cents per kilowatt-hour. Briar requests that we determine which party, PSNH or Briar, is entitled to receive payments for capacity arising under an order of the Federal Energy Regulatory Commission establishing a forward capacity market for existing and new generators of electric power and providing for transition payments to existing generators beginning in December 2006.

I'll note for the record that an affidavit of publication was submitted by the Petitioner on May 1, and that the Consumer Advocate has filed notice of its participation. Can we take appearances please.

MR. MOFFETT: Thank you, Mr. Chairman. I'm Howard Moffett, with Orr & Reno, in Concord. And, with me this morning -- I'm representing Briar Hydro Associates, the Petitioner. With me are Dick Normand and

Jonathan Winer from the Petitioner, Briar Hydro.

CHAIRMAN GETZ: Good morning.

CMSR. MORRISON: Good morning.

CMSR. BELOW: Good morning.

MR. EATON: Good morning. My name is Gerald M. Eaton. I am Senior Counsel for Public Service Company of New Hampshire. I had assumed that we were a necessary party and have not filed a petition for intervention. But I would make that motion at the appropriate time, that we be allowed to intervene as a full party.

CHAIRMAN GETZ: Why don't you make it now.

MR. EATON: Public Service Company wishes to intervene as a full party intervenor. The issues here affect our contractual relationship, and, as we will state in our position, that we do not agree with the position taken by Briar Hydro, and therefore wish to participate fully.

MS. HATFIELD: Good morning, Commissioners. Meredith Hatfield, for the Office of Consumer Advocate, on behalf of residential ratepayers. And, with me is Ken Traum, Assistant Consumer Advocate.

CHAIRMAN GETZ: Good morning.

CMSR. BELOW: Good morning.

CMSR. MORRISON: Good morning.

MS. ROSS: Good morning, Commissioners. Anne Ross, with the Staff of the Public Utilities Commission. And, with me today is Steve Mullen, an analyst in the Electric Division, and Tom Frantz, Director of the Electric Division.

CHAIRMAN GETZ: Good morning.

CMSR. MORRISON: Good morning.

CMSR. BELOW: Good morning.

CHAIRMAN GETZ: Well, let's get this out of the way. Is there any objection to PSNH's intervention?

MR. MOFFETT: Absolutely not.

CHAIRMAN GETZ: Recognizing that PSNH has an interest affected by the proceeding, we will grant their motion to intervene. Let's see. Let me raise this, just in case. There's been, in the past year or so, a couple of cases that have come before the Commission that, with respect to small power producers, where I did not participate because I had years ago been an attorney with respect to the underlying dockets. I've taken a look at this, a quick look at this proceeding. I don't believe that I ever had any participation with the underlying

contract. Mr. Moffett, you may have done a more exhaustive review of the record. But I don't -- I'm not aware of any reason that I would not participate, but I wanted to make sure that the parties had a chance to consider that issue.

MR. MOFFETT: We're certainly not aware of any reason why it wouldn't be appropriate for you to participate, Mr. Chairman.

CHAIRMAN GETZ: Okay. Thank you. Then, let's turn to a statement of the positions of the parties. Mr. Moffett.

MR. MOFFETT: Thank you, Mr. Chairman. The position of the Petitioner is set out pretty fully in the Petition itself, which we filed on March 28th. And, without going into it in detail, if I may, I'll just summarize the major points. This is a contract interpretation case. We believe -- I should explain that it's a 25 year old contract, so it's pretty much ancient history at this point. The contract was entered into between PSNH and New Hampshire Hydro Associates, which was the developer and the original owner of the Penacook Lower Falls hydro project in Boscawen and Penacook, New Hampshire.

In 2002, New Hampshire Hydro Associates

sold the assets of that project, both the tangible and the intangible assets, to its affiliate, its corporate affiliate, Briar Hydro Associates. And, Briar Hydro Associates, at that time, succeeded to the ownership and operation of the project, including this 1982 contract for the purchase and sale of electric energy, which is attached as Appendix 1 to the Petition.

Fast-forwarding a little bit, there were no issues under this contract for many years. There is an index price set forth in Article 3, which establishes a variable price to be paid for energy by PSNH to Briar Hydro under the contract. But, as the Commission is well aware, last year the Federal Energy Regulatory Commission issued an order in June establishing the Forward Capacity Market. And, under that order, all existing generating facilities in New England, including intermittent resources, like hydro projects, which are run-of-river, are entitled to certain capacity payments.

In the first instance, for the first three years, almost four years of the Forward Capacity Market, those are in the nature of what are called "transition payments". And, starting in June of 2010, that will shift to a market-based, essentially auction-derived price for capacity.

So, the question arose, between PSNH and Briar Hydro, as to which party would be entitled to the benefit of those capacity payments accruing to the Penacook Lower Falls Project, once the transition payments under the Forward Capacity Market began. And, I should say those payments began in December of last year, December of 2006. And, one of the -- one of the issues in the case is whether or not any decision by the Commission would be retroactive to the beginning of those payments in December of '06. There have been some discussions about that, between Mr. Normand and his business counterpart at PSNH, Mr. MacDonald, I believe. And, it's our position that there has been an understanding that any decision by the Commission would be retroactive to December of '06. Mr. Eaton tells me this morning that he wants some -- wants the opportunity to confirm whether or not PSNH agrees there was that understanding, and I'm happy to give him that opportunity.

In any event, the issue before the Commission, under the Petition, is a fairly straightforward issue of contract interpretation. It's the question of whether or not PSNH or Briar Hydro is entitled to any capacity payments that would be -- that would accrue to the Penacook Lower Falls Project under the

Forward Capacity Market order.

And, our position is fairly simple and straightforward. We think that there are five reasons why those transition payments, and ultimately the market-based capacity payments, should go to Briar Hydro. The first, very broadly speaking, is that, as an examination of the contract will reveal, it does not deal with capacity. The word "capacity" is not used in the contract. The contract calls for the sale and purchase of electrical energy. It says nothing about "capacity".

The second reason that we have for suggesting that Briar is entitled to these payments is that the industry, including both the Petitioner and PSNH, well understood at the time that this contract was being negotiated the difference between energy and capacity. It was a fairly well-established concept by 1982. It goes back at least to 1979, to a fairly explicit discussion in FERC Order 69, which established the original ground rules for PURPA projects, or the equivalent of LEEPA projects in New Hampshire. And, that distinction was picked up in subsequent orders by the Commission, which essentially differentiated between projects that could offer only energy and projects that could offer both energy and capacity, ultimately, at a rate that was monitored and

measured by Commission engineers.

The third reason is cited on Page 5 of our petition. And, this -- And, that is simply the fact that all of PSNH's invoices, which capture the energy that is -- or the product that is being sold to PSNH, are measured in kilowatt-hours or straight energy. There is no reference to any payment for capacity in the monthly invoices that have been submitted since this project entered into the contract with PSNH.

Fourthly, I would say that Briar is representative of a class of small hydro producers in New Hampshire, many of which, not Briar, but many of which, including some of Briar's affiliates, have long-term rate orders that were issued by this Commission under early orders. And, Briar concedes that any project that has a long-term rate order with the Commission is, quite arguably, not entitled to the capacity payments under the Forward Capacity Market, because the Commission's orders and the original applications for those rate orders, made it clear that PSNH was buying capacity, as well as energy. Our case is different. This is not a long-term rate order, this was a negotiated contract. In which the parties bargained back and forth for what they were going to buy and what they were going to sell. And, that

product ended up being energy, and energy only. Capacity is not mentioned in the contract.

Finally, we would argue, and this is Point 5 on Page 6, that had PSNH intended to bargain to acquire capacity under this contract, it fully well knew how to do that. There are other -- There are other negotiated contracts between PSNH and other small power producers that are contemporaneous with this, and even prior to this, which clearly differentiated between energy and capacity, and provided that PSNH was going to be buying both.

So, in essence, that's our argument. I'd be happy to go into detail or answer questions, if any of the Commissioners have questions. But I don't want to belabor the point. 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.

CHAIRMAN GETZ: Have you discussed prior to the prehearing conference this morning a schedule or

was that the intention to do that after the technical session?

MR. MOFFETT: We have. And, I might let Ms. Ross speak to that.

MS. ROSS: Yes, we have a schedule to propose.

CHAIRMAN GETZ: Okay. All right. We will then move around the room and get to that. Mr. Eaton.

MR. EATON: Thank you. Mr. Chairman, this is a very old contract. And, it does -- it arose during a time when the Commission's policies regarding payments to small power producers was evolving. The contract itself, in the recital, says, supporting our side, says that the "Seller desires to sell its entire generation output to Public Service." And, "Seller is willing and able to sell its entire generation output to Public Service." And, we interpret that and the rest of the contract to mean that energy and capacity were the entire generation output being sold. That conforms with the LEEPA statute, where -- where the small power producer sells their entire output to the local electric utility. In this case, the power was wheeled across the Concord Electric system to PSNH, which was permitted at the time.

So, when I refer to the "local electric utility", it's Public Service Company.

The sales between a generator and a public utility have traditionally been considered to be AN interstate commerce and regulated by the Federal Energy Regulatory Commission. PURPA, under PURPA, qualifying facilities, such as Penacook Lower Falls, were given an exemption from FERC rate regulation, but only if these qualifying utilities sold their entire generation output to the local utility at the avoided cost, which was established by the state jurisdictional commission.

PSNH and Penacook Lower Falls have operated under the contract since 1983. PSNH has counted that capacity as our capacity in its supply portfolio for those entire years. In order to meet what was our capability responsibility before restructuring, we counted this capacity as our own. And, we did not have to purchase additional capacity, because this was part of our portfolio. It was added to our hydro portfolio.

And, as far as now, when we have load responsibility and have to have capacity to meet that load responsibility, we continue to count this capacity as our own. If Penacook Lower Falls had been free to sell its capacity, there have been markets for capacity ever since

1983. And, rather than wait till December of 2006, they could have made this so -- made this proposal and sold capacity when capacity was short and there was a market for capacity.

We believe the exemption that FERC allows under PURPA doesn't allow the Company to -- the small power producer to break up its different products. Just like the New Hampshire statute, the entire generation output must be sold to the local utility. In the context of the time, as the Commission was first setting rates for small power producers, those short-term rates were a lower rate for a project that could provide no dependable capacity and a higher rate for a project that could provide reliable capacity. Those rates were all cents per kilowatt-hour rates. There's a short-term rate that was set by Order Number 13,589. It had two different prices. Both were cents per kilowatt-hour prices, but the higher one included compensation for capacity.

Now, in order to buttress that point, the fact that capacity was paid for through a cents per kilowatt-hour rate, the Commission had a generic proceeding on small power producers and cogenerators, which was docket number DE 83-062, and an order which has been discussed many times in other -- in other cases,

Order Number 17,104, the Commission made a conscious effort to move from collecting capacity costs through a cents per kilowatt-hour rate and moving to a dollars per kilowatt-hour per year. That's at 69 New Hampshire Public Utilities Report. The case starts at Page 352, and the cite is at Page 358. The date of that decision is 1984. It was after this contract was entered into. So, the Commission clearly moved in a different direction after this contract was consummated. And, I quote from that proceeding, that the first is that the expression of capacity values remain in dollars per kilowatt per year, and will no longer be translated into kilowatt-hours and added to the energy rate. So, they made a clear break in 1984 from what was being done before. And, I submit, that's what the parties were operating under, was the previous regime, when capacity values were converted into a cents per kilowatt-hour amount.

So, it's not inconsistent to say that the 9 cent rate included capacity. We have operated that way for 25 years. And, only because there's a new -- a new rate being paid for by ISO New England for capacity, do we have this issue being brought up. We've always considered this capacity to be our own. And, PSNH has paid for this capacity through the rates and has taken

credit for it. And, we believe we're entitled to the transition charges in forward capacity payments that have been -- that have been paid since December of 2006, and which we flow through to our customers through the energy service rate.

CHAIRMAN GETZ: Thank you. Ms. Hatfield.

MS. HATFIELD: Thank you. The OCA does not have a position at this time, but we will be fully participating due to the potential impact that the outcome of this case could have on all ratepayers, including residential ratepayers.

CHAIRMAN GETZ: Ms. Ross.

MS. ROSS: Thank you. The Staff hasn't developed a position yet in this docket, and will participate and hopefully have a position when we've had a chance to review a little more of the material. I did want to present what the group has reached, in terms of a procedural recommendation to the Commission at this time.

The parties have recommended that we have sort of an informal discovery with regard to two issues. One, any information on the negotiations that took place between PSNH and the owner of the Penacook Lower Falls Lower Falls facility, and any information on

the calculation of the pricing for the contract that the parties reached. And, both Briar Hydro's current owner and PSNH have agreed to make any information that they have available to all parties by June 7th. We can deal with any confidentiality issues as they arise.

The parties then agreed that, on June 15th, PSNH will file its response to Briar Hydro's petition. And, on June 29th, any party may file a reply brief to the issues raised, either in the Petition or in PSNH's response. At this time, we do not know whether the parties will be requesting a hearing. We may ask the Commission to reserve one, in case its needed.

Is that a fair statement of what we've -- and that would be our recommendation.

CHAIRMAN GETZ: And, I guess, on that last point, if, based on the pleadings, we would like to hear oral arguments, then we could pursue that as well. Are there any questions?

CMSR. BELOW: I guess I have some questions that might help avoid the need for oral argument, if the parties are aware of them and can address them in their briefs. The first question is, obviously, what's the proper interpretation or understanding of the FERC order approving the Forward Capacity Market and the

underlying settlement agreement that they approved, with regard to who's entitled to the capacity payments? Is it the owner of the generation or is it the party that owns or controls the capacity? And, what does that mean? I guess, from both the technical and legal sense, what does it mean to own or control capacity? And, does the language in the contract, such as "Article 2. Availability", that states "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 kilowatt-hours from said unit when in operation." Does that language -- What does that mean in terms of owning and controlling the capacity?

And, I guess Mr. Eaton already raised the question, you know, "can capacity be sold as part of a kilowatt-hour rate and, you know, in the context of the time?"

And, I guess those were the first kind of impression questions that sort of struck me as things that would be helpful to explore.

CHAIRMAN GETZ: And, I guess one issue that I would appreciate some exploration of is the -- I think one way of formulating the legal issue here is,

under New Hampshire law, what's the breadth of an output contract? It seems like one way of looking at this is there is a contract for output 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's some general contractual principles from other states or treatises, whatever, I'd appreciate some exploration of that concept.

Anything else from the parties? Anything to respond or other suggestions for this proceeding?

(No verbal response)

CHAIRMAN GETZ: Okay. Then, hearing nothing, we will close the prehearing conference, and, well, I guess I'm not sure if we're going to hear anything more, in terms of a recommendation from a technical session?

(No verbal response)

CHAIRMAN GETZ: Okay. Then, we will, I expect, approve the proposed procedural schedule and we'll issue a secretarial letter or an order approving the procedure for the remainder of the case. Thank you.

(Whereupon the prehearing conference ended at 10:45 a.m.)

POLICY STATEMENT
CONTRACT PRICING PROVISIONS
LIMITED ELECTRICAL ENERGY PRODUCERS

Public Service Company of New Hampshire (PSNH) will pursue all viable new supplemental energy sources in order to reduce its dependence on foreign oil, delay construction of future baseload power plants for as long as possible, and provide the best possible service to its customers at the lowest reasonable cost. In this pursuit, PSNH will offer nonfossil fuel burning and hydroelectric Limited Electrical Energy Producers (LEEPS), located in PSNH or its "wholesale for resale" customers franchised areas, the following contract pricing and term provisions.

I. LEEPA Contract Provisions for Nonfossil Fuel Burning & Hydroelectric LEEPS

In accordance with NHRSA 362-A: Limited Electrical Energy Producers Act (LEEPA) and subsequent orders of the N.H. Public Utilities Commission (PUC), contract pricing as determined by the PUC, or other regulatory body having jurisdiction, is available. These rates are currently 8.2 cents per kilowatthour (KWH) for 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), to the extent discussed in the report accompanying Order No. 14280. These rates may change from time to time as determined by the PUC. LEEPA Contracts will have a termination provision that may be exercised by either party upon twelve months, or less, written notice.

II. Fixed Rate - Future Escalating Contract Provisions for Nonfossil Fuel Burning & Hydroelectric LEEPS

Contract pricing under the Fixed Rate - Future Escalating provisions will be as outlined below.

A. An index price of 9.0 cents per KWH is established effective immediately and is the initial price to be paid under this Contract subject to the following provisions.

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1. For the first 10 years of the contract, PSNH will retain 10 percent (0.9 cents per KWH) for all energy purchased. During the second 10 years of the Contract, PSNH will pay the LEEP an additional 0.9 cents per KWH, above the contract price, for purchased energy. The total of said additional payments, for any given year, shall not exceed one-tenth (1/10) of the total money retained by PSNH during the first 10 Contract years.
2. At such time that 96 percent of PSNH's incremental energy cost[1] exceeds the index, the rate to be paid under this Contract will vary in accordance with the provisions of Paragraph B.

B. All payments varying from the index will be determined as a percentage of PSNH's incremental energy cost. As soon as 96 percent of PSNH's incremental energy cost exceeds the index, the Contract price will be based on 96 percent of PSNH's incremental energy cost for a period of one year. For each subsequent year, the percentage of PSNH's incremental energy cost to be paid will be reduced by 4 percent (i.e., 96 percent, 92 percent, 88 percent, 84 percent, etc.) until the incremental energy cost is reduced only 2 percent to reach 50 percent of PSNH's incremental energy cost. At such time, the Contract Price will remain at the 50 percent rate for the remainder of the Contract term.

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. The adjustment will consist of an additional payment for each KWH sold to PSNH during the previous year based on the difference between the price paid and the appropriate percentage of PSNH's incremental energy cost during

[1] See attached definition of PSNH's Incremental Energy Cost

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the previous year. The adjustment will be paid within one month after PSNH's incremental energy cost for the previous year has been determined.

If the price paid for the previous year is more 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. The adjustment will consist of a refund to PSNH for each KWH sold to PSNH during the previous year based on the difference between the price paid and the appropriate percentage of PSNH's incremental energy cost during the previous year. The refund will be made to PSNH by applying one-twelfth of the total amount as a reduction to each month's payment by PSNH during the current year. If for any month, no payment is due the LEEP, or the payment due is not equal to the refund, a payment to PSNH will be made by the LEEP so that the total recovery is achieved by PSNH by the end of said year.

The term of the Fixed Rate - Future Escalating Contract will be 30 years.

III. Optional Contract Provisions for Hydroelectric Energy Producers

PSNH may, at its discretion, offer hydroelectric energy producers contract provisions similar to those explained in Section II, but containing pricing above the 9.0 cents per KWH index for a certain number of years at the beginning of the Contract. Any payments above the index must be recovered by PSNH, in later Contract years, considering the present worth of money. Furthermore, all contracts offered under Sections II and III of this Policy Statement must be of equal value.

The attached exhibit illustrates the pricing provisions discussed under Section II.

These contract pricing provisions will be offered to all facilities qualifying under LEEPA including those facilities already under contract with PSNH who agree to sell their entire net output to PSNH.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

DEFINITION OF INCREMENTAL ENERGY COST

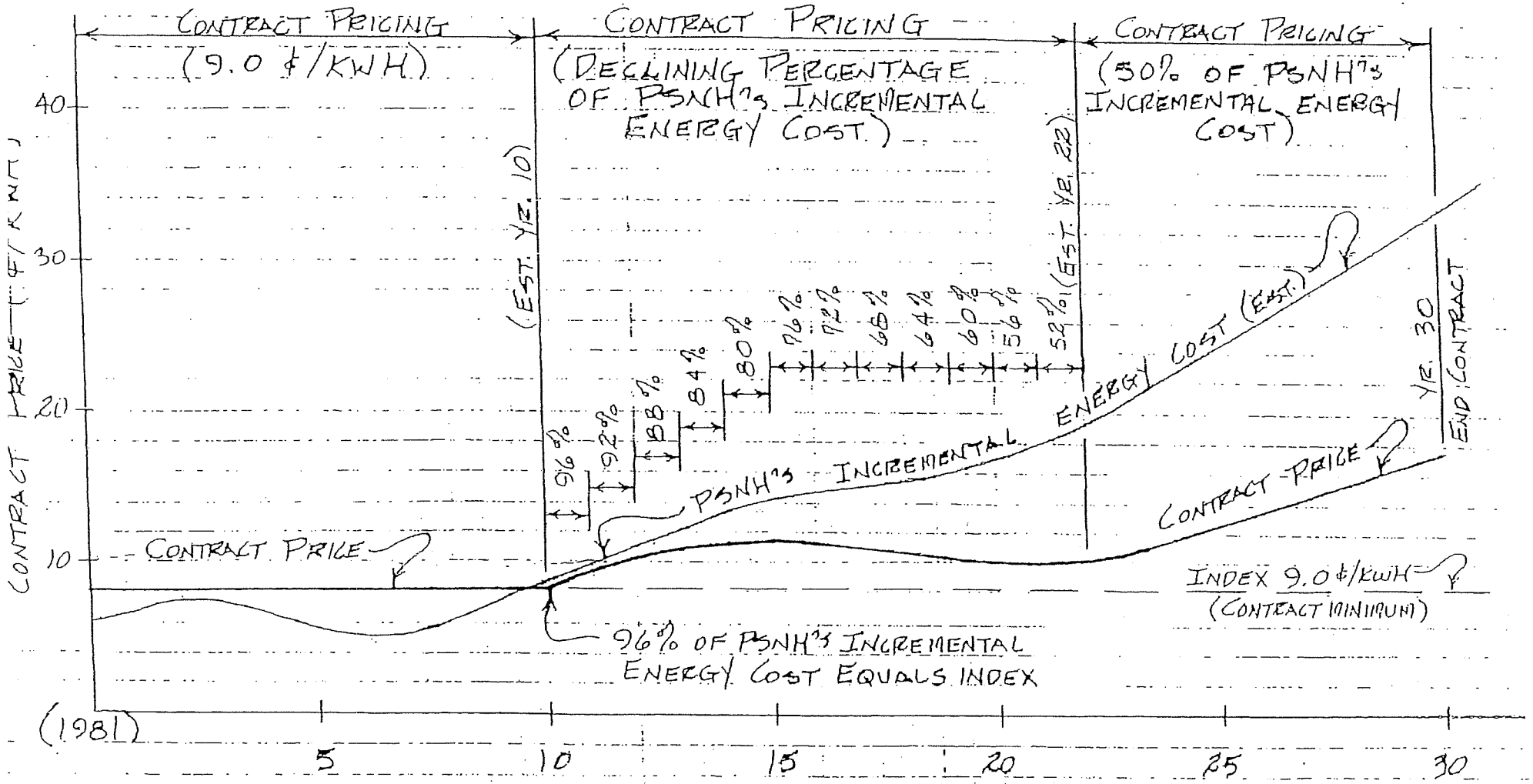
Public Service's incremental energy cost, for any hour, is equivalent to the marginal cost of providing energy for that hour. The marginal cost, for any hour, is the energy cost of the most expensive unit or purchased energy supplying a portion of Public Service's load during that hour and includes all costs in the New England Power Exchange (NEPEX) bus rate cost for the incremental unit. The NEPEX bus rate costs are essentially the cost of fuel consumed. Public Service's incremental energy cost, as referred to in the "Policy Statement of Contract Pricing Provisions for Hydroelectric Energy Producers", is expressed as a yearly average and is calculated by averaging all 8,760 hourly incremental energy costs over the calendar year.

October 1, 1981

EXHIBIT 1

FIXED RATE - FUTURE ESCALATING CONTRACT

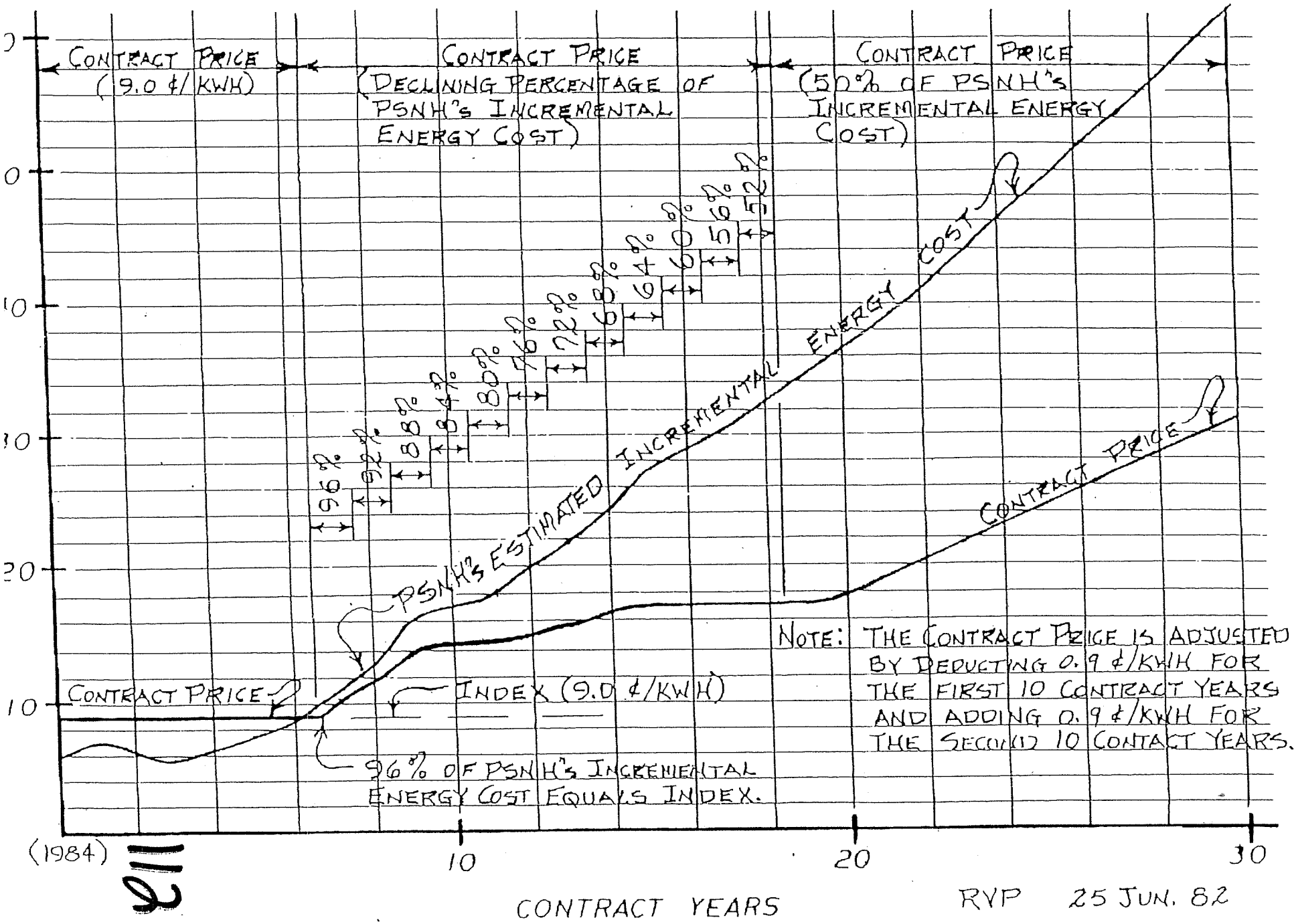
(Hydroelectric Energy Producers)



R.V.P.
30 SEP 81

EXHIBIT 1

FIXED RATE – FUTURE ESCALATING CONTRACT



RVP 25 JUN. 82

PSNH PUBLIC SERVICE
Company of New Hampshire

NOTED DEC 22 1981 R.V.P.

December 21, 1981

Mr. Richard A. Normand
N.H. Hydro Associates
3 Capitol Street
Concord, NH 03301

Subject: Contract Negotiations - Penacook Lower Falls Hydro
Concord/Boscawen, New Hampshire

Dear Mr. Normand:

Attached are copies of worksheets showing our estimate of the average annual payments in cents/KWH, under the terms of a long-term contract as we have discussed. A payment of 10 cents/KWH will be made for the first eight contract years; thereafter, 2.77 cents/KWH will be deducted from payments so that PSNH can recover the front-end payments in excess of the index. It is estimated that payments will drop to 6.23 cents/KWH for years 1990 and 1991, will rise to exceed 9.0 cents/KWH by 1993, continue rising to exceed 10.5 cents/KWH by 1995, and will reach 36 cents/KWH by 2011. Please remember that these figures are estimated only and once our own costs exceed the 9.0 cents/KWH index, all contract prices will then be referenced to our actual costs.

Some contract provisions will have to be made to insure that our interests, and consequently, our customer's interests, are protected due to the front-end loading. We would be interested in any thoughts that you might have.

Please review this information and then give me a call. We are looking forward to purchasing the energy from your facility on a mutually beneficial basis.

Very truly yours,

JE Lyons

John E. Lyons, P.E.
Manager
Supplementary Energy Sources

ams
Enclosures

cc: H. J. Ellis

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NOTED DEC 15 1981 R.V.P.

N. H. HYDRO ASSOCIATES
PENACOOK LOWER FALLS HYDRO
LONG-TERM CONTRACT
14 DEC. 81 RYP-1

Consider front-end loading of 10 ¢/KWH for first 8 contract years.

$$pwf'(17.75\%, 8) = \frac{1-(1+i)^{-n}}{i} = \frac{1-(1.1775)^{-8}}{0.1775} = 4.1093$$

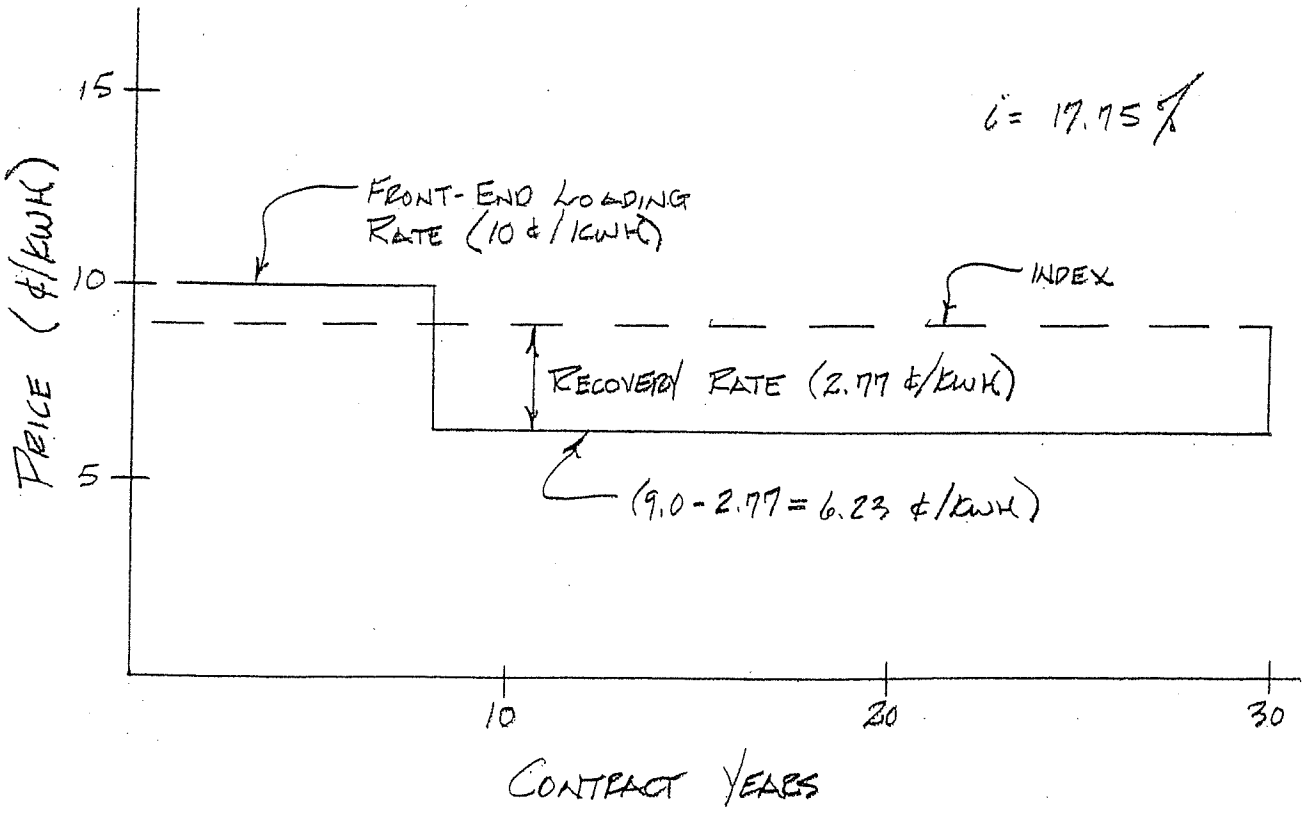
$$pwf'(17.75\%, 22) = \frac{1-(1+i)^{-n}}{i} = \frac{1-(1.1775)^{-22}}{0.1775} = 5.4790$$

$$pwf(17.75\%, 8) = (1+i)^{-n} = (1.1775)^{-8} = 0.2706$$

$$(10.0 - \text{index})(pwf'\text{-}17.75\%\text{-}8) = x\,(pwf'\text{-}17.75\%\text{-}22)(pwf\text{-}17.75\%\text{-}8)$$

$$(10.0 - 9.0)(4.1093) = x\,(5.4790)(0.2706)$$

$x = 2.77$ ¢/KWH (RECOVERY RATE)



NOTED DEC 15 1981 R.V.P. PENACOOK LOWER FALLS
15 DEC. 81 EVP-2

YEAR	EST. PSNH IEC *	%	% x IEC	MINUS RECOVERY	CONTRACT RATE *
1982	5.77				10.00
83	7.27				10.00
84	5.94				10.00
85	6.56				10.00
86	5.53				10.00
87	4.72				10.00
88	5.30				10.00
89	6.42				10.00
1990	7.91		(index)	2.77	6.23
91	9.01		(index)		6.23
92	11.63	96	11.16		8.39
93	13.24	92	12.18		9.41
94	13.44	88	11.83		9.06
95	16.01	84	13.45		10.68
96	18.97	80	15.18		12.41
97	19.83	76	15.07		12.30
98	21.56	72	15.52		12.75
99	24.28	68	16.51		13.74
2000	27.16	64	17.38		14.61
01	30.11	60	18.07		15.30
02	33.39	56	18.70		15.93
03	37.01	52	19.25		16.48
04	41.04	50	20.52		17.75
05	45.50		22.75		19.98
06	49.99		25.00		22.23
07	54.92		27.46		24.69
08	60.34		30.17		27.40
09	66.30		33.15		30.38
2010	72.84		36.42		33.65
2011	79.31		39.66		36.89

FRONT-END LOADING

* ESTIMATED PSNH INCREMENTAL ENERGY COST (IEC).

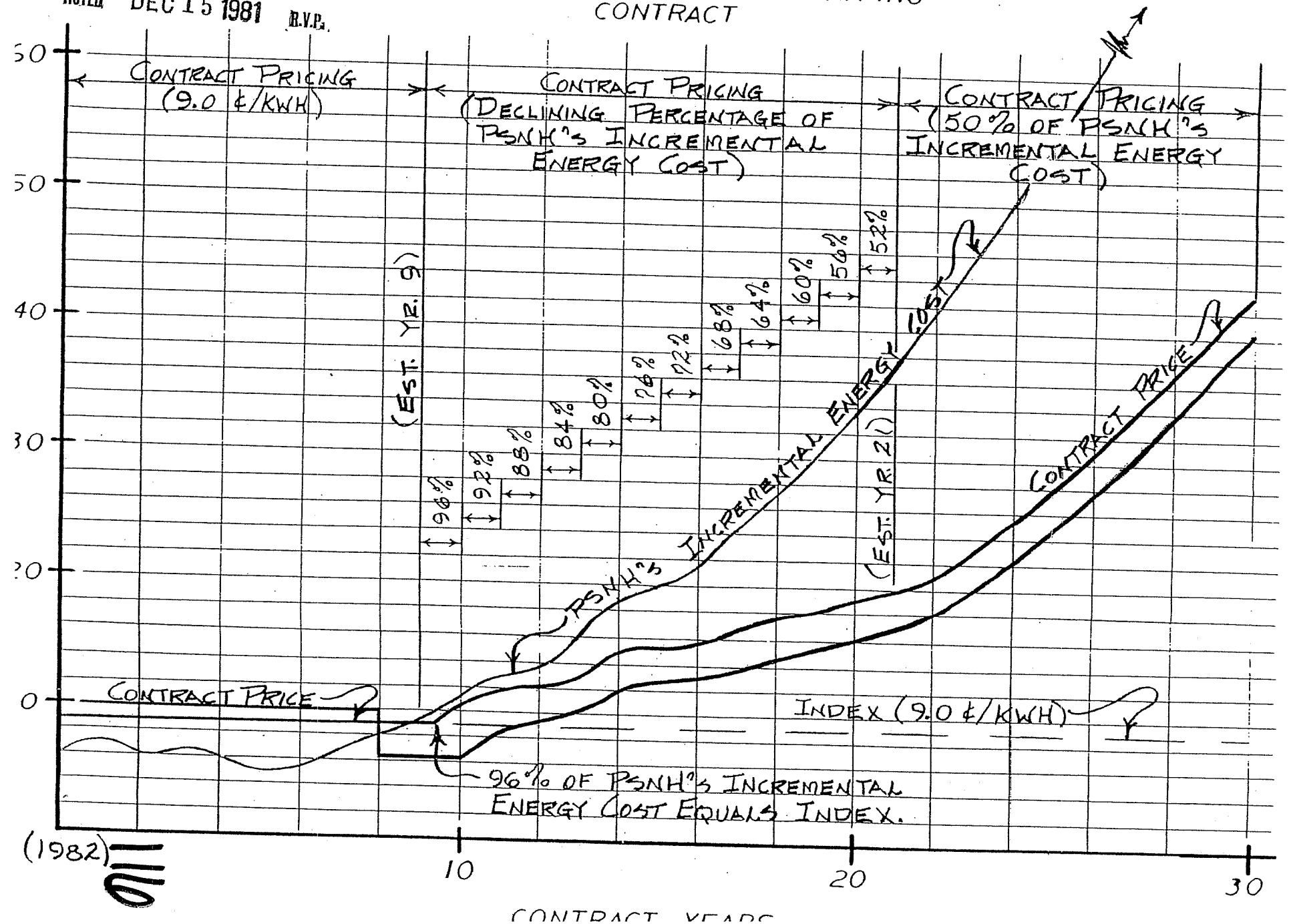
** RATES BEYOND YEAR 1889 ARE ESTIMATED AND ARE NOT GUARANTEED BY PSNH.

EXHIBIT I

FIXED RATE — FUTURE ESCALATING CONTRACT

Penacook Lower Falls
15 Dec. 81 RVP-3

NOTED DEC 15 1981 R.V.P.



EG&G

ESSEX DE _OPMENT ASSOCIATES, GENERAL PAR
EG&G, INC., LIMITED PARTNER

NEW HAMPSHIRE HYDRO ASSOCIATES
THREE CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301
(603) 224-8333

December 29, 1981

NOTED JAN 4 1981 J.E.L.

Mr. John E. Lyons
Public Service Company
of New Hampshire
1000 Elm Street
P.O. Box 330
Manchester, NH 03105

RE: Penacook Lower Falls Power Sales Agreement

Dear Mr. Lyons:

NHHA has reviewed your letter dated December 21, 1981, regarding the purchase of power from the Penacook Lower Falls Project (the "Project"). NHHA is in essential agreement with the methodology used in the analysis that you provided. The following clarifications, revisions and additions are offered for your consideration:

1. Discount Rate

The discount rate that has been used, 17.75%, may be applicable for analyzing payments made for power today, but will not be applicable during the term of our proposed contract. In order to accurately reflect changes in costs of capital, the discount rate should float. NHHA proposes that the discount rate to be used in determining the Recovery Rate be reviewed annually and adjusted to reflect accurately the current cost of capital. It is NHHA's understanding that there exists a methodology which is used annually to calculate PSNH's cost of capital as a part of the routine regulatory process. NHHA proposes that we consider using this method for determining the appropriate discount rate for each year of the contract.

2. Applicable Years for Recovery Rate Calculation

In calculating the Recovery Rate, as defined in your letter of December 21, 1981, the calculation should begin with the commencement of commercial operation of the Project. This is scheduled for May 1, 1983.

3. Term of 10 cent per kwh Floor Price

NHHA proposes that the 10¢ per kwh price for energy delivered from the Project be extended from 8 to 10 years. This 10 year term is required to assure adequate debt coverage.

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On the basis of the above, NHHA has prepared a Calculation of the Recovery Rate and an Energy Price Projection, attached as Exhibits 1 and 2, respectively.

4. Credit for Capacity

The PSNH methodology for power pricing equitably recognizes the value of energy from LEEPS. However, it does not incorporate a means of recognizing any dependable capacity offered by a LEEP. NHHA recognizes that when Seabrook comes on-line it will take care of PSNH's projected need for additional capacity for the near term. However, load growth, plant retirements, etc. will at some point during the proposed term of the contract require PSNH to increase its power supply resources. At that time, the firm capacity of the Project will enable PSNH to avoid the expense of adding capacity. NHHA therefore proposes that the Project be given a capacity payment reflecting the expense that PSNH will avoid by having the Project as a generating resource. This capacity payment can be based upon 1) the firm capacity of the Project as determined using NEPOOL's "Uniform Rating and Periodic Audit of Generating Capacity," and 2) the then current payment for dependable capacity as determined by the Public Utilities Commission of New Hampshire. If there is no such rate in effect, then the then current NEPOOL capacity deficiency charge can be used.

Regarding contract provisions to assure that NHHA will operate the Project for the full term of the contract, several points are worth reviewing. First, NHHA is a New Hampshire limited partnership of which Essex Development Associates, Inc., a Delaware corporation, is general partner. As general partner, EDAI is responsible for fulfilling all of the obligations of NHHA. The Project is only one element of EDAI's hydroelectric program. PSNH can therefore look to an entity with assets and income other than this single Project. Second, NHHA will have in effect sufficient property insurance to assure that the dam and plant can be repaired in the event of fire, flood or other casualty. Finally, the Project structures and equipment are being designed and built and will be maintained to operate well beyond the thirty year life of the proposed comtract. This is a reflection of the long-term commitment, EDAI and EG&G, Inc., the limited partner of NHHA, have to the hydroelectric industry.

NHHA looks forward to discussing these changes at your earliest possible convenience. It would be most helpful if we could meet for this purpose during the week of January 3, 1982.

Sincerely,

NEW HAMPSHIRE HYDRO ASSOCIATES

By: ESSEX DEVELOPMENT ASSOCIATES, INC.,
General Partner

By: Warren W. Mack
Warren W. Mack
Vice President, Development

WWM/abt

Exhibit 1
Penacook Lower Falls Project
Calculation of Recovery Rate

Basis:

1) Discount Rate: 17.75% for each year, although it is proposed that this rate be adjusted annually to reflect current costs of capital.

2) Initial Price for Energy and Term: 10.0 cents per kwh for the initial 10 years of commerecial operation; scheduled start-up is May 1, 1981.

3) Term of Contract: 30 years

4) Average Fixed Rate Future Escalating Contract Price: See Exhibit 2

Calculation:

a) Present worth in 1983 of 1.0 cent per kwh premium in operating years 1983 through 1990:
1.0 x pwf'(i=17.75,n=8) = 4.1093

b) Present worth in 1983 of 0.05 cents per kwh premium in operating year 1991:
0.05 x pwf(i=17.75,n=9) = 0.0115

c) Present worth in 1983 of 1.61 cents per kwh discount in operating year 1992:
1.61 x pwf(i=17.75,n=10) = (0.3142)

Recovery Rate x pwf'(i=17.75,n=20) x pwf(i=17.75,n=10) = a + b + c

Recovery Rate = 3.60 cents per kwh

12/28/81

Exhibit 2
Penacook Lower Falls Project
Energy Price Projection through 1994

Operating Year	Aver. Fixed Rate Future Escalating Contract Price (1)	Less Recovery Rate (2)	Penacook Lower Falls Contract Price (3)
1983	9.00 ¢ per kwh	--	10.00 ¢ per kwh
1984	9.00	--	10.00
1985	9.00	--	10.00
1986	9.00	--	10.00
1987	9.00	--	10.00
1988	9.00	--	10.00
1989	9.00	--	10.00
1990	9.00	--	10.00
1991	9.95	--	10.00
1992	11.61	--	10.00
1993	12.03	3.60	8.43
1994	12.54	3.60	8.94

(1) This is based upon: 1) actual commercial operation of the Penacook Lower Falls Project beginning on May 1, 1983, as currently scheduled. (Therefore for operating year 1991, 8,651 MWH at 9.0¢ and 6,755 MWH at 11.16 for May through December, 1991 and January through April, 1992 respectively); and 2) estimates of PSNH IEC given in RVP-2; December 15, 1981 attached to John Lyons' letter dated December 21, 1981.

(2) See Exhibit 1 for derivation of Recovery Rate.

(3) Prices beyond 1992 are estimates subject to actual: 1) PSNH IEC and 2) PSNH cost of capital.

12/28/81

NOTED SEP 18 1981 R.V.P.

PSNH PUBLIC SERVICE Company of New Hampshire

INTRA-COMPANY BUSINESS MEMO

Subject: Economic Review of Essex Development Associates, Inc. Penacook Lower Falls Hydroelectric Project per 8/25/81 Power Pricing Proposal

From: M. D. Cannata, Jr. District

Date: September 9, 1981

To: H. J. Ellis

Reference

The Penacook Lower Falls Hydroelectric Redevelopment Proposal has been evaluated. Many of the assumptions utilized were a result of the review performed to assess the reasonableness of energy projections (my memo dated July 31, 1981). Study parameters were:

a. Plant Size: 1-4.0 MW Unit
b. Commercial Operation: 1/1/83
c. Contract Term: 40 years
d. Project Energy: 15,545 MWH 1983-1986 (w/o fish ladders)
   14,875 MWH 1987-2022 (w/ fish ladders)
e. Fish Ladder Operation: 125 CFS commencing in 1987
f. Dependable Capacity: 1.57 MW
g. Capacity Credit: $70/KW year 1/83-2/84
   $130.57/KW year levelized 1991-2015
   $894.21/KW year levelized 2016-2022
h. Project Energy Cost: Alternate #1 flat rate
   Alternate #2 oil and avoided costs
   (EDAI proposals, attached)
i. Present Worth Factor: 13.54% and 15.56%
j. Avoided Energy Worth: Per latest production simulation runs
   (recent softness in oil prices neglected)

The attached table shows that both EDAI proposals:

1. Do not provide sufficient payback for the front end penalties incurred.

2. Are sensitive to the PSNH weighted cost of capital.

3. Would fluctuate in terms of financial viability due to changes in water conditions, fuel prices, load forecasts and in-service dates of future generation.

In short, my opinion is that both EDAI proposals are not financially attractive to PSNH. Modification to the proposals could however alter the economics considerably.

M. D. Cannata, Jr.

MDCJR:rtl
Attachment

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ESSEX DEVELOPMENT ASSOCIATES INC.
PENACOOK LOWER FALLS HYDROELECTRIC REDEVELOPMENT PROPOSAL

Pricing Alternate	Present Worth Percent	Year Project Savings Greater Than Costs*	Project Breakeven Year	40 Year Benefit/Cost Ratio	40 Year Levelized Costs 1983 $ ¢/KWH	40 Year Levelized Costs 1981 $ ¢/KWH
Alt. #1	13.54	1991	2010	1.10	9.61	7.45
Alt. #2	13.54	1991	2005	1.10	9.59	7.44
Alt. #1	15.56	1991	2019	1.01	9.67	7.24
Alt. #2	15.56	1991	2009	1.04	9.35	7.00

*Consistently

STATE OF NEW HAMPSHIRE

BEFORE THE PUBLIC UTILITIES COMMISSION

DE 07-045

Briar Hydro Associates' Motion for Rehearing

Affidavit of Warren W. Mack

I, the undersigned Warren W. Mack, a resident of the City of San Diego, San Diego County, State of California, hereby make the following representations under oath:

1. In 1980-82, I was employed by Essex Development Associates, Inc. ("EDA") as its Vice President for Development. In that capacity, among other tasks, I helped negotiate power sales contracts for various EDA affiliates, including New Hampshire Hydro Associates, ("NHHA").

2. I was principally responsible, along with Richard Norman, for negotiation of the April 22, 1982 NHHA contract with Public Service Company of New Hampshire ("PSNH"), which is the subject of this proceeding. During those negotiations, our counterpart at PSNH was John Lyons, Manager of Supplemental Energy Sources.

3. In order to secure financing for the Lower Penacook Project and make debt service payments, NHHA needed a purchase rate from PSNH that was front-end loaded for the term of the construction loan; i.e., NHHA was willing to accept lower rates at the back end of the 30-year contract term in return for higher payments in the early years. NHHA concluded that Alternatives I and II of PSNH's then existing power purchase options would not be sufficient for NHHA to obtain necessary financing. NHHA thus agreed to negotiate with PSNH within the framework of what PSNH called its "Alternative III – Optional Contract Provisions," which allowed pricing above its 9.0 cent per KWH "index rate" for a certain number of years at the beginning of the contract, with much lower rates later in the contract term. NHHA understood

that Alternative III represented an offer from PSNH, to begin negotiation of a power purchase contract, and that Alternative III was separate and distinct from the provisions of Alternative I. In these negotiations PSNH used as a frame of reference an index energy price of $0.09/KWH. This index price was separate and distinct from prices contained in Alternative I. NHHA agreed to accept $0.10/kwh for energy for the first 8 years of project operation, with reduced payments in contract years 9-30 to pay back the front end loaded effect of the contract. Payments in years 9-20 of project operation were reduced to $0.042/KWH, and the energy rate was further reduced to $0.0353/KWH for contract years 21-30. PSNH set a discount rate of 17.61% for use in calculating NHHA's payback obligation. BHA is now receiving 3.53 cents/KWH for energy, considerably below market rates. During our negotiations John Lyons used pricing formula spreadsheets prepared by PSNH to explain the 9.0 cent index price and NHHA's payback obligations. Those spreadsheets were provided to the Commission with BHA's Reply Memorandum of June 29, 2007.

The 9.0 cent index price was based entirely on PSNH's projections of its "incremental energy cost" over the 30-year contract term. The 9-cent index rate included no value for capacity nor was there any reference to Alternative I.

4. One of the difficult issues for NHHA in negotiating this contract with PSNH was the question of whether PSNH would recognize the potential capacity value of the project and to pay NHHA for that capacity, in addition to the front-loaded variation of the 9.0 cent index price for energy. I had several conversations with John Lyons about NHHA's interest in selling capacity to PSNH as well as energy, and wrote to him at least three times with formal proposals to include capacity in the contract. Those letters were provided to the Commission with BHA's Reply Memorandum of June 29, 2007.

5. In our conversations about the capacity issue, including those in response to my three letters, Mr. Lyons did not waver from his assertion that the capacity of the Lower Penacook Project had no value to PSNH, that PSNH would not pay for it, and that he would not include it

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in the contract. He referred to PSNH having Seabrook and therefore no need for additional capacity. Mr. Lyons on several occasions referred to the contract being negotiated as being a standard form of contract and that he was not going to change the contract form for NHHA. Notably, he did not state that PSNH was buying the capacity of the Lower Penacook Project nor did he otherwise suggest that the contract included capacity as well as energy – we both understood clearly that it did not.

6. NHHA was under financial pressure to begin construction. Because a signed power contract was a necessary financing condition, and because NHHA had no other purchaser for its power, NHHA finally decided not to press further to include the sale of capacity in the contract. As a result, the contract committed NHHA to sell only its energy to PSNH, which is why capacity is nowhere mentioned in the contract.

Further the affiant sayeth not.

Dated: December 19, 2007

Warren W. Mack

STATE OF CALIFORNIA

SAN DIEGO, SS

Personally appeared the above-named Warren W. Mack, and made oath that the foregoing statements subscribed by him are true to the best of his knowledge and belief.

Dated: December 19, 2007

Notary Public/Justice of the Peace
My commission expires: 4-11-08

MICHELLE D. KLUSMAN
COMM. #1482612
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
My Comm. Expires April 11, 2008

454954_1.DOC

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PSNH

Public Service of New Hampshire

NOTED FEB 06 1984 R.S.J.

File Copy

a) Pennacook L
Contr

b) NX-3 Dat

February 6, 1984

Mr. Ross McEacharn
NEPEX
174 Brush Hill Avenue
West Springfield, MA 01089

Subject - Purchased Hydro, Penacook Lower Falls

Dear Ross:

Public Service Company of New Hampshire is adding to its hydro capacity 2.5 MW purchased hydro from New Hampshire Hydro Associates, Penacook Lower Falls Station. This addition will increase PSNH's hydro capacity from 65.5 to 68.0 MW.

Penacook Lower Falls will be audited in accordance with NEPEX Audit Procedures prior to the end of the 1983-84 winter audit period.

Enclosed are the following forms and support data.

NX-3 - Notice of change in NEPOOL Claimed Capability.
NX-12C - Hydro Station Data.
Station Log - Support Data.

Sincerely yours,

Herbert S. Slattum

Herbert S. Slattum

Enclosures

cc: E. J. Glofka - NEPEX
W. A. Harvey - PSNH
R. S. Johnson - PSNH

HSS/csb
20:52

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NOTICE OF CHANGE IN NEPOOL CLAIMED CAPABILITY

Company Public Service of New Hampshire
Station Penacook Lower Falls - Purchased Hydro
Unit

1. NEW UNIT

Date of Commercial Operation February 1, 1984

Claimed Capability For Public Service Company of New Hampshi

Summer		Winter	
Normal	Maximum	Normal	Maximum
2.5 MW	2.5 MW	2.5 MW	2.5 MW

Nameplate Rating 4,000 KW
or
4,444 KVA and .9 Power Factor

2. RETIREMENT

Effective Date of Retirement

Nameplate Rating KW
or
KVA and Power Factor

3. RERATING

Effective Date of Rerating

Claimed Capability

Summer		Winter	
Normal	Maximum	Normal	Maximum
OLD MW	MW	OLD MW	MW
NEW MW	MW	NEW MW	MW

4. COMMENTS

Capability of this unit added to PSNH capability as purchased hydro effective February 1, 1984. Penacook Lower Falls station is located on the Contoocook River in the towns of Boscawen - Penacook, New Hampshire

Date This Form Submitted January 30, 1984

By (Signed) Herbert S. Slattum

SEND COPIES OF THIS FORM TO THE FOLLOWING:

Ross McEacharn - New England Power Exchange
174 Brush Hill Avenue, West Springfield, Massachusetts 01089

E. J. Glofka - New England Power Exchange
174 Brush Hill Avenue, West Springfield, Massachusetts 01089

EJG:pfd:REP3
1/3/84

NEPEX FORM NX-12 C

Hydro Station Data

NEW HAMPSHIRE	PSNH	(PURCHASED HYDRO) PENACOOK LOWER FALLS
Satellite	Company	Plant

	Summer		Winter		Unit No.
1. Low Limit	.3	MW Net	.3	MW Net	1 Unit
2. Low Regulation Limit	NA	MW NET	NA	MW Net	NA
3. Normal Net Capability	2.5	MW Net	2.5	MW Net	
4. Maximum Net Capability	2.5	MW Net	2.5	MW Net	

5. Response Rates — Manual Control NA MW/Min. — Automatic Control NA MW/Min.

UNIT IS POND CONTROLLED

6. Nonsynchronized Reserve Capacity — 10-min. NA MW 30-Min. NA MW

7. Capable of Motoring — Yes NA NO X

8. Reactive Capability - MVAR RANGES

Mode of Operation	Net MW	Max. MVARS Lagging	Min. MVARS Lagging	Max. MVARS Leading
Min Load Gen.	NA	NA	NA	NA
Half Load Gen.	NA	NA	NA	NA
Three-quarter Load Gen.	NA	NA	NA	NA
Full Load Gen.	NA	NA	NA	NA
Motoring		NA	NA	NA
Pumping		NA	NA	NA

9. Manning Status and Labor Charges

Fully Manned NA Partially Manned NA Unmanned X

	Hours Unit Not Manned			Labor Charges - $/HR
Weekdays	From NA	To NA		NA
Saturdays	From NA	To NA		NA
Sundays	From NA	To NA		NA
Holidays	From NA	To NA		NA

10. Data Revision No. 1 Date Prepared 1/30/84 By H. Slattum

Requested Effective Date February 1, 1984

* Denotes data items changed this revision.

EKN:jmp
8/26/82

NHHA (LAWRENCE READINGS)
DAILY TOTALS

DATE: JAN 31 1984

CUMMULATIVE MONTHLY TOTAL 687,596

NOTED FEB 3 1984 H.S.S.

TIME	3.5 KWH/ COUNT METER	HOURLY DIFFERENCE X 7	KWH PRODUCED	INSTANTANEOUS K.W.	INSTANTANEOUS K.V.	
						Open
12 Mid	57,572 2			2,200	34.8	Op
1 AM	576026	304	2128	2200	34.9	
2 AM	576335	309	2163	2,200	34.8	
3 AM	576647	312	2184	2200	34.8	
4 AM	576963	316	2212	2300	34.8	
5 AM	577286	323	2261	2,300	34.8	
6 AM	577611	325	2275	2,350	34.1	Op
7 AM	577940	329	2303	2350	34.2	Op
8 AM	578282	342	2394	2400	34.2	
9 AM	578626	344	2408	2500	34.2	
10 AM	578976	350	2450	2550	34.2	
11 AM	579328	352	2464	2450	34.2	
12 PM	579679	351	2457	2550	34.3	
1 PM	580033	354	2478	2450	34.2	
2 PM	580397	364	2548	2600	34.2	Pu
3 PM	580757	360	2520	2600	- -	Pu
4 PM	581118	361	2,527	2,600	34.5	
5 PM	581490	362	2,534	2,600		
6 PM	581846	366	2,562	2,600		
7 PM	582209	363	2,541	2,600	34.4	
8 PM	582577	368	2,576	2,610	34.5	
9 PM	582945	368	2,576	2,650	34.6	
10 PM	583316	371	2,597	2,650	34.9	Pu
11 PM	583680	364	2,548	2,700	35.0	
12 Mid	584048	368	2,576	2630	34.8	
TOTALS			55882			
			74587	monthly Total		

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PSNH

Public Service of New Hampshire

May 14, 1990

Mr. Tom Tarpey, President
Essex Hydro Associates
114 State Street 5th Floor
Boston, MA 02109

Subject: Penacook Lower (SESD #055)
Front-End Loading Computation

Dear Tom:

Enclosed as you requested are the front-end loading computations for the Penacook Lower Hydro Project based on an annual interest rate of 17.61%. As we discussed earlier, after you have a chance to review the information, we should get together with Bob Winship to work out the changes, including any front-end loading buyout, that may be necessary for both 9 cent contracts.

Currently PSNH is in the midst of a transition period due to the pending merger-acquistion by Northeast Utilities, and the policies and responsibilities of the combined companies are yet to be clearly defined. This situation will probably effect how quickly we can make any contract changes for your project.

If you have any questions regarding this information, please feel free to contact me at extension 2314.

Sincerely,

S. B. Wicker, Jr.
Manager
Supplemental Energy Sources

GSS/pjb

PROJECT SPECIFIC CALCULATION OF FRONT END LOADINGS
FOR ENERGY & CAPACITY PURCHASES FROM SPP'S

GSS 05/08/90 \FEL055

CONTRACT TYPE/DATE: L-T 82/04/28
RATE DOCKET:
FIRST L-T PAYMENT: 83/09
REMARKS:

SITE NAME:Penacook Lower Falls
PSNH #:055

CURRENT INSTLED CAP(KW): 4000
ON LINE DATE: 83/09/26
EARLIER INSTLED CAP(KW): 0
ON LINE DATE:
CURRENT PUC DEP CAP(KW): 0
EFFECTIVE DATE:
EARLIER PUC DEP CAP(KW): 0
EFFECTIVE DATE:

PRF: 0.00 EFFEC DATE:
PRF: 0.00 EFFEC DATE:
PRF: 0.00 EFFEC DATE:
PRF: 0.00 EFFEC DATE:
PRF: 0.00 EFFEC DATE:
PRF: EFFEC DATE:

PRELIMINARY
ISSUE DATE 5/14/90

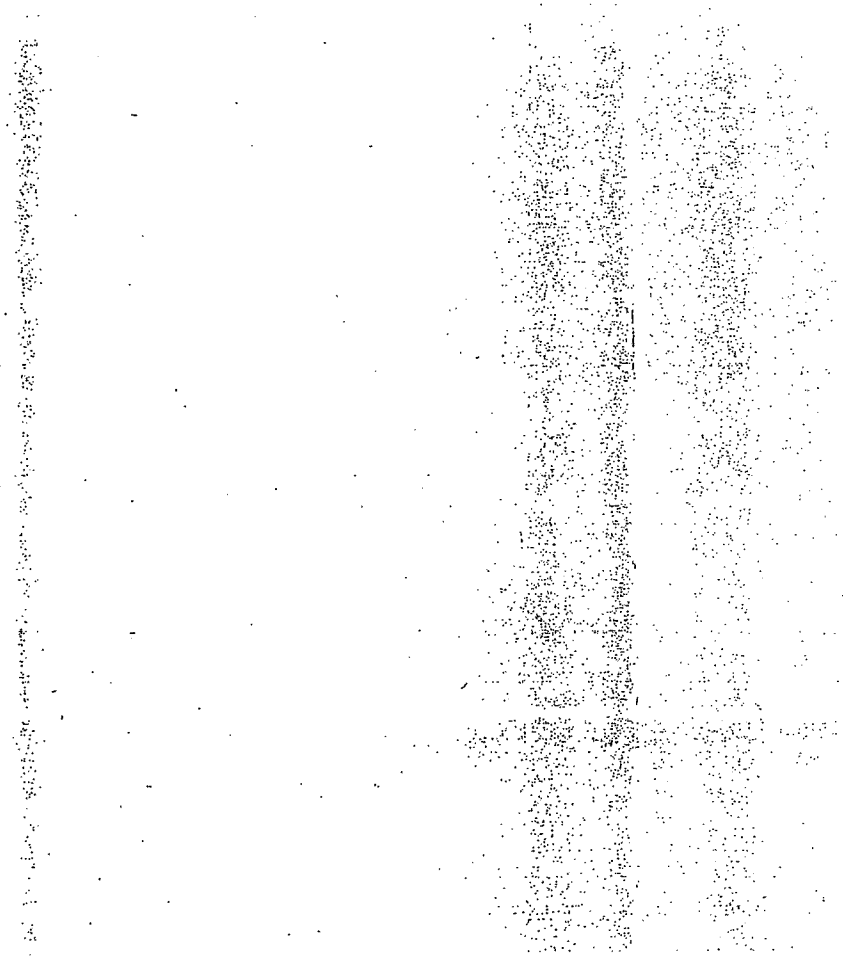
SHA: 90/05/05

ANNUAL INTEREST: 17.6100
MONTHLY INTEREST: 1.3609

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P		
								NON LEVELIZED PAYMENT DATA					HISTORICAL DATA					
YEAR/MONTH	INSTALLED CAPACITY (KW)	PUC AUDIT CAPACITY (KW)	PEAK REDUCTION FACTOR	AVOIDED COST RATES (ALL) MARGINAL (C/KWH)	AVOIDED COST RATES (CAP) MARGINAL ($'S/KW-YR)	ACTUAL GENERATION (KWH)	ACTUAL PAYMENT ($'s)	PAYMENT IF @ NON LEVEL RATE ($'s)	NON-LEVEL EXCESS PAYMENT ($'s)	PREVIOUS EXCESS BALANCE ($'s)	INTEREST ON PREV BALANCE ($'s)	CUMULATIVE EXCESS BALANCE ($'s w/interest)	PSNH MARGINAL ENERGY (C/KWH)	PSNH SHORT TERM CAP COST ($'S/KW-YR)	PAYMENT IF @ MARGINAL RATE ($'s)	EXCESS PAYMENT AT MARGINL RATE ($'s no interest)	MONTHLY PLANT FACTOR	ANNUAL PLANT FACTOR
/31	0	0	0	0.00	0.00			0.00	0.00		0.00	0.00	5.79	36.00	0.00	0.00		
/28	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.45	36.00	0.00	0.00		
82/03/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.77	36.00	0.00	0.00		
82/04/30	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.76	36.00	0.00	0.00		
82/05/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.33	36.00	0.00	0.00		
82/06/30	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.70	36.00	0.00	0.00		
82/07/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	7.18	36.00	0.00	0.00		
82/08/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.35	36.00	0.00	0.00		
82/09/30	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.39	36.00	0.00	0.00		
82/10/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.68	36.00	0.00	0.00		
82/11/30	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	8.58	36.00	0.00	0.00		
82/12/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	7.71	36.00	0.00	0.00		
83/01/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.75	36.00	0.00	0.00		
83/02/28	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.07	36.00	0.00	0.00		35.33
83/03/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.17	36.00	0.00	0.00		
83/04/30	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.32	36.00	0.00	0.00		
83/05/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	5.45	36.00	0.00	0.00		
83/06/30	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	7.33	36.00	0.00	0.00		
83/07/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.32	36.00	0.00	0.00		
83/08/31	0	0	0	0.00	0.00			0.00	0.00	0.00	0.00	0.00	6.17	36.00	0.00	0.00		
83/09/30	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	0.00	0.00	0.00	6.88	36.00	0.00	0.00	0.00	
83/10/31	4000	0	0	8.00	0.00	42000	4200.00	3360.00	840.00	0.00	0.00	840.00	7.76	36.00	3252.47	947.84	1.44	
83/11/30	4000	0	0	8.00	0.00	1652000	165200.00	132160.00	33040.00	840.00	11.43	33891.43	8.05	36.00	133060.46	32139.54	56.58	
83/12/31	4000	0	0	8.00	0.00	2432500	243250.00	194600.00	48650.00	33891.43	461.22	83002.65	5.44	36.00	132396.10	110855.90	83.30	
84/01/31	4000	0	0	8.00	0.00	1725500	172550.00	138040.00	34510.00	83002.65	1129.56	118642.21	6.07	36.00	104801.56	67748.44	59.09	53.33
84/02/29	4000	0	0	8.00	0.00	2040500	204050.00	163240.00	40810.00	118642.21	1614.57	161066.79	6.46	36.00	132322.85	71727.15	69.88	
84/03/31	4000	0	0	8.00	0.00	2394000	239400.00	191520.00	47880.00	161066.79	2191.92	211138.71	6.44	36.00	154250.93	85149.07	81.99	
84/04/30	4000	0	0	8.00	0.00	3108000	310800.00	248640.00	62160.00	211138.71	2873.34	276172.04	5.81	36.00	180484.29	130315.80	106.44	
84/05/31	4000	0	0	8.00	0.00	3129000	312900.00	250320.00	62580.00	276172.04	3758.36	342510.40	5.63	36.00	176041.76	136858.24	107.16	
84/06/30	4000	0	0	8.00	0.00	2292500	229250.00	183400.00	45850.00	342510.40	4661.14	393021.54	7.87	36.00	180525.55	48724.45	78.51	
84/07/31	4000	0	0	8.00	0.00	1522500	152250.00	121800.00	30450.00	393021.54	5348.53	428820.08	5.61	36.00	85369.89	66880.11	52.14	
84/08/31	4000	0	0	8.00	0.00	252000	25200.00	20160.00	5040.00	428820.08	5835.71	439695.78	5.71	36.00	11386.54	10815.46	8.63	
84/09/30	4000	0	0	8.00	0.00	262500	26250.00	21000.00	5250.00	439695.78	5983.71	450929.50	6.94	36.00	18216.01	8033.99	8.99	
84/10/31	4000	0	0	8.00	0.00	322000	32200.00	25760.00	6440.00	450929.50	6136.59	463506.09	6.66	36.00	21442.61	10757.39	11.03	
84/11/30	4000	0	0	8.00	0.00	661500	66150.00	52920.00	13230.00	463506.09	6307.74	483043.83	5.67	36.00	17488.15	28661.85	22.65	
84/12/31	4000	0	0	8.00	0.00	976500	97650.00	78120.00	19530.00	483043.83	6573.63	509147.46	5.84	36.00	17032.04	40617.96	33.44	
85/01/31	4000	0	0	8.00	0.00	542500	54250.00	43400.00	10850.00	509147.46	6928.86	526926.32	7.75	36.00	42053.68	12196.34	18.58	44.28
85/02/29	4000	0	0	8.00	0.00	1302000	130200.00	104160.00	26040.00	526926.32	7170.81	560137.13	7.25	36.00	94436.11	35763.89	44.59	
85/03/31	4000	0	0	8.00	0.00	2541000	254100.00	203280.00	50820.00	560137.13	7622.77	618579.90	5.52	36.00	140365.54	113734.46	87.02	
85/04/30	4000	0	0	8.00	0.00	2275000	227500.00	182000.00	45500.00	618579.90	8418.10	672498.01	5.72	36.00	130076.96	97423.06	77.91	
85/05/31	4000	0	0	8.00	0.00	1228500	122850.00	98280.00	24570.00	672498.01	9151.86	706219.87	4.77	36.00	58641.68	64208.32	62.07	
85/06/30	4000	0	0	8.00	0.00	381500	38150.00	30520.00	7630.00	706219.87	9610.77	723460.64	5.15	36.00	19641.07	18508.93	13.07	
85/07/31	4000	0	0	8.00	0.00	315000	31500.00	25200.00	6300.00	723460.64	9845.42	739606.05	6.88	36.00	15366.85	16133.15	10.79	
85/08/31	4000	0	0	8.00	0.00	133000	13300.00	10640.00	2660.00	739606.05	10065.43							

85/10/31	4000	0	0	8.00	0.00	1382500	138250.00	110600.00	27650.00	780489.46	10621.49	818760.95	5.11	36.00	70585.06	67664.94	47.35	
85/11/30	4000	0	0	8.00	0.00	2219000	221900.00	177520.00	44380.00	818760.95	11142.32	874283.27	5.89	36.00	130707.81	91192.19	75.99	
85/12/31	4000	0	0	8.00	0.00	2271500	227150.00	181720.00	45430.00	874283.27	11897.91	931611.18	7.21	36.00	163711.89	63438.11	77.79	
86/01/31	4000	0	0	8.00	0.00	1536500	153650.00	122920.00	30730.00	931611.18	12678.07	975019.25	5.78	36.00	88650.48	64819.52	52.62	62.62
86/02/28	4000	0	0	8.00	0.00	2331000	233100.00	186480.00	46620.00	975019.25	13268.80	1034908.05	4.68	36.00	108995.52	124104.48	79.83	
86/03/31	4000	0	0	8.00	0.00	2401000	240100.00	192080.00	48020.00	1034908.05	14083.81	1097011.86	3.99	36.00	95801.66	144298.54	82.23	
86/04/30	4000	0	0	8.00	0.00	2775500	277550.00	222040.00	55510.00	1097011.86	14928.97	1167450.83	4.16	36.00	115476.27	162973.73	95.05	
86/05/31	4000	0	0	8.00	0.00	1382500	138250.02	110600.00	27650.02	1167450.83	15887.56	1210988.40	4.76	36.00	65831.95	72418.07	47.35	
86/06/30	4000	0	0	8.00	0.00	2089500	208950.00	167160.00	41790.00	1210988.40	16480.05	1269258.45	3.28	36.00	68631.61	140318.39	71.56	
86/07/31	4000	0	0	8.00	0.00	1221500	122150.00	97720.00	24430.00	1269258.45	17273.03	1310961.48	3.18	36.00	38901.35	83248.65	41.83	
86/08/31	4000	0	0	8.00	0.00	2040500	204050.00	163240.00	40810.00	1310961.48	17846.56	1369612.04	3.04	36.00	62063.95	141986.05	69.88	
86/09/30	4000	0	0	8.00	0.00	395500	39550.00	31640.00	7910.00	1369612.04	18638.72	1396160.76	5.77	36.00	22817.38	16732.62	13.54	
86/10/31	4000	0	0	8.00	0.00	822500	82250.00	65800.00	16450.00	1396160.76	19000.81	1431610.77	2.72	36.00	22356.60	59893.40	28.17	
86/11/30	4000	0	0	8.00	0.00	1515000	151550.00	121200.00	30350.00	1431610.77	19482.44	1481443.21	2.99	36.00	45320.20	106229.80	51.88	
86/12/31	4000	0	0	8.00	0.00	3430000	343000.00	274400.00	68600.00	1481443.21	20160.60	1570203.82	5.43	36.00	117538.21	225461.79	117.47	
87/01/31	4000	0	0	8.00	0.00	1799000	179900.00	143920.00	35980.00	1570203.82	21368.52	1627552.34	3.85	36.00	69853.46	110046.54	61.61	54.98
87/02/28	4000	0	0	8.00	0.00	1074500	107450.00	85960.00	21490.00	1627552.34	22148.97	1671191.30	4.59	36.00	49307.14	58142.86	36.80	
87/03/31	4000	0	0	8.00	0.00	1998500	199850.00	159880.00	39970.00	1671191.30	22742.84	1733904.14	3.56	36.00	71224.39	128625.61	68.44	
87/04/30	4000	0	0	8.00	0.00	2800000	280000.00	224000.00	56000.00	1733904.14	23596.28	1813500.42	4.07	36.00	113370.19	166129.81	95.89	
87/05/31	4000	0	0	8.00	0.00	2166500	216650.00	173320.00	43330.00	1813500.42	24679.49	1881509.91	3.99	47.00	86340.39	130309.61	74.20	
87/06/30	4000	0	0	8.00	0.00	1361500	136150.00	108920.00	27230.00	1881509.91	25605.01	1934344.92	4.83	47.00	65798.63	70353.37	46.63	
[illegible]/31	4000	0	0	8.00	0.00	1617000	161700.00	129360.00	32340.00	1934344.92	26324.03	1993008.95	4.07	47.00	65815.23	95886.77	55.38	
[illegible]/31	4000	0	0	8.00	0.00	140000	14000.00	11200.00	2800.00	1993008.95	27122.38	2022931.33	3.79	47.00	5307.10	8692.90	4.79	
87/09/30	4000	0	0	8.00	0.00	1064000	106400.00	85120.00	21280.00	2022931.33	27529.58	2071740.91	3.91	47.00	41582.90	64817.10	36.44	
87/10/31	4000	0	0	8.00	0.00	1431500	143150.00	114520.00	28630.00	2071740.91	28193.82	2128564.73	4.62	47.00	66140.10	77009.90	69.02	
87/11/30	4000	0	0	8.00	0.00	1704500	170450.00	136360.00	34090.00	2128564.73	28967.12	2191621.85	6.99	47.00	85112.46	85337.54	58.37	
87/12/31	4000	0	0	8.00	0.00	2107000	210700.00	168560.00	42140.00	2191621.85	29825.25	2263587.10	6.70	47.00	98957.20	111742.80	72.16	
88/01/31	4000	0	0	8.00	0.00	1071000	107100.00	85680.00	21420.00	2263587.10	30804.61	2315811.71	5.70	47.00	61041.65	46058.36	36.68	55.78
88/02/29	4000	0	0	8.00	0.00	1960000	196000.00	156800.00	39200.00	2315811.71	31515.32	2386527.03	4.68	47.00	91706.44	104293.56	67.12	
88/03/31	4000	0	0	8.00	0.00	2135000	213500.00	170800.00	42700.00	2386527.03	32477.67	2461704.70	4.39	47.00	93747.85	119752.15	73.12	
88/04/30	4000	0	0	8.00	0.00	2555000	255500.00	204400.00	51100.00	2461704.70	33500.74	2546305.44	3.27	47.00	83450.37	172049.63	87.50	
88/05/31	4000	0	0	8.00	0.00	3160500	316050.00	252840.00	63210.00	2546305.44	34652.65	2644167.69	3.33	47.00	105335.17	210714.83	108.26	
88/06/30	4000	0	0	8.00	0.00	1109500	110950.00	88760.00	22190.00	2644167.69	35983.83	2702341.33	4.31	47.00	47773.10	63176.90	38.00	
88/07/31	4000	0	0	8.00	0.00	787500	78750.00	63000.00	15750.00	2702341.33	36775.51	2754866.83	3.25	47.00	25623.48	53126.52	26.97	
88/08/31	4000	0	0	8.00	0.00	672000	67200.00	53760.00	13440.00	2754866.83	37490.31	2805797.15	3.75	47.00	25206.08	41993.92	23.01	
88/09/30	4000	0	0	8.00	0.00	1060500	106050.00	84840.00	21210.00	2805797.15	38183.41	2865190.56	2.47	47.00	26151.89	79698.11	36.32	
88/10/31	4000	0	0	8.00	0.00	619500	61950.00	49560.00	12390.00	2865190.56	38991.68	2916572.25	3.41	47.00	21116.30	40833.70	21.22	
88/11/30	4000	0	0	8.00	0.00	2803500	280350.00	224280.00	56070.00	2916572.25	39690.92	3012333.17	3.41	75.00	95599.35	184750.65	96.01	
88/12/31	4000	0	0	8.00	0.00	1610000	161000.00	128800.00	32200.00	3012333.17	40994.11	3085527.28	4.00	75.00	64400.00	96600.00	55.14	
89/01/31	4000	0	0	8.00	0.00	1029000	102900.00	82320.00	20580.00	3085527.28	41990.19	3148097.47	5.13	75.00	52782.66	50117.34	35.24	58.47
89/02/28	4000	0	0	8.00	0.00	934500	93450.00	74760.00	18690.00	3148097.47	42841.70	3209629.17	4.97	75.00	46407.27	47042.73	32.00	
89/03/31	4000	0	0	8.00	0.00	1522500	152250.00	121800.00	30450.00	3209629.17	43679.07	3283758.23	4.47	75.00	68111.02	84138.98	52.14	
89/04/30	4000	0	0	8.00	0.00	2929500	292950.00	234360.00	58590.00	3283758.23	44687.87	3387036.10	3.71	75.00	108798.11	184151.89	100.33	
89/[illegible]/31	4000	0	0	8.00	0.00	3055500	305550.00	244440.00	61110.00	3387036.10	46093.35	3494239.46	2.76	75.00	84477.55	221072.45	104.64	
89/[illegible]/30	4000	0	0	8.00	0.00	2495500	249550.00	199640.00	49910.00	3494239.46	47552.26	3591701.71	2.73	75.00	68251.43	181298.57	85.46	
89/07/31	4000	0	0	8.00	0.00	1057000	105700.00	84560.00	21140.00	3591701.71	48878.60	3661720.31	2.59	75.00	27378.10	78321.90	36.20	
89/08/31	4000	0	0	8.00	0.00	1015000	101500.00	81200.00	20300.00	3661720.31	49831.46	3731851.78	2.54	75.00	25766.66	75735.34	34.76	
89/09/30	4000	0	0	8.00	0.00	563500	56350.00	45080.00	11270.00	3731851.78	50785.87	3793907.64	2.72	75.00	15302.63	41047.37	19.30	
89/10/31	4000	0	0	8.00	0.00	1655500	165550.00	132440.00	33110.00	3793907.64	51630.37	3878648.01	3.32	75.00	54881.31	110668.69	56.78	
89/11/30	4000	0	0	8.00	0.00	2968000	296800.00	237440.00	59360.00	3878648.01	52783.58	3990791.59	3.77	75.00	111830.98	184969.02	101.64	
89/12/31	4000	0	0	8.00	0.00	1263500	126350.00	101080.00	25270.00	3990791.59	54309.72	4070371.31	7.53	75.00	95141.55	31208.45	43.27	
90/01/31	4000	0	0	8.00	0.00	1589000	158900.00	127120.00	31780.00	4070371.31	55392.70	4157544.00	7.53	75.00	119651.70	39248.30	54.42	
90/02/28	4000	0	0	8.00	0.00	2383500	238500.00	190680.00	47820.00	4157544.00	56579.01	4261943.01	7.53	75.00	179477.55	59022.45	81.63	
90/03/31	4000	0	0	8.00	0.00	2835000	283500.00	226800.00	56700.00	4261943.01	57999.75	[illegible]	7.53	75.00	213675.50	70824.50	97.09	
90/04/30	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	4376642.76	59560.67	4436203.43	7.53	75.00	0.00	0.00	0.00	
90/05/31	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	4436203.43	60371.22	4496574.65	7.53	75.00	0.00	0.00	0.00	
90/06/30	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	4496574.65	61192.79	4557767.44	7.53	75.00	0.00	0.00	0.00	
90/07/31	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	4557767.44	62025.55	4619792.99	7.53	75.00	0.00	0.00	0.00	
90/08/31	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	4619792.99	62869.64	4682662.63	7.53	75.00	0.00	0.00	0.00	
90/09/30	4000	0	0	8.00	0.00	0	0.00	0.00	0.00	4682662.63	63725.22	4746387.85	7.53	75.00	0.00	0.00	0.00	

TOTALS: 126,346,000 12,634,800 10,107,680 2,527,120 CUMULATIVE TOTAL: 4,746,368 5,515,545 6,438,355 AVG PF: 52.10



STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

May 20, 2008 - 10:11 a.m.
Concord, New Hampshire

RE: **DE 07-045**
BRIAR HYDRO ASSOCIATES:
Petition for Declaratory Ruling.
(Hearing for oral argument regarding Motion for Reconsideration and Rehearing)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Jody Carmody, Clerk

APPEARANCES: **Reptg. Briar Hydro Associates:**
Howard M. Moffett, Esq.

Reptg. Public Service Co. of New Hampshire:
Gerald M. Eaton, Esq.

Reptg. Residential Ratepayers:
Kenneth E. Traum, Asst. Consumer Advocate
Office of Consumer Advocate

Reptg. PUC Staff:
F. Anne Ross, Esq.

Court Reporter: Steven E. Patnaude, LCR

I N D E X

* * *

E X H I B I T S

PROCEEDINGS

CHAIRMAN GETZ: Okay. Good morning, everyone. We'll open the hearing for the purposes of oral argument in docket DE 07-045. On March 28, 2007, Briar Hydro Associates filed a petition seeking a declaratory ruling with respect to a 1982 contract for the purchase and sale of electric energy. And, the Commission issued an order containing its ruling on November 21, 2007. Briar filed a motion for rehearing on December 21, to which PSNH objected on December 31, 2007. And, on May 1 of this year we issued a secretarial letter scheduling oral argument for today.

Before I go to procedure this morning, let's take appearances please.

MR. EATON: For Public Service Company of New Hampshire, my name is Gerald M. Eaton. Good morning.

CHAIRMAN GETZ: Good morning.

CMSR. MORRISON: Good morning.

CMSR. BELOW: Good morning.

MR. MOFFETT: Mr. Chairman, I'm Howard Moffett, with Orr & Reno, for Briar Hydro Associates, the Petitioner. With me is Richard Norman, the President of Briar Hydro Associates, and Susan Geiger from our office.

CHAIRMAN GETZ: Good morning.

CMSR. MORRISON: Good morning.

CMSR. BELOW: Good morning.

MR. TRAUM: Good morning, Mr. Chairman, Commissioners. Representing the Office of Consumer Advocate, Kenneth Traum.

CHAIRMAN GETZ: Good morning.

CMSR. MORRISON: Good morning.

CMSR. BELOW: Good morning.

MS. ROSS: Good morning, Commissioners. Anne Ross, with the Public Utilities Commission Staff, and with me today is Steve Mullen, an analyst in the Electric Division, and Tom Frantz, the Director of the Electric Division.

CHAIRMAN GETZ: Good morning.

CMSR. MORRISON: Good morning.

CMSR. BELOW: Good morning.

CHAIRMAN GETZ: The secretarial letter on May 1 set out in general terms that we would take oral argument today. And, that the -- especially looking at the issues that's raised on Pages 7 through 15 of the Briar motion, and that the parties should come prepared to discuss their legal positions, present offers of proof concerning what evidence, if any, they would produce at a

hearing in support of those positions.

In terms of procedure, I would begin with the Petitioner, original Petitioner, Briar Hydro, and would allow Briar an opportunity for a brief rebuttal. Of course, there's a fair likelihood that there will be questions from the Bench. Would expect to have -- that PSNH go last. But let me turn to Mr. Traum, will you be having oral positions to present today? Because, otherwise, I think we would go from Briar, to the Consumer Advocate, to Staff, then to PSNH.

MR. TRAUM: Certainly, at this point, sir, the Office of Consumer Advocate has been, at this point, expects to continue to support PSNH's position. So, in that sense, I wasn't planning any additional arguments, unless Mr. Eaton says something that I disagree with.

CHAIRMAN GETZ: That might be too late. Mr. -- or, Ms. Ross.

MS. ROSS: Thank you. I don't usually get called a gentleman. I'm not planning on -- Staff is not planning on taking a position in oral argument today.

CHAIRMAN GETZ: Okay. In terms of normal order, I would start with the Petitioner, and let the Company go last. So, I think we'll, unless are there

any other issues that we should raise that need to be addressed before we proceed?

(No verbal response)

CHAIRMAN GETZ: Okay. Then, let's begin with Mr. Moffett.

MR. MOFFETT: Thank you, Mr. Chairman and members of the Commission. We very much appreciate the opportunity to be here today and to try to call the Commission's attention to some matters that we believe were either overlooked or misconceived as part of the Commission's November 21st, 2007 order.

CHAIRMAN GETZ: Actually, let me interrupt for a second. It might be easier for everyone if you sat, then you'd be speaking into the microphone.

MR. MOFFETT: That would be fine. It certainly makes me more comfortable. Thank you. In particular, we would like to focus on seven areas in the Commission's November 21st order where we believe that either explicit assumptions that were made by the Commission in the order or conclusions that the Commission came to in the order are either not supported by evidence in the record or are specifically contradicted by evidence or the precedent that is cited in the record.

I think maybe to try to frame where we

are today, it's fair to say that, when we started this case, certainly Briar Hydro Associates felt that the matter at issue was a fairly simple and straightforward matter of contract interpretation. That is, we really thought that the contract was clear. It talks about energy, it does not talk about capacity. When we got into the case, we discovered that Public Service Company of New Hampshire also thought that the contract was clear, only they thought it was clear in the opposite way that Briar Hydro did.

CHAIRMAN GETZ: A very common occurrence here.

MR. MOFFETT: Yes. The Commission, in dealing with that disagreement, came to the conclusion that, in fact, the contract was not clear, that it was ambiguous, and that it required extraneous evidence in order to sort out the actual meaning of the contract. We're really here today because, if that is the Commission's position, then we think it's only fair to hear at length and in detail about the evidence that would be brought forward by both parties in support of their interpretation of the contract. So, with that understanding, --

CHAIRMAN GETZ: In that regard, you mean

a subsequent hearing on --

MR. MOFFETT: Yes.

CHAIRMAN GETZ: -- a fact-based hearing?

MR. MOFFETT: And, let me make clear, Mr. Norman is here today. I'm going to summarize, very lightly, some offers of proof that we would intend to make. But Mr. Norman is here, and he would be happy to either explain those further, without being under oath or to actually take the witness stand, if the Commission wants him to do that. But we are really saying is, we think that having -- having decided that the contract is not clear on its face, and that it requires extraneous evidence to interpret it, there is a whole lot of evidence, much of it in the record, but not all of it in the record that the Commission had when it decided the case on November 21st, 2007.

CHAIRMAN GETZ: Okay. Well, let me make one procedural point clear. We will not be taking evidence from Mr. Norman today, because it wouldn't be fair to the other parties in that record.

MR. MOFFETT: That's fine.

CHAIRMAN GETZ: But we will be hearing your offers of proof.

MR. MOFFETT: That's fine. We don't --

We didn't expect that. We came prepared to do it, if the Commission wanted it, we didn't expect it. So, I will go ahead and summarize initially the offers of proof that we would be prepared to make on the points that we think were either misconceived or overlooked by the Commission.

And, as I said, I want to speak about seven specific points. The first one has to do with the Commission's statement at Page 15 of the November 21st, 2007 order, about run-of-river hydro facilities. This is the first full paragraph on Page 15 of the November 17th order -- excuse me, the November 21st order. And, in that paragraph, the Commission says "We recognize that not all hydro facilities qualifying under LEEPA were capable of offering energy and capacity. When the Commission differentiated in 1979 between facilities with dependable capacity and those that would receive a lower rate because they lacked this attribute, the example given for the latter was run-of-the-river hydro plants. In the 1982 time frame," which is the time frame of the contract, "therefore, an "entire output" contract for a run-of-the-river hydro would not have included capacity." The Commission goes on to talk about two memos that ascribed specific capacity to the Penacook Lower Falls Project. But those memos were internal to PSNH. They

were never shared with Briar Hydro.

For our purposes right now, the point that we are concerned about is the statement that "In the 1982 time frame, an entire output contract for a run-of-the-river hydro would not have included capacity." Mr. Norman would be prepared to testify, under oath in a later hearing in this docket, that the Penacook Lower Falls facility was designed, began operating, and has always operated as a run-of-river hydro facility. It simply is a run-of-river hydro facility. So, by the Commission's own guidelines, capacity should not have been included and would not have been included in that contract. That's point number one.

Point number two has to do with the policy statement, the PSNH policy statement, that was -- that was attached as Exhibit B-3 to Briar Hydro's reply memorandum of June 29, 2007. This is a policy statement that was developed by PSNH, it was an internal policy statement, it was not negotiated.

CHAIRMAN GETZ: Actually, let me interrupt, because I want to try and work through these as we go along. Let me return to your point about the run-of-river. Well, first of all, you said that I guess Briar was unaware that there was a dependable capacity

number assigned to Penacook?

MR. MOFFETT: That's correct. Briar was never privy to the internal memorandum that Mike Cannata did for PSNH that ascribed the 1.57 megawatts. Those were never shared with New Hampshire Hydro Associates.

CHAIRMAN GETZ: But I'm wondering how this really affects our decision here? Whether it --

MR. MOFFETT: I'll come back to it later. But, for our purposes, all I wanted to indicate was, we don't think those memoranda are relevant to the point that the Commission itself has indicated that a run-of-river hydro facility, selling its entire output in this time frame, would not have been selling its capacity.

CHAIRMAN GETZ: But it appears from the memoranda that, if Briar had selected Option I from the three options put forth by PSNH, that it would have been given a dependable capacity figure to which the higher cents per kilowatt-hour rate would have been applied.

MR. MOFFETT: That's correct. But Briar did not elect Option I. It could not have financed the project under Option I.

CHAIRMAN GETZ: Yes, I understand that. But I guess where I'm going is, I think you're making a point that, with respect to whether Penacook was

run-of-river and how this dependable capacity would have been applied, and I'm trying to understand the relevance to the underlying decision. Because it seems like you're saying that Penacook is run-of-river, but PSNH concluded it had a dependable capacity, and therefore it would have had the higher cents per kilowatt-hour rate that would have been essentially an all-in pricing, including energy and capacity.

MR. MOFFETT: I want to draw it back, Mr. Chairman. I'm not trying to infer any of that more complicated interpretation. All I'm saying, all I'm pointing out, is that the Commission, in its order, said, and I quote, "In the 1982 time frame, an entire output contract for a run-of-river hydro facility would not have included capacity." The Penacook Lower Falls Project was a run-of-river hydro facility. That's all I'm saying.

CHAIRMAN GETZ: And, I'm trying to understand the context. To the extent it's error, whether it's harmless error, or something that would have an effect on the ultimate decision in this case. So, okay, I think I understand the points. So, if you want to proceed to your second.

MR. MOFFETT: Okay. All right. Moving on to point number two, we want to talk for a little bit

about the PSNH policy statement, which, as I said, is Exhibit B-3 to the Briar Hydro reply memorandum of June 29, 2007. This is a policy statement that was developed internally by PSNH. It was not negotiated with New Hampshire Hydro. It was sent to Mr. Norman, by John Lyons of PSNH, on November 20th, 1981, as a way of PSNH indicating the various bases on which PSNH would be prepared to contract with New Hampshire Hydro Associates for the purchase of energy from the Penacook Lower Falls facility.

Now, the key thing about this is the Commission's discussion of that policy statement on Page 13 of the November -- of the Commission's November 21, 2007 order. In the first full paragraph, the Commission indicated that "PSNH's policy statement on contract pricing was of primary relevance to the question of the interpretation of the contract." And, we agree with that. The Commission then goes on to characterize the three alternatives or options that PSNH laid out in that contract -- in that policy statement. It is our position, and Mr. Norman would be prepared to testify, at some length, on the basis of the language of the policy statement and the exhibits that were sent with it. And, we have copies of those here, and I'd like Mrs. Geiger to

pass them out while we're talking about it, so that they can be part of the record.

CHAIRMAN GETZ: I'm sorry, are these in addition to what was part of the filing on --

MR. MOFFETT: These particular -- These particular --

CHAIRMAN GETZ: Mr. Moffett, excuse me, one at a time so Mr. Patnaude can record what's being said here.

MR. MOFFETT: The policy statement --

CHAIRMAN GETZ: Mr. Moffett, please.

MR. MOFFETT: Excuse me.

CHAIRMAN GETZ: What I want to understand is, is this material that's already in your filing from June 29 of last year or are these new materials?

MR. MOFFETT: It's new material.

CHAIRMAN GETZ: Okay.

MR. MOFFETT: Sorry.

CHAIRMAN GETZ: That's okay.

MR. MOFFETT: These are memoranda that were prepared by PSNH and sent to New Hampshire Hydro Associates during the preliminary negotiations over the contract. And, they were worksheets that helped to

explain -- that PSNH indicated would help to explain the policy statement and the options that were being made available in the policy statement.

Now, the central point that Mr. Norman would testify to, and I would really like to defer to him in terms of the way he explains this, but the central point that he would testify to is that, contrary to the Commission's assumption in the last full paragraph on Page 13, that it is, and this is a quote from the last sentence on Page 13 of the November 21 order, Commission indicated "It is similarly reasonable to treat Options II and III, which are long term options employing a 9 cents per kWh index price, as reflecting an all-in price for both energy and capacity."

Now, to be very clear about what we're saying here, Briar Hydro Associates acknowledges, we agree, we concede that Option I or Alternative I included, for the amount of energy that was produced using dependable capacity, Option I included what could fairly be called an all-in price of 8.2 cents a kilowatt-hour for both energy and capacity. So, we have no disagreement about the fact that Option I included an all-in price for energy and capacity. Where we take strong issue with the Commission's conclusion in the last sentence on Page 13 is

that we think there is absolutely no basis in the record for concluding that Options II and III also included an all-in price for energy and capacity. To the contrary, and this would be Mr. Norman's testimony, the record is very clear that the only component of that, of the pricing that was made available by PSNH under Options II and III was an energy component. It did not include capacity in any way. It was based on --

CHAIRMAN GETZ: Let me ask you this. Let me ask, well, there's two things. One is just purely administrative. This document that you've handed out that has a December 15, 1981 stamp at the top, --

MR. MOFFETT: Yes.

CHAIRMAN GETZ: This may answer a question that -- a related question I had had. When I looked at your -- I was just looking at the documents and trying to make sure I've got the chronology correct. And, in your filing from June 29, in sub -- looks like Attachment 4?

MR. MOFFETT: Yes. Attachment 4 is a December 29, 1981 letter to Mr. Lyons from New Hampshire Hydro Associates.

CHAIRMAN GETZ: That's right. And, in the first sentence it says "NHHA has reviewed your letter

dated December 21, 1981." And, I did not see a letter dated that date. I see, you know, previously the letter from November 20th. And, I'm wondering, was this part -- either I've missed the December 21 letter or, you know, perhaps this was part of that December 21 letter. But I just wanted to see if we could --

MR. MOFFETT: Mr. Chairman, I can't, unfortunately, answer your question directly. I honestly do not recall at the moment whether or not the December 21 letter was -- I can't answer the Chairman's question directly without going back and looking more carefully in the files. I will say that, as everybody understands, the documents that form the basis of this contract are now 26 years old. And, PSNH reviewed its files carefully and provided us with copies of everything in their files that they had, and we did the same thing, and provided those copies to PSNH and the other parties. But there were some documents, frankly, that were not available in either of those files. I'll have to go back and look more carefully. But I'm not sure that the December 21, 1981 letter is in the record or even that we found it. If I can -- If I can have the opportunity to look in our files and get back to the Commission on that, I'd like to --

CHAIRMAN GETZ: Well, let me put it this

way then is, to the extent either of the parties can find the -- has the December 21, 1981 letter, ask that it be submitted to us after the hearing.

MR. MOFFETT: Yes.

CHAIRMAN GETZ: And, the other issue I wanted to follow up on is when you said the "evidence" that Mr. Norman would speak to. Does that mean his interpretation of what the policy statement means? The evidence being the policy statement and his understanding?

MR. MOFFETT: Not just the policy statement, but the exhibits that accompanied the policy statement.

CHAIRMAN GETZ: Including the --

MR. MOFFETT: And the matter that has just been introduced into the record, namely the --

CHAIRMAN GETZ: Okay.

MR. MOFFETT: RVP-1, 2 and 3 stands for "Richard V. Perron", who was a colleague of Mr. Lyons at PSNH.

CHAIRMAN GETZ: Okay.

MR. MOFFETT: And worked with him on developing the formula for pricing under the PSNH policy statement.

CHAIRMAN GETZ: Okay.

MR. MOFFETT: And, so, those are his initials.

CHAIRMAN GETZ: All right. That answers my questions. Sorry for dragging you off course.

MR. MOFFETT: That's okay. I would like to be able to say more about this issue, but Mr. Norman is actually much better qualified to speak about it than I am. And, without putting him under oath, I would like to ask if the Commission would allow him just to say a few words about the significance of those worksheets, and why we think it's important that the Commission actually here testimony on that issue.

CHAIRMAN GETZ: I don't think -- that's not the purpose of this oral argument today. You were put in a position to make oral -- to make offers of proof about that --

MR. MOFFETT: All right. Then, let's leave it there, just by saying that we would like Mr. Norman to have the opportunity to speak under oath and provide actual evidence to the Commission on that, on that issue.

Issue number three has to do with the pre-contract negotiations. Oh, I'm sorry. There is -- I got ahead of myself. There is one further document that

we would like to introduce into the record and include in the documents that Mr. Norman would speak to at a later hearing on the merits. And, these are a series of cases analyzing the actual numbers that are used in Option II and Option III in the PSNH policy statement, as compared with the numbers that fall out from the actual pricing formula in the 1982 contract that was signed between Briar Hydro and PSNH, because they are different. In other words, Mr. Norman will testify to the fact that, based upon the numbers that would fall out from Option II and Option III, under the PSNH policy statement, there should have been a higher contract price than there was in the actual contract that was signed in 1982 between PSNH and New Hampshire Hydro Associates. And, again, Mr. Norman would like the opportunity to explain to the Commission just exactly how those numbers stack up.

CHAIRMAN GETZ: Okay. Just for purposes of housekeeping, and recognizing this is not a hearing on the merits, we'll describe the first document, the three-page handwritten calculations, with a date "December 15, 1981" at the top, as "Exhibit A". And, we'll describe the four-page document, with the heading "Option II Fixed Rate Future Escalating Contract" as "Exhibit B". Though, it looks like we have two different

documents up here.

CMSR. BELOW: The front page of mine is marked "Option III".

CHAIRMAN GETZ: You may just be missing one.

CMSR. BELOW: And, the front page of --

CHAIRMAN GETZ: It's just in a different order.

CMSR. BELOW: So, four pages?

CMSR. MORRISON: Four pages.

CMSR. BELOW: Okay.

(The documents, as described, were herewith marked as **Exhibit A** and **Exhibit B**, respectively, for identification.)

CHAIRMAN GETZ: Okay. I think we have it. Please proceed.

MR. MOFFETT: So, moving onto point number three then, I'd like to refer to the Commission's order of November 21 on Page 14. The Commission had concluded its discussion about the PSNH policy statement and had made the -- what we believe was an unwarranted logical leap. That, because Option I could be fairly characterized as included -- as including an all-in price

for energy and capacity, that therefore Option II and Option III must necessarily also include an all-in price for energy and capacity. And, then, on Page 14, the Commission said "Consequently, we find that PSNH offered a price for both energy and capacity, which NHHA ultimately accepted", this is toward the bottom of the first paragraph on Page 14 of the Commission's order.

We, again, we believe strongly that, if the Commission concludes that the language of the contract is ambiguous, there needs to be testimony on what the parties' intent was. And, Briar Hydro Associates has offered, as an attachment to its Motion for Reconsideration and Rehearing, the Affidavit of Warren Mack. Mr. Mack was a colleague of Mr. Norman's, who was participating in the negotiations of this contract in late 1981 and early 1982, along with Mr. Norman. Mr. Mack's affidavit has been submitted as part of the -- as an attachment to Briar Hydro's Motion for Rehearing. And, I would just like to read into the record one paragraph from that affidavit, which summarizes Mr. Mack's recollection of the discussions with Mr. Lyons on the central point, the central factual point of whether or not this contract includes capacity. Mr. Mack is not here today. We're submitting this as an offer of proof. But, if the

Commission schedules a hearing, we would expect that we would ask Mr. Mack to come back from California and testify under oath on this, on this point. But this affidavit is given under oath.

I call the Commission's attention to Paragraph 5 at the bottom of Page 2 of the Mack affidavit. He's talking about New Hampshire Hydro Associates' negotiations with PSNH. And, he says "In our conversations about the capacity issue, including those in response to my three letters, Mr. Lyons did not waver from his assertion that the capacity of the Lower Penacook Project had no value to PSNH, that PSNH would not pay for it, and that he would not include it in the contract. He referred to PSNH having Seabrook and therefore no need for additional capacity. Mr. Lyons on several occasions referred to the contract being negotiated as being a standard form of contract and that he was not going to change the contract form for NHHA. Notably, he did not state that PSNH was buying the capacity of the Lower Penacook Project nor did he otherwise suggest that the contract included capacity as well as energy. We both understood clearly that it did not."

Now, that statement on the record is simply incompatible with the Commission's conclusion at

Page 14 of the Commission's order. And, there is no -- there is no evidence in the record that controverts that. Now, I'm not saying that PSNH might not have evidence that could be taken to controvert that. I'm just saying that, on the record, as it stands today, if you go to extraneous evidence, if you go to extrinsic evidence to explain the meaning of the contract, based on the record I think you have to conclude that this contract was a contract solely for energy and did not include capacity. Neither party understood that it included capacity. This despite the fact that PSNH knew, but did not share with Briar Hydro, that the project had capacity. Okay. So, that's point number three.

Point number four: We would like the opportunity for Mr. Norman to present testimony on the question of post-contract dealings, which, again, if the contract is ambiguous on its face, we believe are helpful in showing the intent of the parties and the way they acted after the contract. Now, the Commission expressly said, at Page 17, that it was not -- at Page 17 of the November 21st order, that it was not going to consider the post-contract dealings. It said it didn't have to, because it had already come to the conclusion that the contract was based on an all-in price for energy and

capacity. But we would like the opportunity for Mr. Norman to present testimony on a series of post-contract dealings between PSNH and New Hampshire Hydro Associates that we think shed light on the question of whether PSNH ever ascribed any capacity value to the contract.

One is the PSNH letter of February 6, 1984 to NEPEX, regarding the fact that PSNH was claiming the capacity of the Penacook Lower Falls Project. The point that Mr. Norman would testify to on that score is simply that, although PSNH may have sent that letter to NEPEX, it never copied New Hampshire Hydro Associates on that letter. So, there was no basis for New Hampshire Hydro Associates to understand that that capability responsibility claim had been made to NEPEX by PSNH. In other words, it was a unilateral claim. It was never acknowledged, it was never acceded to by New Hampshire Hydro Associates. And, it can't be taken now as evidence that both parties understood that capacity was included in the contract.

CHAIRMAN GETZ: Well, let me make sure I understand. So, you're not advancing this as support for your position in the first instance. Basically, it sounds like it's a defensive argument that --

MR. MOFFETT: That's correct. That's

correct.

CHAIRMAN GETZ: But we didn't take it into consideration --

MR. MOFFETT: The point is -- The point is simply --

CHAIRMAN GETZ: Mr. Moffett, you've got to -- Mr. Patnaude is not going to capture all of this if we're both talking.

MR. MOFFETT: Excuse me.

CHAIRMAN GETZ: But you're not saying that the Commission use that as part of its decision in the first instance?

MR. MOFFETT: No, I'm not, because the Commission expressly said, on Page 17, that it would not consider the post-contract dealings between the parties. The second evidence of post-contract dealings that we like Mr. Norman to be able to testify to is a letter that was sent by PSNH, specifically Todd Wicker, to Tom Tarpey, who was associated with Mr. Norman and New Hampshire Hydro Associates, in 1990, May 14, 1990. And, in that letter, Mr. Wicker included a spreadsheet, which purported to demonstrate how PSNH had arrived at an offer that it was making to New Hampshire Hydro Associates to buy out the front-end loading value of the contract. It is a

spreadsheet with a series of columns. And, the columns include several columns that purport to address capacity, but they are filled with zeros. We'd like Mr. Norman to be able to address the impact and the significance of that spreadsheet and what it says about whether PSNH considered that the contract included capacity; we think it's pretty clear that it didn't. So, that is point number -- excuse me. I'm sorry, yes. This is already in the record. It is Exhibit D to the Briar Hydro reply memorandum of June 29th, 2007. And, there is an analysis attached to that, it's called Appendix B-1, which Mr. Norman would like to be able to speak to.

As a third component of this point number four, we would like Mr. Norman to be able to comment on an e-mail that he received from John MacDonald of PSNH on November 7th, 2006, related to the point of whether or not PSNH had bothered to keep track of capacity value for any of these contracts, other than the rate orders. That's already in the record. It is Exhibit C to Briar Hydro's original March 28th, 2007 Petition for Declaratory Ruling.

And, finally, we would like Mr. Norman to be able to address the question of the actual invoices that were used in compensating New Hampshire Hydro

Associates, and then Briar Hydro Associates, for what was sold to PSNH under the contract. A sample copy of those invoices is attached as Exhibit B to the original Briar Hydro Petition for a Declaratory Ruling. And, it makes it clear that PSNH is paying for energy only, no capacity, at the rate of 3.53 cents per kilowatt-hour.

So, those four points are points on which we would like Mr. Norman to have the opportunity to offer sworn testimony on the record. We would also like the opportunity to revisit several points in the Commission's order that deal perhaps not so much with factual questions as legal arguments. And, in the notice of today's hearing, the Commission invited us to summarize any legal arguments that we thought were misconstrued or overlooked, in addition to factual points.

The first of these, so this is point number five, is the whole argument about whether or not output, as it's used in the contract, equates to capacity or to energy. In response to the Chairman's invitation at the original prehearing conference on May 23rd last year, we presented in our reply memorandum a series of cases, notably including several from New York and Virginia, but also some from Indiana and Maryland, in which other courts had construed the term "output" in a way that clearly

identified the term "output" with energy, rather than capacity. It was -- It was surprising to us when the Commission, in its order of November 21st, noted that we had presented those cases, but then said nothing about them. It didn't distinguish -- The Commission didn't distinguish them. It didn't say why they thought they might not be relevant. It just mentioned them and then passed on. So, we would only say that, to the extent that legal precedent has value, which we took from the Chairman's question it should have, we felt that the Commission had essentially overlooked the legal precedential value of those cases.

Point number six: The Commission, on Page 16 of its November 21st order, makes the following statement: This is toward the bottom of the page. It's the last couple of sentences on Page 16. It says "Generation capacity does not exist in the abstract entirely separable from the energy produced by a facility. Energy output is the result of the using generating capacity over time." We agree with the second statement incidentally, it's the first statement that gives us trouble. We think, in fact, that the industry, including the parties, PSNH and New Hampshire Hydro Associates, and the Commission and FERC have clearly differentiated

between energy and capacity since 1979, when FERC issued its Order 69 in the PURPA case. We talked about that at some length in our reply memorandum. I don't want to rehash the arguments here. But, in fact, throughout Order 69 from FERC, the distinction is made between energy and capacity, and FERC explains in some detail the reason why they are different and the reason why they have to be considered differently, in terms of capturing the value that comes from a generating facility.

CHAIRMAN GETZ: But isn't it true, at the time of the formation of this contract, that energy and capacity was compensated through a cents per kilowatt-hour rate that included both attributes of energy and capacity?

MR. MOFFETT: Only for short-term contracts. Only for contracts that specifically used the Commission's 8.2 and 7.7 cents bifurcated pricing.

CHAIRMAN GETZ: And also the Option I --

MR. MOFFETT: This was -- I'm sorry?

CHAIRMAN GETZ: And also the Option I under the policy statement.

MR. MOFFETT: Option I specifically referred to and incorporated the Commission's bifurcated price, which included an all-in price for energy and

capacity up to -- up to the amount of dependable capacity, and then a strict energy price, a lower price of 7.7 cents for any energy in excess of that dependable capacity. That was captured in Option I of PSNH's policy statement, but that was not the basis for the New Hampshire Hydro Associates' contract in 1982. The basis for that contract was Option III. And, as we would like to give Mr. Norman a chance to testify to, Option III plainly did not include capacity.

CHAIRMAN GETZ: Plainly did not include capacity or assigned no value to capacity?

MR. MOFFETT: It just didn't deal with capacity. It was based strictly and entirely, solely on PSNH's incremental cost of energy. And, that phrase "incremental energy cost" is very clearly defined both in the PSNH policy statement and in the contract to include energy alone.

CHAIRMAN GETZ: Is it fair to conclude that what the Commission was doing at the time, in terms of the cents per kilowatt-hour price that included both attributes of energy and capacity, was it was a pricing mechanism for administrative ease?

MR. MOFFETT: Well, Mr. Chairman, that may be. I wouldn't want to speak to that. I wouldn't

want to characterize what PSNH or the Commission had in mind when it set that bifurcated price. The major point here is, we don't have any argument with the Commission or with PSNH that Option I included an all-in price for energy and capacity. We simply don't understand how the Commission could make a logical leap that, because capacity was included in an all-in price in Option I, that therefore necessarily had to be included -- that capacity had to be included in an all-in price under Options II and Options III. There is, in fact, no evidence in the record that would support that, and there is evidence in the record that contradicts that, that suggests otherwise.

CMSR. BELOW: Just to focus on the sentence that you seem to be taking exception to, the statement that "Generation capacity does not exist in the abstract entirely separable from the energy produced by a facility." Are you simply -- Are you saying that sort of troubles you or that you think there's a logical -- you have a logical disagreement with that statement?

MR. MOFFETT: Both. And, we think -- And, we think that the industry has long recognized the difference and has compensated energy and capacity differently.

CMSR. BELOW: Well, in looking at this

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specific power plant, are you suggesting it had the ability to generate electricity that could be used for some other purpose than to deliver that electricity in its entirety to PSNH.

MR. MOFFETT: No. No, Commissioner Below, I'm not suggesting that. We don't argue that the energy from that, from that plant, has to go to PSNH under the contract. What we're saying is --

CMSR. BELOW: So, isn't the entire capacity of that generation facility obligated to meet its contractual obligation to deliver the entire output to PSNH?

MR. MOFFETT: No, because, and in order to make this point maybe as simply as I can, we're clear that New Hampshire Hydro Associates, or Briar Hydro Associates now, is obligated to provide all of its energy or, if you want, all of its output to PSNH, but capacity is different. And, in order to make that point, I would simply call your attention to the fact that ISO-New England and FERC have recognized that capacity has a separate value in the Forward Capacity Market, which basically says "we're going to ascribe value to steel and concrete in the ground that represents the capacity to produce electric energy, even though the actual energy

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that it produces might be sold to a different party."

CMSR. BELOW: But are you saying they're willing to recognize the ability to generate electricity capacity distinct from and separate from actually producing that electricity, in the sense that, if the plant is not actually contractually capable of delivering the electricity or, you know, actually using that capacity, is that a different concept?

MR. MOFFETT: What the capacity -- What the capacity value represents is the ability to produce the energy. But you could have the capacity to produce the energy without having an obligation to sell the energy, and vice versa. You can have an obligation to sell the energy, without being obligated to give the value that's represented by the capacity to the same party. That's what the Forward Capacity Market stands for. And, I understand the point that you're making. I just think -- I just think it's important to recognize that the industry ascribes different values to capacity and energy. It does not assume that, because one party is entitled to the entire output, that is all of the energy that is produced by a plant, that that party also has an entitlement to the value of the capacity.

Another way of saying it would be simply

to say that there are -- you can imagine circumstances under which a plant that has a given capacity might shut down, it might stop selling energy. But, as long as it has the capacity to start up again and produce energy, ISO-New England and FERC and NEPOOL will recognize that capacity separately from the energy that could have been produced using that capacity.

CMSR. BELOW: But, just to be clear, you're not asserting that this generation unit could use its capacity to produce electricity for any customer other than PSNH?

MR. MOFFETT: That's correct. All of the energy, all of the energy produced by the Penacook Lower Falls facilities is obligated to be sold to PSNH under the contract.

CMSR. BELOW: Okay.

MR. MOFFETT: Okay. Point number seven, and this is my last one: In PSNH's memorandum of June 15, 2007, I'm trying to find it here, at Page 3 I believe, PSNH deals with the FERC regulations and the Code of Federal Regulations that define the obligations of qualifying facilities. And, it makes the statement, which we believe is unsupported, that "a qualifying facility selling under these regulations to an electric utility

cannot sell energy without selling capacity." We don't believe there's any support for that in FERC Order 69, which we -- which we analyzed at some length in our reply memorandum of June 29th. But the more salient point, for purposes of this morning, and this gets to a factual point that again I'd like Mr. Norman to have the opportunity to testify to, PSNH makes a distinction between a qualifying facility that it says is obligated to sell both energy and capacity together, under 18 CFR Section 292.303(a). This is at the bottom of Page 3 in the PSNH memorandum. And, then, it goes onto stay "But there's an exception under Section (d) of 292.303. And that exception would allow capacity to be sold separately from energy in the case of a qualifying facility that is not directly connected to the purchasing utility", in this case PSNH, "but rather has to wheel through an interconnecting utility." Mr. Norman would like the opportunity to testify that the Penacook Lower Falls facility is not directly connected to PSNH. It is connected to Concord Electric, or what is now Unitil, and Unitil wheels that power to PSNH. So, it falls directly within the exception to what PSNH we believe mistakenly calls a general rule that a qualifying facility cannot sell capacity separately from energy.

And, with that, Mr. Chairman, I'll stand

down. I've talked an awful lot. And, we -- oh, I'm sorry Mrs. Geiger is calling my attention to the fact that we're not sure that a second -- actually, it's a third document that we had meant to include in the record got into the record this morning. This is a March 5th letter to Mr. Mack, from John Lyons, with an attachment that shows the basis for PSNH's pricing formula based on the incremental energy cost. And, if we could, I'd like to make sure that that gets into the record as well.

CHAIRMAN GETZ: Okay. Let's mark this as "Exhibit C".

(The document, as described, was herewith marked as **Exhibit C** for identification.)

CHAIRMAN GETZ: I want to return for a moment, Mr. Moffett, to the policy statement. I think you've indicated that you agree that Option I is an all-in price cents per kilowatt-hour that includes energy and capacity?

MR. MOFFETT: Up to the point of dependable capacity, yes.

CHAIRMAN GETZ: And, then, it seems that we have two options with respect to Options II and III. Is that, and the one that we -- the conclusion we made in

the order was that Options II and III are equivalent in nature to Option I, to the extent that there are both attributes of energy and capacity being purchased by PSNH. It's simply that PSNH assigned no value to that capacity. The other option, the other alternative is that Options II and III do not include capacity. And, it seems that the crux of that conclusion would have to be based on the fact of the way the word "energy" was used. That it was only meant to buy energy, and that it was basically saying "you keep the capacity." Is that a fair characterization of the alternatives of how to interpret?

MR. MOFFETT: With this qualification, Mr. Chairman. I don't think I would agree with your first statement that PSNH was -- said "we're buying the capacity, but we're not ascribing any value to it." In fact, the internal PSNH memoranda from Mike Cannata to Henry Ellis in this same time frame made it clear that PSNH did ascribe a value, specifically 1.57 megawatts of capacity. It's just that that was not shared with NHHA. So, when John Lyons took the position that the contract had no value, and he didn't want to pay for it and he didn't want to include it in the contract, the only fair inference was they understood there was capacity, they just didn't want to include that in the contract.

CHAIRMAN GETZ: Well, I guess I have a hard time reconciling what you just said with the November 21, 1981 letter from Mr. Lyons, which is the cover to the policy statement. It seems that you could read this package as saying, in this communication to Mr. Norman, "You have" -- "We're providing three options. Pick an option." And, why would we not conclude that they were comparable options, in terms of we will -- this is the value we will provide you for all of what you have, with Option I being specific about having both attributes, and in this letter saying "This policy is somewhat more liberal in compensation for purchased energy", I realize he uses the word "energy", but the options conclude all three, which -- and you've already admitted, in Option I, includes energy and capacity. So, this is what I'm having trouble reconciling.

MR. MOFFETT: Well, let me just say first, I'd really like to give Mr. Norman a chance to speak to that, because I think he's more grounded in the details. But I will tell you that there are at least two answers to that question. One is that, unlike Option I, PSNH made very clear in the policy statement that Option II and Option III were based on PSNH's incremental cost of energy. That term "incremental cost of energy" or

"incremental energy cost" was very specifically defined by PSNH in an addendum to the policy statement, it's at Page 4 of the policy statement, and it's entitled "Definition of Incremental Energy Cost", and that same definition is included in the contract itself in Article 3, the price formula. So, that's --

CHAIRMAN GETZ: Yes, I recognize that. But that seems to me you're taking that as the means of calculating what Briar would be paid to mean that PSNH expressly waived any interest in the capacity.

MR. MOFFETT: No, that's not what we're arguing. We're not arguing that in connection with the policy statement. We are arguing that in connection with the evidence that we would proffer on the pre-contract negotiations between Mr. Mack and Mr. Norman on the one hand and Mr. Lyons and Mr. Perron on the other. But, for purposes of an analysis of the policy statement, we're not -- all we're arguing is that, by its own terms, the policy statement drafted and developed by PSNH specifically links the pricing under Options II and III solely and entirely to PSNH's incremental cost of energy. And, that is very specifically defined by PSNH in the policy statement and in the contract. That's one thing.

The second thing, the second reason I

would respectfully take issue with your characterization is really something that, again, I'd like Mr. Norman to have the opportunity to testify to, but the worksheets that were attached to the policy statement, one of which was already in the record, the others of which have been submitted into the record this morning, really speak volumes about how PSNH viewed the pricing and the basis for the pricing under Option II and Option III, but specifically Option -- well, both Option II and Option III. It's clear that Option II and Option III were supposed to have an equivalent economic value. That point was not -- did not extend to Option I, okay? Option I had a different economic value. It was a short-term contract. Option II and Option III were based on PSNH's projections about the cost that it would bear to produce energy, energy only, over time, over the term, the long term of the contract, 30 years. And, we just think that, if the Commission -- if the Commission really believes that the contract is not clear on its face, and that it requires extraneous evidence to interpret the meaning of "energy" and "output" and things like that, we'd like Mr. Norman to have the -- and Mr. Mack, for that matter, to have the opportunity to testify about what they understood going into -- going into the signing of that contract.

CHAIRMAN GETZ: Okay. Thank you. Mr. Traum, did you --

MR. TRAUM: After having listened to Briar Hydro's comments this morning, the OCA continues to support the arguments laid out by PSNH previously and the Commission decision.

CHAIRMAN GETZ: Thank you. And, Ms. Ross, you had not intended to make argument this morning?

MS. ROSS: Staff takes no position on the issues. Thank you.

CHAIRMAN GETZ: Okay. Mr. Eaton.

MR. EATON: Thank you, Mr. Chairman. As I understand the task this morning we are to address is whether rehearing ought to be granted so that a further evidentiary hearing can be held. More discovery would be taken and witnesses presented as to what was in the minds of the persons who negotiated this agreement more than 25 years ago. PSNH believes that the Commission's Order Number --

CHAIRMAN GETZ: Well, let me stop you there. I guess Briar has offered the testimony of Mr. Norman and Mr. Mack. Is there anyone available from PSNH who could testify to these matters?

MR. EATON: Well, that -- I was going to bring that up in my -- in comments, but I can address them now. Mr. Lyons joined PSNH in 1948. He retired in 1990. We know that he still is alive, but he is at least in his late 80's, and may be approaching 90 years old. He, in his last official duties for the Company, supervised the supplemental energy supply matters. He had many special contracts or contracts and rate orders to deal with. And, we have not contacted him, we have not asked him if he remembers this particular negotiations. And, we think we're at a distinct disadvantage by the fact that this is someone who has left the Company almost 20 years ago and his recollection may not be good. It --

CHAIRMAN GETZ: Well, what about Mr. Perron, who's --

MR. EATON: Mr. Perron has also left the Company in the past, I think, five years. And, I spoke with him about this, but he said he was mostly a person who didn't negotiate, but who did do the calculations, and he did do the calculations that are in Exhibit A. So, we're at a disadvantage.

CHAIRMAN GETZ: Well, let me then ask this question, in terms -- I guess I don't think we've had formal discovery, but -- that's correct?

MR. EATON: Well, we have exchanged documents that were in our possession that relate to this contract.

CHAIRMAN GETZ: So, you have provided Briar all the documents relevant to the policy statement and to this contract?

MR. EATON: Yes, everything that we had.

CHAIRMAN GETZ: And, we have everything?

MR. EATON: I believe they were given to Attorney Ross as well.

MS. ROSS: That's correct.

CHAIRMAN GETZ: Thank you. Okay. Please proceed. And, to follow up on that, you know, all of this or much of this information is hearsay of what Mr. Mack may testify to and what Mr. Norman may testify to as to conversations that took place. Mr. Mack, in the paragraph that Mr. Moffett referred to, he concludes in that paragraph that "we both understood that it did not", so Mr. Mack is testifying as to what is in Mr. Lyons' mind many, many years ago. Which brings me to the point of whether the Commission is bound by the technical rules of evidence. It's not, it doesn't follow the strict rules of evidence, but that was described in a decision the Commission made in Re: New England Electric Transmission,

and it was describing the difference between a civil court matter and an administrative proceeding before the Commission. And, this is at 67 NHPUC 408, that's where the decision starts, and at 412 the Commission said that "First, strict rules of evidence are not applied, especially the hearsay rules. Second, most testimony and documentary evidence will be expert testimony or exhibits based on the expertise of the witness sponsoring the exhibit. Third, the problems associated with drawing inferences from eyewitness accounts of past behavior or events are virtually nonexistent in these types of proceedings." Well, that third point is exactly what Mr. Mack and Mr. Norman will talk about, is what Mr. Lyons said and what the conversations were back then. So, it is eyewitness, earwitness accounts and memories of something that happened 28 years ago, which I think is entirely unreliable and, therefore, we shouldn't explore that area of inquiry, and would not necessarily need a rehearing for the Commission to conclude this matter.

We have already presented our arguments in our June 6th memorandum in opposition to the Briar Hydro petition and our objection to the Motion for Rehearing, which we filed on December 31st. We think the Commission's decision was correct. We won't repeat those

arguments at this time.

Motions for rehearing direct attention to matters overlooked or mistakenly conceived in the original decision and require an examination of the record already before the fact-finder. Good reason is shown when a party demonstrates that new evidence exists that was unavailable at the original hearing. The Commission need not grant a request for rehearing so that a party has a second chance to present evidence that it could have presented earlier. Those are quotes that I included in our brief in opposition to the Motion for Rehearing.

It was Briar Hydro that suggested that we could argue this case based upon the agreement and the documents exchanged by the parties. Now, Briar Hydro doesn't like the decision the Commission made, although the decision is fully supported by the documents and the regulatory context in which the agreement was negotiated. After expressly waiving an evidentiary hearing, Briar Hydro now requests on rehearing that the Commission hold an evidentiary hearing. And, as I explained, why don't we simply provide Mr. Lyons, and I'm not sure that we can or that he will be a reliable witness, given his advanced years, and the number of years he's been away from this subject matter.

What I'd like to point out to the Commission is that, which I haven't presented before, or perhaps I did allude to it in our brief in opposition to the Motion for Rehearing, is Briar Hydro can't legally obtain the relief it seeks. And, without conceding our original argument that capacity is included in the contract, we still believe that, let's assume they're correct, that the only thing that's in the contract is the energy. For purposes of this argument, that's what I'm going to assume. Now that ISO-New England is offering Forward Capacity Market payments, Briar would like to receive those payments. There's two ways that they could do this; either outside of the contract with PSNH or as part of the contract with PSNH.

If Briar Hydro were to offer the capacity in a Forward Capacity Market, directly to ISO New England, we believe they would be violating PURPA. PURPA established two -- three distinct advantages for this emerging small power industry. Number one, the local utility could be required to purchase the output. And, the local utility in this case was Concord Electric, but Concord Electric could also wheel that output to another buying utility. Number two, the utility could be required to provide backup power or station service. Number three,

and the point that's most important for this inquiry, is the qualifying facility could avoid regulation as a public utility, if it sold its output to the local utility, under rates established by the local Commission, or under contracts that were approved and sanctioned by the Commission, as these were, they avoided FERC jurisdiction. Now, if they split things up and sell capacity to one party and energy to another party, which they would do outside of the contract, they'd blow up their QF status. They're no longer a qualifying facility. And, they might love that, because right now the contract has them selling to PSNH at well below the market price. But we're not going to let them get out of the contract. They still owe us five years of below contract prices. And, we're going to hold them to that contract, as they should. But they're arguing all these facts about what was in, what was out, they could not and did not attempt to sell any capacity until the Forward Capacity Market happened.

The second --

CMSR. BELOW: Is this a new legal argument that you're positing here that should have been brought up earlier or is this sort of a defense to what has been raised today?

MR. EATON: It's an argument, I believe

the second argument that we point out was in our brief or in our opposition to the memorandum -- I mean, the Motion for Rehearing.

CMSR. BELOW: Your objection to the Motion for Rehearing?

MR. EATON: Right. And, that's if -- if they're trying to work through the contract, which I believe they are, I believe the initial request of Mr. MacDonald was "why don't you pass through the Forward Capacity Market payments to us that you're receiving for Penacook Lower Falls." Now, that changes the contract. That alters the contract. And, the series of cases that start with the *Freehold Cogeneration* and what the small power producers bring up all the time, is the Commission can't change the rules halfway through based upon changed circumstances. That's what Briar Hydro wants to do.

CHAIRMAN GETZ: Well, but, I mean, isn't that a distinction between whether PSNH purchased the energy and capacity in the first instance, which is your position, and versus Briar's position that you -- that PSNH only purchased the energy, and the capacity was waived, not purchased by PSNH?

MR. EATON: Well, PSNH has taken credit for the capacity ever since the first month that that was

provided. Ever since the first month of the contract, we have claimed capacity for this. And, --

CHAIRMAN GETZ: Well, I guess that goes to perhaps what PSNH thought it was buying, but it doesn't necessarily speak to what Briar thought it was selling. Is that fair to say?

MR. EATON: Well, if we weren't entitled to that value, I think it's incumbent upon the seller to have discovered that in public documents, and also in -- periodically we have to have this capacity audited. In fact, in January 31st of 1984, there was -- there was an audit created, and it was sent to NEPEX. This is the document that both PSNH and Briar attached to their pleadings. It's Attachment B to ours. And, right there there are some readings from the plant as to instantaneous kilowatts of capacity, and our claim as to what the capacity value was, which was 2.5 megawatts. I think our initial position is that we resisted any payment for capacity in the contract, we valued it at zero, but it was included in the contract.

CHAIRMAN GETZ: Okay. Let me just stop there for a second. I don't know if I got too far off on the QF issue. Did you have additional inquiry, Commissioner Below?

CMSR. BELOW: No. I mean, in your reply objection, it was in the context of the jurisdictional issue, which hasn't been orally argued today. But you're saying this also implicates the interpretation of the contract, this sort of legal constraint, as a QF, their ability to sell energy and capacity to different entities and different markets?

MR. EATON: Right. We don't believe they have that -- they have that authority to do as a qualifying facility. That they have to sell only to the interconnecting utility or the utility to which it's wheeled. Or else they're no longer a qualifying facility, they become an exempt wholesale generator today, which was not known back then. Back then they would have had to file their capacity contract with FERC and have it approved, and be subject to FERC jurisdiction. So, their energy would have been -- would have been QF New Hampshire regulated power or New Hampshire sanctioned power, and their capacity somehow be FERC power. And, I don't believe that there's any authority for splitting those two things up if you are a qualifying facility. That's how you got the -- that's how you got to buy from --

CHAIRMAN GETZ: Is that a timing -- Does that apply just at the time of formation or does that also

apply today you're saying?

MR. EATON: I think it applies today, because now we're going into the changed circumstances. Wouldn't it be great if we could just say "gee, avoided costs have really changed since we determined. And, so, let's reopen all the rate orders because avoided costs have changed." Briar is saying "Hey, there's now a great capacity market. We ought to get that money. Either we ought to be able to go out and apply for it separately, because it's separate from the contract, or, PSNH, you ought to flow that money through to us, because you never purchased the capacity." And, now, you're changing the express terms of the contract and getting paid for capacity through the contract. Either way, I don't believe they can do it.

CHAIRMAN GETZ: Well, let me step back a second to your statement that "the contract included capacity". That is what you said, correct?

MR. EATON: Uh-huh.

CHAIRMAN GETZ: If we take it a step back to the policy statement, the PSNH policy statement. So, is it also your position that Options II and III included capacity?

MR. EATON: Yes, and it was priced at

zero. There was no reason to do a calculation of avoided capacity costs, because under that offer the capacity was priced at zero. And, all the way through, at that time divestiture of -- I'm sorry, the sell-down of PSNH's share in Seabrook had started, that started I believe in the beginning of 1979, but PSNH still believed it was going to have 36 percent of both Unit 1 and Unit 2, which was about 800 megawatts of capacity, and their offer was energy priced at the 10 cents. And, PSNH made many changes to its original offer. So, that 10 cents was paid for the first eight or ten years under this contract, in order to satisfy Briar -- New Hampshire Hydro Associates' need for financing. And, so, they made changes. So, it wasn't just simply a 9 cent contract. It was a front-end loaded contract with 10 cents for several years. So, they got the value of that, and they did their financing and they signed the agreement.

So, to say that "We now are entitled to payments for Forward Capacity Market through the contract" flies in the face of their own arguments that "capacity is not in the contract". And, alternatively, going around PSNH and applying directly we think blows up their QF status, which they are required to stay till the end of the agreement. I have nothing further.

CHAIRMAN GETZ: Okay.

CMSR. BELOW: Are you assuming that the documents that were attached to the various briefs are to be considered in effect as evidence, even though there was not an evidentiary hearing, because both parties waived an evidentiary hearing, and both parties used documents to substantiate their arguments?

MR. EATON: Yes, I am. I don't think any party objected to the use of documents attached to their pleadings. We exchanged those with the idea we could use those documents, and I could be corrected if I'm -- if Attorney Moffett or Attorney Ross has a different opinion, but that the reason for exchanging the documents is that these were documents that centered around the formation of the contract and would help in interpretation.

CMSR. BELOW: And, if we were to decide that we should have an evidentiary hearing to more closely scrutinize those documents, or have additional discovery, I'm just wondering, I've heard the Forward Capacity Market and how that plays in here, and we didn't really consider that, that was not exactly part of the original arguments. But now it seems like it's been brought in by both sides as to how the Forward Capacity Market looks at capacity as

a concept. Do you have an opinion as to whether that bears on our decision or not or whether that should be the subject of examination, if we did go to an evidentiary hearing?

MR. EATON: Well, I'll -- I think the Commission asked us to address that, of how the Forward Capacity Market looks at capacity, who owns it, who controls it. And, so, I think both parties did address it already. So, yes, I believe, if you go onto an evidentiary hearing, that that's part of the evidentiary hearing.

CMSR. BELOW: Okay.

CHAIRMAN GETZ: Mr. Moffett, an opportunity for rebuttal?

MR. MOFFETT: I do have some rebuttal, Mr. Chairman. But I'd like to ask, if I may, would it be possible to take a four or five minute break, because I'd like to -- I'd like to talk with Mr. Norman about some points that were argued about earlier. Is that --

CHAIRMAN GETZ: I think Mr. Patnaude would appreciate it as well. So, why don't we take 15 minutes.

(Recess taken at 11:38 a.m. and the hearing reconvened at 11:55 a.m.)

CHAIRMAN GETZ: Before we turn to Mr. Moffett, let me just make sure I understand. Mr. Eaton, with the specific question that was in the secretarial letter about what evidence you would produce at a hearing, let me see if this is a fair characterization. You basically said that, of the two potential witnesses, one you spoke to and had no knowledge of the negotiations, so you don't intend to produce him?

MR. EATON: That was my understanding. I can -- I can circle back and talk to him again, and we can talk to Mr. Lyons.

CHAIRMAN GETZ: Well, I mean, I'm just saying, in terms of where you are today.

MR. EATON: Right.

CHAIRMAN GETZ: And, the other was that you hadn't talked to the other witness, and you seemed to be expressing a concern about his recollection. And, then, so, is it fair to say then that there is no other evidence that you would produce at a hearing, that you're prepared to rely on the documents that have been submitted, or is there other evidence?

MR. EATON: Well, there's other evidence. I think it's -- we could put in the testimony of concerning how we treated the capacity. Again, this is

a post-contract, but we could have a witness that would show that we claimed the capacity and got credit for the capacity during a period when capacity did have a positive value. And, you know, we claim it today as part of our portfolio for capability responsibility, when that was the term, and ever since. It's part of our portfolio. And, it's been recognized by NEPOOL and by ISO-New England as part of PSNH's portfolio. And, so, we could put on a witness to describe that. And, I think that's evidence that either Briar Hydro knew or should have known about that or they have sat on their rights for 18 years, 20 years of this contract.

CHAIRMAN GETZ: Okay. So, then, there would be no other evidence that you would seek to produce?

MR. EATON: Not at this time.

CHAIRMAN GETZ: Okay.

MR. EATON: That I can think of.

CHAIRMAN GETZ: All right. Then, we'll turn to Mr. Moffett, your opportunity for rebuttal. And, I'm hopeful you'll be -- part of that rebuttal would be responding to the QF issue raised by Mr. Eaton. Please.

MR. MOFFETT: Thank you, Mr. Chairman. First, on the point that was just being discussed, it's our position that we understand now, from having been

provided a copy of the "NEPEX letter" by PSNH, in connection with the discovery or the exchange of documents in this proceeding, that PSNH was claiming that capacity "from the beginning". We did not understand it at the time. Further to that point, I'd like to just refer briefly to the e-mail, which is a part of the record, and this is Exhibit D, I believe, in -- I'm sorry, Exhibit C to the original Briar Hydro petition, in which Mr. MacDonald is telling Mr. Norman, in an e-mail, in reference to the short-term purchases, that he says "Up till now, no real monthly capacity margin has existed. Therefore, we have not paid and won't pay a capacity component of short-term rates until the new ISO capacity market starts in December. Therefore, FCM payments", that's Forward Capacity Market payments, "will be passed through and forwarded to the QF owner."

CHAIRMAN GETZ: I'm sorry, just before you go into an explanation of that. Is that Exhibit C-3 to your June 29 filing?

MR. MOFFETT: I believe, Mr. Chairman, that that is Appendix C to our original Petition for Declaratory Ruling, dated March 28th, 2007.

CHAIRMAN GETZ: Well, in my Attachment C, it looks like there's three numbered subsets.

MR. MOFFETT: Give me just a second here.

CHAIRMAN GETZ: In which I have one and two, but nothing after three.

MR. MOFFETT: I'm sorry, it was Appendix 3, you're correct and I'm mistaken. It was Appendix 3 to the original Petition for Declaratory Ruling, dated March 28, 2007. And, the --

CHAIRMAN GETZ: I'm sorry, I hate to belabor this, but I want to see the document. My Appendix 3 to your June 29 memorandum --

MR. MOFFETT: No, wrong document. It's the original petition, the petition that initiated the case, March 28th, 2007.

CHAIRMAN GETZ: Okay, I'm all set now.

MR. MOFFETT: Appendix 3. And, the language that I was quoting from is in the second block of text, toward the bottom of the second block of text. Okay?

Next, I'd like to briefly address the legal argument that Mr. Eaton made in summary, suggesting that "a QF would be in violation of PURPA, if it attempted to sell capacity separately from the energy that it was selling to the purchaser of the energy." With respect, I

just don't think there's any support for that, either in the PURPA rules or in the record. This contract, for one thing, was not strictly speaking a LEEPA contract. The FERC rule, FERC Rule 69, specifically allows small power producers, QFs, to negotiate rates and terms that are different from the rates and terms that are set by a public utilities commission. And, those we have always referred to in this state as "negotiated contracts", as opposed to "rate orders" or contracts based on the avoided cost rates that were set by the Commission.

CHAIRMAN GETZ: Well, that's I guess what I, and maybe this is probably more for Mr. Eaton, but I'm having trouble seeing how the contract rests on the premise that "Briar is a QF". And, basically, you're telling me that --

MR. MOFFETT: I think you're right. It's virtually irrelevant. I mean, it's not -- we're not, Briar was not counting on QF status when it negotiated that contract with PSNH. It was a small power producer. And, it happened to qualify for qualifying facility status, but there is no -- there is no prohibition against a QF negotiating a contract to sell energy separately from capacity. In fact, FERC Rule 69 specifically says, you know, that that's okay. It can sell either capacity or

energy or both.

I think the last thing I'd like to say is there's sort of a -- there's sort of a counterintuitive argument that I believe PSNH is making here. They're conceding that the contract does not mention capacity, and yet they're saying "it included capacity", and, more than that, "we've got it, we've got it under the contract." It's almost as if you had a rug maker that was selling rugs, and he had a contract to sell rugs to a merchant, and he said he was going to buy the entire output of the rug factory, the loom, if you will. And, the merchant who's buying the rugs takes that to mean that he owns the loom as well. And, it's hard for me to imagine a contract that is silent on a second discrete element, which is not mentioned, and where the assumption would be that the seller is buying it, rather than that the -- excuse me, that the purchaser is buying it, rather than that the seller is retaining it, if it's not mentioned in the contract. Remember, this is not a situation where PSNH and the Commission and the small power producers weren't aware of the distinction between energy and capacity. We've been aware of that for three years by the time this contract was negotiated. It's not as if they didn't know what capacity was and that it was different from energy.

So, to say that we've got a contract here that talks only about energy, this is a contract for the purchase and sale of electrical energy, and it talks about "output", yes, but the courts have construed "output" to mean the energy that is generated by the capacity, not the capacity itself. So, to argue from that that the buyer is getting the capacity, as well as the energy, is counterintuitive, and I think it's contrary to the law and the evidence in the record. It's certainly contrary to the contract. I shouldn't say that. The contract is silent. But I think it's very hard to argue, from the fact that the contract is silent on capacity, that capacity went with the energy. In fact, the evidence in the record is to the contrary, that it did not. The contract was based strictly on energy cost.

Just one final thing, to avoid any misunderstanding about the documents that have been presented in the record today, all three of those documents, A, B, and C, are new in the sense that they were not part of the record previously. But A and C were documents that had been previously either in PSNH -- I think, in both cases, in PSNH's files. And, we're simply bringing them forward today because we think that it would be important for the Commission to understand how Mr.

Norman would testify as to the significance of those documents.

Exhibit B that was filed for the record today is in a different category. PSNH has never seen Exhibit B. Exhibit B was developed by Briar Hydro Associates specifically in anticipation of this hearing or a subsequent hearing at which there would be testimony. And, we would certainly be happy to give PSNH a chance to do discovery on that and depose or whatever they want to do on that. But the point is, PSNH had not seen that document prior to this morning, Exhibit B.

CHAIRMAN GETZ: Okay.

CMSR. BELOW: I'm intrigued by your rug merchant analogy. And, I'm trying to understand your argument about what's intuitive or counterintuitive logical or not. If a merchant, Merchant A, had a contract with a rug maker that obligated the entire output of a loom to supply that merchant for the next ten years, the owner of the loom still owns it, but does he have capacity that he could offer to Merchant B during the ten year period that that -- the entire output is obligated to Merchant A?

MR. MOFFETT: Sure, he can offer to sell the factory to Merchant B. And, then, Merchant B --

CMSR. BELOW: Well, that's the ownership of the factory.

MR. MOFFETT: Right. But that's what we're talking about with capacity.

CMSR. BELOW: If the entire output we're obligated to Merchant A, isn't the entire capacity -- wouldn't Merchant A assume that the entire capacity of that loom was committed to meet their needs? And, it couldn't go to meet some other merchant's needs in terms of producing rugs --

MR. MOFFETT: You can't use it to make rugs to sell to somebody else. But that doesn't answer the question about who owns the factory.

CMSR. BELOW: Is the ownership of the power plant in question here?

MR. MOFFETT: No, but the capacity, we would argue, and I think this is consistent with the ISO, the Forward Capacity Market position, unless the capacity is contracted away by the owner of the capacity, the plant, then the owner retains it.

CMSR. BELOW: So, you're saying the owner retains it, even though that entire capacity is under obligation to meet -- to supply needs for energy, electrical power, to PSNH?

MR. MOFFETT: That's correct, Commissioner. The Forward Capacity Market rules make it clear that what ISO is bargaining for is, when it -- when it asks people to step up and bid into the Forward Capacity Market, it's asking them to commit that, if they don't already have an existing plant that will generate, that they're going to build a plant that would be capable of generating X megawatts in time to meet the commitment period, the three-year commitment period covered by the Forward Capacity Market on a rolling basis. And, the way that works is, you can sell your energy separately, but you are committing to ISO that you're going to have iron in the ground that would be capable of producing energy that you could sell to Party A, B, or C.

CMSR. BELOW: Well, in your understanding of that, if Party A were outside of the New England Control Area, and you obligated your capacity of your generator, the entire output of that plant to sell to a load-serving entity outside of the New England Control Area, could that count as capacity for New England?

MR. MOFFETT: I want to be careful, because I think the rule actually does speak to that issue. But I'm not certain that I recall, without reviewing it, exactly how it treats it. But I'll get an

answer for you on that.

CMSR. BELOW: Okay. And, furthermore, if that plant didn't produce and supply power onto the Grid for New England at the time it was called upon, could it -- would it get paid for that capacity, just in the abstract?

MR. MOFFETT: No, and that's a key point. If the generator, you know, refuses to operate the plant during the commitment period, refuses to make the plant available for sales into the day-ahead market or the same day market, then they lose their capacity payments. They're penalized.

CHAIRMAN GETZ: Mr. Eaton.

MR. EATON: I have one point to raise, based upon Mr. Moffett's arguments. And, if this wasn't -- if this contract wasn't formed under the auspices of PURPA, then it had to be filed with FERC as a FERC wholesale rate. A generator that sells to a utility is subject to -- it is considered to be, prior to PURPA, it's considered to be a sale in interstate commerce, and it was required to be filed with FERC at that time. And, I don't believe it was. I believe it was a -- it was a contract. And, I think the Commission's decision speaks to the fact that PSNH went out to negotiate these agreements pursuant

to PURPA and LEEPA, and that, if it wasn't given an exemption from FERC regulation, it had to be filed with FERC, and I don't believe it has, and I don't believe there has been any approval by FERC of this agreement. That this is a QF agreement, and they're bound by the rules of a QF.

CHAIRMAN GETZ: Okay. We're going to give you the chance to go last, Mr. Moffett. But does the Consumer Advocate or Staff have anything?

MR. TRAUM: No thank you.

CHAIRMAN GETZ: Well, then, let me just address, it looks like we've made one commitment at least with respect to one answer from the Company to -- or from Briar to Commissioner Below's question. And, I guess we will reserve Exhibit D for that, for that answer.

(Exhibit D reserved)

CHAIRMAN GETZ: Okay. If there's nothing further from the other parties, then, Mr. Moffett, you have the opportunity to go last.

MR. MOFFETT: Just quickly in response to Mr. Eaton's last point. I didn't say, I certainly didn't mean to say, and I hope I didn't say, that "New Hampshire Hydro Associates was not a QF." I think, clearly, New Hampshire Hydro Associates was a QF. What I

intended to say, what I hope I said, is that there is nothing in the FERC rule that requires a QF to sell power to an electric utility at rates and terms that are set by a public utilities commission. There are such things, and we call them "rate orders". But the FERC Rule 69 specifically provides, and this is cited in our brief, specifically provides that a QF can sell to an electric utility at negotiated rates and terms that are different from those that are set up by the Public Utilities Commission. And, it in no way implies that, if you do that, you have to sell both capacity and energy.

CHAIRMAN GETZ: Okay. Well, thank you, everyone. At this time, we'll close the hearing for the purposes of oral argument and take the matter under advisement. Thank you.

(Whereupon the hearing ended at 12:16 p.m.)