STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 07-045

BRIAR HYDRO ASSOCIATES

Petition for Declaratory Ruling

Order Denying Motion for Rehearing

O R D E R N O. 24,960

April 22, 2009

I. INTRODUCTION

Petitioner Briar Hydro Associates (Briar Hydro, successor to New Hampshire Hydro Associates or NHHA) seeks rehearing pursuant to RSA 541:3 of Order No. 24,804 (Nov. 21, 2007), which resolved the question raised by this case in favor of Public Service Company of New Hampshire (PSNH). Briar Hydro owns the Penacook Lower Falls Hydroelectric Project, a 4.1 megawatt facility on the Contoocook River in Penacook and Boscawen. At issue is whether Briar Hydro or PSNH is entitled to payments arising out of the recently established regional mechanism for compensating generators for the capacity they make available to the New England electricity grid. In Order No. 24,804 we determined that, under the long-term power contract entered into by PSNH and the corporate predecessor to Briar Hydro in 1982, the entitlement belongs to PSNH. Briar Hydro filed its rehearing motion on December 21, 2007. PSNH submitted a pleading in opposition to the motion on December 31, 2007. A Secretarial Letter issued on May 1, 2008 scheduled oral argument on the rehearing motion for May 20, 2008. The Secretarial Letter indicated that we would resolve the jurisdictional issues raised by Briar Hydro on the papers, but that we would hear argument on the remaining issues and

expected the parties to come prepared with offers of proof with respect to the evidence they would produce should rehearing be granted.

Briar Hydro filed a letter on June 25, 2008 indicating that it was in need of additional time to respond to a request posed during the May 20, 2008 oral argument. Briar Hydro indicated that it had conferred with PSNH, OCA and Staff, with each assenting to Briar Hydro submitting responses, which were filed on July 10, 2008.

II. JURISDICTION

In its motion for rehearing, Briar Hydro asked to vacate Order No. 24,804 on the ground that the Commission lacked subject matter jurisdiction. Briar Hydro conceded that it was "unusual" for the party that first invoked the Commission's jurisdiction to argue later in the case that the tribunal lacks such jurisdiction. Briar Hydro Motion at 3. However, according to Briar Hydro, it could reasonably (1) choose the Commission as a forum for resolution of an energy-related dispute with a utility, (2) lose on the merits, and (3) argue only after not prevailing that jurisdiction was lacking – all because of what was then a recent decision of the U.S. District Court for the District of New Hampshire, *Greenwood v. New Hampshire Public Utilities Commission*, No. 2007 DNH 088 (D.N.H. July 19, 2007), 2007 WL 2108950, issued after Briar Hydro sought relief before the Commission. Briar Hydro argued that the federal district court's *Greenwood* decision highlighted "the Commission's lack of authority to adjudicate . . . disputes of this type" between a utility and a PURPA qualifying facility, i.e., an independent power producer that qualified as a generator from which PSNH is obliged to purchase power under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3. Briar Hydro Motion at 3.

Subsequent events have overtaken this argument. *See, Greenwood v. New Hampshire Public Utilities Commission,* 527 F.3d 8 (1st Cir. 2008) (vacating District Court decision and dismissing case with prejudice). Moreover, in *Druding v. Allen*, 122 N.H. 823, 826 (1982) the New Hampshire Supreme Court has held that "jurisdictional issues will be deemed to have been waived unless they are fully litigated prior to the determination of any substantive issues." *See also,* RSA 541:3 (authorizing administrative agencies to entertain rehearing requests "in respect to any matter *determined in the action or proceeding, or covered or included in the order*") (emphasis added) and *Appeal of Campaign for Ratepayers' Rights,* 133 N.H. 480, 484 (1990) (concluding that due process argument was thus waived for purposes of both rehearing and appeal) (citation omitted). These authorities establish that the question of the Commission's subject matter jurisdiction is not cognizable on rehearing in these circumstances.

One tangential jurisdictional argument made by Briar Hydro requires comment. According to Briar Hydro, we should vacate the order entered in this docket because it "treads into territory that the Commission in the past has acknowledged it is prohibited from entering." Briar Hydro Motion at 4-5 (citing *Connecticut Valley Elect. Co*., Order No. 23,939 (March 29, 2002), 87 NH PUC 150). Briar Hydro misreads and misapplies the referenced decision.

In the *Connecticut Valley* order, the Commission asserted, rather than eschewed, jurisdiction to decide a controversy involving a previously approved PURPA rate order dating from 1983. *Connecticut Valley*, 87 NH PUC at 164-65. In any event, the 2002 decision was ultimately withdrawn and the underlying dispute was compromised as part of a broader agreement to transfer the utility's franchise. *See, Connecticut Valley Elect. Co*., Order No.

24,176 (May 23, 2003), 88 NH PUC 288, 306. For the reasons set forth above, the contentions of Briar Hydro Associates about jurisdictional issues are rejected.

III. ARGUMENTS REGARDING MERITS OF ORDER NO. 24,804

Briar Hydro asks that we grant rehearing of Order No. 24,804 and convene an evidentiary hearing for the purpose of taking what Briar Hydro characterizes as "new evidence." Briar Hydro Motion at 7. Briar Hydro asserts that it did not request an evidentiary hearing in the first place because it believed the contract in question to be unambiguous and thus the dispute resolvable on the papers as a matter of law. Now that we have resolved the dispute based on the papers, Briar Hydro contends that we are obliged to receive additional evidence so as to shed light on the meaning of the contract.[1]

The "new evidence" identified in Briar Hydro's motion consists of the testimony of Richard Norman and the affidavit of Warren Mack, the latter attached to the motion. In the affidavit, Mr. Mack states that he and Mr. Norman were principally responsible for negotiating the contract at issue here on behalf of Briar Hydro's predecessor-in-interest, New Hampshire Hydro Associates (NHHA). *Inter alia*, Mr. Mack stated that in his discussions with John Lyons, who represented PSNH in the negotiations, "Mr. Lyons did not waver from his assertion that the capacity of the Lower Penacook Project had no value to PSNH, that PSNH would not pay for it, and that he would not include it in the contract." Affidavit of Warren W, Mack, Exh. 1 to Briar Hydro Motion, at ¶ 5, pp. 2-3. According to Mr. Mack, the PSNH representative "referred to PSNH having Seabrook and therefore no need for additional capacity." *Id*. At the time, PSNH

[1] In cursory fashion, Briar Hydro suggests that a failure to conduct an evidentiary hearing in these circumstances would raise due process issues. We do not address the constitutional question, deeming it to have been waived. *See, e.g., Keenan v. Fearon*, 130 N.H. 494, 499 (1988) (concluding that "off-hand" and "glancing" references to constitutional issues are insufficient to preserve them).

was slated to own 36 percent of the then-unbuilt nuclear facility, which would have yielded approximately 800 megawatts of capacity. Tr. 5/20/08 at 53.

At oral argument, Briar Hydro described what Mr. Norman would state if permitted to testify. According to Briar Hydro, the "central point" of Mr. Norman's testimony would relate to the "policy statement" of PSNH that Mr. Lyons sent to Mr. Norman on November 20, 1981 "as a way of PSNH indicating the various bases on which PSNH would be prepared to contract with New Hampshire Hydro Associates for the purchase of energy from the Penacook Lower Falls Facility."[2] Tr. at 13, 15. Order No. 24,804 referred to the PSNH policy statement as being "of primary relevance" to the case, noting that it set forth three pricing options that PSNH was willing to offer NHHA and other similarly situated generators from which PSNH was obliged to buy power. Order No. 24,804 at 13.

As noted in the Order, the policy statement offered power producers three contract options: (1) contract rates determined by the Commission under the state-law analog to PURPA, the Limited Electrical Energy Producers Act (LEEPA), RSA 362-A, which at the time were 8.2 cents per kilowatt-hour for dependable capacity and 7.7 cents per kilowatt-hour for energy in excess of dependable capacity, (2) a contract with a single "index price" of 9 cents per kilowatt-hour that escalated over a 30-year term, and (3) a variation on the second option, using the same index price but a payment schedule that was "front-end loaded" so as to increase the amount of the revenue stream in the early years of the contract without affecting its overall value. *Id.*

Noting that the first of these options offered an "all-in" price for both energy and capacity (and was, in effect, assigning a value of 0.5 cents per kilowatt-hour to capacity as distinct from

[2] The PSNH policy statement itself, with a cover letter addressed by Mr. Lyons to Mr. Norman, appears as an attachment to Briar Hydro's Reply Memorandum of June 29, 2007.

energy), Order No. 24,804 deemed it "similarly reasonable to treat Options II and III . . . as reflecting an all-in price for both energy and capacity." *Id.* This had outcome-determinative significance because it is undisputed that the contract at issue here was entered into pursuant to Option III. If the contract price is "all-in," then PSNH and not Briar Hydro owns the capacity.

According to Briar Hydro, it is the reasonableness of this inference about Options II and III in Order No. 24,804 that Mr. Norman would contradict in his testimony. At oral argument, Briar Hydro asserted that Mr. Norman would testify "that the only . . . pricing that was made available by PSNH under options II and III was an energy component. It did not include capacity in any way." Tr. 5/20/08 at 16. Briar Hydro also indicated that Mr. Norman would testify about "a series of cases analyzing the actual numbers that are used in Option II and Option III in the PSNH policy statement," because these analyses would demonstrate that . . . there should have been a higher contract price than there was in the actual contract." *Id*. at 20, referencing Exhs. B and C introduced at oral argument.

PSNH suggested that the Commission was justified in looking purely to the policy statement itself as a reliable source of extrinsic evidence to shed light on the meaning of an ambiguous contract. According to PSNH, "[t]his type of extrinsic evidence is more reliable than hearsay testimony concerning negotiations taking place in 1981-1982 because the documents did not change over time." PSNH Opposition of December 31, 2007 at 3. Overall, according to PSNH, the Commission's interpretation of the contract should not be revisited because it is fully supported by an adequate record.

At oral argument, PSNH was asked to address whether it could produce anyone to testify about the matters Messrs. Mack and Norman intended to address on behalf of Briar Hydro. PSNH replied:

> Mr. Lyons joined PSNH in 1948. He retired in 1990. We know that he is still alive, but he is at least in his late 80s, and may be approaching 90 years old. . . . [W]e have not contacted him, we have not asked him if he remembers this particular negotiations. And we think we're at a distinct disadvantage by the fact that this is someone who has left the Company almost 20 years ago and his recollection may not be good.

Tr. 5/20/08 at 43. PSNH indicated that it had spoken with a second former employee whose name appeared on the relevant PSNH documents, Richard Perron, but "he said he was mostly a person who didn't negotiate" but simply did calculations that Mr. Lyons used in the negotiations. *Id*. Rather than call Messrs. Mack and Norman to testify, PSNH suggested that the Commission reject such testimony as "entirely unreliable" given the amount of time that has elapsed. *Id*. at 45. Moreover, according to PSNH, Briar Hydro should not now be permitted to introduce additional evidence after having agreed the case could be decided on the papers and losing the case when it was so decided.

IV. CONCLUSION

RSA 541:3 authorizes the Commission to grant rehearing of a decision if it determines that "good reason for the rehearing is stated in the motion." RSA 541:4 requires the movant to demonstrate that the decision is unlawful or unreasonable. Good reason for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). Based on the arguments presented in the motion, the opposition to the motion, and the offers of proof presented at oral argument, we find that Briar Hydro has not stated good reason for rehearing of Order No. 24,804.

This proceeding concerns a contract dispute that the parties agreed to bring before us. In its petition, Briar Hydro stated that it "believe[d] this issue can be decided without extensive evidentiary hearings, on the basis of written pleadings and exhibits" but added that Briar Hydro "would certainly be willing to participate in more extensive hearings should PSNH request them and/or the Commission decide that they would be helpful in resolving this issue." Petition at 3. At the pre-hearing conference on May 23, 2007, Briar Hydro indicated that it was "not aware at this point of any factual issues that would require oral testimony" and "would be prepared to submit this on the paper record" unless "some party raises an issue that requires oral testimony in the course of possible discovery." Tr. 5/23/2007 at 11. In its final submission prior to Order No. 24,804, Briar Hydro did not request a hearing and continued to assert that the case "is ultimately about construing the plain meaning of contract language," which is a legal rather than a factual issue. Briar Hydro Reply Memorandum at 19.

As we observed in Order No. 24,804, at p. 12: "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 concluded that the meaning of the terms was not plain. Accordingly, consistent with *Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n,* 153 N.H. 194 (2007), we looked to the documents associated with, and the circumstances underlying, the contract.

It is a well-established principle of New Hampshire law that when a contract is ambiguous it is appropriate to look to extrinsic evidence for assistance in resolving the factual question of what meaning to assign to the ambiguous language. *See, e.g., Behrens v. S.P. Construction Co*., 153 N.H. 498, 500 (2006). In our view, the ambiguity in this case was

resolved by reference to PSNH's so-called policy statement, which was essentially an offer sheet setting forth three pricing options for developers. Our conclusion was bolstered by our reading of letters from Briar Hydro to PSNH dated December 29, 1981 and January 21, 1982. We found that Briar Hydro accepted PSNH's Option III, which we concluded provided an all-in price for energy and capacity at an index price, with front-end loaded payments, for a period of thirty years. We essentially found that Briar Hydro had made a counter offer that PSNH did not accept, and that Briar Hydro ultimately accepted the offer contained in PSNH's policy statement.

In Order No. 24, 804, we explained the basis for our conclusion that Option I of the PSNH policy statement represented an all-in price for both energy and capacity and we found that it was reasonable to treat Options II and III as reflecting all-in pricing as well. Based on our understanding of the case, the meaning of Option III as recited in the PSNH policy statement is at the heart of the dispute and the record supports a finding that Option III of the PSNH policy statement included an all-in price such that a contract entered into pursuant to Option III includes the sale of both energy and capacity.

Briar Hydro concedes our finding that Option I reflects all-in pricing but it argues that we "made an unsupported leap of logic" in finding that Options II and III also reflected all-in pricing. Briar Hydro contends that PSNH provided in Option I for the purchase of energy and capacity through a cents per kWh payment, but that its use of a cents per kWh payment in Options II and III should be read to apply only to energy. The relevant question concerns whether Options II and III should be treated similarly to Option I or treated differently from Option I. We concluded in Order No. 24,804 that the options should be treated similarly in that PSNH would be purchasing the entire output, meaning both energy and capacity, under all three

options.[3] The papers do not support Briar Hydro's opposite contention that Options II and III, in the context of a thirty-year contract, were meant to exclude capacity.

Briar Hydro seeks to introduce testimony, which it characterizes as "new evidence," from two individuals involved in the negotiations in 1981 and 1982. Having decided not to present affidavits or testimony from its witnesses earlier in this proceeding, Briar Hydro may not simply change its strategy following an adverse decision and then present such evidence as a basis for a motion for rehearing. Briar Hydro has failed to explain why this evidence could not have been presented at the time Briar Hydro agreed to submit the dispute for resolution on the papers, and therefore this evidence does not constitute "new" evidence or a good reason for rehearing. *See, Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981) *citing O'Loughlin v. N.H. Personnel Comm'n.*, 117 N.H. 999, 1004 (1977)

Furthermore, the testimony now proffered by the two individuals has dubious value given the passage of twenty-seven years. Mr. Mack's affidavit, moreover, states that PSNH's representative, Mr. Lyons, "on several occasions referred to the contract being negotiated as being a standard form of contract and that he was not going to change the contract form for NHHA/Briar Hydro. Notably he did not state that PSNH was buying the capacity of the Lower Penacook Project nor did he otherwise suggest that the contract included capacity as well as energy – we both understood clearly that it did not." Putting aside the evidentiary issues raised

[3] This conclusion is bolstered by the circumstance that once PSNH has purchased Briar Hydro's entire output, Briar Hydro retains no ability to generate power for any other purpose.

by Mr. Mack's assertion as to Mr. Lyon's state of mind, we view Mr. Mack's testimony to be consistent with our conclusion in Order No. 24, 804 that NHHA/Briar Hydro attempted to negotiate a richer financial agreement and PSNH rejected NHHA/Briar Hydro's proposal. Finally, as to Mr. Mack's characterization of what Mr. Lyons did not say, it was not necessary for Mr. Lyons to state that PSNH was buying the capacity of Lower Penacook if PSNH were buying the entire output, i.e., energy and capacity, of the facility, which we concluded it was.

Rehearing and ultimately judicial review of Commission decisions turn on whether findings have adequate support in the record. *See, e.g., LUCC v. Public Serv. Co. of N. H.,* 119 N.H. 332, 340 (1979) ("The ultimate issue before the court on appeal is whether the party seeking to set aside the decision has demonstrated by a clear preponderance of the evidence that such order is contrary to law, unjust, or unreasonable.") The papers filed in this proceeding adequately support our decision. Briar Hydro has structured an argument that supports a contrary result but the essence of an ambiguous contract is that the disputed language is susceptible to alternative interpretations. Inasmuch as Briar Hydro has not, by a clear preponderance of the evidence, shown our decision to be unlawful or unreasonable; or shown that evidence was overlooked or misconstrued; or pointed to new evidence that was not available at the time of our decision, we deny the motion for rehearing.

Based upon the foregoing, it is hereby

ORDERED, that the motion of Briar Hydro Associates for rehearing of Order No. 24,804 is DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of April, 2009.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary