DE 00-110

Connecticut Valley Electric Company

Petition for an Order for Refunds Under Section 210 of the Public Utility Regulatory Policy Act (PURPA)

Order Establishing Mediation

O R D E R N O. 24,006

July 5, 2002

On March 29, 2002, the Commission issued Order No. 23,939, resolving longstanding issues concerning the purchase by Connecticut Valley Electric Company of the power produced by Wheelabrator Claremont Company. The Commission determined that, consistent with principles established in Docket No. DR 89-148, CVEC was not required to purchase, at long term rates approved in 1983, output in excess of 3.6 MW from the Wheelabrator facility. The Commission also noted that a hearing was necessary to determine "whether, and if so to what extent, either or both of CVEC and Wheelabrator have exceeded the authority granted under Order No. 16,332" concerning long-term power sales.

Order No. 23,939 also scheduled a status conference to be held May 16, 2002 for the purpose of establishing a schedule for the conduct of a full evidentiary hearing to develop the record necessary to determine the relief due CVEC ratepayers. However, prior that that date, the Commission received timely motions for rehearing in the above-captioned

matter pursuant to RSA 541:3 from the New Hampshire-Vermont Solid Waste Project, WM/Wheelabrator Claremont Company, L.P. (Wheelabrator) and Connecticut Valley Electric Company (CVEC). These motions presented a variety of grounds in support of the view that the Commission should reconsider Order No. 23,939.

Certain other filings were received on April 29 in this docket. Specifically, intervenors Thomas E. Donovan, Jr., Judith Moriarity and Margaret North (Pro Se intervenors) jointly submitted a letter captioned "Motion for Further Consideration and Relief," urging the Commission not to reconsider Order No. 23,939, to conduct a complete investigation of the matters discussed in that Order, to prevent Wheelabrator from passing on any financial liability in this case to the communities that use the Wheelabrator facility for garbage disposal, to conduct a public hearing in Claremont and to take certain other actions consistent with their position in this docket. Another intervenor, Working on Waste, submitted a pleading urging the Commission not to reconsider its determinations in the March 29 Order.

On April 29, 2002, CVEC submitted a Stipulation of Settlement entered into by CVEC, Wheelabrator, the Office of Consumer Advocate (OCA) and the Staff of the Commission. In

essence, the Stipulation of Settlement provides for compensation to CVEC ratepayers in the amount of $835,000, to be paid between July 2002 and March 2007, a continuation of payments for all sales (in excess of 3.6 MW) from the plant at the contractual long-term avoided cost rate, the Commission's vacation of Order No. 23,939 and a determination that all issues arising out of the current CVEC-Wheelabrator power purchase agreement (which expires in March 2007) have been finally resolved. Working on Waste and the Pro Se Intervenors oppose the Stipulation.

A hearing on the Stipulation was held on June 7, 2002.

The focus of the hearing was to determine whether the Stipulation is in the public interest. The crux of CVEC’s argument in support of the Stipulation appears to be that there are signficant legal obstacles to the Commission’s order, and therefore, a resolution that provides some rate relief is reasonable.

Working on Waste and the Pro Se Intervenors take three related positions in opposition to the Stipulation. First, they argue that sufficient information has not been provided to accurately calculate the overcharges and they ask for additional data. Second, they assert that they were

excluded from the settlement process. Finally, given the single alternative of an $835,000 settlement versus the possibility of recovering $8 million to $10 million through litigation, they reject the settlement.

The reference to an overcharge of roughly $8 million to $10 million drew most attention during the hearing, and is derived by assuming that the overcharge period began at the time of commercial operation of the Wheelabrator plant and that sales in excess of 3.6 MW since that time should only have been credited at short term avoided cost rates. During the hearing, the Commission sought information that would allow a numerical comparison of the proposed settlement amount to a variety of outcomes under different theories of recovery. The Commission directed CVEC to provide this information in response to several record requests.

The CVEC and Wheelabrator motions for rehearing, which were filed along with the Stipulation for consideration in case the Stipulation was rejected, assert that no recovery is warranted, because of the application of one or more legal theories to the Commission's March 29, 2002 analysis. Assuming that some refunds were warranted, despite the CVEC and Wheelabrator arguments, calculating the conceivable overcharge outcomes would depend on two variables: the length

of time of historical overcharge, and the difference between rates under the contract and rates that should have been applied in various periods. With respect to the length of a possible overcharge period, there are at least five possible beginning dates to employ: (1) commercial operation, or 1987; (2) effective date of the so-called "Creep Order" in DR 89-148, or July 23, 1991; (3) the earliest setting of temporary as opposed to permanent rates for CVEC's fuel and purchased power rates, or February, 1998; (4) the application of a two-year "statute of limitations," pursuant to RSA 365:29, which under one scenario would extend back to March 29, 2000; and (5) the date of our March 29, 2002 Order, resulting in no retroactive payment but no entitlement to the 1984 contract rate going forward. As for determining the magnitude of the rate differential, there are two possible choices set forth in DR 89-148, based on the relevant short-term or long-term avoided cost rates looking forward at various points in time.

Each of the possible starting dates relates to a different legal theory as to how far back, if at all, the Commission may permissibly require refunds. At this point in the proceeding we have not made a determination regarding the remediation of past overcharges. We do have concerns, however, about approving a settlement that allows prospective

purchases at 1983 long-term avoided costs for output in excess of 3.6 MW.

In any event, Exhibit 6, submitted by CVEC on June 20, 2002, in response to the outstanding record request, sets forth a fuller range of the conceivable litigation outcomes, against which to compare the Stipulation, than was available as of the hearing on the Stipulation.

We note, however, that the non-settling parties did not have this information available to them either before or during the hearing, and have not had an opportunity to consider their positions in light of this record request response. Therefore, despite the historic antagonism between various parties to this dispute, we believe further discussions, in light of the new information brought out by the hearing process and motions for rehearing, and with the participation of all the parties, may at least narrow the differences between parties' positions and lead to greater understanding of issues in the case. It is not inconceivable that all of the parties could reach a mutually agreeable settlement of the case.

Before we rule on this Stipulation, we believe all of the parties should have all of the information, and sit down together to see what further common ground can be

identified. In order to make the process as effective as possible, we will appoint an independent mediator whose responsibilities will include assuring that the relevant legal theories and numerical bases for determining potential overcharges have been explored and that the various legal theories regarding retroactive versus prospective rate changes have been explored as well. As part of this responsibility, the mediator will be authorized to conduct such additional discovery as deemed reasonable and necessary. We are currently in the process of selecting the mediator and will notify the parties as soon as the selection is made, after which we will establish a specified period for mediation.

Based upon the foregoing, it is hereby

ORDERED, that a mediator shall be appointed to conduct further discussions with all parties as set out above; and it is

FURTHER ORDERED, that once appointed, the mediator shall convene a meeting of all parties and establish a schedule for such additional meetings as necessary, and, upon completion of such meetings, prepare a final report and recommendation to the Commission.

By order of the Public Utilities Commission of New Hampshire this fifth day of July, 2002.

Thomas B. Getz	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary