

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 07-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petition for Clarification and Interpretation of Commission Orders Regarding
Hemphill Power & Light**

Order Approving Settlement

ORDER NO. 24,919

December 5, 2008

Appearances: Gerald M. Eaton, Esq. on behalf of Public Service Company of New Hampshire; Brown, Olson & Gould, PC, by Bryan K. Gould, Esq. on behalf of Hemphill Power & Light Company; Meredith A. Hatfield, Esq., Office of Consumer Advocate on behalf of residential ratepayers; and F. Anne Ross, Esq. on behalf of Commission Staff.

I. PROCEDURAL BACKGROUND

On November 9, 2007, Public Service Company of New Hampshire (PSNH) filed a Petition for Clarification and Interpretation of Commission Orders Regarding Hemphill Power and Light Company (Hemphill) and requested that the Commission adjudicate a dispute between PSNH and Hemphill. Hemphill is an independent power producer (IPP) that operates a 12,500 kilowatt wood-fired generation facility. According to the petition, on April 2, 1985 the Commission issued an Order Nisi approving Hemphill's request for a twenty-year rate order. *Hemphill Power and Light Company*, Order No. 17,524, 70 NH PUC 142 (1985) (Rate Order). The petition states that the dispute concerns whether the Rate Order expired on October 26, 2006, as PSNH maintains, or a year later on October 26, 2007, as Hemphill claims. According to PSNH, its position relies upon its interpretation of the generic Order No. 17,104 in *Re Small Energy Producers and Cogenerators*, 69 NH PUC 352 (1984) (Generic Rate Order). In contrast,

Hemphill bases its position on the date the Hemphill facility began operation, which was 10 months later than anticipated when the Rate Order was approved.

The Office of Consumer Advocate (OCA) filed a letter on November 27, 2007 stating that it would participate in the docket on behalf of residential ratepayers. The Commission issued an Order of Notice on November 29, 2007, setting a prehearing conference for December 27, 2007. On December 20, 2007, Commissioner Getz informed the parties by letter that he was recusing himself from the proceeding.

On December 14, 2007, Hemphill filed a motion to intervene and a motion to continue the prehearing conference. Subsequently, on December 27, 2007, Hemphill filed a motion to stay and a motion to enjoin the Commission from proceeding with the docket. On December 20, 2007, the Commission granted Hemphill's motion to continue the prehearing conference and issued a supplemental Order of Notice rescheduling the prehearing conference for January 7, 2008. The prehearing conference was held as scheduled and following the prehearing conference, the Parties and Staff met in a technical session and discussed the possibility of PSNH and Hemphill settling the case without litigation.

Staff filed a letter on January 8, 2008 suggesting that PSNH and Hemphill attempt to settle their dispute. On January 10, 2008, the Hearings Examiner filed a report of the prehearing conference. Also on January 10, 2008, PSNH filed a letter stating that PSNH and Hemphill had decided to enter into settlement discussions and requesting that the Commission suspend proceedings in the docket. On the same day, the OCA filed a letter requesting the Commission set a deadline by which PSNH and Hemphill should file any proposed settlement.

On September 3, 2008, PSNH filed a motion requesting that the Commission approve a settlement agreement that PSNH had reached with Hemphill. With its motion, PSNH filed

supporting testimony and the proposed settlement. Staff filed a proposed procedural schedule on September 26, 2008, which was adopted by the Commission by secretarial letter issued October 3, 2008. A hearing on the settlement was held as scheduled on November 6, 2008.

II. PRELIMINARY POSITIONS OF THE PARTIES

A. Public Service Company of New Hampshire

In its petition, PSNH stated that, pursuant to the Rate Order, PSNH has been purchasing power produced by Hemphill since the facility began operating on October 27, 1987. PSNH said it made its final payment to Hemphill under the Rate Order on October 26, 2006, and since that time, PSNH has been paying the market rate for Hemphill's power. PSNH argued that the Rate Order ended on October 26, 2006 because: (1) Hemphill became operational on October 27, 1987, ten months after it was scheduled to deliver power to PSNH; (2) therefore PSNH was required to begin paying the 1988 rates because the 1988 rate year, the second year of the Rate Order, took effect starting on September 1, 1987; (3) PSNH made all the scheduled changes to the rates on the anniversaries of the date Hemphill first began supplying power to PSNH; (4) throughout the 19-year history of receiving payments under the Rate Order, Hemphill never disagreed with the selection of the underlying Rate Order rate, nor with the timing and application of annual changes to those rates; and (5) 2006 is the last year shown on the rate schedule attached to the Rate Order. PSNH stated that its interpretation is consistent with the Generic Rate Order.

PSNH said that the dispute between Hemphill and PSNH concerns both the date on which the Rate Order terminated, and the appropriate rate to be paid by PSNH if the Rate Order continued past October 26, 2006. PSNH explained that Hemphill maintains that the Rate Order ended October 26, 2007, twenty years after Hemphill became operational, but Hemphill had not

specified what rate ought to be paid for the additional year, nor why PSNH's retail customers should pay additional above-market rates beyond the expiration of the rate schedule approved in the Rate Order. Further, PSNH argued that if the Commission finds that Hemphill is entitled to be paid for an additional year of deliveries at some rate to be determined, the Commission must also find that Hemphill has been enriched by the increases in energy and capacity rates realized one year earlier than contemplated by the Rate Order.

According to PSNH, in May 2007 it was served with a writ of summons by Hemphill which had been filed in Hillsborough County Superior Court (Superior Court) whereby Hemphill was seeking both monetary damages and declaratory relief relative to its dispute with PSNH concerning the Rate Order. *See* Superior Court Docket No. 07-C-294. PSNH later filed a motion to stay the Superior Court proceeding along with a counterclaim asserting a right to an offset against any recovery eventually awarded to Hemphill.

In its current petition, PSNH asserts that the Commission has jurisdiction to hear the dispute over the term and payment rates under the Rate Order because: (1) the matter involves the meaning and interpretation of a Commission order; (2) Hemphill is a Limited Electrical Energy Producer as defined in RSA 362-A; (3) the Commission is the specialized agency created by the Legislature to determine rates and charges and to administer the Limited Electrical Energy Producer Act (LEEPA)¹ and Public Utility Regulatory Policies Act of 1978 (PURPA)²; (4) the Commission has held that small power producers are utilities subject to its jurisdiction; (5) the Commission has authority under RSA 363:5 on its own motion or upon petition of a public utility, such as PSNH, to investigate any rate charged by a public utility, like Hemphill; (6) the

¹ RSA Chapter 362-A

² 16 U.S.C. § 824a-3

Commission may investigate any charge demanded by a public utility to determine if it is just and reasonable, or more than what is allowed by law or Commission order, RSA 374:2; and (7) the Commission has previously accepted jurisdiction of similar disputes in connection with Franklin Power L.L.C. in *Public Service Company of New Hampshire*, Order No. 24,177, 88 NH PUC 308, (2003) and Pinetree Power-Tamworth in *Public Service Company of New Hampshire*, Order No. 24,679, 91 NH PUC 431, (2006).

B. Hemphill Power and Light Company

On December 27, 2007, Hemphill filed a motion to stay the proceeding. Hemphill maintained that only the Superior Court had jurisdiction to adjudicate all of the parties' claims and grant all relief sought. Hemphill argued that the issue should be resolved before the Superior Court, not "through piecemeal litigation in two forums"³ and that, pending a decision by the Superior Court it would be a waste of resources for the Commission to move forward with the instant docket. Hemphill stated that as a matter of comity toward the Superior Court and in the interest of economy, the Commission should stay all further proceedings in this docket until the Superior Court has ruled.

C. Office of Consumer Advocate

The OCA stated that it supported PSNH's petition for clarification and opposed Hemphill's motion to stay the proceeding.

D. Commission Staff

At the prehearing conference, Staff raised the issues of (1) whether the Commission is preempted pursuant to PURPA or any other federal law from entertaining this case, and (2) whether PSNH and Hemphill were waiving any right to contest whether the Commission has

³ Hemphill Motion (12/27/07) at 2.

jurisdiction under PURPA later in the proceeding. According to Staff, there was no plausible reason why the Commission should not continue to hear this case. Finally, Staff said that, in its opinion, the case was one that was amenable to resolution by settlement.

III. SETTLEMENT AGREEMENT

A. PSNH and Hemphill

PSNH filed a Motion to Approve Settlement Agreement, and supporting testimony, on September 2, 2008. Attached to that motion was a Settlement Agreement and Mutual Release of Claims executed by PSNH and Hemphill on May 23, 2008 (Settlement Agreement). According to PSNH, the Settlement Agreement resolved all issues in this proceeding and in the concurrent proceeding in the Superior Court.

The Settlement Agreement characterized the dispute between PSNH and Hemphill as a disagreement regarding whether the Rate Order expired on October 26, 2006 or October 26, 2007. In its motion, PSNH briefly described each party's position. With respect to Hemphill's position, PSNH stated that Hemphill maintained that the last year of the Rate Order was from October 27, 2006 through October 26, 2007 and that Hemphill was entitled to be paid at the 2006 Rate Order rates for that year. Assuming Hemphill was correct, and based on Hemphill's production for that year, the amount due from PSNH to Hemphill is \$7,002,114. This amount represents the total revenue Hemphill claimed it should have been paid (\$14,847,304) less what it was paid by PSNH at the short-term market rate (\$7,845,190).

Under the Settlement Agreement, PSNH is obligated to pay Hemphill \$3.5 million, or approximately 50% of the amount that Hemphill claims it should have received under the Rate Order. According to PSNH, the settlement "avoids significant litigation costs in the Commission, the Superior Court, and the Federal District Court, as well as any appeals to the

U.S. Court of Appeals for the First Circuit or the N.H. Supreme Court.”⁴ PSNH also stated that, the Superior Court or the Federal District Court would likely urge PSNH and Hemphill to settle the dispute.

In testimony accompanying the Settlement Agreement, PSNH proposed to recover the \$3.5 million through its default energy service rate. At hearing, PSNH corrected its testimony and recommended that the Commission allow PSNH to recover the \$3.5 million as part of the over-market costs included in its stranded cost recovery charge.

Hemphill stated its agreement with the contents of PSNH’s motion.

B. Office of Consumer Advocate

After questioning the timing and specific accounting for the \$3.5 million payment, the OCA stated that, considering the amount of above-market costs paid to Hemphill by PSNH ratepayers over the years, it could not support the additional above-market payment under the Settlement Agreement. However the OCA stated that it was not objecting to the Settlement Agreement as it believed PSNH took ratepayers’ concerns into account in its negotiations with Hemphill.

C. Commission Staff

Staff stated it supported the Settlement Agreement as a reasonable compromise considering; (1) the significant litigation risk faced by each party, and (2) the interests of PSNH and its ratepayers.

IV. COMMISSION ANALYSIS

We generally approve settlements of contested cases if we determine that the “result is just and reasonable and serves the public interest.” N.H. Code of Admin. Rules Puc 203.20. In

⁴ PSNH Motion to Approve Settlement at 4.

determining the public interest we serve as arbiter between the interests of customers and those of regulated utilities. *See*, RSA 363:17-a. In this case we must consider the interests of PSNH customers as well as the interests of PSNH and Hemphill. We consider these competing interests in the context of LEEPA, and PURPA which formed the basis of the Rate Order. We must also consider RSA Chapter 374-F which restructured the New Hampshire electric utility industry.

Both LEEPA and PURPA were designed to promote electric generation facilities using renewable and indigenous fuels by requiring utilities to purchase the output of qualifying facilities. The Rate Order provided the terms of that long term purchase commitment between PSNH and Hemphill. In 1996 the legislature enacted RSA Chapter 374-F which allowed customers to select electricity providers in a competitive market. As a result of the enactment of RSA Chapter 374-F, LEEPA was amended to allow a transition from long term contracts to a more flexible market based pricing arrangement between IPPs and incumbent utilities such as PSNH. *See*, RSA 362-A:3, II and RSA 362-A:4.

In determining the merits of the Settlement Agreement before us, we need not determine the merits of each party's preliminary position, although both parties raise colorable arguments. Hemphill claims that PSNH owes it \$7,002,114, under the terms of the Rate Order, for power purchased during the year in dispute, i.e., October 27, 2006 through October 26, 2007. PSNH claims that since the rate schedule under the Rate Order began in year two, when the Hemphill facility became operational, the rate schedules ended 19 years later in 2006. As a result, PSNH argues that it has properly paid Hemphill market rates for power output in the 20th year. Both parties agree that \$7,002,114 represents the difference between the market price paid to Hemphill by PSNH and the rates provided in the 20th year of the Rate Order. PSNH has agreed to pay Hemphill \$3.5 million, essentially half of Hemphill's claim.

We understand that the parties' principal reason for settling this dispute is to avoid the unknown and potentially significant litigation costs at the Commission, in Superior Court, and possibly in other forums. In addition to avoiding litigation expense, however, the Settlement Agreement achieves a balance between Hemphill's financial expectations when it entered into the financing and construction of its facility over 20 years ago and the ratepayers' interest in paying the lowest possible rates for electricity. By allowing Hemphill to recover half of its over-market rates we have continued to promote the use of renewable and indigenous fuels in the production of electricity, while also allowing customers some rate relief compared with a possible outcome of continued litigation. We find that the settlement is reasonable and approve the terms of the settlement agreement executed by PSNH and Hemphill.

We also find it appropriate for PSNH to recover the \$3.5 million settlement payment through its stranded cost recovery charge. Pursuant to RSA 374-F:2, IV, stranded costs are those costs:

“...that electric utilities would reasonably expect to recover if the existing regulatory structure with retail rates for the bundled provision of electric service continued and that will not be recovered as a result of restructured industry regulation that allows retail choice of electricity suppliers, unless a specific mechanism for such cost recovery is provided. Stranded costs may only include costs of:

- (a) Existing commitments or obligations incurred prior to the effective date of this chapter [May 21, 1996];
- (b) Renegotiated commitments approved by the commission; and
- (c) New mandated commitments approved by the commission, including any specific expenditures authorized for stranded cost recovery pursuant to any commission-approved plan to implement electric utility restructuring in the territory previously serviced by Connecticut Valley Electric Company, Inc.”

PSNH's Part 2 stranded costs consist primarily of the over-market value of energy purchased from IPPs, such as Hemphill, and the amortization of payments previously made for IPP buy-downs and buy-outs as approved by the Commission. PSNH's payment to Hemphill

proposed in the settlement agreement is clearly a price in excess of the market price of power for Hemphill's output over the year in question. In addition, since Hemphill's Rate Order predates the effective date of RSA Chapter 374-F, the payment relates to an existing commitment or renegotiated commitment consistent with the definition of stranded costs found in RSA 374-F:2, IV. Therefore, we will allow PSNH to recover the payment to Hemphill in settlement of this dispute through its stranded cost recovery charge.

Based upon the foregoing, it is hereby

ORDERED, that Public Service Company of New Hampshire's Motion to Approve Settlement Agreement between Public Service Company of New Hampshire and Hemphill Power & Light is hereby GRANTED; and it is

FURTHER ORDERED, that, PSNH's request to recover the settlement payment through its stranded cost recovery charge is hereby GRANTED.

By order of the Public Utilities Commission of New Hampshire this fifth day of December, 2008.

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director