

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 09-

PUBLIC SERVICE COMPANY'S PETITION FOR DECLARATORY RULING RE:
PENACOOK LOWER FALLS PRICING

Public Service Company of New Hampshire ("PSNH" or "the Company") hereby petitions the New Hampshire Public Utilities Commission ("Commission") pursuant to RSA 362-A:5, and N. H. Code Admin. Rule § 207.01 (a) to adjudicate a dispute between PSNH and Briar Hydro Associates, owner of the Penacook Lower Falls hydroelectric facility. The issue in controversy is the correct pricing to be paid by PSNH to the Penacook Lower Falls facility under the terms of an existing thirty year contract. This dispute is separate and unrelated to the dispute adjudicated in Docket DE 07-045 which is currently before the New Hampshire Supreme Court (N.H. Sup. Ct. Docket No. 2009-0359). In support of its Petition, PSNH says the following:

1. The Penacook Lower Falls hydroelectric facility is located on the Contoocook River in the village of Penacook, New Hampshire and was first developed by New Hampshire Hydro Associates ("NHHA"). In 1982, PSNH and NHHA entered into a thirty year contract for the purchase and sale of the output from Penacook Lower Falls ("the Contract"). Briar Hydro Associates ("Briar") later acquired the interests of NHHA in the Penacook Lower Falls facility. PSNH has purchased the output of that facility and paid the rates provided under the Contract since the facility began operating.

2. Under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA") (16 U.S. Code 2601 *et seq.*) and/or the state Limited Electric Energy Producers Act ("LEEPA") (RSA Chapter 362-A), PSNH was required to purchase the output from small power producers and cogenerators. The Commission initially set rates for short term sales of energy and capacity but also encouraged utilities to contract individually with facilities which would otherwise be

eligible to sell under rates established by the Commission.¹ In response to the Commission's encouragement to enter into contracts, PSNH made a general offer to purchase power at nine cents under a long term purchase power contract. PSNH and NHHA negotiated the Contract under this framework

3. The pricing terms of the Contract are found in Article 3 of the Contract. Article 3 provides for two adjustments, both up and down, to the nine cent index price for the first eight years of the thirty year Contract term. Under Section A of Article 3, the index price of nine cents per KWH was raised to eleven cents for the first eight (8) years of the Contract.

For the first eight (8) years of the contract, the Contract rate shall be 11.00 cents per KWH. This rate exceed 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 the later Contract years, in accordance with Section D.1., Article 3. This rate is subject to the adjustment provided under Section D.2., Article 3. Contract, at 2.

This payment over the index price was recovered by PSNH through the following language of Section D.1.:

Beginning in 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 exceed the index price. Contract at 4 (Emphasis added).

4. The crux of the instant dispute between Briar and PSNH is that Briar believes the Contract price must return to the index price of nine cents per KWH once PSNH has been fully reimbursed for the 2.00 cent per KWH premium paid during the initial eight Contract years. PSNH contends that the clear language of the Article 3., Section D.1. above provides that the recovery amount of 5.47 cents per KWH continues for the remaining term of the Contract. Based upon conversation with the principal of Briar Hydro Associates, PSNH believes Briar Hydro will contest the pricing issue outlined in

¹ "Following the passage of the LEEPA and PURPA legislation in 1978, the commission set rates and established interconnection standards, first for PSNH as the state's only generating utility and subsequently for the state's non-generating utilities. These early orders determined short term buy back rates for energy and capacity for all utilities, and offered non-generating utilities the option of either paying their generating suppliers' avoided cost or wheeling to their suppliers at no charge. *Although the commission also encouraged utilities to negotiate long term purchase power agreements with developers, only PSNH responded, signing long term contracts primarily with small hydro-electric facilities.* Between 1978 and 1983, 57 facilities achieved commercial operation; they were predominantly run of the river hydro-electric (41), but also residential wind (1), wood/cogeneration (4) and photovoltaic (1)." *Re: Public Service Company of New Hampshire*, Docket No. DR 86-41, Order No. 19,052, 73 NH PUC 117, 123 (April 7, 1988) (Emphases added).

this petition before the Commission and/or will bring an action before the superior court to assert its claim. That superior court filing may be made as soon as Monday, September 21, 2009.

5. It is important to note that there is a separate downward adjustment to the Contract rate during the first eight Contract years combined with distinct recovery provisions which are governed by their own terms. Section D.2. provides:

For the first eight Contract years, the Contract rate shall be adjusted by subtracting from 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. Contract at 4.

During the first eight Contract years, PSNH paid 10.00 cents per KWH for the output from Penacook Lower Falls. This Contract price started with the index price of nine cents, adjusted by a combination of the 2.00 cents per KWH premium paid under Section A, and the 1.00 cent price rollback of Section D.2. PSNH repaid to Briar the amount equal to the eight years when the 1.00 cents per KWH price rollback was in effect by adding to the Contract price 0.67 cents for Contract years nine through twenty, limited only to the one-twelfth restriction of Article 3., Section D.2. Briar and PSNH do not dispute that this provision of the Contract has been fully performed by both sides.

6. The Contract price diverges from the index price in two different directions for the first eight years of the Contract. After the first eight years of the Contract conclude, each party is reimbursed for the price change that occurred in two different ways. The 2.00 cent per KWH premium paid to Briar in the first eight Contract years is later adjusted by a deduction of 5.47 cents per KWH “continuing for the term of the Contract.” The 1.00 cent per KWH price rollback afforded to PSNH in the first eight Contract years has a distinct, defined, and expressly limited repayment period of “the ninth through the twentieth Contract years.” Given that one pricing adjustment continues for the remaining years of the Contract while the other has express recovery terms that end in twelve years, PSNH does not believe that the express terms of the Contract allow the cessation of the 5.47 cents per KWH reduction.

7. The Commission has jurisdiction to accept this petition and decide this matter:

A. This matter involves the meaning and interpretation of a contract entered into as a part of the Commission’s supervision of arrangements between electric utilities and small power producers under RSA 362-A and PURPA. PSNH is not requesting that the Commission change the terms of the Contract, merely interpret the words by their normal

meaning. Because the Contract was entered into under the PUC's authority to set rates for purchases from small power producers, the Commission has authority under N. H. Admin. Code Puc § 207 to issue a declaratory ruling to determine the proper price to be paid under the Contract.

B. Penacook Lower Falls is a Limited Electrical Energy Producers as defined by RSA Chapter 362-A, and the Commission has jurisdiction to resolve this dispute. Under RSA 362-A:5, "Any dispute arising under the provisions of this chapter may be referred by any party to the commission for adjudication." The Commission has primary jurisdiction over this matter as the Commission is the specialized agency created by the Legislature to determine rates and charges and to administer the LEEPA and PURPA statutes.

8. This petition is verified by the attached affidavit of Richard C. Labrecque. A copy of the Contract is attached. There is an actual dispute based upon the facts presented above and in the affidavit which effect the rights and responsibilities of PSNH and Briar Hydro Associates, successor in interest to the Penacook Lower Falls facility. PSNH requests that the Commission review, clarify, and interpret the Contract, and specifically rule that the deduction of 5.47 cents per KWH from the index price continues for the remainder of the Contract term.

WHEREFORE, PSNH respectfully requests this Commission to open a proceeding and make the determinations and rulings requested above.

Respectfully submitted,

Public Service Company of New Hampshire

By: 

Gerald M. Eaton, Senior Counsel
Energy Park, 760 North Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-2961


Date

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused copies of the attached Petition for Declaratory Ruling Re: Penacook Lower Falls Pricing to be served pursuant to N. H. Code Admin. Rules §§ 203.02 and 203.11 to the persons on the attached Service List.

_____ |
Date

Gerald M. Eaton

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AFFIDAVIT OF RICHARD C. LABRECQUE

Personally appeared the above-named Richard C. Labrecque, who, under oath, deposed and stated the following:

1. My name is Richard C. Labrecque. I am employed by Public Service Company of New Hampshire ("PSNH"). I current hold the position of Manager, Supplemental Energy Services. My duties include the administration of interconnection agreements and purchase contracts with non-utility generators. The department supervises the arrangements between PSNH and small power producers such as Penacook Lower Falls.

2. I have spoken with Richard Norman who represents Briar Hydro Associates, successor in interest to New Hampshire Hydro Associates. He has told me his position that the 5.47 cents per KWH deduction from the nine cent per KWH index price should end when PSNH has fully recovered the 2.00 per KWH premium above the nine cent index price during the first eight (8) years of the Contract. PSNH has taken the position that the 5.47 cents per KWH deduction continues for the full remaining Contract term, years nine through thirty.

3. Based upon my conversations with Mr. Norman, I believe Briar Hydro will contest the issue outlined in this petition before the Commission and/or will bring an action before the superior court to assert its claim. That superior court filing may be made as soon as Monday September 21, 2009

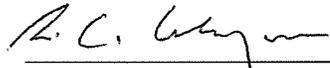
4. During the first eight Contract years, PSNH paid 10.00 cents per KWH for the output from Penacook Lower Falls. This Contract price started with the index price of nine cents, adjusted by a combination of the 2.00 cents per KWH premium paid under Article 3, Section A, and the 1.00 cent price rollback under Article 3, Section D.2.

5. During years 9 through 20, PSNH started each year off by paying a Contract price of 4.20 cents per KWH. This Contract price started with the index price of nine cents, reduced by the 5.47 cents per KWH deduction required under Article 3, Section D.1. and increased by the 0.67 cents per KWH addition required under Article 3, Section D.2. In any of the years when one-twelfth (1/12) of the money subtracted during the first eight years under Article 3, Section D.2. was repaid, the 0.67 cents per KWH addition was discontinued for the remainder of that Contract year.

6. From Contract year 21 through the present, PSNH has paid Briar at the rate of 3.53 cents per KWH.

7. If Briar Hydro Associates is correct, PSNH estimates the amount in controversy at approximately \$4.7 million through the duration of the contract which terminates in September 2013.

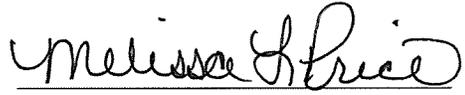
Further the affiant sayeth not.


Richard C. Labrecque

Sworn to and subscribed before me this 18th day of September, 2009.



My Commission expires 02/18/14


Justice of the Peace/Notary Public

The point of delivery from the Concord Electric Company to PUBLIC SERVICE shall be the Garvins Substation metering point located in Bow, New Hampshire.

Article 2. Availability.

During the term hereof, SELLER shall 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 kilowatthours from said unit when in operation.

It is agreed that SELLER shall have sole responsibility for operation and maintenance of its generating unit, including any relays, locks, seals, breakers, and other control and protection apparatus that are necessary, or which Concord Electric Company may designate as being necessary, for the operation of SELLER's generating unit in parallel with the system of Concord Electric Company and that SELLER will maintain said generating unit in good operating order and repair without cost to PUBLIC SERVICE.

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 percent 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 superseded 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 provisions, 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 costs over the calendar year.

If the rate during any year is less 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 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 SERVICE'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.

If proven necessary to PUBLIC SERVICE by SELLER and/or the project lenders, for amortization of the first cost of SELLER's facilities, PUBLIC SERVICE shall grant SELLER the option to extend the pricing under Section A, Article 3 through the ninth or tenth Contract year. If said pricing is extended through the ninth Contract year, the recovery amount under Section D.1., Article 3 shall be 6.84 cents per KWH and the recovery shall begin with the tenth Contract year; if said pricing is extended through the tenth Contract year, the recovery amount shall be 8.46 cents per KWH beginning with the eleventh Contract year.

5.47
1.00
1.2

Article 4. Metering.

The metering shall be configured so as to represent the generation delivered to PUBLIC SERVICE. The metering may be installed on the generation side of the transformer provided that transformer losses are subtracted from the measured generation by a suitable method.

SELLER will install, own, and maintain all metering equipment as specified in PUBLIC SERVICE's study of the SELLER's electric generating facility, which study is, or will be upon mutual consent of both parties, attached hereto as Attachment A. SELLER shall bear all costs associated with said equipment and its installation.

If at any time, the metering equipment is found to be in error by more than two percent fast or slow (+ or -2%), SELLER shall cause such metering equipment to be corrected and the meter readings for the period of inaccuracy shall be adjusted to correct such inaccuracy so far as the same can be reasonably ascertained, but no adjustment prior to the beginning of the preceding month shall be made except by agreement of the parties. All tests and calibrations shall be made in accordance with Section V-14 of the NHPUC Rules and Regulations Prescribing Standards for Electric Utilities in effect as of September 8, 1972, as amended. The meter shall be tested as prescribed in said Rules and Regulations.

In addition to the regular routine tests, SELLER shall cause the metering equipment to be tested at any time upon request of and in the presence of a representative of PUBLIC SERVICE. If such equipment proves accurate within two percent fast or slow (+ or -2%), the expense of the test shall be borne by PUBLIC SERVICE.

The SELLER shall allow PUBLIC SERVICE reasonable access to the meter located on the SELLER's premises. PUBLIC SERVICE reserves the right to secure or seal the metering installation, to require SELLER to measure electrical energy sold to PUBLIC SERVICE on an hour-by-hour basis, and to require SELLER to notify PUBLIC SERVICE once each day of SELLER's generation in kilowatthours for each hour during the prior 24 hours.

Article 5. Modifications.

If SELLER plans any modifications to its electric generating facility, SELLER shall give PUBLIC SERVICE prior written notice of its intentions. In the event that PUBLIC SERVICE reasonably determines that said modifications would necessitate changes to the metering equipment or would cause PUBLIC SERVICE to incur additional expenses associated therewith, the SELLER shall make such changes as reasonably required by PUBLIC SERVICE and reimburse PUBLIC SERVICE for said expenses before PUBLIC SERVICE is obligated to purchase any increased output.

If the interconnecting circuit is converted to a higher voltage in the future, the SELLER shall be responsible for all metering changes necessitated by the conversion and shall bear all costs associated with said conversion.

Article 6. Billing & Payment.

PUBLIC SERVICE shall read the meter, installed in accordance with Article 4, on or at the end of each month, and PUBLIC SERVICE shall send the SELLER a form showing the month's beginning and ending meter readings and total net kilowatthour generation.

SELLER shall then transmit to PUBLIC SERVICE a bill showing the amount due, which amount will be determined by multiplying the rate per kilowatthour specified in Article 3 times the number of kilowatthours delivered to PUBLIC SERVICE since the prior reading of the meter, and PUBLIC SERVICE will send to SELLER a payment for that amount within 20 days of receipt of SELLER's bill.

Article 7. Liability & Insurance.

- a. Each party will be responsible for its facilities and the operation thereof and will indemnify and save the other harmless from any and all loss by reason of property damage, bodily injury, including death resulting therefrom suffered by any person or persons including the parties hereto, employees thereof or members of the public, (and all expenses in connection therewith, including attorney's fees) whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, caused by or sustained on, or alleged to be

caused by or sustained on, equipment or facilities, or the operation or use thereof, owned or controlled by such party, except that each party shall be solely responsible for and shall bear all costs of claims by its own employees or contractors growing out of any workmen's compensation law. SELLER shall indemnify and save PUBLIC SERVICE harmless against any and all liability for claims, costs, losses, expenses and damages, including bodily injury and death, sustained by Concord Electric Company, its employees or agents, arising out of SELLER's performance of this Contract.

- b. SELLER hereby agrees to maintain in force and effect, for the duration of this Contract, Workmen's Compensation Insurance, as required by statute, and Comprehensive General Liability Insurance for bodily injury and property damage at minimum limits of three million dollars (\$3,000,000). Within sixty days of the effective date of this Contract, the SELLER agrees to provide PUBLIC SERVICE with a certificate of such insurance.
- c. In no event shall PUBLIC SERVICE be liable, whether in Contract, tort (including negligence), strict liability, warranty, or otherwise, for any special, indirect, incidental, or consequential loss or damage, including but not limited to cost of capital, cost of replacement power, loss of profits or revenues or the loss of the use thereof. This provision, subsection c of Article 7, shall apply notwithstanding any other provision of this Contract.

Article 8. Force Majeure.

Either party shall not be considered to be in default hereunder and shall be excused from purchasing or selling electricity hereunder if and to the extent that it shall be prevented from doing so by storm, flood, lightning, earthquake, explosion, equipment failure, civil disturbance, labor dispute, act of God or the public enemy, action of a court or public authority, withdrawal of facilities from operation for necessary maintenance and repair, or any cause beyond the reasonable control of either party.

Article 9. Effective Date & Contract Term.

This Contract shall become effective between the parties as of the date hereof, provided that the metering equipment, as specified by PUBLIC SERVICE in accordance with the conditions set forth in Section 4 of this Contract, has been installed by SELLER.

If said equipment has not been properly installed, this Contract shall become effective between the parties as of the date of proper installation of said equipment or as of the date SELLER begins delivering energy to PUBLIC SERVICE, whichever occurs latest. As of the effective date of this Contract, the Contract shall remain in full force and effect for thirty (30) years.

In order for any modification to this Contract to be binding upon the parties; said modifications must be in writing and signed by both parties.

Article 10. Prior Agreements Superseded.

This Contract with Attachment A represents the entire agreement between the parties hereto relating to the subject matter hereof, and all previous agreements, discussion, communications, and correspondence with respect to the said subject matter are superseded by the execution of this Contract.

Article 11. Waiver of Terms or Conditions.

The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this Contract shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in full force and effect.

Article 12. General.

This Contract shall be binding upon, and inure to the benefit of the respective successors and assigns of the parties hereto, provided that SELLER shall not assign this Contract except to an affiliated company, without the prior written consent of PUBLIC SERVICE, which consent shall not be unreasonably withheld. The term "affiliated company" shall include any partnership in which SELLER or one of SELLER's subsidiaries or affiliates is a general partner or any corporation in which SELLER or one of its subsidiaries or affiliates owns or controls more than 50 percent of the voting stock or otherwise has operating control. In the event of an assignment to an affiliate, SELLER shall notify PUBLIC SERVICE within five (5) days of the effective date of the assignment.

Article 13. Applicable Law.

This Contract is made under the laws of The State of New Hampshire and the interpretation and performance hereof shall be in accordance with and controlled by the laws of that State.

Article 14. Mailing Addresses.

The mailing addresses of the parties are as follows:

SELLER: New Hampshire Hydro Associates
99 North State Street
Concord, New Hampshire 03301
Attn: Richard A. Norman, Partner

PUBLIC SERVICE: Public Service Company of New Hampshire
1000 Elm Street
P.O. Box 330
Manchester, New Hampshire 03105
Attn: Henry J. Ellis, Vice President

IN WITNESS WHEREOF, the parties have hereunto caused their names to be subscribed, as of the day and year first above written.

NEW HAMPSHIRE HYDRO ASSOCIATES
By ESSEX DEVELOPMENT ASSOCIATES,
A General Partner

John Mal Hall
(Witness)

By: Richard A. Norman
Name: Richard A. Norman
Title: Partner

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

John E. Lyons
(Witness)

By: Henry J. Ellis
Henry J. Ellis, Vice President