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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petitions for Approval of Renegotiated Power Supply
Arrangements with Whitefield Power and Light Company, Bio-
Energy Corporation and Hemphill Power and Light Company**

Order Following Pre-Hearing Conference

O R D E R N O. 23,763

August 23, 2001

APPEARANCES: Robert A. Bersak, Esq. for Public Service Company of New Hampshire; Nixon Peabody LLP by Robert L. Dewees, Esq. for Edison Mission Marketing and Trading, Inc.; Brown, Olson & Wilson, P.C. by Robert A. Olson, Esq. for Bio-Energy Corporation; Jasen A. Stock for the New Hampshire Timberland Owners Association; Upton, Sanders & Smith, L.L.P. by Robert Upton II, Esq. for the Town of Whitefield; Robert Berti for North Country Procurement, Inc.; Keegan, Werlin & Pabian, LLP by David S. Rosenweig, Esq. for BancBoston Leasing Services, Inc.; Meredith M. Hatfield, Esq. for the Governor's Office of Energy and Community Services; Office of Consumer Advocate by Michael W. Holmes, Esq. on behalf of residential ratepayers; and Marcia A.B. Thunberg, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On April 19, 2001, Public Service Company of New Hampshire (PSNH) filed with the New Hampshire Public Utilities Commission (Commission) petitions for approval of new power purchase arrangements in connection with three independent power producers (IPPs):¹ Whitefield Power and Light Company

¹ IPPs are also sometimes referred to as Small Power Producers (SPPs).

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(Whitefield), Bio-Energy Corporation (Bio-Energy) and Hemphill Power and Light Company (Hemphill). The Commission assigned Docket No. DE 01-089 to the Whitefield proceeding, No. DE 01-090 to the Bio-Energy proceeding and No. DE 01-091 to the Hemphill matter.

Whitefield, Bio-Energy and Hemphill are all qualifying facilities under the federal Public Utilities Regulatory Policy Act (PURPA) and, accordingly, PSNH is obligated to purchase power from them at PSNH's avoided cost. Each facility is also a limited electrical energy producer within the meaning of the New Hampshire Limited Electrical Energy Producers Act (LEEPA), RSA 362-A. The Commission has previously approved PSNH's interconnection agreement with each IPP and entered a corresponding rate order.

The renegotiation of PSNH's power purchase arrangements with IPPs is an outgrowth of the PSNH Restructuring Settlement Agreement approved in Docket No. DE 99-099. See Order No. 23,443 (April 19, 2000), slip op. at 276 (noting that Commission "will allow PSNH to retain 20 percent of the savings due to agreements reached between PSNH and SPPs before the end of one year from the date of this Order that are subsequently approved by the Commission" with

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PSNH's share falling thereafter to 10 percent for one additional year). In approving the securitization of certain of PSNH's stranded costs as contemplated by the Restructuring Settlement Agreement, the Legislature explicitly determined that the renegotiation of power purchase arrangements with IPPs "is in the public interest in order to reduce the total cost to ratepayers of these obligations". RSA 369-B:1, XI (also noting that "the sharing of the benefits among ratepayers and all of the parties involved in the renegotiations is in the public interest"); see also RSA 362-A:4-c (setting forth conditions for Commission approval of renegotiated IPP agreements).

In each of the three petitions at issue here, PSNH has not directly renegotiated a new power purchase arrangement with the IPP in question. Rather, PSNH has entered into a proposed new power purchase arrangement with an intermediate entity which, in turn, has negotiated a contractual arrangement with the IPP that replaces the existing contract with PSNH. In each instance, the intermediate entity is an affiliate of Edison Mission Marketing and Trading, Inc. (EMMT). The proposed arrangement with regard to Hemphill is contingent upon AES Corporation acquiring the interests of

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Hemphill currently held by Thermo Ecotek Corporation.

According to the pre-filed testimony of David R. McHale, vice president and treasurer of PSNH and its parent company Northeast Utilities, the proposed agreement involving Bio-Energy requires no up-front payment by PSNH. However, Mr. McHale notes that the Whitefield and Hemphill proposals require PSNH to make up-front payments totaling approximately \$93 million, which PSNH proposes to securitize in the same manner employed with regard to the stranded costs previously securitized under the Restructuring Settlement Agreement.

Concurrent with its April 19 filing, PSNH submitted a motion, on its own behalf and that of EMMT, for confidential treatment of certain documents. The documents at issue are the agreements by which PSNH and EMMT (through its affiliates) entered into the arrangements for which Commission approval is sought.

The Commission issued an Order of Notice on June 5, 2001. Prior to that date, the Commission received intervention petitions from the New Hampshire Timber Owners Association (NHTOA) and BancBoston Leasing Services, Inc. (BancBoston). The BancBoston petition was limited to the

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Hemphill docket and averred that BancBoston is the owner of the Hemphill facility as well as the assignee of Hemphill's right, title and interest in the relevant interconnection agreement and rate order.

The Order of Notice scheduled a pre-hearing conference for June 15, 2001 and required parties seeking intervenor status to submit a petition to that effect by June 12, 2001. Prior to the pre-hearing conference, the Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers and the Commission received timely intervention petitions from EMMT, Bio-Energy Corporation (as to the Bio-Energy docket), the Governor's Office of Energy and Community Services (ECS), the Town of Whitefield (as to the Whitefield docket) and North Country Procurement (also as to the Whitefield docket, seeking "limited intervenor status"). BancBoston also filed a response to the motion for confidential, indicating no objection to the request on the condition that BancBoston be promptly provided with an un-redacted copy of all documents produced in the proceeding, upon the execution of a reasonable non-disclosure agreement with the Petitioners.

On June 15, 2001, PSNH and EMMT filed a joint

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objection to BancBoston's proposed intervention as well as to BancBoston's request for access to the documents covered by the proposed protective order. The pre-hearing conference took place as scheduled on June 15, with the Commission indicating that it would grant those intervention petitions to which there were no objections. BancBoston's proposed intervention, as well as the dispute over BancBoston's access to the key contractual documents in these cases, were the central focus of the pre-hearing conference. Following the pre-hearing conference, the parties and BancBoston met with Staff in a technical session.

Thereafter, on June 19, 2001, Staff submitted a proposed procedural schedule as agreed upon by the participants at the technical session. The proposed schedule called for the submission of additional testimony by PSNH on June 29, 2001, a round of data requests posed to PSNH and a settlement conference on August 1, 2001. Under this proposal, the merits hearing in these dockets would have taken place on September 5 and 6, 2001.

As contemplated by the proposed schedule, PSNH submitted pre-filed testimony on June 29, 2001 from Messrs. Stephen R. Hall and S.B. Wicker, Jr. on behalf of PSNH as well

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as pre-filed testimony from Mark Palanchian on behalf of EMMT. These documents were filed under seal, subject to the pending motion for confidential treatment, with redacted versions also provided.

On July 11, 2001, the Town of Whitefield submitted a motion to add Thermo Ecotek Corporation and AES Corporation as parties to the Whitefield docket. Neither of these companies has appeared in any of these dockets and the Town was not acting on behalf of the two corporations. NHTOA subsequently indicated its concurrence with this motion as to the Bio-Energy and Hemphill dockets.

The Town of Whitefield filed a motion to compel discovery responses in the Whitefield docket on July 20, 2001. At issue is the Town's request of PSNH that it furnish "copies of all communications between and among PSNH, Whitefield Power & Light Company, Thermo Ecotek Corporation, Bretton Woods Funding LLC, Edison Mission Marketing & Trading, Inc. and AES Corporation which relate to or refer to the proposed settlement and any related transactions." The Town averred that PSNH had interposed an objection to this data request and, accordingly, had not furnished a response to it.

On July 27, 2001, NHTOA similarly filed a motion to

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compel discovery responses. Four of NHTOA's discovery requests are at issue in the motion. According to NHTOA, PSNH objected to NHTOA's requests for itemizations of ratepayer savings and PSNH's estimate of the "blended market price" of energy on the ground that this information is confidential. In two other instances, NHTOA deems PSNH's responses to data requests to have provided an insufficient explanation of how PSNH has calculated its estimates of blended market price and of the effect of the buyout on certain statutory criteria set forth in RSA 362-A:8, II(b).

On July 31, 2001, Staff requested that the proposed procedural schedule be suspended until such time as the Commission rules on the threshold issues raised at the pre-hearing conference. The following day, Staff indicated that it had obtained the concurrence of PSNH, EMMT, the Town of Whitefield, NHTOA, ECS and OCA with regard to its request.

PSNH and EMMT submitted joint objections to the pending discovery motions on August 1 and 2, 2001. On August 2, 2001, the Commission advised the parties by secretarial letter that it would grant Staff's request for a stay in the procedural schedule. PSNH submitted the pre-filed testimony of David R. McHale on August 3, 2001.

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Finally, on August 20, 2001, PSNH and EMMT advised the Commission in writing that they were withdrawing their objections to BancBoston's intervention and its request for access to certain documents at issue in the pending motion for confidential treatment.

II. PETITIONS TO INTERVENE

Inasmuch as the previously pending objections to BancBoston's intervention in this proceeding have been withdrawn, and given the lack of objections to the other intervention requests, all of the pending intervention requests are granted. Because North Country Procurement has not specified in its request for "limited" intervention whether it wishes to participate as a full party to the Whitefield proceeding, we will assume it wishes to retain full rights as an intervenor unless it advises us to the contrary.

III. PRELIMINARY POSITION OF THE PARTIES AND STAFF²

A. Public Service Company of New Hampshire

PSNH stated that it was required under PURPA and LEEPA to purchase energy from qualifying facilities but that, over time, these contracts have proven uneconomic. According to PSNH, the power plants are responsible for approximately \$100 million annually in additional stranded costs, that the Legislature has attempted to address stranded costs and that

² As previously noted, much of the pre-hearing conference was taken up by the dispute over BancBoston's requested intervention and access to documents deemed confidential by PSNH and EMMT. Because PSNH and EMMT have withdrawn their objections with regard to these issues, we treat them as moot and have omitted them from the recitations of the parties' preliminary positions.

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the Legislature has expressed its opinion that these rates hurt the state's economy. PSNH believes the terms set forth in the proposed agreements are the best arrangements possible for PSNH to avoid high energy rates and continued ratepayer subsidization of these plants. PSNH further believes their subsequent filings will evidence compliance with RSA 362-A:4-c, IV (precluding Commission approval of IPP renegotiations "if, for any calendar year prior to 2006, the renegotiation would reduce the total number of kilowatt hours being purchased annually at predetermined prices from all listed facilities to less than 80 percent of the base listed-facility kilowatt hours for that calendar year").

PSNH indicated that the decision on whether to operate or shut down any of the three IPPs at issue in this docket would be made by the individual power plant but that PSNH would not expect the power plants to shut down if they are entering into new interconnection agreements. PSNH noted that the plants could sell power to users in other states and that the savings from any closure may offset any losses to the forestry communities.

B. Edison Mission Marketing and Trading, Inc.

EMMT expressed its support for the proposed

settlements and requested the Commission act expeditiously to approve them. EMMT indicated that it did not expect the plants to close after the agreements were in place but stressed that it could not speak for Whitefield, Hemphill, or Bio-Energy.

C. Bio Energy, Inc.

Bio-Energy indicated its support for the proposed agreements. It noted that the agreements before the Commission were reached voluntarily. Bio-Energy stated that it is not a "listed facility" and therefore will not impact the 80 percent threshold in RSA 362-A:4-c, IV.

D. New Hampshire Timber Owners Association

The NHTOA declined to take a position until it has additional information concerning the proposed settlement agreements. The Association urged consideration of local economic impacts and asked if the savings would exceed costs to the local communities.

E. Governor's Office of Energy and Community Services

ECS expressed its concern about economic and environmental issues as well as the continued use of fuels indigenous to New Hampshire.

F. North Country Procurement, Inc.

North Country Procurement urged the Commission to look beyond the bottom line and consider the negative impacts upon the state's forests due to reduced timber stand improvements and reductions in harvesting. North Country Procurement noted that an IPP in Alexandria has been closed the five years since it renegotiated its agreement with the purchasing utility.

G. Office of Consumer Advocate

OCA expressed its preliminary support for the petitions but reserved its full endorsement of the agreements until it has had a chance to review the benefits to ratepayers. OCA saw no benefit to saving uneconomic power plants through ratepayer subsidies.

H. Town of Whitefield

The Town of Whitefield stated that the proposed agreement in the Whitefield docket and any subsequent shutdown of the power plant in Whitefield would not be in the best interest of the town. According to the Town, the plant's employees, wood chip suppliers, loggers, town taxpayers and even ratepayers would be adversely affected. The Town further argued that future tax revenues for the town are being taken

away by this proceeding.

I. BancBoston Leasing Services, Inc.

BancBoston noted that Hemphill Power & Light leases the Hemphill facility from BancBoston, with the basic lease term expiring on March 1, 2003. At that point, according to BancBoston, Hemphill has the option of either purchasing the facility or leasing it for up to an additional three years. BancBoston contended that it is affected by the agreement between PSNH and EMMT with regard to Hemphill because, after March 1, 2003, BancBoston has a right to assume the contractual rights and obligations in the remaining term of the Hemphill-PSNH Interconnection Agreement, which terminates in 2006. BancBoston stated that it gained this right in an assignment agreement with Hemphill, dated September 9, 1988. In the assignment agreement, according to BancBoston, Hemphill also assigned to BancBoston its right, title and interest in the Hemphill Rate Order (Order No. 17,524) the Commission approved on April 2, 1985. BancBoston also noted the terms of the Assignments, as well as the provisions included in the Participation Agreement, the Security Agreement and Assignment, and the Leasing Agreement require BancBoston's consent to any substitution for or addition to the

Interconnection Agreement. For this reason, according to BancBoston, the Hemphill filing is premature.

J. Staff

Commission Staff took no position on the proposed settlements but did express concern over compliance with RSA 362-A:4-c, IV and RSA 369-a:8, IV(b). Staff indicated that it was not opposed to consolidating the dockets but preferred Bio-Energy be kept as a separate docket due to the unique issues raised in that proceeding.

IV. MOTION FOR CONFIDENTIAL TREATMENT

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. See RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "and whether disclosure would constitute

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an invasion of privacy." *Id.* at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id.* at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive

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disadvantage for the petitioner." *Id.* at (c).

PSNH and EMMT request confidential treatment for the Execution Agreements and two accompanying exhibits that detail the restructuring of the existing power supply arrangements between PSNH and Hemphill Power and Light Company, Whitefield Power and Light Company, and Bio-Energy Corporation.

According to the motion, EMMT is in the business of structuring settlements and renegotiated power supply arrangements with independent power producers and regulated utilities. EMMT regards the contract structure and details of the arrangements as trade secrets "which required significant effort and cost to produce and would take significant effort and cost by [EMMT's competitors] to develop independently." N.H. Code Admin. Rule Puc 204.06 (c)(1)a. PSNH and EMMT assert that disclosure of the financial information in these documents would have severe adverse consequences to EMMT.

PSNH further argues negotiations are ongoing with other IPPs and that public disclosure of the detailed structure of the renegotiated arrangements with Hemphill, Whitefield, and Bio-Energy would put PSNH at a disadvantage in negotiations with the remaining unsettled IPP's because those parties could discern how far PSNH will compromise to reach

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settlement.

No parties in the proceeding objected to the Motion for Protective Order. The OCA and BancBoston offered their assent to the motion for protective order on the condition they be provided access to the confidential information. We will assume that, because PSNH and EMMT have withdrawn their objection to BancBoston's request for intervention and document access, PSNH, EMMT and BancBoston are also in agreement with regard to the extent to which the parties will have access to any documents that may be accorded confidential treatment under the pending motion.

We note that the public has a significant interest in disclosure of the documents in question - which relate directly to the level of public confidence that the process of determining and allocating a just and reasonable share of savings produced by renegotiated power purchase agreements, pursuant to RSA 369-B, is conducted fairly and rigorously. Nevertheless, the positions of PSNH and EMMT are persuasive. Public disclosure of these documents would create a substantial likelihood of competitive harm to both companies - harm that could, with regard to PSNH, negatively impact ratepayers by reducing stranded cost offsets in future IPP

renegotiations. In these circumstances, the companies' interest in non-disclosure clearly outweighs the public's interest in obtaining access to the documents.

V. MOTION FOR ADDITION OF ADDITIONAL PARTIES

The Town of Whitefield asks the Commission to "add as parties" to the Whitefield docket Thermo Ecotek Corporation and AES Corporation, neither of which have appeared or otherwise requested leave to participate in the proceeding. According to the Town, (1) it believes that Whitefield Power and Light Company is a wholly owned subsidiary of Thermo Ecotek, (2) AES Corporation has entered into an agreement to acquire Whitefield Power & Light, (3) whether the facility will ultimately be closed is germane to the Commission's required inquiry under RSA 362-A:8, II(b) (requiring Commission to take into account economic impacts, community impacts, effects on energy security, environmental and health effects as well as rate impacts in making decisions affecting IPPs), (4) neither Thermo Ecotek nor AES appeared at the pre-hearing conference to advise concerning the possible closure of the facility, and, (5) therefore, only by "making Thermo Ecotek Corporation and AES Corporation parties to this docket can the Commission obtain information concerning the closure

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of the facility which is essential to its inquiry" under RSA 362-A:8, II(b). NHTOA indicates that the two companies should be added as parties to Docket No. DE 01-091 (the Hemphill docket) for the same reasons.

We agree with the Town of Whitefield and the NHTOA that the question of whether the proposed agreements would result in the closure of the Whitefield or Hemphill plants is a factor we must consider. Nevertheless, we have concluded that it is appropriate to deny the pending motions to add Thermo Ecotek and AES as parties.

Neither our rules nor the Administrative Procedures Act contemplate the addition of a party to proceedings before the Commission other than upon that party's explicit request. While our enabling statutes vest us with the power to subpoena witnesses, see RSA 365:10, this is not a case in which any relief we might order would be incomplete or insufficient absent the participation of the allegedly missing parties. Rather, the problem raised by the Town of Whitefield and NHTOA is fundamentally an evidentiary one - i.e., whether the record will be sufficient for us to make the required determinations under RSA 362-A:8, II(b). In that regard, our view is that

PSNH and EMMT, as the petitioners in these dockets, carry the ultimate burden of demonstrating that the proposed agreements merit our approval under the applicable statutes. Thus, assuming without deciding that a likely or even a possible closure of one of the plants would merit our rejection of the relevant agreement, it is appropriate for us to rely on the petitioners to develop the necessary record.

VI. MOTIONS TO COMPEL

We have reviewed the papers submitted in connection with the pending motions to compel discovery and have determined that they are insufficient to permit us to resolve the discovery disputes described therein without a hearing. Accordingly, pursuant to RSA 363:17 we will designate a hearings examiner to hear the parties, report the facts and make a recommendation to the Commission with regard to these discovery motions. We instruct the Executive Director to advise the parties as to a hearing date, to be scheduled as expeditiously as possible.

VII. PROCEDURAL SCHEDULE

In light of the foregoing, we believe that it is appropriate to move these cases forward to resolution in as efficient a manner as possible. Continuing to treat these

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dockets as consolidated for purposes of hearing is consistent with this objective. Although, as has been pointed out, the issues in the three dockets are not identical, there is sufficient commonality to make consolidated hearings an efficient use of the resources of the parties and the Commission. Likewise, we believe it is appropriate to move forward with the Whitefield docket notwithstanding the possibility that BancBoston may have a contractual right to prevent the relevant agreements from ultimately being implemented. It is not unprecedented for us to consider proposals that some outside entity, be it another government agency or a private entity, has an ability to veto or prevent.

In considering what procedural schedule to implement, we note that prior to Staff's July 31 request to suspend the procedural schedule the parties and Staff had been moving forward on the assumption that the previously proposed schedule would be implemented. Thus, there has already been a full round of discovery provided by PSNH that need not be repeated, apart from the resolution of issues raised by the motions to compel.

Accordingly, we will implement the following schedule to govern the proceedings in the remainder of the

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three subject dockets:

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| Settlement Conference | Sept. 12, 2001 |
| Testimony from Intervenors and Staff | Sept. 28, 2001 |
| Data requests to Intervenors and Staff | Oct. 5, 2001 |
| Responses to 9/28 data requests | Oct. 12, 2001 |
| Merits hearing | Oct. 22-23, 2001 |

As already noted, delays in these proceeding have potential impacts on ratepayers as well as on several parties.

Therefore, we anticipate the cooperation of the parties in moving these cases toward decision as expeditiously as possible.

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule described above is APPROVED; and it is

FURTHER ORDERED, that the motions of the Town of Whitefield and the New Hampshire Timber Owners Association to add additional parties in Docket Nos. 01-089 and 01-091 are DENIED;

FURTHER ORDERED, that the joint motion for confidential treatment of the Execution Agreements and attached exhibits is GRANTED; and it is

FURTHER ORDERED, that, with regard to the decision

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on the joint motion for confidential treatment, this Order is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any party or any other member of the public to reconsider this Order in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of August, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary