

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 07-045

BRIAR HYDRO ASSOCIATES

Petition for Declaratory Ruling

Order Following Briefs

ORDER NO. 24,804

November 21, 2007

APPEARANCES: Orr & Reno, P.A. by Howard M. Moffett, Esq. for Briar Hydro Associates; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire; Office of Consumer Advocate by Meredith A. Hatfield, Esq. on behalf of residential ratepayers and F. Anne Ross of the Staff of the New Hampshire Public Utilities Commission.

I. BACKGROUND AND PROCEDURAL HISTORY

On March 28, 2007 Briar Hydro Associates (Briar) filed a petition seeking a declaratory ruling with respect to a 1982 contract for the purchase and sale of electric energy. The 1982 contract was between New Hampshire Hydro Associates (NHHA) and Public Service Company of New Hampshire (PSNH), covering the sale to the utility of the entire output of the Penacook Lower Falls Hydroelectric Project for a term of 30 years. The present petition raises the question of whether the “output” sold under the contract includes the facility’s generation capacity as distinct from the energy actually produced and which entity is entitled to payments for capacity in the New England Forward Capacity Market (FCM) administered by ISO New England.

The Penacook facility is a 4.1 megawatt capacity hydroelectric generation station on the Contoocook River in Penacook and Boscawen. Briar purchased the Penacook facility in 2002 and, following the sale, assumed NHHA’s rights and obligations under the agreement. Briar seeks a determination that it owns the right to the facility’s capacity. PSNH’s position is that the

contract entitles the utility, rather than Briar, to both the energy produced by the facility and the capacity associated with it. The question is of interest to the parties in light of the approval by the Federal Energy Regulatory Commission (FERC) of the regional FCM, which will yield income to the party with rights to the generating capacity of the facility at issue in this proceeding. *See Devon Power LLC*, 115 FERC ¶ 61340 (June 16, 2006) (approving settlement regarding creation FCM for New England, as a means of encouraging development of new generation capacity region-wide).

The Penacook Lower Falls Hydroelectric Project is a qualifying facility (QF) within the meaning of section 210 the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, which, in relevant part, required PSNH to enter into a long term power purchase arrangement such as the one at issue here.¹ Generally, QFs are small power producers (SPPs) that are independent of the local electric utility and rely on alternatives to fossil fuel and nuclear power.

On April 17, 2007, we issued an order of notice scheduling a prehearing conference for May 23, 2007. On April 19, 2007, the Office of Consumer Advocate (OCA) entered an appearance on behalf of residential ratepayers. At the prehearing conference, PSNH requested intervention as a full party, the parties gave initial positions on Briar's petition and the parties recommended a discovery and briefing schedule for the docket. At the close of the hearing, we granted PSNH's request for intervention and approved the discovery and briefing schedule.

Following discovery, PSNH filed a memorandum in opposition to Briar's petition on June 15, 2007, and Briar filed a reply memorandum on June 29, 2007. No party has requested a hearing and accordingly we make our decision based on the petition and subsequent pleadings.

¹ QFs typically exercise their PURPA rights by requiring their local utility to purchase their power. In this instance, the Penacook facility is actually in the service territory of Unitil Energy Systems, Inc. but sells its power to PSNH pursuant to 18 CFR 292.303(d), a FERC regulation giving a QF and its local utility the option of wheeling the power to another utility for purchase.

In so doing, we note our understanding that by requesting a declaratory judgment here, Briar is waiving any right it may enjoy to have this dispute resolved elsewhere. *Cf. Alden T. Greenwood v. New Hampshire Public Utilities Comm'n*, 2007 WL 2108950 (D.N.H.) (refusing to find such a waiver of rights, in dispute over rates applicable to small power producer in PSNH service territory).²

II. POSITIONS OF THE PARTIES

A. Briar Hydro Associates

In seeking to establish that the contract at issue here does not entitle PSNH to the facility's capacity as distinct from its energy output, Briar noted that the language of the 1982 agreement refers to "sales of electric energy" and "a reliable supply of electrical energy," but nowhere refers to electric generating capacity. Briar further asserted that the distinction between electric energy and capacity was well known at the time the 1982 agreement was signed, as evidenced by a 1980 Federal Energy Regulatory Commission (FERC) Order implementing section 210 of PURPA³ and also by four Commission orders issued in 1979, 1980 and 1981.⁴

Briar pointed to the fact that PSNH invoices issued to Briar under the 1982 agreement have all been expressed in cents per kilowatt-hour (kWh) and have not mentioned any separate charge for capacity. Briar distinguished the 1982 agreement from numerous other long term rate orders approved for QFs in New Hampshire that provide for separate energy and capacity payments. Briar contrasts the 1982 agreement with an earlier contract dated August 21, 1980

² The cited decision of the U.S. District Court for the District of New Hampshire is presently on appeal to the U.S. Court of Appeals for the First Circuit.

³ Final Rule Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214 (Feb. 25, 1980).

⁴ *New Hampshire Electric Cooperative.*, 64 NH PUC 82 (1979); *New Hampshire Electric Cooperative.*, 64 NH PUC 244 (1979); *Small Energy Producers and Cogenerators*, 65 NH PUC 291 (1980); and *Small Power Producers and Cogenerators*, 66 NH PUC 83 (1981).

between PSNH and QF owner Rollinsford Manufacturing Co., Inc. in which there were separate prices for “each KW [kilowatt] of dependable capability generating during an hour,” and for “each KW generated during an hour in excess of the dependable capability.” Briar took the position that had PSNH bargained for the purchase of both energy and capacity it could have done so in the same manner it had done with Rollinsford.

B. PSNH

In its memorandum in opposition to Briar’s petition, PSNH pointed to the fact that NHHA agreed to sell the “entire generation output” from the Penacook facility under the 1982 agreement. PSNH contended that the parties intended that phrase to include both energy and capacity from the Penacook facility. PSNH maintained that the 9 cent-per-kWh rate in the 1982 agreement covered both energy and capacity. Citing applicable FERC regulations, specifically 18 CFR § 292.303(a), PSNH maintained that PURPA required the Penacook facility and other QFs to sell, and the local electric utility to purchase, “any energy and capacity which is made available from a qualifying facility,” language PSNH views as precluding PSNH from simply purchasing energy as opposed to energy and capacity.

Moreover, PSNH drew the Commission’s attention to the fact that its purchases from the Penacook facility also implicate 18 CFR §292.303(d), the FERC rule allowing a QF to wheel its power to a utility that is not the one in whose service territory the QF is actually sited. According to PSNH, unlike subsection (a) discussed above, subsection (d) of the rule explicitly allows for separate sales of energy and capacity – but requires the interconnecting utility to authorize such arrangements, which effectively gives the utility the right of first refusal.

PSNH observed that both PURPA and its counterpart in New Hampshire law, the Limited Electrical Energy Producers Act (LEEPA), RSA 362-A, required the incumbent utility to

purchase the entire output of a qualifying facility, including both energy and capacity. *See Appeal of Granite State Electric Co.*, 121 N.H. 787, 789 (1981); *Appeal of Public Service Co. of New Hampshire*, 130 N.H. 285, 287 (1988); and *Small Power Producers and Cogenerators*, 68 NH PUC 531, 537 (1983). The utility asks the Commission to view the agreement at issue in the context of the regulatory framework that existed at the time of the contract. According to PSNH, the Commission established avoided cost rates that required payments of 7.7 cents per kilowatt-hour to projects without reliable capacity and 8.2 cents to facilities with such reliable capacity. PSNH explained that the agreement at issue here, providing for an index price of 9 cents per kilowatt hour for 30 years, was front-loaded and, thus, consistent with the Commission's then-applicable, standard 8.2-cent rate that, according to PSNH included both energy and capacity.⁵ PSNH states that the Commission later abandoned the cents-per-kWh pricing for both energy and capacity and adopted separate energy and capacity payments, but did so without purporting to abrogate any existing contracts such as the one with the Penacook facility.

PSNH also suggested that the parties' course of dealing supports an interpretation of "entire output" as including both energy and capacity. PSNH pointed to the fact that for the entire term of the contract to date, now more than 20 years, PSNH has claimed the capacity of the Penacook facility as part of its generating capacity, and that until 2006 Briar and its predecessor, NHHA, never questioned nor challenged PSNH's claim to the capacity. According to PSNH, the parties had considered the value of the facility's capacity and had discussed a separate price for capacity, but PSNH had rejected that proposal and opted to purchase the

⁵ "Front-loaded" refers to the fact that, under the Commission's approach to longterm PURPA rates, a QF could enter into a longterm contract with PSNH with rates that escalated over time, as projections of PSNH's avoided costs increased, or the QF could adjust the rate schedule, as long as the net present value of the overall revenue stream remained equal. Because this adjustment resulted in a rate that would be higher in the initial years of the agreement than would otherwise be applicable, the contract was said to be front-loaded. Such an arrangement was attractive to lenders and thus the Commission authorized them as a means of achieving PURPA's objective of encouraging the development of new energy alternatives.

capacity as part of the all-in 9 cent price. Further, PSNH produced a 1990 letter in which PSNH proposed terms for an early buyout of the 1982 contract. PSNH Memorandum at Attachment D. In the attachments to that letter were references to what the Penacook facility would have been paid if it had received the marginal value of electricity. PSNH contended that the spreadsheet column showing short-term capacity rates evidences that both NHHA and PSNH viewed the 1982 agreement as including energy and capacity.

C. Office of Consumer Advocate

On June 28, 2007, OCA filed a letter supporting the positions taken by PSNH in its memorandum in opposition to Briar's petition. OCA argued that the language "entire generation output" included both energy and capacity. Further, OCA agreed that, under PURPA, NHHA could not separate its sales of energy and capacity. OCA urged the Commission to find that the 1982 Agreement included both energy and capacity.

D. Briar Hydro Associates' Reply to PSNH

In its reply memorandum, Briar reiterated its argument that the 1982 Agreement does not contain the word capacity and therefore the phrase "entire generation output" is properly understood as including only electric energy. Briar's discussion begins with a series of references to reported contracts cases of the New Hampshire Supreme Court, to the effect that decision makers must give the language used by the parties its reasonable meaning, in light of the circumstances and context in which the agreement was negotiated, must read the document as a whole and must construe contracts of adhesion against the drafter. While disclaiming any intent to allege that the contract at issue here is one of adhesion, Briar noted that PSNH was the drafter of the agreement and thus asked the Commission to resolve any ambiguities in Briar's favor.

Briar directed the Commission's attention to the general definition of the word "output" in *Webster's Third New International Dictionary* as "something that is put out or produced." According to Briar, capacity does not meet this definition because it is the instrument of production rather than anything that is itself "produced." Thus, Briar argued that the phrase "entire generation output" in the agreement can only refer to electric energy and not to capacity. Briar claimed that PSNH was not willing to recognize any capacity value for the project in its pre-contract negotiations.

Briar noted that there are no New Hampshire cases interpreting the meaning of "entire generation output." Therefore, Briar relies principally, as supporting its position that capacity either cannot be deemed part of output or is not necessarily included in output, on cases from New York and Virginia: *Energy Tactics, Inc. v. Niagara Mohawk Power Corp.*, 219 A.D.2d 577 (N.Y. App. Div. 1995) *Westmoreland-LG & E Partners v. Virginia Electric and Power Co.*, 486 S.E.2d 289 (Va. 1997); and the unreported *Gordonsville Energy L.P. v. Virginia Electric & Power Co.*, 1996 WL 1065548 (Va. Cir. Ct. 1996).

Briar disagreed with PSNH's contention that PURPA precluded Briar or its predecessor from separating sales of energy from capacity. According to Briar, both the PURPA regulations and the New Hampshire statute that parallels PURPA, LEEPA, allow such separate arrangements. Briar took the position that under PURPA regulations a purchasing utility must purchase "any energy and capacity made available by the QF at the utility's avoided costs – but if the QF offered only energy (either because it had no reliable capacity, or because it didn't want to sell it, or because the parties couldn't agree on a price), the utility would still be required to purchase whatever energy the QF made available, up to and including its entire generation output." Briar Reply Memorandum at 8. Briar also pointed to a provision of LEEPA that

differentiates between energy and capacity: “RSA 362-A:8, II (a) provides that ‘energy *or* energy and capacity provided by qualifying small power producers ... under commission orders or negotiated power purchase contracts are part of the energy mix relied on by the commission to serve the present and future energy needs of the state ...’ (emphasis added)” and concluded that “LEEPA confirms that QF sales can be either for energy, or energy and capacity” and the “1982 NHHA Contract specified the former.” Briar Reply at 8.

Briar further described the context in which NHHA and PSNH were negotiating the 1982 Agreement. According to Briar, NHHA did not have the “luxury” of relying on the standard 7.7 cent and 8.2 cent avoided cost rates for energy and energy and capacity set by the Commission⁶ because NHHA needed to provide its lender with the security of a long-term contract with significant front-loading in order to finance the construction of the facility. *Id.* at 9. Briar asserted that PSNH “refused to entertain any credit for the Project’s capacity under the Contract.” *Id.* According to Briar, NHHA therefore never made the Penacook facility’s capacity available to PSNH.

Next, in response to a request posed at the prehearing conference, Briar took up the question of whether the FERC in its FCM order considered the question of who could claim ownership of the capacity credit that becomes a valuable (and eventually a tradable) commodity pursuant to the order. According to Briar, the settlement agreement approved by the FERC in its FCM decision makes clear that the owner of capacity entitled to FCM payments can assign away such capacity by contract. But, Briar reported, the FERC did not otherwise make any determinations that would resolve the present dispute.

⁶These standard rates, and the basis for them, are set forth in *Small Energy Producers and Cogenerators*, 65 NH PUC 291 (1980). Later orders superceded these rates, as already noted.

According to Briar, the Commission's generic approval of a higher rate for energy associated with dependable capability, as distinct from energy without such dependable capability, does not lead to the inevitable conclusion that the single, undifferentiated rate ultimately agreed to by PSNH and NHHA included the sale of capacity. Rather, according to Briar, had PSNH wished to purchase capacity from NHHA all PSNH had to do was either accept the seller's offer to that effect or get the seller to agree explicitly that the single undifferentiated rate included capacity.

Briar next drew the Commission's attention to internal PSNH memoranda obtained in discovery and attached to Briar's reply memorandum. According to Briar, these documents establish that PSNH knew from the outset of the contract that the Penacook facility had reliable capacity value to the purchasing utility, even as PSNH was claiming to NHHA that the capacity was valueless.

Briar asked the Commission to consider a policy statement NHHA received from PSNH in 1981, announcing PSNH's willingness to enter into three types of contracts with hydroelectric QFs: (1) a short term-contract for dependable capacity at 8.2 cents per kWh plus any excess energy to be purchased at 7.7 cents, (2) a 30-year contract based on a 9 cent "index price" with future adjustments, and (3) a front-loaded variation on the second option, with prices above 9 cents early in the contract and lower rates later. Briar noted that in this instance PSNH and NHHA settled on the third option, given NHHA's interest in near-term income so as to attract financing. According to Briar, what is relevant here is that only the first option explicitly assigned a higher value to energy accompanied by dependable capacity. According to Briar, NHAA sought to sell its capacity to PSNH, but NHHA's understanding at the time was that capacity had no value to PSNH and was not of interest.

Briar disagreed emphatically with PSNH's characterization of the course of dealing that followed the signing of the contract. According to Briar, PSNH never gave Briar or NHHA written notice that it was claiming rights to the Penacook facility's capacity with the New England Power Pool (NEPOOL), then the operator of the regional electricity grid. Briar noted that neither it nor NHHA were parties to capacity filings made with NEPOOL. Furthermore, according to Briar, although capacity had been traded at ISO New England (the independent grid operator that assumed NEPOOL's responsibilities in 1998 once FERC mandated open access to the grid), and although the Penacook Facility's capacity had at least some value to PSNH and its customers between 1998 and FERC approval of the FCM in late 2006, PSNH claimed this value at the ISO "without the knowledge or concurrence of NHHA or Briar." Briar Reply at 16-17. Briar stated that it is not here claiming that pre-FCM capacity value and, in fact, is willing to waive any such claim as long as Briar is allowed to recover the capacity value of the Penacook facility from December 1, 2006 forward.

In response to PSNH's argument that its contract buyout proposal to NHHA in 1990 evidenced the parties' understanding that the 30-year contract included both energy and capacity, Briar pointed out that, although the spreadsheet attached to PSNH's May 14, 1990 letter included a column for capacity values, PSNH did not include any capacity value in its buyout proposal. Finally, Briar attached a recent invoice from PSNH to its reply memorandum, pointing out that it explicitly references "energy" and does not contain the word "capacity."

III. COMMISSION ANALYSIS

Upon a careful review of the parties' pleadings, as well as applicable state and federal law, we find that the contract at issue in this case had the effect of assigning to PSNH not simply the actual energy generated by the Penacook facility but also the capacity associated with the

facility. The applicable regulatory framework has changed significantly since 1982 in a manner that places more emphasis on, and assigns a greater economic value to, the generation capacity of QFs and other energy producers in the region. But, as we explain fully below, the concept of capacity nonetheless played a role in the regulatory framework under which the contract was negotiated. When considered against that backdrop, the contract must be understood as granting to PSNH the rights to both the energy and the capacity of the facility.

A. Contract Formation

To the extent this case turns on principles of contract interpretation, the parties invoke New Hampshire law in their pleadings. We agree that, although this case arises under LEEPA and PURPA, basic state-law contracts principles provide relevant guidance. In particular, although “the parties’ intent will be determined from the plain meaning of the language used in the contract,” when a contract contains ambiguous language a New Hampshire tribunal “give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole.” *Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n*, 153 N.H. 194, 197 (2006) (citations omitted).

During 1981 and 1982, NHHA was attempting to finalize a purchase commitment from PSNH at pricing sufficient to satisfy NHHA’s lender. From the pleadings, it appears that the lender was financing capital improvements needed to make the Penacook Facility operational. At the time the contract was negotiated, the Commission-approved short term rates of 8.2¢ per kWh for energy and dependable capacity and 7.7¢ kWh for energy without capacity were reportedly insufficient for NHHA’s financing requirements. In order to satisfy its lender, NHHA

sought a long term, front-loaded contract with higher payments in the first eight to ten years of the 30-year term.

The parties provided copies of two PSNH memos, dated July 31, 1981, and September 9, 1981, reflecting PSNH's analysis of the Penacook Facility's projected energy production and dependable capacity. Briar Reply Memorandum at Attachments B 1 and B 2. Also included was PSNH's letter of November 20, 1981 to NHHA attaching the pricing policy PSNH had developed for SPPs, which set forth three pricing options. Briar Reply Memorandum at Attachment B 3. The PSNH policy statement noted that it was attempting to "pursue all viable new supplemental energy sources in order to reduce its dependence on foreign oil, delay construction of future baseload power plants for as long as possible, and provide the best possible service to its customers at the lowest reasonable cost." *Id.*

Briar produced documents indicating that NHHA had attempted, through several written proposals to PSNH, to obtain additional payment for the capacity of the Penacook Facility beyond the options contemplated in the Policy Statement. Briar Reply Memorandum at Attachments B 4, B 5 and B 6. Based on these communications, Briar argues that because the contract did not include a separate capacity payment or separate capacity pricing, PSNH had declined NHHA's offer of capacity and that NHHA had therefore retained ownership of the capacity of the Penacook facility.

The dispute between the parties concerns the proper interpretation of the terms "entire output" and "energy" and variations thereof used in the contract. Both parties assert that the plain meaning of the contract supports their contrary positions. We conclude, however, that within the four corners of the contract we cannot resolve the question of whether "entire output" includes energy and capacity; or whether "energy" was meant to be used in a general sense,

which would include capacity, or in a technical sense, which would be distinguished from capacity. Another formulation of the dispute goes to the issue of whether the pricing in the contract was an all-in price for both energy and capacity, or a price for energy only. To interpret the contract we therefore look to the documents associated with, and the circumstances underlying, the contract.

Of primary relevance to our inquiry is PSNH's policy statement on contract pricing for limited electrical energy producers, which offered developers three pricing options and which PSNH provided to NHHA under cover of a letter dated November 20, 1981. Option I was a rate that changed from time to time and which, at that time, was 8.2 cents per kWh for dependable capacity and 7.7 cents per kWh for energy in excess of dependable capacity. Option II employed an index price of 9 cents per kWh that escalated over a 30-year term. Option III was a variation of Option II that provided for front-end loaded payments. The contract memorializes Option III.

Option I of the policy statement provided a price on a kWh basis that was higher, i.e., 8.2 cents per kWh, to the extent a project had dependable capacity, and lower, i.e., 7.5 cents per kWh, to the extent a project produced energy in excess of its dependable capacity.⁷ A fair interpretation of this approach to pricing is that PSNH, rather than employing a separate price per kW month for capacity, was paying for the capacity of a project at a rate of 0.5 cents per kWh up to the dependable capacity of that project. In other words, PSNH was using an all-in kWh price for both energy and capacity. It is similarly reasonable to treat Options II and III, which are long term options employing a 9 cents per kWh index price, as reflecting an all-in price for both energy and capacity.

⁷ As noted in PSNH's September 9, 1981 memorandum, the Penacook Facility had an estimated dependable capacity of 1.57 megawatts compared with its nominal or maximum generating capacity of 4.1 megawatts.

As for Briar's argument that NHHA, through letters dated December 29, 1981 and January 21, 1982, "offered" to sell its capacity to PSNH, which PSNH declined to purchase, the circumstances do not comport with Briar's characterization of the relevant documents. We start from the premise that Option III was an all-in price for both energy and capacity, and conclude that the better interpretation of the NHHA letters is simply as an attempt to negotiate a richer financial arrangement than provided for in the PSNH policy statement. Consequently, we find that PSNH offered a price for both energy and capacity, which NHHA ultimately accepted, and that NHHA did not retain any rights in the capacity of the Penacook facility by virtue of PSNH's apparent decision to not consider an additional payment for capacity.

B. Regulatory Context

The contract is between an SPP (NHHA) and an electric utility (PSNH), which was developed in the context of regulatory decisions of this Commission. Accordingly, we look also to the regulatory context in which the contract was executed for guidance in making our decision.

During the 1979-1982 timeframe, the Commission explicitly understood that capacity had economic and practical value because QFs that "supply capacity as well as energy can be used to satisfy reserve requirements," *New Hampshire Electric Cooperative*, 64 NH PUC at 87, the very reason the Forward Capacity Market was approved 27 years later. Nevertheless, when setting rates, the Commission described capacity for SPPs in terms of energy production and not as a stand-alone product. For example, in 1979 the Commission set SPP rates of 4.5 cents per kWh for "plants which produce[d] energy on a dependable capacity basis" and rates of 4 cents per kWh for "plants which produce[d] on a non-dependable basis." *Id.* at 89. Thus it was common practice in 1982 to describe capacity as a characteristic of energy and to price it with

energy on a per kWh basis. As a result, the references in the contract to “energy produced” do not mean that capacity was not also included.

We recognize as well that not all hydro facilities qualifying under LEEPA were capable of offering energy and capacity. When the Commission differentiated in 1979 between facilities with dependable capacity and those that would receive a lower rate because they lacked this attribute, the example given for the latter was run-of-the-river hydro plants. *Id.* In the 1982 time frame, therefore, an “entire output” contract for a run-of-the-river hydro would not have included capacity. However, an SPP such as the Penacook facility, which was capable of producing dependable capacity and estimated to have a dependable capacity of 1.57 MW, would have been obligated to provide that capacity as part of its energy production under an “entire output” arrangement.

LEEPA provided that utilities purchase the “*entire output of electric energy* of such limited electrical energy producers, if offered for sale.” RSA 362-A:3 (emphasis added). This language was part of the original LEEPA statute enacted in 1978. Although Briar cited a provision of LEEPA that differentiates between energy and capacity, it is significant to note that RSA 362-A:8, as well as another differentiating between energy and capacity, RSA 362-A:4-a, were enacted as amendments to the LEEPA statute, in 1988 and 1989, respectively, well after execution of the 1982 NHHA contract. In 1982 there was no recognition of capacity as distinct from energy in LEEPA. Indeed, another original provision of LEEPA, RSA 362-A:4, entitled “Payment by Public Utilities for Purchase of Output,” provided in 1982 that “Public utilities purchasing electrical energy in accordance with the provisions of this chapter shall pay a price

per kilowatt hour to be set from time to time by the public utilities commission.” NH Laws of 1978, 32:1.⁸

In Docket No. DE 79-208, the Commission, among other things, established a minimum, grandfathered rate for qualifying facilities of 7.7 cents per kWh for energy and 8.2 cents per kWh for reliable capacity, the exact amounts subsequently reflected in PSNH’s policy statement. In addition, the Commission noted in reference to Granite State Electric Company, that, since it had excessive capacity, qualifying utilities in its service territory would be awarded only “the energy component of 7.7 cents for all kwh.” *Small Energy Producers and Cogenerators*, 65 NH PUC at 299. Furthermore, in direct reference to the 7.7 cents per kWh and 8.2 cents per kWh, the Commission stated in its 1980 order establishing avoided cost rates for all New Hampshire SPPs that “the aforementioned rates for *energy and capacity* will only apply to (1) cogenerators who offer to sell their *entire output* and buy back all their needs.” *Id.* (emphasis added).

As additional support for our interpretation, we observe that, in Docket No. DE 83-62, the Commission acknowledged the then existing practice of paying for capacity as part of an all-in price. In that proceeding, the Commission explicitly determined that “the expression of the capacity values...will no longer be translated into cents/KWH and added to the energy rate.” *Small Energy Producers and Cogenerators*, 69 NH PUC 352, 358 (1984). Subsequently, both short- and long-term rates contained an energy component expressed in cents per kilowatt-hour and a capacity component expressed in dollars per kilowatt-year. Generation capacity does not exist in the abstract entirely separable from the energy produced by a facility. Energy output is the result of using generating capacity over time. When the entire energy output of a facility is obligated to another party, as is the case here, there is no generating capacity available for other

⁸ In 1983 the later part of this sentence was amended to read “shall pay rates per kilowatt hour to be set from time to time by the commission.” 1983 N.H. Laws Ch. 395:4 (eff. Aug. 21, 1983).

purposes. Furthermore under the Article 2 of the 1982 NHHA contract in question here, NHHA/Briar is obligated to “endeavor to operate its generating unit to the maximum extent reasonably possible under the circumstances and shall make available to PUBLIC SERVICE the entire net output in kilowatt hours from said unit when in operation.” As a result, in the legal and regulatory context prior to July 5, 1984, we find that the phrase “entire output” when applied to the contract in dispute here meant all of the energy and capacity NHHA was able to produce and that all of the generating capacity and the energy produced by that capacity are fully obligated to PSNH and are fully compensated through the all-in price specified by the contract.

C. Conclusion

Although over the course of the 25 years this “entire output” contract has been in existence, the definitions of, and markets for, capacity and energy have evolved, in 1982 the practice was to sell energy and capacity together on a cents per kWh basis. Hence, the language “entire output” in the contract described a purchase of all energy and capacity the Penacook facility was capable of producing. Inasmuch as we base our findings on the circumstances and context in which the contract was negotiated, we conclude that it is not necessary to address the various arguments regarding the subsequent course of dealings with respect to the contract.

We find that NHHA agreed to sell its electric energy and associated capacity exclusively to PSNH and to no other party. Having granted PSNH exclusive rights to purchase its entire output, NHHA and its successor Briar may not sell energy or capacity to any other party. As a consequence, PSNH, and ultimately its customers, are entitled to transition capacity payments pursuant to the Forward Capacity Market.

Based upon the foregoing, it is hereby

ORDERED, that PSNH has contracted to purchase all of the energy and capacity produced by the Penacook Lower Falls Hydroelectric Facility for a term of 30 years and may continue to claim that capacity for purpose of its capacity reserve requirements; and it is

FURTHER ORDERED, that PSNH is entitled to receive transition capacity payments pursuant to the Forward Capacity Market Order for the capacity of the Penacook Lower Falls Hydroelectric Facility and any Forward Capacity Market payments for the capacity of the facility that may be available during the term of the contract..

By order of the Public Utilities Commission of New Hampshire this twenty-first day of November, 2007.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director