DE 05-153

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Clarification and Interpretation of Commission Orders

Order Approving Settlement Agreement

O R D E R N O. 24,679

October 16, 2006

I. PROCEDURAL HISTORY

This proceeding before the New Hampshire Public Utilities Commission (Commission) involves a dispute as to the upcoming expiration dates of 20-year rate orders under which Public Service Company of New Hampshire (PSNH) has been purchasing power from two independently owned wood-burning generation facilities in the PSNH service territory pursuant to the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. §824a-3 *et seq*. and its state-law analog, the Limited Electrical Energy Producers Act (LEEPA), RSA 362-A. The two power producers, each a "qualifying small power production facility" (QF) within the meaning of PURPA and LEEPA and thus entitled to sell power to PSNH at rates based on the "utility's avoided cost," *see* RSA 362-A:4,[1] which as it turns out are higher-than-market rates in certain circumstances, are the jointly appearing Pinetree Power Tamworth, Inc. (Pinetree) and Bridgewater Power Company LP (Bridgewater).

In *Bridgewater Steam Power Co*., 70 NH PUC 509 (1985) (Order No. 17,645), and *Pinetree Power Tamworth, Inc*., 71 NH PUC 123 (1986) (Order No. 18,112), the Commission exercised its responsibility under PURPA and LEEPA and entered 20-year rate orders as to each power producer, setting the rates based on then-current estimates of the utility's long-term avoided cost of producing the power itself. Neither rate order specifies an expiration date.

[1] See also 16 U.S.C. § 824a-3(b) and 18 C.F.R. § 292.101(b)(6) and 18 C.F.R. § 292.304(b)(2).

PSNH filed a petition for a declaratory order on September 19, 2005, seeking a determination as to what expiration date applies to each rate order. At the time PSNH filed its petition, Pinetree and Bridgewater had instituted civil proceedings in the Northern Division of Hillsborough County Superior Court, Docket No. 05-E-0341, for the purpose of causing the same dispute as to the rate order expiration dates to be resolved before that forum.

According to the Superior Court petition, Pinetree began selling electricity to PSNH pursuant to the terms of the 1986 rate order on April 29, 1988[2] and is thus entitled to a declaration that it may continue such sales through April 28, 2008. Relying principally on the terms of the petition with which Pinetree sought in the initial rate order, PSNH asks the Commission to declare that the long-term rates approved by the Commission for Pinetree in 1986 terminate on August 31, 2007. Similarly, Bridgewater alleged in Superior Court that it began selling electricity pursuant to the 1985 rate order on August 6, 1987 and is entitled to continue doing so through August 5, 2007. According to PSNH, the expiration date for Bridgewater is December 31, 2006. Thus framed, the dispute is a straightforward one: Do the rates specified in each 20-year rate order expire 20 years after each plant began furnishing power to PSNH pursuant to the order or do the rates expire on earlier dates referenced in the facility's formal request for such a rate order?

The dispute is of financial significance because, with the expiration of their respective rate orders, the currently applicable version of PURPA exposes Pinetree and Bridgewater to the

[2] The Superior Court petition appears in the record as Attachment A to the petition with which PSNH commenced proceedings here. Although Pinetree and Bridgewater alleged therein that Pinetree began selling power to PSNH pursuant to the rate order on April 29, 1988, it appears this allegation was slightly in error. According to the settlement agreement subsequently entered into by Pinetree, Bridgewater and Staff, Pinetree sought a downward adjustment of its long term rates on April 6, 1988 to reflect lower loss factors resulting from the interconnection of the Pinetree facility at transmission voltage (i.e., 115 kV) rather than at primary voltage, a change the Commission approved on April 11, 1988 in *Pinetree Power-Tamworth, Inc*., 73 NH PUC 165 (1988) (Order No. 19,059). Settlement Agreement at 4-5. Pinetree began selling power under the amended rate order the following day, on April 12, 1988. *Id*. at 5.

spot price of wholesale electricity. Generally, spot prices are significantly less favorable than those to which Pinetree and Bridgewater are entitled under their respective rate orders. In recently filed legal memoranda, PSNH and OCA have estimated the amount in controversy at $19 million.

The Commission issued an order of notice on September 2, 2005, scheduling a prehearing conference for October 7, 2005. The Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers pursuant to RSA 363:28. On October 4, 2005, Pinetree and Bridgewater entered a joint appearance and moved to stay the proceeding in light of the pendency of the Superior Court litigation. Wheelabrator Concord Company LP (Wheelabrator) , another QF in the PSNH service territory, filed a request for intervenor status.

The prehearing conference took place as scheduled, conducted by the Commission's general counsel, with the issues limited to the pending intervention requests and motion to stay the proceedings. By secretarial letter dated October 20, 2005, the Commission granted the pending intervention requests and temporarily suspended the proceeding pending further order of the Superior Court. On the same date, the Superior Court entered an order (1) denying a request by Pinetree and Bridgewater to enjoin PSNH from proceeding before the Commission, and (2) granting PSNH's request to stay the Superior Court proceedings pending a decision by the Commission. Staff advised the Commission by letter of November 28, 2005 that it had been unable to cause the parties to reach agreement on how to proceed in light of the Superior Court's decision, which Pinetree and Bridgewater had sought to appeal on an interlocutory basis.[3]

[3] During November 2005, there were also certain proceedings related to the question of which commissioners would participate in the docket. Pinetree and Bridgewater moved on November 2, 2006 to disqualify Chairman Getz and Commissioner Harrington from participating. By letter of November 7, 2005, Chairman Getz withdrew from the proceeding in light of his having acted as counsel to PSNH between 1993 and 1996 in connection with the Pinetree and Bridgewater rate orders. Commissioner Harrington's term of office ended in December 2005 without his having ruled on the request for his disqualification.

By secretarial letter of January 17, 2006, the Commission scheduled a status conference in the case for February 9, 2006. On February 7, 2006, the New Hampshire Supreme Court declined to hear the interlocutory appeal submitted by Pinetree and Bridgewater of the Superior Court's decision to stay the civil litigation and permit PSNH to proceed before the Commission. The status conference took place as scheduled; the Commission asked the parties and Staff to confer about settlement possibilities. According to Staff's February 13, 2006 report of the discussions that followed, there was agreement to explore settlement. The Commission therefore adopted Staff's recommendation to schedule a meeting of the parties and Staff for March 14, 2006. At the request of Staff, this meeting was ultimately postponed to March 16 and 17, 2006.

On June 12, 2006, Staff submitted a letter indicating that extensive discussions of settlement possibilities had taken place but that ultimately a settlement involving all of the actively participating parties appeared to be beyond reach. Accordingly, Staff attached a settlement agreement into which it had entered with Pinetree and Bridgewater but not PSNH or OCA.[4] Staff noted that the parties were likewise not in agreement with respect to how the Commission should proceed thereafter and, accordingly, recommended the scheduling of a prehearing conference.

As the result of further discussions with the parties, Staff submitted a letter on July 3, 2006 noting that the parties and Staff had agreed that an evidentiary hearing would not be necessary in order for the Commission to consider the settlement agreement. The July 3 letter thus proposed a briefing schedule, which the Commission approved on July 11. Pursuant to that schedule, the Commission received timely briefs in opposition to the settlement from PSNH and OCA (on August 1 and July 31, 2006, respectively), followed by a brief in support of the

[4] Although the preamble to the settlement identifies the signatories as PSNH, Staff, OCA, Pinetree and Bridgewater, PSNH and OCA did not sign the agreement and have actively opposed it since Staff submitted the document.

settlement from Pinetree and Bridgewater on August 22, 2006, followed by reply briefs from PSNH and OCA on September 5, 2006.

On September 14, 2006, Pinetree and Bridgewater filed a joint motion for leave to file a pleading to make a substantive response to the arguments raised in the reply briefs of PSNH and OCA. According to Pinetree and Bridgewater, PSNH and OCA reply filings both contained arguments the two parties could have and should have made in their initial briefs. Pinetree and Bridgewater attached their proposed responsive pleading to their motion. In support of the appropriateness of such an additional round of substantive argument, Pinetree and Bridgewater invoked N.H. Code Admin. Rules Puc 203.32(a) (providing that, upon request of a party, "the commission shall allow parties to submit briefs at any point in an adjudicative proceeding if the commission determines that such briefing would assist the commission in its determination of the issues presented").

PSNH and OCA each filed objections to the Pinetree and Bridgewater motion. PSNH asserted that Pinetree and Bridgewater were seeking to avoid the effects of a procedural schedule (i.e., one involving sequential rather than simultaneous briefing) that Pinetree and Bridgewater had themselves proposed. In the alternative, PSNH proposed that the Commission consider the additional Pinetree-Bridgewater substantive pleading and then also accept a "Surresponse Memorandum" appended by PSNH to its objection. OCA objected to the request of Pinetree and Bridgewater by complaining that their request itself contains additional substantive argument and by taking the position that additional written argument would not "assist the Commission" in the manner contemplated by Puc 203.32(a). Unlike PSNH, OCA did not submit its own additional pleading but reserved the right to submit such a paper should the Commission agree to consider the additional substantive arguments of Pinetree and Bridgewater.

II. PINETREE-BRIDGEWATER MOTION FOR ADDITIONAL BRIEFING

Before laying out the positions of the parties, it is necessary for us to define the extent of those positions by ruling on the request of Pinetree and Bridgewater for an opportunity to respond to the PSNH and OCA filings of September 5, 2006. We deny the motion and, accordingly, do not consider the substantive arguments offered by Pinetree and Bridgewater in their September 14, 2005 pleading; nor the arguments offered by PSNH in their "Surresponse Memorandum." Even assuming that a plausible purpose of Puc 203.32(a) is to invite requests for additional briefing beyond written submissions already authorized, we agree with OCA that another round of argument would not assist the Commission in the manner contemplated by the rule. We further agree with PSNH that the parties, having agreed to a specific briefing schedule that adopted a particular sequence of written argumentation, cannot now be heard on the question of whether it was truly fair to grant PSNH and OCA the last word.

We thus turn to the substantive positions of the parties.

III. SUMMARY OF THE SETTLEMENT AGREEMENT

The settlement, if approved, would require PSNH to continue to purchase power under the Pinetree rate order through March 31, 2008, as opposed to the April 28, 2008 expiration date originally alleged by Pinetree and Bridgewater in Superior court. The rate order expiration date for Bridgewater would be August 5, 2007, which coincides with the expiration date sought in the civil litigation. The settlement would also involve a determination that PSNH is entitled to recover the cost of purchasing this power from customers. Finally, upon the issuance of a final and unappealable order of the Commission approving the settlement, Pinetree and Bridgewater agreed to the dismissal with prejudice of its Superior Court petition.

As has been stressed by PSNH, the settlement agreement explicitly notes that the Pinetree rate petition referenced a term of "twenty years commencing September 1, 1987 and ending with the year 2007" and the Bridgewater petition similarly referenced a term of "twenty years commencing after September 1, 1986 and ending with the year 2006." Settlement at 4, 5. However, the settlement goes on to point out that both petitions also included three long-term rate worksheets, the format of which had been specified by the Commission, each presenting a "net present value calculation for a 20-year-long rate" with a 1988 start date for Pinetree and a 1987 start date for Bridgewater. *Id*. at 5, 6.

The settlement then goes on to invoke language from a generic order of the Commission in Docket No. DE 83-62, *Small Energy Producers and Cogenerators*, 69 NH PUC 352 (1984) (1984 Generic Order). The Commission opened Docket No. DE 83-62 for the purpose of "updating and establishing the short term and long term rates to be paid by Public Service Company of New Hampshire . . . to small power producers and cogenerators [under PURPA and LEEPA]. . . *and the methodologies to be employed in deriving such rates*." *Id*. at 353 (emphasis added). The 1984 Generic Order contained a table that provided a summary of Commission-approved avoided costs, relevant to the calculation of long-term PURPA/LEEPA rates, for the years 1984 through 2015. *See id*. at 364-65.[5] The data was relevant because, under PURPA and LEEPA as was then applicable, QFs were entitled to sell PSNH power at PSNH's avoided cost of producing the power itself.

As noted in the settlement, following the table in the 1984 Generic Order was language indicating that the Commission would allow PSNH and QFs to enter into long-term purchase power obligations of between 5 and 30 years, but that "[t]he initial year of the long-term rate

[5] Specifically, as to each year, the table included data for total loss-adjusted capacity costs on a dollars-per-kilowatt-year basis, followed on a cents-per-kilowatt-hour basis by data for on-peak hours, off-peak hours and all hours.

obligation may not be more than four years from the time of filing" of the petition for such a rate order. Settlement at 6, citing 69 NH PUC at 365. Power producers such as Pinetree and Bridgewater were allowed to select as their rates the values shown in the table, "levelized values for the years of their obligation, or some rate in between, so long as the cumulative net present values, discounted appropriately, [did] not exceed the values shown" in the table. *Id.* The Settlement then invokes this language from the 1984 Generic Order:

> For facilities on line before September 1, the year in which the facility first supplies power under the long-term rate is considered to be the initial year for rate calculations. For facilities on line after September 1, the following year will be considered the initial year. All facilities will receive annual rate changes (if any) of their elected rate schedule in the month of their anniversary date (the date on which the SPP [i.e., small power producer such as Pinetree or Bridgewater] supplied power under the long-term rate). Any SPP may elect the short term rate until September 1, to obtain rates using the following year as the initial year and an anniversary date commensurate with the start of the long-term rate.

Id.

The settlement next invokes a 1986 order of the Commission, *New England Alternate Fuels, Inc.,* 71 NH PUC 423 (1986). In this order, the Commission denied a rehearing motion and reaffirmed that a QF which had obtained a 20-year rate order to commence in 1986 could not defer initial delivery of electricity to 1988 and simply shorten the term of the rate order to 18 years.[6] According to the Settlement, the *New England Alternate Fuels* rehearing order make clear that a QF was not expected to be operational at the time it filed for approval of a long-term rate but, rather, that a QF simply (1) could not select a start date more than four years from the time of its formal request for a rate order and (2) was required to come on line by August 31 of the year of the facility's projected start date as recited in the petition. Settlement at 7. Thus,

[6] Employing an 18-year rate order that was based on avoided costs calculated in 1986, as opposed to simply obtaining a new 20-year rate order based on 1988 avoided cost calculations, would have been desirable to the applicant because oil prices were falling during the period and, with them, the Commission's calculation of long-term avoided costs.

according to this analysis, the problem was not the two-year delay itself but, rather, the applicant's failure to come on line by August 31 of the year of the facility's projected start date.

According to the settlement, the agreed upon expiration dates for the Pinetree and Bridgewater rate orders are logical extensions of the Commission's determinations in the 1984 Generic Order and *New England Alternate Fuels*. The settlement recites that Pinetree (1) received a 20-year rate using the Commission-approved avoided cost calculations based on a 1988 start date, (2) was therefore obliged to be operational by August 31, 1988, (3) met this deadline by first generating under its long-term rates on April 12, 1988, and (4) saw its rate change annually pursuant to the rate order 19 times on April 12 of each successive year. According to the settlement, this means that the "2007 rate year" referenced in its initial rate order petition is "a non-calendar year starting on April 12, 2007 and ending on April 11, 2008." Settlement at 7-8. As to Bridgewater, the settlement states that the facility received a 20-year rate using the Commission-approved avoided cost calculations based on a 1987 start date, (2) was therefore obliged to be operational by August 31, 1987, (3) met this deadline by first generating under its long-term rates on August 6, 1987 and (4) saw its rate change annually pursuant to the rate order 19 times on August 6 of each successive year. Thus, according to the Settlement, the "2006 rate year" referenced in Bridgewater's initial request for a rate order "is a non-calendar year starting on August 6, 2006 and ending on August 5, 2007."

In support of these conclusions, the settlement goes on to invoke subsequent proceedings before the Commission in Docket No. DE 95-022. The Commission's final decision in that proceeding, *Public Service Company of New Hampshire*, 83 NH PUC 278 (1998), involved the rejection of a proposed renegotiation of the Bridgewater long-term rate order as well as that of Pinetree and four other QFs. According to the settlement, the testimony offered by PSNH in

Docket No. DE 95-022 unambiguously indicated that PSNH understood the expiration dates of the two rate orders in question to be "later in time than the end dates upon which PSNH based its Petition in this case, but are substantially the same" as those adopted by the settlement here. Settlement at 9.

IV. POSITIONS OF THE PARTIES

A. Public Service Company of New Hampshire

Given that the two long-term rate orders in question are themselves silent on the applicable expiration dates, PSNH contends that the Commission must examine the underlying petitions themselves "to determine exactly what the Commission approved." PSNH Memorandum at 5. As noted, *supra*, the Pinetree petition referenced a term of 20 years "commencing September 1, 1987 and ending with the year 2007" and the Bridgewater petition similarly referenced a 20-year term "commencing after September 1, 1986 and ending with the year 2006." According to PSNH, the Commission should ascribe the plain and ordinary meaning of these words as used in the petitions and thereby conclude, without further inquiry, that the 20-year term ends for Pinetree "with the year 2006" – i.e., on December 31, 2006, and that the 20 years end for Bridgewater "with the year 2007" on the 20th anniversary of September 1, 1987. In the view of PSNH, any other result would cause the legally incorrect, unfair and unjust result of forcing PSNH customers "to pay an estimated $19,000,000 in additional above-market subsidies to these two plants." *Id*. at 6.

In the view of PSNH, relying on precedents established under the law of contracts by the New Hampshire Supreme Court, only if the Commission were to determine that the two petitions were ambiguous would any further inquiry be necessary. According to PSNH, the settlement in essence takes the position that the petitions are ambiguous and thus that reference to extrinsic

evidence is appropriate. Again relying on precedents arising out of contract law, PSNH takes the position that such extrinsic evidence is only admissible when it serves as an aid to interpretation or to clarify an ambiguity, as opposed to contradicting the unambiguous terms of a written agreement.

PSNH characterizes as "instructive" the fact that the two petitions do not contain identical wording even though they were filed within one year of each other. According to PSNH, "[o]ne petition requested a specific start date; the second, specified a not-later-than end date. Yet, despite the differences in what the Petitions requested 20+ years ago, today these two IPPs [independent power producers] argue that they both mean the same thing." *Id*. at 8.

Finally, PSNH draws the Commission's attention to the fact that each petition sought to protect the petitioner's interests in the event the facility came on line before its expected start date, but did not make any such provisions for delay. According to PSNH, the failure to make such provisions does not render either of these petitions ambiguous – and, in the absence of such ambiguity, the Commission should reject the approach to the dispute contained in the settlement.

B. Office of Consumer Advocate

OCA contends that the settlement constitutes an unlawful attempt to modify the two rate orders. Like PSNH, OCA takes the position that the applicable end dates are clear as the result of unambiguous language in the two petitions. According to OCA, although each petition provided for some flexibility as to the start date of the 20 years, neither provided that the end date would be subject to adjustment based on the actual start date.

It is further the position of OCA that neither the 1984 Generic Order nor *New England Alternative Fuels*, the two orders cited in the settlement, supports the end dates adopted by the settlement. As to the latter case, OCA draws the Commission's attention to a footnote in the

1986 order noting that "[n]o case has come before us involving an already constructed project whose commercial operation is a short period beyond the date specified in its rate order. Therefore, the Commission has not yet decided the continuing effectiveness of a rate order in such a circumstance." OCA Memorandum at 5, quoting *New England Alternate Fuels*, 71 NH PUC at 427 n.3. Pointing out that Pinetree began operating six months after its projected start date and Bridgewater likewise experienced a delay of seven months, OCA contends that this footnote language served as a warning to each QF that these delays placed their already-approved rate order, financially advantageous as Commission estimates of avoided costs declined, in jeopardy. Thus, according to OCA, Pinetree and Bridgewater "chose to let sleeping dogs lie and did not request any adjustment of their end dates after their operation dates were delayed." OCA Memorandum at 6.[7]

With respect to the 1984 Generic Order, OCA's position is that the decision is properly viewed simply as "general discussions of methodology and rates," as opposed to the kind of project-specific rate order on which one may rely for insight as to the end of the applicable term. *Id*. at 7. According to OCA, "[g]eneric orders were not intended to modify the terms of project-specific orders." *Id*.

According to OCA, the proceedings in Docket No. DE 95-022 have no relevance to the present controversy. OCA points out that the Commission rejected the renegotiated rate agreements presented in that docket, nor did the Commission use that occasion to determine or clarify the end dates of the existing rate orders. OCA contends that the facts and testimony in the record of DE 95-022 are not helpful to the Commission here because neither the parties' course

[7] Further discussing the *New England Alternate Fuels* decision, OCA goes on to contend that "[s]ome have argued that the [] case stands for the proposition that the Commission would not allow twenty year rates to end after less than a full 20 years of scheduled rates." OCA Memorandum at 6 (characterizing this as a "misreading" of the order). Such a view of the *New England Alternate Fuels* case does not appear in any arguments made here in support of the settlement, however.

of dealing, nor any settlement discussions they may have undertaken, can serve to modify an existing Commission order unless the Commission itself so decides. Citing case law referencing contract law doctrines such as impossibility of performance and frustration of purpose, OCA asserts that long-term rate orders are not contracts and thus their terms cannot be modified by changed circumstances as a contract can.

Finally, OCA contends that because the signatories to the settlement are requesting modifications to the Pinetree and Bridgewater rate orders, the Commission must apply the same test to the settlement as it applied in rejecting the settlements proffered in Docket No. DE 05-022. *See Public Service Co. of N.H.*, 83 NH PUC at 280 (noting that resolution of the issue "requires the Commission to balance the savings achieved for ratepayers against the costs and any risks shifted from PSNH and the QFs to ratepayers," as well as the factors set forth in RSA 362-A:8).[8] Under the balancing test, according to OCA, the Commission would have to determine that burdening customers with an additional $19 million in costs would have the effect of shifting some significant risk from customers to Pinetree and Bridgewater. The Commission cannot rationally make such a determination, in the view of PSNH, because the settlement has the effect of moving risk in the opposite direction by forcing customers to assume the financial burden of start dates that were later than anticipated.

C. Pinetree Power Tamworth, Inc. and Bridgewater Power Company LP

In their legal memorandum, Pinetree and Bridgewater contend that both PSNH and OCA are asking the Commission to conduct the wrong inquiry. According to Pinetree and Bridgewater, the sole issue before the Commission is whether the settlement meets the requirements of N.H. Code Admin. Rules Puc 203.20(b), which provides that the Commission

[8] Specifically, RSA 362-A:8, II, the provision of LEEPA governing Commission consideration of decisions involving small power producers, requires the Commission to take into account economic impacts, community impacts, the impact on energy security and potential environmental and health impacts.

shall approve the disposition of a contested case by settlement "if it determines that the result is just and reasonable and serves the public interest." In the view of Pinetree and Bridgewater, where OCA would have the Commission consider whether the two power producers are entitled to an extension of their rate orders, the appropriate question is whether the settlement is reasonable. According to Pinetree and Bridgewater, "[i]f the Commission were required to rule on the merits of the underlying claims in the determining whether to approve a settlement agreement, then settlement would be pointless." Pinetree and Bridgewater Memorandum at 1.

Similarly, Pinetree and Bridgewater concede that one of the major factors the Commission must consider in reviewing the settlement is the relative strength of each party's arguments on the substantive issue of the expiration dates. But Pinetree and Bridgewater take the position that PSNH is simply incorrect in suggesting that the substantive issue must itself be decided here. According to Pinetree and Bridgewater, "[t]he Commission must also consider that approval of the Settlement Agreement will resolve not only this docket but also a civil damages claim lodged in Hillsborough Superior Court, federal preemption litigation, and any other causes of action relating to the end dates" of the rate orders. *Id*. at 2.

Pinetree and Bridgewater then proceed to take the Commission through their view of the merits of the substantive resolution set forth in the settlement. They begin with the table, referenced *supra*, from the 1984 Generic Order.

According to Pinetree and Bridgewater, this table sets forth what were then the Commission's estimates of PSNH's avoided costs for each of the years from 1984 through 2015. Pinetree and Bridgewater note that, under the methodology established by the Commission, a QF's long-term rates were designed with reference to the cumulative net present value of the annual rates in the table.

> For rate calculation purposes, QFs were required to choose an initial year from the table and a term between 5 and 30 years. Once the QF had selected an initial year and a term, it could elect as its set of rates the annual values shown in [the table,] a fully levelized rate, or any other series of yearly rates, provided the cumulative present value of the set of chosen rates was equivalent to the cumulative present value of the corresponding set of annual rates for the same term shown in [the table], using a discount factor of 13.43 percent. The QF's chosen rate design was then submitted to the Commission as part of its rate petition using the long-term rate worksheets for capacity, on-peak energy, and off-peak energy attached to [the 1984 Generic Order].

Id. at 3-4, citing 1984 Generic Order, 69 NH PUC at 364-65, 367 and 370-73.

> These rate worksheets start with a column of years and a column of rates corresponding to the [rates in the table]. In the next column of the worksheet, labeled "contract price," the petitioner was to insert the set of rates it had designed. The initial year of this "contract price" column would correspond to the initial year of the rate selected from [the table]. For example, a petitioner could select a set of rates starting with the 1987 rate from [the table] and a term of twenty years and redesign that set of rates into its long-term rates to be shown in the "contract price" column starting with the line labeled "1987" and ending with the line labeled "2006." To be approved, the "contract price column of rates had to have the same cumulative net present value as the corresponding set of rates shown in the column on the worksheet corresponding to the [rates in the table]."

Pinetree and Bridgewater Memorandum at 4.

According to Pinetree and Bridgewater, a QF's selection of a particular set of twenty-year rates from the table in the 1984 Generic Order left open the question of when the QF could begin to receive payment under the set of long-term rates chosen. Pinetree and Bridgewater contend that the 1984 Generic Order resolved this question by allowing a QF to begin generating at the long-term rates up to four months before the beginning of the first calendar year selected – i.e., September 1 of the preceding year. The position of Pinetree and Bridgewater is that

> [t]his policy of allowing the first rate in the set of long-term rates to be paid as early as the September 1st prior to the year first shown on the rate worksheet is reflected in the rate petition through the statement that the rate "commences on or after September 1" and that the petitioner will use the long-term rates for sales "commencing after September 1. September 1 as used in this context in a rate petition is not a reference to when the facility will or must actually start

> generating at its long-term rates; instead it refers to the earliest date the facility *could* commence generation at the long-term rates it had selected.

Id. at 5 (citation omitted, emphasis in original).

Pinetree and Bridgewater next contend that the 1984 Generic Order provided the rule for when a QF would experience the annual change in long-term rates. According to Pinetree and Bridgewater, the 1984 Generic Order did this by establishing the concept of the "anniversary date," defined as "the date on which the [facility] supplied power under the long-term rate." *Id*. at 6, quoting 1984 Generic Order, 69 NH PUC at 365. Thus, in the view of Pinetree and Bridgewater, a facility that became operational on August 6, 1986[9] for purposes of making sales under long-term rates would make such sales at the rate on the "1987" line of the "contract price" column of the rate worksheets through the next ensuing anniversary date – August 5, 1988 – and on the following day PSNH would commence payments according to the rate in the "1988" price on the rate worksheets. According to Pinetree and Bridgewater, these annual rate changes would then continue to take place on a total of nineteen anniversary dates, the last change being on August 6, 2006 for rates payable through August 5, 2007.

Pinetree and Bridgewater next direct the Commission's attention to certain language in the 1986 *New England Alternate Fuels* decision. According to Pinetree and Bridgewater, *New England Alternate Fuels* stands for the proposition that a facility with a long-term rate order was obliged to commence sales under the long-term rates at some point during the one-year period commencing on September 1 of the year selected from the table in the 1984 Generic Order through the following August 31. According to Pinetree and Bridgewater, this 12-month period is referred to in the New England Alternate Fuels decision as a "power year." Pinetree and Bridgewater Memorandum at 7; *see New England Alternate Fuels*, 71 NH PUC at 426 ("absent

[9] The use of the year "1986" in this instance appears to be a typographical error or a mistake, as use of "1987" instead would be logical in the example given and otherwise consistent with the party's argument.

NEAF fulfilling its obligations under its rate orders and bringing its project on line before the end of the 1986 power year (September 1, 1986) its rate orders would no longer be effective").

According to Pinetree and Bridgewater, it is against the backdrop of these Commission decisions that the statements in the underlying petitions, invoked by PSNH and OCA, must be evaluated. Pinetree and Bridgewater offer this view of the import of the language used in the petitions:

> Pinetree[] filed a set of long-term rates using an initial year from Table 3 [i.e., the table in the 1984 Generic Order] of 1988 and a term of 20 years, i.e., a present value for a 1988 start. Pinetree[]'s initial generation for long-term rate purposes was on April 12, 1988, and thus the rate shown on its rate worksheet on the 2007 line of the "long-term rate" column would be used to pay for generation during the period from April 12, 2007 through April 11, 2008.

Pinetree and Bridgewater Memorandum at 9. Similarly,

> Bridgewater filed a set of long-term rates using an initial year from Table 3 of 1987 and a term of 20 years, i.e., a present value for a 1987 start. Bridgewater's initial generation for long-term rate purposes was on August 6, 1987, and thus the rate shown on its rate worksheet on the 2006 line of the "contract price" column would be used to pay for generation during the period from August 6, 2006 through August 5, 2007.

Id. In contrast, according to Pinetree and Bridgewater, PSNH and OCA are asking the Commission to overlook the regulatory regime to which the two petitions seeking rate orders were submitted.

Moreover, according to Pinetree and Bridgewater, PSNH and OCA are asking the Commission to ignore language within the two petitions themselves. In the view of Pinetree and Bridgewater, PSNH and OCA would have the Commission ignore the fact that both petitions refer to September 1 of a given year but do not identify the end date with reference to a day or month of the year. According to Pinetree and Bridgewater, this lack of specificity has an explanation: A petitioner could not, as it made the initial filing, state the month and day on

which the long-term rate obligation would end because that date could only be ascertained with reference to the anniversary date – i.e., the date on which the facility commenced its long-term rate obligation.

Pinetree and Bridgewater accuse PSNH and OCA of ignoring 20 years of PSNH conduct that is consistent with the expiration dates adopted by the settlement. According to Pinetree and Bridgewater, PSNH has been making the annual change in the rate it pays Pinetree in August of every year since the rate order became effective in 1987, performance Pinetree and Bridgewater view as consistent with the notion that the Pinetree rate order remains effective through August of 2007. Similarly, Pinetree and Bridgewater contend that PSNH revised the rate it paid Bridgewater every year in April from 1988 forward, consistent with the notion that the rate order expires in April of 2008.

Citing New Hampshire Supreme Court caselaw, Pinetree and Bridgewater contend that the doctrine of judicial estoppel bars PSNH from advancing its current position as to the end of the two 20-year periods. Pinetree and Bridgewater invoke the Commission to proceedings in Docket No. DE 95-022, referenced *supra*. According to Pinetree and Bridgewater, PSNH submitted sworn testimony in DE 95-022 that is consistent with the expiration dates in the settlement agreement and inconsistent with the position PSNH is advancing here. In contrast to the OCA view that the evidence adduced in DE 95-022 is of no consequence given the Commission's ultimate decision in the case, Pinetree and Bridgewater note that the Commission ultimately approved the proposed renegotiation of an unrelated rate order – that of the Bio-Energy facility in Hopkinton. Conceding that the Bio-Energy agreement approved in DE 95-022 was never consummated, Pinetree and Bridgewater point out that a subsequent renegotiation of the Bio-Energy rate obligation was later approved in Docket No. DE 01-090. *See Public Service*

Co. of New Hampshire, 86 NH PUC 682 (2001). According to Pinetree and Bridgewater, PSNH offered testimony in DE 01-090 that the Bio-Energy rate obligation extended through June of 2015, the Commission relied on that testimony in approving the renegotiated arrangement, notwithstanding the fact that the underlying rate order petition sought a rate "ending with the year 2014." Pinetree and Bridgewater Memorandum at 18 and Exh. 17 thereto.

Finally, Pinetree and Bridgewater ask the Commission to consider that PSNH and OCA did not address the risk of Pinetree and Bridgewater prevailing in Superior Court and/or in a federal lawsuit challenging the Commission's jurisdiction. In their memorandum, Pinetree and Bridgewater affirmatively state that they "will file a federal district court action should this matter proceed beyond consideration of the Settlement Agreement to a proceeding on the merits," citing *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of New Jersey*, 44 F.3d 1178 (3d Cir. 1995), and what Pinetree and Bridgewater describe as "similar law." Pinetree and Bridgewater Memorandum at 19. Pinetree and Bridgewater stress that they "assent only to the Commission's consideration of the Settlement Agreement based on the relative strength of the parties' arguments on the merits and their respective litigation risks." *Id*. at 19 n. 13. According to Pinetree and Bridgewater, neither they nor Staff "have asked the Commission for a ruling on the merits, and [Pinetree and Bridgewater] expressly object to any such ruling before their jurisdictional challenge is resolved in the federal courts." *Id*.

D. Public Service Company of New Hampshire (in Reply)

In reply to Pinetree and Bridgewater, PSNH rejects the suggestion that the Commission should not truly address the underlying issue of the duration of the two rate orders. According to PSNH, the settlement is "a 'settlement' in name only" because it provides Pinetree and Bridgewater with 100 percent of the relief they have sought. PSNH Reply Memorandum at 1.

Thus, according to PSNH, there is no compromise for the Commission to weigh from a public policy standpoint in relation to the risk of some other, less favorable, outcome. In other words, according to PSNH, there is no litigation risk here because the outcome proposed in the settlement agreement is already the worst possible one from the standpoint of PSNH customers. PSNH characterizes its own risk exposure as zero, pointing out that by the terms of the settlement any costs would simply be passed on to customers. According to PSNH, its participation here is solely for the purpose of protecting the interests of those customers.

PSNH further contends that Pinetree and Bridgewater are violating the terms and conditions of the very rate orders they seek to enforce when Pinetree and Bridgewater state an intention to file a federal lawsuit challenging the Commission's jurisdiction to do anything other than approve the proposed settlement. In support of that view, PSNH draws the Commission's attention to certain language in a 1983 generic order of the Commission, *Small Energy Producers and Cogenerators*, 68 NH PUC 531 (1983), in which the Commission determined:

> [A] long term rate under PURPA and RSA 362-A is in the nature of a legally enforceable obligation. In essence, it is similar to the agreement between the utility and its retail customers embodied in the filed tariffs of the utility with this Commission. However, a long term rate applies to a considerably longer term than tariffed rates and the Commission must, therefore, establish a procedure that makes clear the precise relationship of the parties. For the time being, the Commission will require . . . . [that] [a]ny small power producer wishing to invoke the long term rate established by this Order must file with this Commission and [PSNH], a certificate signed by the duly authorized agent of the entity, attesting . . . . that the producer will abide by all applicable rules, regulations and orders of this Commission and will obey the Commission's directives in the case of any disputes with PSNH.

Id. at 544. According to PSNH, both Pinetree and Bridgewater filed such a certificate in connection with obtaining the rate orders at issue in this case.

On the question of the Commission's jurisdiction, PSNH further invokes *Connecticut Valley Electric Company*, 87 NH PUC 150 (2002). In that order, the Commission concluded it

had the jurisdiction to decide whether it had previously authorized a PURPA Qualifying Facility to sell its gross output or its net output at the QF-favorable rates approved in the applicable PURPA rate order. [10] *Id*. at 164-65.

PSNH dismisses as "meaningless" the contention of Pinetree and Bridgewater that the pending Superior Court litigation poses any kind of risk the Commission ought to take into account here. PSNH Reply Memorandum at 6. The utility points out that the Superior Court stayed its proceedings precisely for the purpose of allowing the Commission to consider this case.

According to PSNH, the contentions of Pinetree and Bridgewater about the course of conduct adopted by PSNH in the wake of the two rate orders, including any testimony PSNH offered in Docket No. DE 95-022, is irrelevant because PSNH's views have no bearing on the meaning of the two rate orders.

Further, according to PSNH, the Commission considered and rejected in 1991 an argument that is essentially the same as the one Pinetree and Bridgewater advance here to the effect that one must construe the rate orders in the context of the applicable regulatory regime of the Commission. In *Public Service Company of New Hampshire*, 76 NH PUC 619 (1991), the Commission refused to allow QFs to increase their capacities and then collect rates under the terms of previously approved long-term PURPA rate orders based on capacity additions not reflected in the original petitions seeking those rate orders. *Id*. at 620. The Commission concluded that the relevant question was whether the rate orders "included consideration of potential additions to the capacity specified in the petitions for those rate orders." *Id*. In so

[10] As noted in the *Connecticut Valley* decision, gross output is simply the amount of energy generated by the facility whereas net output subtracts from that figure the amount of energy consumed by the facility as "station service" used to meet the plant's internal operating requirements for heat, lighting and instruments. *Connecticut Valley Electric Co*., 87 NH PUC at 152.

ruling, the Commission rejected the notion that the issue was "one of construction of the language of the 'comprehensive regulatory process' by application of common-law principles of contract interpretation," holding that "the terms pertinent to individual QFs must be found in those rate orders." *Id.*

According to PSNH, Pinetree and Bridgewater could have framed their original requests for rate orders in a manner that would have allowed them to collect the full 20 years of rates, but simply failed to do so. PSNH further contends that the utility's subsequent conduct – revising the rates paid to Pinetree and Bridgewater each year on the anniversary of the date on which each plant first started supplying energy under its rate order – does not change this reality because PSNH was simply complying with instructions to that effect from the Commission in the 1984 Generic Order. Apart from that, according to PSNH, Pinetree and Bridgewater could have obtained the entire 20-year benefit of their rate orders simply by beginning the sale of power at the long-term rates on an earlier date (between September 1, 1986 and December 31, 1986 in the case of Bridgewater and on September 1, 1987 in the case of Pinetree).

E. Office of Consumer Advocate (in Reply)

The chief argument advanced by OCA in reply to Pinetree in Bridgewater is that the two QFs are seeking to confuse the concept of a "rate" with the concept of a "term." According to OCA, the significance of September 1 in the 1984 Generic Order is not with respect to the term of an applicable rate – i.e., the period of time in which the rate would apply to a particular facility – but, rather to the calculation of the amount of the rate itself (which would vary, under the avoided cost calculations set forth in the 1984 Generic Order, depending on which September-to-August period the applicant sought to commence operations in.) According to OCA, "[p]roperly interpreted, an 'initial year' for a rate means rate that is valued from

September 1 through August 31 for calculation purposes only. Rather than providing a facility with authority to start operating, this policy actually requires a facility that cannot operate by September 1, 1986 to calculate rates based on the assumption they start in 1987." OCA Reply Memorandum at 4. OCA further contends that the references in the Pinetree petition to "1988 start" were erroneous in the sense that strict conformity with the language used by the Commission in its 1984 Generic Order would have involved using the phrase "1988 initial year" – to describe not when the 20-year period would begin but, rather, which particular set of avoided cost rates would apply.

According to OCA, the true significance of September 1 in this context is that a QF that did not operate until September 1, 1987 had to calculate rates based on a 1988 start, which would yield less revenue. Thus, OCA contends, it was in the financial interest of such a QF to make a business decision to be ready for the plant to go on line as soon as possible, in order to obtain the favorable long-term rates for as long as possible. On the other hand, OCA suggests, a QF that planned to be on line by August 31, 1987 but missed the deadline would be unable to take advantage of long-term rates calculated based on a 1987 start.

OCA contends that Pinetree made a particular business decision not to take the chance of calculating long-term rates based on a 1987 start date and risk being unable to take advantage of a rate order approving those rates because it failed to come on line before September 1 of that year. But, according to OCA, because it was possible that Pinetree might operate by September 1, 1987, the QF had no intention of giving up any long-term rate advantage if the facility achieved that benchmark. Thus, in the view of OCA, Pinetree opted for the less favorable short-term rates for operations before September 1, 1987 and specifically sought authority to collect long-term rates starting on that date. According to OCA, "[t]he financial officers [of Pinetree]

weighed the need for up-front cash should they come on-line in September of 1987 versus what they would lose at the end of the 20 year term if they actually came on line later than September 1987." OCA Reply Memorandum at 8. In the opinion of OCA, "[h]ad Pinetree operated September 1, 1987, the QFs would have won their bet. Having lost their bet, Pinetree wants ratepayers to cough up the part they lost." *Id*. at 9.

OCA next contends that it is not appropriate to conclude that either it or PSNH are being disingenuous in their interpretations of the references to end dates in the two rate-order petitions. With respect to the Pinetree petition and its reference to "twenty years commencing September 1, 1987 and ending with the year 2007," OCA suggests that "[t]he math is straight forward and there is no need to use the month and day in the phrase 'ending with the year 2007.'" *Id*. According to OCA, the Bridgewater petition is less straightforward, inasmuch as that petition states that the "term of the rate is twenty years commencing after September 1, 1986 and ending with the year 2006." *Id*. But, according to OCA, this is "consistent with the language causing a technical problem" in the PUC's 1984 Generic Order, in which the Commission "probably meant September 1, rather than 'after September 1.'" *Id*. Thus, in the view of OCA, "the only reasonable way to read this term in the Bridgewater petition is September 1, 1986, to September 1, 2006." *Id*.

OCA noted the reference in the Bridgewater rate order petition to the possibility of a start date before September 1, 1986 and Bridgewater's use of short-term rates to cover such sales. OCA offers what it characterizes as two "observations" about this reference: (1) that it is not unusual for such a facility to come on line four months before its projected start date, but "there was no way a QF was going to come on-line for four months without long term rates," so Bridgewater made a "business decision to seek authority for a term commencing September 1,

despite the fact it expected to come on line January 1, 1987," and (2) seeking a term of 20 years "commencing after September 1, 1986" was simply consistent with the statement in the Bridgewater rate order petition that the long-term rates in the petition would be used "for sales commencing after September 1, 1986." *Id*. at 10.

OCA disagrees emphatically with the contention of Pinetree and Bridgewater that the Commission did not require facilities to meet a particular online date but, rather, allowed such facilities to come on line any time from September 1 through August 31 of the initial year used to calculate the long-term rates in order to use those rates. OCA Memorandum at 10 citing Pinetree-Bridgewater Memorandum at 14. According to OCA, "[i]nstead of providing an open-ended, one-year period in which to commence authority to collect [the long-term] rates," the rule was that if a project adopted long-term rates based on a 1986 start for purposes of rate calculations but did not start by September 1, 1986, the rates would not be effective. OCA Memorandum at 11.

Likewise, OCA disagrees with the Pinetree-Bridgewater interpretation of the phrase "commencing in 1988" contained in the initial Pinetree petition. According to OCA, this phrase does not support the view that the petition required long-term rates to be applied to a term that started in that year. In OCA's view, the phrase is "merely elaborating on the preceding sentence on rates by providing actual calculations off the worksheets." *Id*. at 12.

According to OCA, the underlying petitions were "subsumed" in the orders approving them and the orders themselves "have the force of law of the statutes under which the PUC performs its duties." *Id*. Therefore, according to OCA, the Commission should apply the rules of statutory construction to the task of interpreting the orders. Noting that one such rule is that a tribunal should construe statutes dealing with the same subject in a manner that causes the

statutes not to conflict with one another, the OCA contends its view of the case is consistent with this principle by recognizing that "a rate based on a start date on a worksheet is no different than the policy requirement of an 'initial year.'" *Id.* By contrast, according to OCA, the Pinetree and Bridgewater interpretation requires the Commission "to treat the rate worksheet in a manner inconsistent with its intended purpose and furthermore leaves totally unreconciled language in the Orders stating that a term of twenty years commences on September 1." *Id*. at 12-13.

OCA urges the Commission to reject the Pinetree and Bridgewater contention that PSNH is judicially estopped from pursuing the merits of its position if the Commission rejected the proposed settlement. Conceding that PSNH's position today is inconsistent with the previous PSNH testimony referenced by Pinetree and Bridgewater, OCA nevertheless cites caselaw from the New Hampshire Supreme Court to the effect that judicial estoppel would not apply because PSNH never gained any advantage or caused any detriment as the result of the previous testimony. In other words, according to OCA, the Commission's failure in the earlier proceeding to adopt the settlements being advocated by PSNH through its testimony makes judicial estoppel an inappropriate doctrine here.

However, OCA does agree that the previous PSNH testimony may be of some relevance here. According to OCA, the Commission could treat the prior testimony as an admission by PSNH – evidence that is probative but not necessarily conclusive.

Finally, OCA disagrees with the Pinetree and Bridgewater gloss on the renegotiated 30-year rate order of the Bio-Energy facility and the alleged inconsistency between PSNH's testimony about that rate order and PSNH's position in this docket. According to OCA, the reference to 2014 in the underlying petition was simply a mistake, given the focus in the

applicable generic order on rates spanning periods of 5, 10, 15, 20 and 30 years, suggesting a rate order for Bio Energy ending in 2015.[11]

V. COMMISSION ANALYSIS

This is an important case and thus it would be particularly improvident here to elide an important threshold question raised by the parties' filings. We refer to the contention of Pinetree and Bridgewater that we cannot and should not reach the merits of the dispute presented by this case, confining our analysis to the question of whether the settlement Pinetree and Bridgewater reached with our Staff is reasonable given the risk of what would occur if we failed to approve the agreement. We agree with PSNH that our analysis of the settlement agreement should focus on its substantive merits.

We hold that view notwithstanding the plainly stated intention of Pinetree and Bridgewater to "file a federal district court action should this matter proceed beyond consideration of the Settlement Agreement to a proceeding on the merits." Pinetree and Bridgewater Memorandum at 19. Pinetree and Bridgewater contend we are preempted from considering the merits, based on the principles set forth in the 1995 *Freehold Cogeneration* decision of the U.S. Court of Appeals for the Third Circuit, a precedent this Commission has previously acknowledged, *see Alden T. Greenwood*, Order No. 24,613 (April 13, 2006), aff'd on reh'g, 24,638 (June 22, 2006); *and Connecticut Valley Elect. Co*., 87 NH PUC 150, 164-5 (2002). As those decisions illustrate, the Commission has not treated *Freehold Cogeneration* as precluding us from ever considering issues arising under previously entered long-term PURPA

[11] One additional argument appears in the OCA Reply Memorandum. According to OCA, Pinetree and Bridgewater "allege they have some cause of action against PSNH if PSNH's interpretation of the Woods' term of authority to collect long term rates is correct." OCA then offers a rebuttal to that proposition. We do not understand Pinetree and Bridgewater to be suggesting it has a civil cause of action against PSNH although, obviously, their civil lawsuit against PSNH remains pending in Superior Court. The present case does not require us to consider how that court would resolve whatever dispute remains between PSNH and the two QFs once we have rendered a final decision here.

rate orders. Arguably, *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.[12]

In the *Freehold Cogeneration* decision itself, the Third Circuit pointed out that a QF may waive any rights it enjoys under PURPA to have disputes in connection with long-term PURPA rates heard in a federal forum. *See Freehold Cogeneration*, 44 F.3d at 1187, citing 18 C.F.R. § 292.301(b)(1) (authorizing QFs "to agree to a rate for any purpose, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required" by the Federal Energy Regulatory Commission's PURPA rules). PSNH makes a similar point when it argues that Pinetree and Bridgewater each filed a certificate affirmatively indicating a willingness to allow any disputes related to their rate orders to be heard and adjudicated by the Commission. *See also* RSA 362-A:5 (LEEPA provision stating that "[a]ny disputes arising under the provisions of this chapter may be referred by any party to the commission for adjudication").

The settlement pending before us does not include any terms that would purport to limit us to resolving the case based on an assessment of the risk that preemption-related federal litigation, or the action of any other tribunal with jurisdiction over the parties here, would result in an outcome more favorable to Pinetree and Bridgewater than the one contemplated by the settlement agreement. To the contrary, the settlement reads much like a legal brief, purporting to analyze in considerable detail the legal merits of the proposed outcome – one that, as PSNH

[12] The parties should note that the term "arguably" is used advisedly here. The *Connecticut Valley* decision, invoked by PSNH here, is questionable at best as precedent because, as PSNH well knows, the applicable dispute was subsumed by a later settlement in which PSNH acquired the assets and franchise of another utility and, with it, the obligation to purchase power from the QF at issue in the *Connecticut Valley* decision. The *Greenwood* case is presently the subject of a civil action against the Commission in the U.S. District Court for the District of New Hampshire. While we believe the task at issue here – discerning what the Commission intended in rate orders issued nearly 20 years ago – is distinguishable from the term-revision precluded by *Freehold Cogeneration*, the issue is unquestionably a live controversy as a matter of federal law.

correctly points out, reflects not compromise but, rather, a conclusion that Pinetree and Bridgewater are essentially entitled to prevail. The settlement contains four "Specific Settlement Terms:" (1) an agreed-upon expiration date of March 31, 2008 for the Pinetree rate order, (2) an agreed-upon expiration date of August 5, 2007 for the Bridgewater rate order, (3) PSNH's entitlement to recover the cost of the associated energy purchases from customers, and (4) the dismissal, with prejudice, of the pending Superior Court litigation once our decision in this proceeding becomes final and unappealable. No term requires us to eschew consideration of the merits or preserve any party's right to argue we lack the authority to decide the merits. Thus, notwithstanding the subsequent arguments of Pinetree and Bridgewater to the contrary, we view the settlement as a request that we exercise our authority to consider whether the settlement adopts the correct interpretation of the two rate orders.[13]

We answer that question in the affirmative.

As the parties note, the two rate orders are notably lacking in clarity. In particular, those seeking guidance about the expiration date of each long-term rate find virtually no guidance in the Commission's decisions.[14] PSNH contends that in such circumstances the Commission should look to the underlying pleadings in search of clarity, on the theory that the rate orders were intended to give Pinetree and Bridgewater what they requested, no more and no less.

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[13] In light of this view of the settlement and what it asks the Commission to determine, we do not regard the preemption question to have been squarely presented by this case in its current posture. We thus leave to another day the issue of whether federal law preempts us from providing the clarification of the two rate orders that PSNH originally requested in its petition and the settlement also asks us to make.

[14] The original orders are short and to the point. In *Bridgewater Steam Power Co*., 70 NH PUC 509 (1985) (Order No. 17,645), the title is "[o]rder nisi granting petition by a small power producer for approval of interconnection agreement and long term rates" with a relevant ordering clause stating: "[o]rdered nisi, that Bridgewater's Petition for a Twnety-Year Rate Order for approval of its interconnection agreement with PSNH and for approval of rates set forth on the long term worksheet is approved." In *Pinetree Power Tamworth, Inc*., 71 NH PUC 123 (1986) (Order No. 18,112) the title is "[o]rder nisi approving a petition for a twenty-year rate order for a small power production project" with a relevant ordering clause stating: "[o]rdered nisi, that Pinetree Power's Petition for a 20-Year Rate Order for approval of its interconnection agreement with PSNH and for approval of rates set forth on the long term worksheet is approved."

Pinetree and Bridgewater, in both the settlement and in their memorandum, essentially view the inquiry as one in which the Commission should consider the rate orders in the context of the generic order that preceded it.

The law appears to be settled that when a judgment is ambiguous the task of clarifying the ambiguity falls to the tribunal that entered the judgment, *Peter Bay Owners Ass'n v. Stillman*, 58 F. Supp. 2d 640, 643 (D. Virgin Is. 1999); *Randlett v. Randlett*, 401 A.2d 1008, 1011 (Me. 1979); *Palmi v. Palmi*, 140 N.W.2d 77, 81 (Minn. 1966) (interpretation of trial court entitled to "great weight"); *LeBrun v. Boston & Maine R.R.*, 82 N.H. 170, 174 (1925) ("A court's interpretation of its own decrees is held to be binding upon other courts") (citations omitted), and clarifying such an ambiguity involves the use of the same rules of interpretation that apply to contracts, statutes and other written instruments, *United States v. Motor Vehicle Mfrs. Ass'n*, 643 F.2d 644, 651 (9th Cir. 1981) (court may consider surrounding circumstances); *Eaton v. Courtaulds of North America, Inc*., 578 F.2d 87, 91 (5th Cir. 1978) (court may turn to "aids to construction"); *Gimlett v. Gimlett*, 629 P.2d 450, 453 (Wash. 1981); *International Org. of Masters, Mates and Pilots v. International Org. of America, Local No. 2 v. International Org. of Masters, Mates and Pilots of America, Inc*., 439 A.2d 621, 624 (Pa. 1981); *Wright v. Wright*, 284 N.W.2d 894, 903 (Wis. 1979); *Lone Star Cement Corp. v. Fa*ir, 467 S.W.2d 402, 404 (Tex. 1971);*Wise v. Watson*, 236 So.2d 681, 686 (Ala. 1970); *Cooper v. Cooper*, 158 N.W.2d 712, 713 (Iowa, 1968); *Christiano v. Christiano*, 41 A.2d 779, 781 (Conn. 1945). The objective is "to give effect to the intention of the [tribunal], not to that of the parties." *United States v. 60.22 Acres of Land*, 638 F.2d 1176, 1178 (9th Cir. 1980) (citation omitted); *see also Gilmett*, 620 S.W. 2d at 453 (same) and *Cooper*, 158 N.W. 2d at 713-714 (same).

If the intention of the tribunal as distinct from that of the parties is paramount, then the significance PSNH and OCA attach to the language of the underlying petitions is too great. This is particularly true given that the petitions themselves are not models of clarity on the issue in question. The Pinetree petition, dated January 28, 1986, recites that

> [t]he term of the rate is twenty years commencing September 1, 1987 and ending with the year 2007. The rates are based on a present value for a 1988 start date. . . . The expected on-line date of the Facility is post September 1, 1987. In the event the Facility is on-line prior to September 1, 1987 then the facility will utilize the available short-term rate for sales from the facility prior to September 1, 1987 and will utilize the herein filed rate for sales commencing after September 1, 1987.

Exh. 5 to Pinetree and Bridgewater Memorandum at 54; Settlement at 4. The reference to September 1, 1987 as a "start date" is plainly inconsistent with the reference to a "1988 start date" in the ensuing sentence. An effort to arrive at a reasonable interpretation of this language would involve finding a way to harmonize these two seemingly inconsistent but juxtaposed sentences. As a dispositive aid to construing the Pinetree rate order, this writing raises as many questions as it answers.

The Bridgewater petition is even less illuminating. That pleading recited that

> [t]he term of the rate is twenty years commencing *after* September 1, 1986 and ending with the year 2006. Per the discussion in the Docket No. DE 83-62 Report [i.e., the 1984 Generic Order] at page 25, the rates are based upon the present value for a 1987 start date. . . . The expected on-line date of the Facility is January 1, 1987. In the event the Facility is on-line prior to September 1, 1986 then consistent with [the 1984 Generic Order] the Facility will utilize the available short-term rate for sales from the facility prior to September 1, 1986 and will utilize the therein filed rate for sales commencing after September 1, 1986.

Exh. 4 to Pinetree and Bridgewater Memorandum at 34; Settlement at 5-6 (emphasis added). This language obviously offers no date that could reasonably be interpreted as a fixed and binding time for the commencement of the long-term rate. Indeed, as to the language from both petitions, the only unambiguously rendered thought is that in no instance would either long-term

rates commence before September 1 of the relevant year, presumably to reserve to each plant the right to operate before that date and sell electricity without triggering the commencement of the 20-year period.

The fog of confusion and ambiguity lifts significantly when one considers both the rate orders and the underlying petitions in light of the 1984 Generic Order, a reality all parties implicitly acknowledge to some extent by addressing the matters discussed in that order.

The stated purpose of the 1984 Generic Order was to supercede a previously entered, interim decision by "updating and establishing the short term and long-term rates to be paid" by PSNH to QFs "and the methodologies to be employed in deriving such rates." 1984 Generic Order, 69 NH PUC at 353. The Commission explicitly stated that its decision was an exercise of its "authority to set rates" as established both by PURPA and LEEPA. Id. at 355. The 1984 Generic Order "fulfill[ed] the Commission's responsibility under PURPA to set just and reasonable rates for sales of electric power to public utilities, based on the utility's incremental cost of alternative electric energy and capacity." *Id*. at 356.

There is thus a section of the 1984 Generic Order bearing the caption "Applicable Long Term Rates." *Id*. at 364. It begins with a table, referenced extensively in the settlement that contains a line for each year from 1984 through 2015. *Id*. at 364-65. As to each year, there is a figure for each relevant component of the rate: total capacity costs, total energy costs, on-peak energy costs and off-peak energy costs. Id. This represents the Commission's calculation of what PSNH's avoided cost, as to each of these components for each year listed, would be.

As the 1984 Generic Order made clear, a QF seeking to use the rates approved in the order had two options: simply adopt the rates in the table or vary them subject to certain conditions. *Id*. at 365. Varying the rates, as both Pinetree and Bridgewater did, involved use of

the "Net Present Value method" previously adopted by the Commission. In effect, this was an instruction to QFs that they could use "front-end-loaded rates" – i.e., rates designed to accelerate rate recovery, presumably as an incentive to investors – and/or more levelized rates than those in the table, for purposes of rate stability – as long as the net present value of the total sum recovered did not exceed what the QF would recover under a straight application of the rates in the table. Thus, the Commission instructed that

> [o]bligations of 5 to 30 years will be permitted. The initial year of the long-term rate obligation may not be more than four years from the time of filing. [QFs] may select as their rates the values shown above [i.e., those in the table], levelized values for the years of their obligation, or some rate in between, so long as the cumulative net present values, discounted appropriately, do not exceed the values shown in the table.

Id. at 365. Worksheets for making the appropriate calculations were appended to the order. *See id*. at 367, 370-73.

Completed versions of these worksheets were appended to both petitions. Thus, the "1988 start date" and the "1987 start date" referenced in the Pinetree and Bridgewater petitions, respectively, are properly viewed as references to the worksheets, which adopt the same terminology. It is similarly clear that the two referenced 'start dates' in the worksheets and the petitions relate to the Commission's directive that "the initial year of the long term rate obligation may not be more than four years from the time of the filing." Id. at 365. Likewise, the referenced start dates were intended to comply with this explicit Commission instruction: "For facilities on line before September 1, the year in which the facility first supplies power under the long-term rate is considered to be the initial year for rate calculations. For facilities on line after September 1, the following year will be considered the initial year." Id.

In other words, the worksheets and language of the Pinetree petition seek approval of long-term rates that would be applicable to a plant that began supplying power under the long-

term rate (1) not more than four years after the petition's submission in January 1986, and (2) between September 1, 1987 and August 31, 1988, making 1988 the 'initial year' for rate calculation purposes pursuant to the express command of the order. In context, the reference to September 1, 1987 in the Pinetree petition refers not to the date on which the 20 years would commence but the benchmark date used to calculate the rate. The same reasoning applies to the Bridgewater petition and its reference to "commencing after September 1, 1986." Thus, these two dates as referenced in the two petitions do not hold the significance PSNH and OCA assign to them and the logical and reasonable interpretation of the two rate orders is that they became effective, and the 20 years or long-term rates granted therein likewise became effective, as of the date of their issuance.

Given this conclusion, it is not necessary for us to consider the arguments of Pinetree and Bridgewater to the effect that PSNH's subsequent course of dealing with them, as well as the utility's testimony and conduct in any later proceedings, justify or require any particular outcome. Likewise, because they are at variance with the approach we have adopted and view as the legally required one, we are unable to agree with PSNH's contentions that the correct approach is to focus on the underlying petitions, that there is outcome-determinative significance to the slight difference in wording of the two petitions with respect to the term of the rate, or that a similar significance should be attached to the lack of a provision in either petition addressing the question of delay. Similarly, we are unable to adopt the positions of OCA to the effect that Pinetree and Bridgewater are making an unlawful attempt to modify their rate orders, that we should decide the case at least in part based on a factual finding that Pinetree and Bridgewater deliberately did not seek clarity about expiration dates when they sought their rate orders, that the 1984 Generic Order was not intended to modify the rate orders, or that we are required to

apply a balancing test because we are shifting costs from generators to customers. Because we are merely clarifying and interpreting a previous Commission Order, and not changing it or making a new decision, we conclude that the factors to be considered under RSA 362-A:8, II (b) do not apply in this instance.

Simply stated, the relevant question is the meaning of the two rate orders. Logically, this is something the ensuing historical record cannot illuminate. In arguing to the contrary, PSNH invokes *Public Service Company of New Hampshire*, 76 NH PUC 619 (1991). This case is inapposite. In the referenced 1991 order, the Commission refused to allow QFs to apply their lucrative long-term rates to capacities in excess of those approved in the underlying rate orders. Among the arguments the Commission rejected was the notion that such increases were justified in light of the "comprehensive regulatory process" through "application of common-law principles of contract interpretation." *Id*. at 620. Such is not the basis of the result we adopt here. Rather than invoke some inchoate notion of what the comprehensive regulatory process entails in light of any common law principles, we have simply discerned the meaning and intention of the rate orders themselves, a process that requires recourse to the generic order that preceded them.

As to the contentions in the OCA reply memorandum, they amount in large part to speculative assertions about why Pinetree and Bridgewater chose to draft their petitions as they did. Assuming the plausibility of these assertions, they shed no light on the Commission's intentions. Beyond that, to the extent that OCA's argument in reply, about the distinction between a "term" and a "rate," is inconsistent with the straightforward approach to the interpretive task at hand, the argument is too strained to merit credence.

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. It is worth noting that a key objective of PURPA as enacted in 1978 was to encourage the development of alternative sources of electricity by replacing investor risk with certainty and opening the power generation market to independent power producers. This case illustrates both the success of that policy strategy, as evinced by the development and subsequent operation of Pinetree and Bridgewater for nearly two decades, and the significant cost of that policy strategy, as implemented in New Hampshire, in the form of retail rates that are higher than they otherwise would have been. The PURPA-required bargain that induced Pinetree and Bridgewater into existence during the 1980s is not infinite in duration but, for good or ill, it lasts for twenty years, as originally approved by Commission, through the dates specified by the two QFs in the settlement they reached with Staff. We conclude that approval of the settlement is just and reasonable and serves the public interest by properly and lawfully clarifying and interpreting previous Commission orders. Bridgewater and Pinetree will receive 20 years of payments[15] under their original rate orders, no more and no less.

[15] Twenty years to the day in the case of Bridgewater, and a few days less, rounded down to the end of the previous month, per the settlement, in the case of Pinetree.

Based upon the foregoing, it is hereby

ORDERED, that the Settlement Agreement entered into in this docket among Pinetree Power Tamworth, Inc., Bridgewater Power Company LP and the Staff of the Commission is APPROVED; and it is

FURTHER ORDERED, that Public Service Company of New Hampshire be required to purchase energy and capacity from Pinetree Power Tamworth, Inc. under the long-term rates previously approved by the Commission through March 31, 2008; and it is

FURTHER ORDERED, that Public Service Company of New Hampshire be required to purchase energy and capacity from Bridgewater Power Company LP under the long-term rates previously approved by the Commission through August 5, 2007; and it is

FURTHER ORDERED, that Public Service Company of New Hampshire be entitled to the recovery of the associated costs of these energy and capacity purchases.

By order of the Public Utilities Commission of New Hampshire this sixteenth day of October, 2006.

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary