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

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

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

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

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

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

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,

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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,

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

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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