THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 09-174

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

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

At the hearing held on September 7, 2010 the Commission allowed Briar Hydro Associates ("Briar Hydro") and Public Service Company of New Hampshire ("PSNH") to file briefs by September 21, 2010 on the issues of "just those three issues; the question of ambiguity in contracts, Article 10, and proper remedy". Transcript, September 7, 2010 at 157. PSNH hereby submits its brief without repeating evidentiary arguments made during the hearing and in closing arguments. *Id.*

I. Ambiguity. In construing the meaning of a contract the New Hampshire Supreme Court has stated:

> Accordingly, we must look to all of the language of the Agreement in resolving the present dispute. In so doing, we will give the language used by the parties its reasonable meaning as understood by reasonable people and, in the absence of ambiguity, we will determine the parties' intent from the plain meaning of the language used, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. *Ryan James Realty v. Villages at Chester Condo. Assoc.* 153 N.H. 194, 197 (2006). Absent ambiguity, however, we will determine the parties' intent from the plain meaning of the language used in the contract. *Id.*

Glick v. Chocorua Forestlands Ltd. P'ship, 157 N.H. 240, 248, (2008).

> The interpretation of a contract is a question of law that we review de novo. *Czumak,* 155 N.H. at 373. " When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and context in which the agreement was negotiated, when reading the document as a whole." *Gen. Linen Servs. v. Franconia Inv. Assocs.*, 150 N.H. 595, 597 (2004). " Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used." *Id.* Ambiguity exists only when the parties could reasonably disagree as to a clause's meaning. *See id.*

Lassonde v. Stanton, 157 NH 582, 594 (2008).

> Nor does any such confusion, or legal impossibility, create ambiguity in the clause itself. *See Lassonde v. Stanton*, 157 N.H. 582, 594 (2008) (lack of precision in contract clause does not create ambiguity). Instead, "[a]mbiguity exists only when the parties could reasonably disagree as to a clause's meaning." *Id*.

Cardone Revocable Trust v. Linda Cardone. N.H. Supreme Court No. 2009-316 (July 20, 2010).

In order for Briar Hydro to prevail, the Commission must conclude that the sentence, "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." is ambiguous. Article3, Section D.1. The plain meaning of this sentence is obvious. The phrase in this sentence "and continuing for the term of the Contract" can only mean that the deduction remains in effect for the remaining years in the Contract's term.

Briar Hydro has argued that the sentence immediately following in Section D.1.,"This deduction allows PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price" supersedes the plain meaning of "continuing for the term of the Contract". In order for Briar Hydro to prevail, the Commission has to put new words into the Contract like "if necessary" or "once PSNH has recovered every dollar, but no more". Mr. Labrecque testified on redirect that it would have been easy to add such words to the Contract, but the parties did not. Transcript, at 79.

If the Commission needs to clarify what is meant by "This deduction allows PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price", it need only look to the present value calculations which were exchanged by the parties where a two cent addition to the Index Price over the first eight years would be repaid by a 5.47 cent deduction from the Index Price over the last twenty-two years. Attached to Mr. Norman's testimony were several items accumulated during discovery. Pre-filed Testimony of Richard A. Norman, Hearing Exhibit 8. Of note were Briar Hydro Exhibit 2-20, a letter to Warren Mack with a present value calculation of the 2 cent addition and 5.54 cent reduction using a 17.75% interest rate, and Briar Hydro Exhibit 2-31 with the eventual 2 cent addition and 5.47 cent reduction using a 17.61% interest rate which Commissioner Below went over with Mr. Norman on the record. Transcript 136-137. The parties exchanged these present value calculations which demonstrated what they were negotiating. Without knowing how much the unit would generate

each year over thirty years, the parties agreed that 5.47 cents reduction "[b]eginning with the ninth Contract year, and continuing for the term of the Contract," would allow "PUBLIC SERVICE to recover the payments made under Section A, Article 3, which exceeded the index price". This agreement was based upon the present value calculations (Briar Hydro Exhibits 2-20 and 2-31), and is premised on the assumption that the amount of generation will be constant each year. The "payments made under Section A, Article 3, which exceeded the index price" were two cents over the index price for the first eight years of the Contract, not one cent as Briar Hydro's counsel stated over and over on the record.

As the supreme court has required, the plain meaning of the language governs, not the bill rendered or the mathematics that followed. Just because there is disagreement or contested issues does not mean the plain language of an agreement is ambiguous or that there never was a meeting on the minds. "Ambiguity exists only when the parties could reasonably disagree as to a clause's meaning." *Lassonde v. Stanton, ibid* (Emphasis added).

II. Article 10 Merger Clause. PSNH's witness, Richard Labrecque, took the position in his rebuttal testimony that Article 10 made many of Mr. Norman's arguments irrelevant because they relied on documents or correspondence which were outside of the express terms of the Contract. Exhibit 4, pp. 2, 5, 6 and 9. The subject article is quoted below:

> 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, discussions, communications, and correspondence with respect to the said subject matter are superseded by the execution of this Contract.

Mr. Labrecque's position is well supported by case law:

> Collectramatic correctly points out that, under Kentucky law, a court must construe a clear and unambiguous contract strictly in accordance with its written terms. *Veech v. Deposit Bank of Shelbyville*, 278 Ky. 542, 550, 128 S.W.2d 907, 911 (1939); *O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky.1966). Moreover, when parties reduce their agreement to writing, all prior negotiations and agreements on the matter typically merge in that writing, resulting in an integrated contract. *Jones v. White Sulphur Springs Farm, Inc.*, 605 S.W.2d 38, 42 (Ky.Ct.App.1980). Absent a showing of special circumstances, not suggested here, including fraud, mutual mistake, or illegality, the parol evidence rule dictates that evidence of prior or contemporaneous negotiations or agreements not be afterwards admissible to vary the terms of what the parties intended to be an integrated contract. *See id.* Finally, a merger clause is strong evidence that the

> parties did intend their contract as an integrated one. *See O'Bryan supra*; *KFC Corp. v. Darsam Corp.*, 543 F.Supp. 222, 224-25 (W.D.Ky.1982).

Kentucky Fried Chicken v. Collectramatic 130 N.H. 680, 684 (1988).

Any evidence of what the parties exchanged before the Contract was executed should not be relied upon to construe the meaning of the Contract's terms. This prohibition is in accordance with both Article 10 and the case law cited above. If the parties have reduced their agreement to writing, the Commission must not deviate from the clear language of that writing. Two separate pairs of price adjustments are clearly delineated in the Contract: (A) the 2 cent addition to the Index Price for the first eight years of the Contract term with a 5.47 cent deduction for the remainder of the Contract term, and (B) the 1 cent reduction in the Contract price for the first eight years of the Contract term with a 0.67 cent addition to the Contract price which was repaid over the following twelve years of the Contract term. Exhibit 2, para.6. Briar Hydro cannot combine the two separate pairs of price adjustments because that attempted combination contravenes the clear language of the Contract. Had the parties intended to have one price adjustment, one cent for the first eight years of the Contract, they could have written that language into the Contract, thereby making the drafting and interpretation of the Contract much simpler.

The parties' intent is evidenced by the express written language of the Contract. Mr. Labrecque agreed on the record that nine cents, plus two cents, minus one cent, equals ten cents. He never agreed that the two separate pairs of price adjustments were combined, because that proposition contravenes the express written language of the Contract. Parol evidence may be admitted and can include the conduct of the parties but only if there is an ambiguity in the contract itself. *MacKay v. Breault* , 125 N.H. 135, 140 (1981) (Master was correct in admitting this parol evidence of the defendants' conduct to resolve the deed's latent ambiguity.) There is no ambiguity in the Contract over the pricing.

PSNH anticipates that Briar Hydro's argument with respect to Article 10 will be that, in the previous Penacook Lower Falls proceeding (Docket DE 07-045) extrinsic evidence was necessary to determine which party was entitled to the value of capacity. *See* Transcript at 116-117. The two Penacook Lower Falls cases are inapposite. In the previous proceeding, PSNH

agreed with Briar hydro that the term "capacity" does not appear in the Contract. The Commission expressly found that there was no clear contract language which decided who should receive the value of capacity; therefore, extrinsic evidence was necessary to determine the parties' intent:

> We conclude, however, that within the four corners of the contract we cannot resolve the question of whether "entire output" includes energy and capacity; or whether "energy" was meant to be used in a general sense, which would include capacity, or in a technical sense, which would be distinguished from capacity. Another formulation of the dispute goes to the issue of whether the pricing in the contract was an all-in price for both energy and capacity, or a price for energy only. To interpret the contract we therefore look to the documents associated with, and the circumstances underlying, the contract.

Re: Briar Hydro Associates, Docket No. DE 07-045 Order Following Briefs, Order No. 24,804 (2007), slip op. at 13.

When there is ambiguity as to an important term of a contract, extrinsic evidence, parol evidence of conduct of the parties and the circumstances surrounding the negotiations may be used to discern the intent of the parties. Ambiguity was specifically found in the case of the capacity issue in Docket No. DE 07-045; it is not the case in this docket. The pricing terms and how long they will last are clearly delineated in Article 3 of the Contract. Extrinsic evidence is not necessary to interpret the clause "Beginning with the ninth Contract year and continuing for the term of the Contract". Although the operation of each pair of pricing adjustments may be confusing, there is no ambiguity. Confusion does not create ambiguity. *See Cardone. supra.* This Penacook Lower Falls proceeding and the previous case are clearly distinguishable.

III. Proper Remedy. It is clear that RSA 362-A:5 gives the Commission jurisdiction to adjudicate disputes between small power producers and the purchasing utility. The Commission may decide that PSNH is correct and the 5.47 cent reduction from the nine cent Index Price shall remain in effect for the term of the Contract. This remedy is preferred by PSNH, and the evidence fully supports such a finding. The Commission may alternatively decide that Briar Hydro is right, i.e. that implicitly the parties agreed that the 5.47 cent reduction should end when PSNH has been fully repaid for the price paid above Index Price during the first eight years.

Assuming the Commission decides that Briar Hydro's interpretation is correct on this threshold issue and the 5.47 cent reduction ends when PSNH has been fully repaid, the

Commission must then decide which party's interpretation of the Contract with respect to the different pricing terms is correct. PSNH argues that the express terms of the Contract apply while Briar Hydro argues that extrinsic evidence applies. PSNH argues that two independent pairs of pricing terms appear in the Contract: (A) the 2 cent addition to the Index Price for the first eight years of the Contract term with a 5.47 cent deduction for the remainder of the Contract term, and (B) the 1 cent reduction in the Contract price for the first eight years of the Contract term with a 0.67 cent addition to the Contract price which was repaid over the following twelve years of the Contract term. Exhibit 2, para.6. PSNH's view is that pricing part (B) was fully and completely performed by year twenty of the Contract. In fact, pricing under part (B) terminated in September 2003 when the last payment of 0.67 cents per kilowatt-hour were made. *See* Hearing Exhibit 2, Stipulation of Facts "Generation and Article 3 Payment Terms Under the 1982 Contract (the Stipulation's Exhibit 2)". Briar Hydro did not raise any issue concerning this payback prior to the time it was completed.

Under pricing part (A) PSNH paid two cents over the Index Price producing an overpayment. Without admitting that the 5.47 cent reduction ends before the end of the Contract term, PSNH was asked to calculate a break even point, i.e. when the excess payments above the Index Price were repaid. For the sake of argument, had a breakeven point been contemplated by the parties, PSNH calculates that the breakeven point occurred in October 2009, and a balance of $1,156,768 has accumulated. *See,* Hearing Exhibit 8, Pre-filed Testimony of Richard A. Norman, Briar Hydro Exhibit 4 Briar Hydro argues that the two pairs of pricing provisions in the Contract are somehow combined and that the Contract only required PSNH to pay one cent over the Index Price over the first eight years of the Contract term. Under Briar Hydro's interpretation, PSNH was repaid as of June 1996, the thirteenth year of the Contract Term, and the cumulative amount PSNH has deducted from the Index Price since that date is $54,640,300. *Id.,* to Hearing Exhibit 8, Pre-filed Testimony of Richard A. Norman, Briar Hydro Exhibit 3 .

There are the only three results that the evidentiary record will support. One side is correct on the threshold issue of pricing, i.e. whether or not the 5.47 cent reduction terminates before the end of the Contract term. If Briar Hydro's position is correct on the first issue, then only one party is correct on the date when the overpayment was repaid. The Commission must

determine if there is a reasonable disagreement concerning the interpretation of the pricing terms in order to rely on extrinsic evidence. *Cardone Revocable Trust, supra.* The Commission must also make a finding that Briar Hydro and PSNH agreed at the time the Contract was entered into that the 5.47 cent deduction from the Index Price would end when PSNH had been fully paid for the 2 cent addition in the first eight years. The record reflects that the end of the 5.47 cent reduction was only a suggestion which came informally from a PSNH employee. PSNH later formally stated its position otherwise. If the eventual end of the 5.47 cent reduction was clearly contemplated and agreed to by the parties negotiating the Contract, the party with the most to lose would have kept track of the accumulation and notified the other party as soon as the accumulated 2 cent addition had been repaid. This revelation of contract interpretation need not to have come to light over a wine and a beer.

There is no basis for the Commission to reform the Contract:

> In *Erin Food Servs*., Inc. v. 688 Props., 119 N.H. 232, 237, 401 A.2d 201, 204 (1979), this court stated that "reformation will only be granted when the evidence is clear and convincing that (1) there was an actual agreement between the parties, (2) there was an agreement to put the agreement in writing and (3) there is a variance between the prior agreement and the writing." We have also stated that reformation may be proper when an instrument "fails to express the intention which the parties had in making the contract," *Minot v. Tilton,* 64 N.H. 371, 374, 10 A. 682, 684 (1887) (quoting J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 845), and that reformation, absent fraud, requires a mutual mistake, *Franklin Nat. Bank v. Austin,* 99 N.H. 59, 62, 104 A.2d 742, 745 (1954); *Fitch Company v. Company,* 82 N.H. 318, 321, 133 A. 340, 342 (1926).

Midway Excavators, Inc. v. Chandler, Comm'r, 128 N.H. 654, 657-58 (1986).

Even if the Commission were to look at the extrinsic evidence, it will find that the parties exchanged and reviewed present value analyses which determined that a 5.47 cents per kilowatt-hour deduction for years nine through thirty would repay the 2 cent addition accumulated during the first eight years. *See,* Hearing Exhibit 8, Pre-filed Testimony of Richard A. Norman, Briar Hydro Exhibit 2-20 and Briar Hydro Exhibit 2-31. There was no mutual mistake on how that pair of pricing provisions would work. There was a meeting of the minds on the 2 cent/5.47 cents pair of pricing provisions. The evidence does not suggest that there was a variance between what the parties agreed to and the written terms of the Contract.

The proposal set forth by Mr. Norman upon questioning by Commissioner Ignatius suggested a refund to Briar Hydro of the 5.47 cents per kilowatt reduction hour back to the date the Petition for Declaratory Relief was filed (September 21, 2009) followed by a cancellation of the Contract. Mr. Norman stated that Penacook Lower Falls produced somewhat less than twenty gigawatt-hours per year. Transcript at 128-129. Mr. Norman's digits were correct in that twenty gigawatt-hours times 5.47 cents equals $1,094,000. The Contract is currently set to expire in September 2013. Purchased power to replace the 3.53 cent power from Penacook Lower Falls will probably be more expensive. Sixty gigawatt-hours of sales from Penacook Lower Falls to PSNH from now until September 2013 times 1.47 cents per kilowatt-hour (assume market price of five cents per kilowatt-hour) produces additional costs to customers of $882,000. Mr. Norman's proposal is worth roughly $2 million under the assumptions contained herein. Other than Mr. Norman's offer on the record, there is no evidentiary basis to support this proposed resolution of this matter.

IV. Conclusion. The Commission is not bound by the technical rules of evidence. RSA 365:9. The Commission, therefore, can allow extrinsic evidence to become part of the record. Under the contract interpretation rules set forth in the cases cited above, however, the Commission must first look to the written expression of the parties' intent. Absent ambiguity, the Commission may not rely on extrinsic evidence to rewrite the clear expressed terms of the Contract.

Each argument put forward by Briar Hydro requires the Commission to ignore the unqualified phrase "Beginning in the ninth Contract year and continuing for the term of the Contract." There are several explanations for the other contractual terms contained in Article 3 that do not require the Commission to rewrite the Contract. The parties had agreed on present value calculations regarding how the 2 cent addition could be repaid over the remaining twenty-two years of the Contract. The repayment provision was like a liquidated damages clause. The parties had no idea how the future would turn out so they agreed on a calculation that did rough justice. PSNH customers could have lost if *force majeure* had excused performance on the part of Briar Hydro. Unlike the 1 cent/.067 cents pair of price adjustments, the parties supplied no instructions of how to compute when the cross over of the 2 cents/5.47 cent adjustments would take place.

New Hampshire Hydro Associates made a deal with PSNH that had huge upside potential under Article 3.C. PSNH's incremental energy cost was expected to rise well past the Index Price bringing the Contract Price with it. As successor to New Hampshire Hydro Associates, Briar Hydro should be required to complete performance under the Contract by its express terms. For the reasons stated above and based upon the record evidence, the Commission should rule that the 5.47 cent reduction to the Index Price of nine cents should continue for the remainder of the Contract term.

Respectfully submitted this twenty-first day of September, 2010.
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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Certificate of Service

I hereby certify that copies of the attached Brief of Public Service Company of New Hampshire have been served this day upon persons on the attached Service List pursuant to the requirements of Rules Puc §203.02 and §203.11.

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Gerald M. Eaton