

DE 00-110

CONNECTICUT VALLEY ELECTRIC COMPANY

Petition for An Order For Refunds Under Section 210 of PURPA

Prehearing Conference Order

O R D E R N O. 23,632

February 8, 2001

APPEARANCES: Ransmeier & Spellman by Dom D'Ambuoso, Esq. and John T. Alexander, Esq. for Connecticut Valley Electric Company; Thomas E. Donovan, Jr. on behalf of himself; Judy Moriarity on behalf of herself; William Gallagher and Katie Lajoie on behalf of Working on Waste; Bossie, Kelly, Hodes, Buckley & Wilson, P.A. by Jay L. Hodes, Esq. and Gail Lynch, General Counsel, Wheelabrator Claremont for WM/Wheelabrator Claremont Company, LP; Michael Holmes, Esq. for the Office of Consumer Advocate; Gary Epler, Commission General Counsel, for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On May 12, 2000, Connecticut Valley Electric Company (CVEC) filed a Petition for an Order for Refunds Under Section 210 of the Public Utility Policy Act of 1978 (PURPA), 16 U.S.C. §2601. CVEC requests that the New Hampshire Public Utilities Commission (Commission) order refunds arising out of CVEC's purchases of the electric output from WM/Wheelabrator Claremont Company L.P. (Wheelabrator), a limited electric energy producer under the New Hampshire Limited Electric Energy Producers Act (LEEPA), RSA 362-A, and under PURPA. On June 13, 2000, CVEC filed the testimony of C. J. Frankiewicz, Financial Analysis Coordinator, in support of its position. A

revised copy Mr. Frankiewicz' testimony was filed on July 17, 2000, and a second revised copy on July 25, 2000.

On June 21, 2000 the OCA advised the Commission of its intent to participate in this docket on behalf of residential ratepayers.

An Order of Notice was issued by the Commission on December 19, 2000 setting a prehearing conference for January 4, 2001 at the offices of the Commission. A copy of the Order of Notice was published in the Eagle Times on December 21, 2000.

On December 29, 2000 a Motion to Intervene was filed on behalf of Thomas E. Donovan, Jr., Judith Moriarity, and Margaret North (hereinafter, the "Pro-se Intervenors.") Also on December 29, 2000 a Motion to Intervene was filed on behalf of Working on Waste, a Claremont-based advocacy group.

On January 4, 2001 the duly-noticed prehearing conference was held at the offices of the Commission.

Subsequent to the prehearing conference, the following material has been filed with the Commission:

On January 8, 2001 Attorney Jay L. Hodes of the firm Bossie, Kelly, Hodes, Buckley & Wilson, P.A. by Jay L. Hodes filed his appearance on behalf of Wheelabrator, requesting clarification of Wheelabrator's intervenor status.

On January 9, 2001 the Sullivan County Regional Refuse Disposal District and the Southern Windsor/Windham counties Solid Waste Management District, jointly d/b/a the New Hampshire/Vermont Solid Waste Project (NH/VT) filed a motion to intervene.

On January 16, 2001 Working on Waste filed its objections to the intervention of NH/VT. Objections to NH/VT's intervention were also filed by the Pro-se Intervenors on January 17, 2001.

On January 17, 2001 the OCA filed its recommendations regarding issues to be initially briefed by the parties. Recommendations regarding issues to be briefed were also filed by: Working on Waste on January 19, 2000; by Pro-se Intervenors on January 22, 2000;

On January 17, NH/VT filed a Notice of Correction.

On January 24, 2001 the OCA submitted its recommendations regarding a proposed stipulation of facts.

On January 24, Working on Waste filed its comments regarding the proposed facts and issues submitted by CVEC. Comments on CVEC's proposed stipulation and list of issues were also filed by Pro-se Intervenors on January 24, 2001.

On January 25, 2001 NH/VT filed replies to the objections of Pro-se Intervenors and Working on Waste's to

NH/VT's motion to intervene.

On January 30, 2001 the Commission's Staff filed a proposed procedural schedule agreed to during the technical session held subsequent to the prehearing conference, and also submitted its recommendations concerning a proposed stipulation of facts and list of issues to be briefed.

On February 2, 2001 Wheelabrator filed a Motion to Limit Scope of Issues to be Briefed along with an attached Motion for Expedited Treatment of the accompanying motion.

II. INITIAL POSITIONS OF THE PARTIES AND STAFF

CVEC restated its request, set forth in its May 12, 2000 petition, that the Commission: 1) Determine that the sale of electric energy to CVEC from Wheelabrator violates Section 210 of PURPA; 2) Amend the Commission's order in NHPUC Docket No. DR 83-343, issued March 2, 1983, that approved the long-term rates under which CVEC purchases power from Wheelabrator; 3) Amend the power purchase contract between CVEC and Wheelabrator, a Qualifying Facility that sells power to CVEC under a Commission approved long-term rate order; and 4) Order Wheelabrator to refund with interest the difference between the amount actually charged by Wheelabrator and the maximum lawful amount under Section 210 of PURPA.

Wheelabrator argued that the relief sought in CVEC's petition is exactly the same or closely the same relief requested in the complaint CVEC filed with the Federal Energy Regulatory Commission (FERC) and which was decided against CVEC on February 11, 1998. (See *Connecticut Valley Electric Co. v. Wheelabrator Claremont Co.*, 82 FERC ¶ 61,116 (1998), rehearing denied, 83 FERC ¶ 61,136 (1998), and the subsequent decision on appeal of the United States Court of Appeals, District of Columbia Circuit in *Connecticut Valley Electric Company, Inc. v. FERC*, 208 F.3d 1037 (D.C. Cir. 2000).) Wheelabrator asserted that these decisions are binding upon the Commission, and does not interpret these rulings as to allow CVEC to pursue these claims before the Commission. Wheelabrator also argued that recent case law would preclude the modification or renegotiation of the underlying contract by the Commission. See *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioner of the State of New Jersey*, 44 F.3d 1178 (3rd Cir. 1995). On this basis Wheelabrator recommended that the Commission initially proceed on whether jurisdiction exists to address these matter and whether these are judicable issues at all. This position was restated in their Motion to Limit Scope of Issues to be Briefed.

In general, the Pro-se Intervenors requested that

the Commission act in this matter to provide protection to the public from the financial hardships that it is alleged the CVEC-Wheelabrator contract has caused and also the environmental problems allegedly caused by the incinerator.

Working on Waste referred to the position and arguments set forth in its Motion to Intervene, wherein it urged the Commission to evaluate the benefits that would result from termination of the CVEC-Wheelabrator power purchase contract and closure of the Wheelabrator trash incinerator in Claremont.

OCA supports CVEC's petition for relief and argues that it is appropriate for the Commission to take jurisdiction of this matter.

Commission Staff recommended that, in light of the apparent disagreement regarding jurisdiction and scope of remedies, the Commission proceed with a procedure whereby it would determine certain preliminary legal matters, after affording the parties an opportunity to submit initial and reply briefs. In addition, Staff recommended that the parties be given an opportunity to determine whether a stipulation of facts could be reached. CVEC and Wheelabrator indicated general support of these recommendations.

III. COMMISSION ANALYSIS

During the prehearing conference the Commission granted full intervention to the Pro-se Intervenors, Working on Waste, and to Wheelabrator on its oral motion to intervene. The Commission, after consideration of the recently submitted Motion to Intervene of NH/VT, the objections thereto of Pro-se Intervenors and Working on Waste, NH/VT's response and affidavit, and the standards of RSA 541-A:32, will also grant full intervention to NH/VT.

As discussed by the Presiding Commissioner during the prehearing conference, the Commission has determined to proceed in this matter by requesting initial briefs and reply briefs on certain preliminary legal issues. With respect to the position argued by Wheelabrator in its Motion to Limit Scope of Issues to be Briefed, we believe that a presentation by the parties in briefs on the issues outlined below will be helpful to the Commission in deliberations on the initial matters of jurisdiction and federal preemption. Therefore, the Commission will accept the agreement of the parties on a procedural schedule to accommodate such filings:

Initial Briefs (all parties)	February 19, 2001
Response Briefs (all parties)	March 3, 2001

The parties shall confine their briefs to the

following issues:

1. Whether the sale of electric energy to CVEC from Wheelabrator violates Section 210 of PURPA;
2. Whether the Commission's Order No. 16,232 in Docket No. DR 82-343, issued March 2, 1983 should be amended, pursuant to RSA 365:28;
3. Whether the power purchase contract between CVEC and Wheelabrator should be amended, and the authority of the Commission to require such an amendment;
4. Whether Wheelabrator's status as a qualifying facility under Section 210 of PURPA should be decertified, and the authority of the Commission to order such decertification;
5. Whether Wheelabrator should be ordered to refund the difference between the amount actually charged by Wheelabrator since March 1987 and the maximum lawful amount under Section 210 of PURPA, and if so, should such refunds include interest, and at what rate. The parties are also requested to address whether different levels of refunds or distinct legal arguments in favor of or against refunds attach to any

specific period of time within the period of March 1987 to the present as a result of decisions by the FERC, the federal courts, this Commission or action by the contracting parties.

6. The basis upon which either Wheelabrator or CVEC may claim, during the period in question and in the future, a right to charge for a facility in excess of 3.6 MW, as said facility was described and approved in Order No. 16,232; and
7. Issues related to the decision of the Federal Energy Regulatory Commission (FERC) in *Connecticut Valley Electric Co. v. Wheelabrator Claremont Co.*, 82 FERC ¶ 61,116 (1998), rehearing denied, 83 FERC ¶61,136 (1998), and the decision of the United States Court of Appeals, District of Columbia Circuit in *Connecticut Valley Electric Company, Inc. v. FERC*, 208 F.3d 1037 (D.C. Cir. 2000).

Based upon the foregoing, it is hereby

ORDERED, that the procedural schedule set forth above is adopted; and it is

FURTHER ORDERED, that parties submitting briefs in this matter confine their arguments to the list of issues set

forth above; and it is

FURTHER ORDERED, that the motions to intervene of Working on Waste, Pro-se Intervenors, Wheelabrator, and NH/VT are granted.

By order of the Public Utilities Commission of New Hampshire this eighth day of February, 2001.

Douglas L. Patch
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary