

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 on Motion for Clarification
And Designating Mediator**

O R D E R N O. 24,068

October 11, 2002

I. BACKGROUND

On August 1, 2002, WM/Wheelabrator Claremont Company, L.P. (Wheelabrator) filed a motion for clarification (Motion) of the New Hampshire Public Utility Commission's (Commission) Order No. 24,006 (July 5, 2002). The motion states that the clarification is sought because the scope of the mediator's charge, as discussed at pages 6-7 of the Order, is too broad. In addition, Wheelabrator alleges that the function of the mediator, and the confidentiality, nature, and timing of further settlement discussions are unclear. Wheelabrator alleges that unless the Order is clarified as requested, the mediation process has the potential to violate its federal rights.

II. POSITIONS OF THE PARTIES

Wheelabrator's first request is that the scope of mediation be clearly limited to matters within the Commission's jurisdiction. The company states that it is concerned that the

mediator may inquire into issues relating to how any alleged overcharges should be allocated between CVEC and Wheelabrator, and the two companies "conduct" after issuance of Order No. 16,232 (*New Hampshire /Vermont Solid Waste Project*, 58 NHPUC 96(1983)). Wheelabrator asserts that any inquiry into these matters would go to the very heart of the areas preempted by federal law. Wheelabrator is also concerned with the scope of authority granted to the mediator to conduct discovery, and requests that this be limited to a determination of various possible aggregate overcharge amounts.

Wheelabrator's second request is with respect to the mediator's role in general. Wheelabrator interprets Order No. 24,006, along with certain statements in the RFP as providing for functions by the mediator that go well beyond the common understanding of mediation and are more akin to those of a special master or presiding officer, including conducting discovery relating to relevant legal theories of potential overcharges and preparation of a final report and recommendation.

Third, Wheelabrator requests that the Commission clarify that all discussions, information and discovery conducted under the auspices of the mediator be treated as confidential and used solely for the purposes of these

settlement procedures.

Finally, Wheelabrator requests that the mediation last no more than 60 days following appointment of the mediator, arguing that a longer process will diminish the benefit of the current contested stipulation to Wheelabrator and that the validity of the stipulation may be jeopardized as well.

On August 9, 2002, Working on Waste (WOW) filed an Objection to Motion for Clarification. WOW urges rejection of the Motion for Clarification on the grounds that it inaccurately characterizes the role of the mediator, seeks to impose restrictive ground rules, ignores applicable law and misstates the relative status of various parties. On August 16, 2002, the Citizen Intervenors similarly filed a "Motion for Consideration and Relief, Objection to Wheelabrator's Request for Clarification of Mediation Order" (Objection).

As an initial matter, we note that the Citizen Intervenors assert that they were served a copy of Wheelabrator's Motion several days late, and request that there be no objections to the timeliness of their response. No objection has been filed, and the Commission will treat the Citizen Intervenors' motion as timely filed under our rules.

Citizen Intervenors object to Wheelabrator's Motion and request that it be denied. Instead, Citizen Intervenors request a full investigation of this matter with a mediator who is charged with full discovery authority as necessary, as opposed to a facilitator working to develop a consensus. Citizen Intervenors also request that the Commission: clarify the standards that are to be applied when dealing with material claimed to be privileged and confidential in the context of settlement negotiations; provide clarification as to Wheelabrator's claim regarding the threat to its rights under federal law; make it clear that all parties to this proceeding have equal standing; deny Wheelabrator's attempt to shut down further discovery, and instruct it to produce any and all information necessary to the mediation process.

III. COMMISSION ANALYSIS

As a general matter, Wheelabrator misapprehends Order No. 24,006. Our intent was and is that a mediation, and not an arbitration, be conducted. In the hope of avoiding further, unnecessary confusion, we respond to Wheelabrator's Motion and the objections as follows:

Scope of mediation and role of mediator: As we stated in Order No. 24,006, before the Commission rules on the Stipulation submitted on April 29, 2002, on behalf of

Connecticut Valley Electric Company (CVEC), Wheelabrator, the Office of Consumer Advocate (OCA) and the Staff of the Commission, we believe that all the parties should have an equal opportunity with comparable access to relevant facts and informed understanding of legal arguments, through mediation, to sit down together to determine whether further common ground may be identified. By selecting mediation, we anticipate a process consistent with that described in the definition of mediation of the American Arbitration Association referenced on page 5 of Wheelabrator's Motion: "[A] process by which a neutral assists the parties in reaching their own settlement but does not have authority to make a binding decision." As for our reference to discovery, it was intended primarily to highlight that there may be additional information that should be made available to all the parties in order for them to accurately calculate and fairly evaluate various overcharge scenarios. The mediator is not conducting an independent investigation but should be assuring, where necessary, the exchange of relevant information.

Confidentiality: The mediation, as a settlement process, shall be conducted under strict confidentiality. Further, all discussions and materials produced therein shall

not be used in this or any other proceeding. This includes the results of any discovery.

Jurisdiction concerns: During the course of the mediation, the mediator may find it necessary and helpful to the parties to discuss the boundaries of federal and state jurisdiction under the Public Utility Regulatory Policy Act, 16 U.S.C. § 823a, *et seq.* We do not view such voluntary settlement discussions, conducted under the auspices of the mediator, as calling into question the jurisdiction of the Commission. Similarly, a brief historical review of the project may also assist the parties in understanding the proper scope and limits of the questions before the Commission, and therefore encourage all parties to participate. It is, of course, not our intention that the mediator seek to resolve issues beyond our jurisdiction.

Deadline: The Commission anticipates that this process should be able to be completed by mid-December, and the mediator is to file his report on the result of the mediation by December 20, 2002.

IV. DESIGNATION OF MEDIATOR

Since the issuance of Order No. 24,006, the Commission released a Request for Proposals for mediation services on July 11, 2002. Responsive proposals were submitted to the Commission

by July 25, 2002. On August 15, 2002, the Commission solicited confidential comments from the parties on four finalists. After the filing of comments by the parties, which were due on August 26, 2002, we conducted a review process and selected Alan Mandl, Esq. as the mediator. Pursuant to State of New Hampshire contract procedures, Mr. Mandl executed a contract on October 4, 2002.

We direct Mr. Mandl to contact the parties as soon as practicable to begin the mediation. We also point out that our expectation is that the mediator's report will recount the process and, if applicable, describe the mediated result and include a recommendation as to further Commission action. In the event a mediated result is not achieved, we are not requiring a proposed resolution of the underlying disputes, as that would more nearly constitute an arbitration rather than a mediation. We do, however, expect in the case of such an outcome that the mediator will provide a summary of events and a recommendation as to further Commission action.

Based upon the foregoing, it is hereby

ORDERED, that Wheelabrator's Motion for Clarification is GRANTED IN PART and DENIED IN PART consistent with the discussion above.

By order of the Public Utilities Commission of New
Hampshire this eleventh day of October, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary