STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 09-174

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Petition for Declaratory Ruling Regarding Penacook Lower Falls Pricing

Order on the Merits

O R D E R N O. 25,184

December 22, 2010

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I. INTRODUCTION AND PROCEDURAL HISTORY

On September 18, 2010, Public Service Company of New Hampshire (PSNH) filed a petition for a declaratory ruling regarding the terms of a 1982 contract between it and Briar Hydro Associates (Briar)[1]. This is the second time that a disagreement over the terms of this contract has come before us. *See generally* Docket No. DE 07-045. The contract at issue (the Contract) is for the sale of the electrical output of the Penacook Lower Falls Hydroelectric Facility. This request for declaratory ruling concerns the pricing terms of the Contract and whether PSNH has been purchasing the output of the facility at prices below those authorized by the Contract.

The contract, which was for 30 years, contained a "front-loaded" payment arrangement by which PSNH paid Briar a higher rate than a referenced "index price" in the early years, followed by a period in which payments were reduced. Whether the later payment reduction to

[1] The contract was entered into between PSNH and the predecessor in interest to Briar, New Hampshire Hydro Associates. For the sake of convenience, we will refer to Briar throughout.

the Contract rate continues until the end of the Contract, or ceases when PSNH has been fully reimbursed for the "front loaded" early payment period, is at the heart of the dispute.

An Order of Notice was issued on November 6, 2009, and on December 3, 2009, Briar timely petitioned to intervene in the docket. On January 25, 2010, PSNH and Briar filed a stipulation of facts (Stipulation), followed the next day by various exhibits, including a copy of the Contract.

The facility is a 4.1 megawatt hydroelectric generating station on the Contoocook River in Penacook and Boscawen. *See* Order No. 24,804 (November 21, 2007). Briar purchased the facility in 2002, and at that time assumed the rights and obligations of New Hampshire Hydro Associates under the Contract. The parties' Stipulation confirms that the Contract was for a term of 30 years, and will expire by its terms in September 2013. *See* Hearing Exhibit 2 (Ex. 2), Stipulation at ¶¶ 5 and 19. As noted in the Stipulation, the parties' dispute centers around the pricing terms in Sections A, B and D of Article 3 of the Contract. Ex. 2, ¶ 6. Article 3 reads in part:

Article 3. Price.

The price charged by SELLER to PUBLIC SERVICE for sales of electric energy under this Contract shall be based on an index price of 9.00 cents per kilowatthour (KWH) and shall be determined as follows.

A. For the first eight (8) years of the Contract, the Contract rate shall be 11.00 cents per KWH. This rate exceeds the index price by 2.00 cents per KWH; and all payments made by PUBLIC SERVICE to SELLER which exceed the index price must be recovered by PUBLIC SERVICE, during later Contract years, in accordance with Section D.1., Article 3. This rate is subject to the adjustment provided for under Section D.2., Article 3. The provisions of Section C, Article 3, shall not override the provisions of this paragraph.

B. If, during the first eight Contract years, 96% of PUBLIC SERVICE's incremental energy costs has not exceeded the index price, the Contract rate beginning with the ninth contract year shall be the index price of 9.00 cents per KWH; and this

rate shall remain in effect until superceeded [*sic*] by the provisions of Section C, Article 3. This rate is subject to the adjustment provided for under Section D.2., Article 3.

C. At such time that 96 percent of PUBLIC SERVICE's incremental energy cost exceeds the index, the rate to be paid under this contract will vary in accordance with the following provision, subject to the provisions of Section D, Article 3.

As soon as 96 percent of PUBLIC SERVICE'S incremental energy cost exceeds the index, the contract rate will be based on 96 percent of PUBLIC SERVICE's incremental energy cost for a period of one year. For each subsequent year, the percentage of PUBLIC SERVICE's incremental energy cost to be paid will be reduced by 4 percent (i.e. 96 percent, 92 percent, 88 percent, 84 percent, etc.), until the incremental energy cost is reduced only 2 percent to reach 50 percent of PUBLIC SERVICE's incremental energy cost. At such time, the contract rate will remain at the 50 percent rate for the remainder of the contract term.

PUBLIC SERVICE's incremental energy cost, for any hour, is equivalent to the marginal cost of providing energy for that hour. The marginal cost, for any hour, is the energy cost of the most expensive unit or purchased energy supplying a portion of PUBLIC SERVICE's load during that hour and includes all costs in the New England Power Exchange (NEPEX) bus rate cost for the incremental unit. The NEPEX bus rate costs are essentially the cost of fuel consumed. PUBLIC SERVICE's incremental energy cost, for the purposes of this Contract, will be expressed as a yearly average and will be calculated by averaging all 8,760 hourly incremental energy cost over the calendar year.

If the rate during any year is less then [*sic*] the appropriate percentage of PUBLIC SERVICE's incremental energy cost for that year, an adjustment will be made for all energy sold to PUBLIC SERVICE. The adjustment will consist of an additional payment for each KWH sold to PUBLIC SERVICE during said year based on the difference between the price paid and the appropriate percentage of PUBLIC SERVICE's incremental energy cost. The adjustment will be paid within one month after PUBLIC SERVIC's incremental energy cost for the previous year has been determined.

If the rate during any year is more than the appropriate percentage of PUBLIC SERVICE's incremental energy cost for that year, an adjustment will be made for all energy sold to PUBLIC SERVICE. The adjustment will consist of a refund to PUBLIC SERVICE for each KWH sold during said year based on the difference between the price paid and the appropriate percentage of PUBLIC SERVICE's incremental energy cost. The refund will be made to PUBLIC SERVICE by applying one-twelfth of the total amount as a reduction to each month's payment by PUBLIC SERVICE during the current year. If for any month, no payment is due the SELLER, or the payment due is not equal to the refund, a payment to

PUBLIC SERVICE will be made by SELLER so that the total recovery is achieved by PUBLIC SERVICE by the end of the current year.

D. The Contract rates described in Sections B and C, Article 3, are subject to the following provisions, in order to determine the Contract price to be charged by SELLER to PUBLIC SERVICE for sales of electric energy under this Contract.

1. Beginning with the ninth Contract year, and continuing for the term of the Contract, a recovery amount equal to 5.47 cents per KWH shall be deducted from the Contract rate. This deduction allows PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price.

2. For the first eight Contract years, the Contract rate shall be adjusted by subtracting 1.00 cents per KWH from the rate. For the ninth through the twentieth Contract years, the Contract rate shall be adjusted by adding 0.67 cents per KWH to the rate. The total of said additional payments, for any given year, shall not exceed one-twelfth (1/12) of the money subtracted during the first eight Contract years.

Ex. 2, Attachment 1 at 2-4. The parties' agree that the provisions of Article 3, Section C were never triggered because 96 percent of PSNH's incremental energy costs never exceeded the 9.00 cents per kWh threshold, though they disagree on whether Section C is otherwise relevant to the Contract's interpretation. *See* Ex. 8, Pre-Filed Testimony of Richard A. Norman at 7; Ex. 4, Pre-filed Rebuttal Testimony of Richard C. Labrecque (Ex. 4), at 7-8.

The parties agree that the index price of 9.00 cents per kWh was the base price of the Contract and that the price would be adjusted by various provisions. First, in accord with paragraph 3.A, PSNH would pay Briar 11.0 cents per kWh, a 2 cent premium over the index price, for the first 8 years of the Contract. Additionally, pursuant to paragraph 3.D.2, one cent per kWh would be removed from the rate for the first 8 years. The Stipulation states that the parties agree that in the first 8 years the actual rate paid was 10.0 cents per kWh. Ex. 2 at ¶8.

The Stipulation also notes, however, that the parties disagree on the interpretation and application of paragraph 3.D.1 in determining the proper rate. Ex. 2 at ¶ 7. That paragraph

requires a deduction of 5.47 cents per kWh from the Contract rate, beginning in the ninth Contract year. Ex. 2, Attachment 1 at 4. The parties disagree on whether that deduction is to be taken for the reminder of the Contract term. Ex. 2 at ¶ 7.

Further, paragraph 3.D.2 requires an addition of 0.67 cents per kWh for the ninth through twentieth contract years. Ex. 2, Attachment 1 at 4. The parties disagree on the relationship of this addition and the 1.00 cent reduction in the first 8 years also called for in paragraph 3.D.2. Ex. 2 at ¶ 10. The parties do agree, however, that the 0.67 cent addition was in effect in the ninth through twentieth years and that it is no longer in effect. Ex. 2 at ¶¶ 12, 13. Currently, PSNH pays a rate of 3.53 cents per kWh, which is equal to the index price of 9.00 cents per kWh minus the 5.47 cents per kWh noted in paragraph 3.D.1. Ex. 2 at ¶¶ 13, 14.

On July 13, 2010, counsel for Briar filed a letter with the Commission informing the Commission that the name of Commission Chairman Tom Getz had appeared in a document produced in discovery relating to the Contract. According to Briar's letter, in 1992, when Mr. Getz was employed by PSNH, he may have received a copy of a memorandum on issues relating to the Contract. On August 3, 2010, by letter filed in the docket, Chairman Getz stated that he had no knowledge of the memorandum but would, nevertheless, recuse himself from the docket in order to avoid any appearance of impropriety, in accordance with RSA 363:12, I. The September 7, 2010 hearing was held as scheduled with a quorum of the remaining commissioners.

II. POSITIONS OF THE PARTIES AND STAFF

A. PSNH

PSNH contends that the Contract is not ambiguous and that it may be interpreted according to its terms, without resort to extrinsic evidence. Ex. 4 at 11-12; Brief of Public

Service Company of New Hampshire (Brief) at 8. PSNH argues that the administration of the pricing provisions in the Contract is clear, and that the Contract was administered according to those terms and without question or dispute until 2009. Transcript of September 7, 2010 Hearing (Tr.) at 12, 21. Further, PSNH contends that Article 10 of the Contract is an integration clause that renders all prior discussions and interpretations irrelevant. Ex. 4 at 2. Thus, it argues, the Contract stands as written and should not be interpreted through resort to extrinsic evidence.

As to the terms of the Contract itself, according to PSNH, the reduction of 5.47 cents per kWh, which results in a current purchase price below prevailing market rates for wholesale power, is to continue for the term of the Contract, *i.e.*, until September 2013. Ex. 3, Pre-Filed Testimony of Richard C. Labrecque (Ex. 3), at 2. PSNH argues that the phrase "and continuing for the term of the Contract" in paragraph 3.D.1 evidences the parties' intent that the reduction was to continue for the duration of the Contract, and not terminate upon the fulfillment of some repayment period. Ex. 4 at 4.

PSNH argues that the language in paragraph 3.D.1 that refers to 5.47 cents per kWh as a "recovery amount" and then states "[t]his deduction allows PSNH to recover payments made under Section A, Article 3, which exceeded the index price" does not mean that the 5.47 cent per kWh reduction was meant to cease. Ex. 3 at 3. According to PSNH, this language is merely explanatory and has no bearing on the invoicing and administration of the Contract. Ex. 3 at 3.

PSNH contends that its interpretation is bolstered by the fact that the Contract does not contain a discount rate. Ex. 3 at 4. According to PSNH, without the inclusion of a discount rate there is no method by which the value, over time, of the 2 cent per kWh premium it paid over the index price of 9 cents per KWh in the first eight years could be calculated. Ex. 3 at 4; Ex. 4 at 5. Thus, PSNH contends, it is not possible to determine when a "recovery" period would end. In

order to make such a calculation, a discount rate would have to be inferred and PSNH contends that no such inference is necessary since the reduction continues to the end of the Contract without regard to a recovery period. Ex. 4 at 5. PSNH argues that it was part of the bargain struck by the parties that this reduction would be included in the calculation for the duration of the contract in place of including a discount rate for the calculation of a recovery period. Tr. at 21.

Further, PSNH argues that the reduction is to continue to the end of the contract term because the Contract does not contain any mechanism for it to recover the premium it paid in the first 8 years should Briar's facility not have performed as expected. Ex. 4 at 5-6. According to PSNH, if Briar's facility had a catastrophic failure sometime after the first 8 years such that it reduced or ceased its power production, the Contract contained no language through which PSNH could still recover its overpayments. Ex. 4 at 6. In essence, therefore, continuing the reduction for the term of the Contract was the trade-off for the risk that PSNH might not later recover its overpayments for the initial years. Ex. 3 at 3.

Notwithstanding the above, PSNH has calculated that at a discount rate of 17.61 percent, it would have recovered the cost of its initial overpayments sometime in late 2009. Trans. at 71-72. PSNH selected the discount rate of 17.61 percent to complete that calculation because the number appeared in memoranda exchanged by the parties prior to execution of the Contract. Ex. 3 at 4. In addition, PSNH contends that the present value of 5.47 cents per kWh reduction in the final 22 years of the Contract is equal to the present value of the 2 cents per kWh adder during the first 8 years of the contract. Ex. 3 at 4-5. PSNH argues, however, that this calculation is not relevant to determining whether the reduction to the rate should be continued because the

reduction was to remain in effect through the end of the Contract term, irrespective of the amount PSNH had been repaid. Tr. at 71-72, 76-77.

With regard to the 1 cent per kWh reduction for the first 8 years and 0.67 cent per kWh addition for years 9 through 20, PSNH contends that those amounts are related to each other, with the latter addition being intended to allow for recovery of the prior deduction. Ex. 4 at 10-11. PSNH argues that these adjustments were aimed at providing Briar the funding it needed while at the same time ensuring that PSNH would be able to recover that amount on a nominal basis, meaning without regard to the time value of money. Tr. at 49-52, and 75. PSNH argues that the adjustments in paragraph 3.D.2 are related to each other, but have no impact on any calculations relating to the 2 cent per kWh addition in paragraph 3.A and the 5.47 cent per kWh reduction in paragraph 3.D.1. Ex. 4 at 11. In PSNH's view, the 1 cent per kWh and 0.67 cent per kWh adjustments are contained entirely within the confines of paragraph 3.D.2 and have no bearing on any other adjustments in the Contract. Ex. 4 at 11.

B. Briar

Briar contends that the Contract is ambiguous because the parties have attached differing, reasonable interpretations to its terms. Briar Hydro Associates' Memorandum of Law (MOL) at 7. Briar argues further that the Contract is so confusing and ambiguous that the Commission must resort to extrinsic evidence or should conclude that there was no meeting of the minds at the time the Contract was formed, or both. MOL at 2. Briar contends that the Article 10 integration clause in the Contract does not limit the Commission's ability to review extrinsic evidence because there has not yet been a determination that the Contract was a final integration, and because extrinsic evidence may be used to clarify ambiguities, regardless of the existence of a valid integration clause. MOL at 6.

As to the terms of the Contract itself, Briar contends that the 5.47 cent per kWh deduction is not to continue to the end of the Contract term, but is to terminate when PSNH has been repaid for the premium it paid in the initial 8 years. Ex. 8 at 8. This is so, according to Briar, because paragraph 3.D.1 states that the reduction is a "recovery amount" intended to allow PSNH to recover the payments made in excess of the index price. Ex. 8 at 8. Briar argues, therefore, that PSNH may apply the deduction only so long as is necessary for it to recover the excess payments made in the first 8 years. According to Briar, to read the Contract in the manner suggested by PSNH would be to elevate the phrase "and continuing for the term of the Contract" above the other provisions in Article 3. Tr. at 97-98. Briar contends that its interpretation is bolstered by the inclusion of language in paragraph 3.A specifically referring to the adjustments in paragraphs 3.D.1 and 3.D.2. Ex. 8 at 18-19.

Furthermore, Briar contends that the evidence relating to the parties' negotiations supports its interpretation. Briar argues that the evidence shows that through the course of the negotiations leading to this Contract, PSNH controlled the drafting and the terms. Ex. 8 at 22. Moreover, Briar contends that it had such a limited marketplace for the output of the facility at the time, and that it was essentially without any other place to market its power if PSNH did not purchase it. Tr. at 103-105. Therefore, it contends, since PSNH controlled the process and Briar had no other entity with whom to deal, to the extent there is an ambiguity in the contract it should be resolved against PSNH. Ex. 8 at 22. Further, Briar argues that during the course of the negotiations, a discount rate of 17.61 percent was consistently used to calculate the parties' estimated payments over the term of the Contract. Ex. 8 at 22. Thus, Briar states, a discount rate was known to PSNH at the time and a recovery period can be calculated based upon that rate.

As to the amount to be recovered, Briar argues that PSNH has erred in its calculation of the value of the Contract because it misreads and misapplies paragraph 3.D.2. Ex. 8 at 18-19. Whereas PSNH contends that the 1 cent per kWh deduction and 0.67 cent per kWh addition in paragraph 3.D.2 are unrelated to the 5.47 cent per kWh adjustment in paragraph 3.D.1, Briar contends that they are related. Ex. 8 at 20. Because, according to Briar, 1 cent per kWh was deducted from the rate in the first 8 years, the actual rate was 10.0 cents per kWh during that period. Ex. 8 at 19-20. Therefore, Briar argues, PSNH was only paying a premium of 1 cent per kWh over the index price in that period, and only needed to recover that amount. Ex. 8 at 20. According to Briar, because PSNH based its recovery on the erroneous presumption that it paid a 2 cent per kWh premium, PSNH miscalculated the date of recovery. Briar's calculations demonstrate that PSNH was fully repaid in mid-1996. *See* Hearing Exhibit 6, Chart of Payment Provisions Prepared by Briar Hydro; Tr. at 117-118. Briar estimates that to require PSNH to pay back its over-recovery since mid-1996 would cost tens of millions of dollars. Tr. at 105. Rather than ask for that amount, however, Briar argues that it be allowed to recover on any payments made by PSNH since this petition was filed, and for the Contract to either be reset to the index price for the remainder of its term, or be terminated. MOL at 10; Ex. 8 at 24.

C. Staff

Staff took no position on the Contract or its interpretation. Staff stated that the parties had clearly stated their differing positions on the issue and that it believed the Commission had before it all information necessary to make its decision. Tr. at 141.

III. COMMISSION ANALYSIS

A. Legal Framework

Resolution of the instant matter requires interpretation of the language in the parties' Contract. As we noted in Order No. 24,804, though this Contract may have arisen under the Federal Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq*., and the State Limited Electrical Energy Producers Act, N.H. RSA Ch.362-A, basic principles of contract interpretation guide our decision. *See Briar Hydro Associates*, Order No. 24,804 (Nov. 21, 2007) at 11. When interpreting a written agreement we, like the New Hampshire Supreme Court, give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated. We read the document as a whole with the intent of giving an agreement the meaning intended by the parties when they wrote it. *Behrens v. S.P. Construction Co., Inc*., 153 N.H. 498, 503 (2006).

Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the agreement. *Id*. A clause of an agreement is ambiguous when the contracting parties reasonably differ as to its meaning. *Id*. If the language is ambiguous, it must be determined, under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean when they wrote it. *Id*.

> Parol evidence may be used by a trial court to aid in interpreting or explaining an ambiguous term of a contract. Even in the absence of ambiguity, parol evidence may be admitted to prove the existence of unexpressed terms or conditions that are not inconsistent with the writing. The first step in determining whether parol evidence is admissible is to consider whether the writing is a total integration and completely expresses the agreement of the parties. A lack of integration of an instrument may be proved by reference to the circumstances surrounding the writing.

Richey v. Leighton, 137 N.H. 661, 663-64 (1993) (quotations and citations omitted). The existence of an integration clause, while evidence that parties intended a writing to be a total integration, does not necessarily render a contract unambiguous. *Behrens*, 153 N.H. at 504.

B. The Contract is Unambiguous and May Be Interpreted Without Resort to Extrinsic Evidence

We find that the Contract is not ambiguous when read as a whole and may be interpreted solely by resort to its plain terms.

i. Duration of Adjustment in Contract Section 3.D.1

As to the duration of the repayment scheme envisioned in Sections 3.A and 3.D.1, we conclude that the 5.47 cent per kWh reduction was to continue for the Contract term. Section D.1 of Article 3 states that:

> Beginning with the ninth Contract year, and continuing for the term of the Contract, a recovery amount equal to 5.47 cents per KWH shall be deducted from the Contract rate. This deduction allows PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price.

There can be little doubt that the phrase "and continuing for the term of the Contract" in 3.D.1 evidences an intent that the repayment continue until the end of the Contract and not, as Briar urges, only to the point that the earlier additional payment has been reimbursed. Although the Contract refers to the reduction as a "recovery amount," we find the only reasonable interpretation, reading the Contract as a whole, to be a payment term through the life of the Contract and not a payment term that expires when the earlier additional payment has been satisfied.

First, the second sentence in Section 3.D.1 uses the word "recover" in reference to how PSNH will get back the payments made pursuant to Section 3.A that exceeded the index price.

Thus, it functions to explain the reason for the reduction beginning in the ninth year, and does not provide an independent limitation on the reduction itself. Second, as shown in Sections 3.D.2 and 3.C, the parties knew how to draft rate adjustments with time limitations. Section 3.D.2 provides for discrete values and time, and for termination of the adjustment on a date certain. In addition, though its provisions were never invoked, Section 3.C of the Contract contains extensive and explicit terms for rate adjustments in the event that 96 percent of PSNH's incremental energy costs exceed the index price. The adjustments in Section 3.C call for year-to-year rate setting, with adjustments being made at the end of the year for any potential under-payments.

The parties, as evidenced by the language used in Sections 3.D.2 and 3.C, understood how to provide for rate or payment adjustments meant to balance prior over- or under-payments, and opted not to include such adjustment or limitations in Section 3.D.1. Thus, the exclusion of such specificity in Section 3.D.1 appears to be intentional, and the Contract language itself supports the conclusion that the deduction to Contract rate made pursuant to Section 3.D.1 was to continue for the term of the Contract.

Further, as pointed out by PSNH, the Contract does not contain a discount rate and therefore the Contract contains no express means by which a date of recovery of earlier additional payment could be accurately calculated. Given the detail on calculating recovery contained in Sections 3.D.2 and 3.C, we interpret the lack of a discount rate as further evidence of the parties' intent that the reduction in Section 3.D.1 continue for the term of the Contract.

Our interpretation is consistent with the parties' mutual assumption of certain pricing risks in the Contract. Both parties assumed some risk: PSNH was at risk that the early years' overpayment would never be recouped, if the facility ceased operation or failed to operate

efficiently; Briar was at risk that the ultimate amount discounted could exceed the amount PSNH overpaid in the early years. The Contract balances these risks by providing for the 5.47 cent per kWh reduction to continue for the term of the Contract.

ii. Amount of Adjustment in Contract Section 3.D.1

Section 3.A, after noting that for the first 8 years the Contract rate will be 11 cents per kWh, states:

> This rate exceeds the index price by 2.00 cents per KWH; and all payments made by PUBLIC SERVICE to SELLER which exceed the index price must be recovered by PUBLIC SERVICE, during later Contract years, in accordance with Section D.1., Article 3.

Thus, in a single sentence, the Contract acknowledges that for the first 8 years, the Contract rate exceeds the index rate by 2 cents per kWh and confirms that all payments in excess of the index rate must be recovered in accord with Section 3.D.1. It is in a following sentence that the rate is subject to the adjustment in Section 3.D.2. That following sentence makes no reference to excess payments or the index rate.

Section D.1 of Article 3 states that:

> Beginning with the ninth Contract year, and continuing for the term of the Contract, a recovery amount equal to 5.47 cents per KWH shall be deducted from the Contract rate. This deduction allows PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price.

Section D.1 clarifies that a recovery amount of 5.47 cents per kWh will be deducted from the Contract rate beginning with the ninth year and it refers back to the payments that exceeded the index price as created by Section 3.A. Section 3.D.2, by contrast, contains no references to any other Sections or adjustments in the Contract. It refers only to a subtraction in the first 8 years and an addition in the following 12 years. The only limitation in Section 3.D.2 is that the total of the addition in any of the middle 12 years is not to exceed one-twelfth of the money subtracted in

the first 8 years. Thus, Section 3.D.2 evidences the parties' intent to treat that adjustment separately from the Section 3.D.1 adjustment.

The parties have drafted a Contract which called for payments in excess of an agreed upon index price upfront, and provided for a recovery of that excess later through very specific and simple terms, and, in addition, created a second, more limited rate adjustment mechanism in Section 3.D.2. Based upon the language of the Contract, we conclude that the adjustments in Sections 3.D.1 and 3.D.2 are to be administered separately and that the excess payments in need of recovery after the first 8 years under Section 3.D.1 were, in fact, 2 cents per kWh and not 1 cent per kWh as alleged by Briar. The fact that the final amount paid during the first 8 years was 1 cent above the index rate as a result of a second adjustment does not change our interpretation. We find that the terms of the Contract provide that the Section 3.D.1 rate deduction was intended to recover the amount of the Section 3.A Contract rate of 11 cents per kWh in excess of the index price of 9 cents per kWh by means of what is, in effect, a liquidated specific deduction to be made over the remaining term of the contract, independently of the Section 3.D.2 adjustment, which is a separate pair of adjustments that are accumulated with all other adjustments made pursuant to the Contract to determine the actual payments to be made by PSNH over the term of the Contract.

C. Analysis of Extrinsic Evidence Concerning the Contract

Notwithstanding our finding above that the Contract is not ambiguous, were we to consider extrinsic evidence, as urged by Briar, our interpretation of the Contract would remain the same.

i. Duration of Adjustment in Contract Section 3.D.1

In the months and days leading up to the April 28, 1982 date of the Contract, the parties' negotiations included the exchange of numerous documents showing that the Contract would operate in the manner that PSNH has alleged. For example, in his pre-filed testimony Mr. Norman states:

> Specifically, the recovery methodology was set forth in very specific detail *and followed the methodology established by PSNH* in Exhibit 2-8. In all of the pricing negotiations that followed, this formula never changed. Both parties accepted it as an equitable methodology by which Briar could accomplish its objective, i.e., payments higher than the Index Price in early contract years, and PSNH could accomplish its objective, i.e., recovery of those payments in excess of the Index Price in later years with recognition given to the time value of money.

Ex. 8 at 6 (emphasis in original). On the second page of Exhibit 2-8 to Mr. Norman's testimony, which is dated December 14, 1981, there is a calculation showing the recovery rate as continuing to year 30 of the Contract. The following page, dated December 15, 1981, contains a breakdown of the Contract rate for each of the 30 years of the contract. On that breakdown, the "recovery" deduction is noted as continuing to the end of the Contract term. Thus, the methodology established in Exhibit 2-8, and referenced by Mr. Norman, shows the recovery continuing for the Contract's term.

There are similar calculations or breakdowns in exhibits 2-18 and 2-21 to Mr. Norman's testimony, each having been made prior to the Contract's execution, using the same methodology, and showing the "recovery" deduction continuing for the term of the Contract. In fact, Mr. Norman testified at the hearing that he had received the calculations prepared by PSNH and contained in exhibit 2-21 prior to the time the Contract was executed. Tr. at 133. Further, included as exhibit 2-16 to Mr. Norman's pre-filed testimony is a letter from PSNH to Mr.

Norman dated March 2, 1982, which states, in relevant part, at paragraph 3 "[f]rom the ninth through the thirtieth contract years, the rate will be the index of 9.00¢/KWH minus the amount necessary for PSNH to recover the earlier payments in excess of the index."

These pre-contract communications show the parties' attempts to make the adjustment for the front loading in the first eight years comparable to the reduction in the final twenty-two years, but tellingly none of these communications shows a termination of the later price reduction prior to the Contract term of thirty years. This extrinsic evidence demonstrates that the parties were negotiating a price adjustment prior to contract formation and that each was assuming the risk that the adjustment over the course of the thirty year term might over- or under- recover the overpayments in the first eight years of the Contract term. The fact that the parties were calculating the effect of different pricing arrangements using time value calculations, does not evidence an agreement that once the pricing terms were set rates would be further adjusted during the term of the Contract. None of the pre-Contract communications evidence an intent to terminate the adjustment prior to Contract termination in thirty years. Accordingly, we find that the extrinsic evidence supports the conclusion that the recovery payments under Section 3.D.1 were intended to continue for the duration of the Contract.

ii. Amount of Adjustment in Contract Section 3.D.1.

As to the parties' understanding regarding the amount of the recovery, the extrinsic evidence likewise supports the conclusion that the recovery is based upon a 2 cent per kWh premium over the index price and not 1 cent per kWh. In other words, the evidence of the parties' negotiations supports the conclusion that the adjustments in 3.D.1 and 3.D.2 operated separately, though cumulatively, and the over-payment for purposes of Section 3.D.1 was based on the 11 cents per kWh Contract rate before adjustment by Section 3.D.2.

In the calculation shown on Exhibit 2-8 to Mr. Norman's pre-filed testimony, a recovery rate of 2.77 cents per kWh is calculated based upon "front-end loading" of 10 cents per kWh, or 1 cent over the index price. That calculation was performed in December 1981 and makes no reference to any other rates or adjustments. This exhibit shows that the parties had considered what the recovery rate would be, should the actual excess payments be 1 cent per kWh over the index price. Later exhibits, however, show that the parties moved off this pricing arrangement.

In exhibit 2-20 to Mr. Norman's pre-filed testimony, which contains a letter addressed to Warren Mack as Vice President of New Hampshire Hydro Associates and dated March 5, 1982, a new calculation is performed which shows a "recovery" rate of 5.54 cents per kWh based upon a rate of 11 cents per kWh, or 2 cents over the index rate. Noted as a separate and distinct adjustment on a breakdown of the rates by year in that exhibit is a two part "adjustment" equal to the one called for in paragraph 3.D.2. This exhibit evidences the parties' intent that the Section 3.D.1. and 3.D.2 adjustments would operate separately, though cumulatively, and uses the 11 cent per kWh Contract rate as the starting point that was eventually agreed upon.

On exhibit 2-21 dated March 19, 1982, which Mr. Norman stated he received, there is a revised schedule showing a deduction, under the heading "recovery," of 5.47 cents per kWh, and, again, a separate and distinct "adjustment" covering the amounts called for in paragraph 3.D.2. Thus, near to the date the contract was signed, the evidence shows that a "recovery" deduction in the later years of approximately 5.5 cents per kWh was to be used to recover a premium of 2 cents in the first 8 years and that any other reduction was a separate adjustment and not some means to limit, offset, or otherwise influence the amount of the recovery. This exhibit likewise evidences the parties' intent that Section 3.D.1 and 3.D.2 adjustments would

operate separately, though cumulatively, and uses the 11 cent per kWh initial Contract rate eventually agreed upon.

IV. CONCLUSION

We conclude, based upon the language of the Contract, that the parties intended the 5.47 cent per kWh reduction to run for the term of the Contract and that the amount of the reduction was intended to recover a 2 cent per kWh premium paid by PSNH in the first 8 years of the Contract. As discussed above, although we do not find it necessary to resort to extrinsic evidence because the Contract is not ambiguous, the extrinsic evidence submitted regarding communications between the parties prior to finalizing the Contract in 1982, supports our interpretation of the final Contract terms. Accordingly, we find that the Contract is being administered in the manner intended by the parties, and we do not find that the Contract should be modified or cancelled.

Based upon the foregoing, it is hereby

ORDERED, the 1982 contract between Public Service Company of New Hampshire and Briar Hydro Associates is being properly administered and shall continue until its scheduled termination in September 2013 without modification or cancellation, except as may be mutually agreed to by the parties to the Contract with Commission approval.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of December 2010.

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary