THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Docket No. DE 09-174

PETITION FOR DECLARATORY RULING
PENACOOK LOWER FALLS PRICING

BRIAR HYDRO ASSOCIATES' MEMORANDUM OF LAW

Briar Hydro Associates ("Briar"), by its counsel, Orr & Reno, P.A., submits the following memorandum of law in support of its positions at hearing before the Public Utilities Commission ("Commission") on September 7, 2010.

At the hearing it became clear that the parties disagreed fundamentally on the meaning of several provisions in the April 28, 1982 contract ("Contract"):

(1) Whether the third sentence in Section 3.A incorporates the Section 3.D.2 adjustments into the "Contract rate" paid by PSNH during Contract years 1-8 and 9-20 respectively, or whether Section 3.D.2 should be seen as a separate pair of off-setting adjustments that have no bearing on the "Contract rate" as administered in those two periods;

(2) Whether Section 3.D.1 should be read to extend the 5.47¢/kwh deduction to the end of the 30-year Contract term regardless of whether the "excess payments" made by PSNH during years 1-8 have been fully recovered with interest, or whether that deduction should end once full recovery with interest has been achieved; and

(3) Whether the Article 10 merger clause limits the admissibility of extrinsic evidence to aid the Commission in deciding issues (1) and (2) above.

In addition, Briar asked to brief the issue of the Commission's authority to order appropriate remedies. The Commission granted Briar's request to submit a legal memorandum on the issues of contract ambiguity, the effect of the Article 10 merger clause, and the Commission's power to order an appropriate remedy.

I. Ambiguity in Article 3 Pricing Provisions

Article 3 includes two sets of provisions that are so confusing, so ambiguous, and so susceptible to conflicting interpretations that the Commission needs either to resort to extrinsic evidence to determine the parties' intent, or to conclude that there was no meeting of the minds when the Contract was signed, or both.

(a) Section 3.A and the Section 3.D.2 Adjustments. Sections 3.A and 3.D.2 provide in relevant part as follows:

> 3.A. For the first eight (8) years of the Contract, the **Contract Rate** shall be 11.00 cents per KWH. This rate exceeds the [9.0 cent] 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. . .** (emphasis added).
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> 3.D.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. . . (emphasis added).

PSNH's witness Richard Labrecque argued in his prefiled rebuttal testimony of August 25, 2010 (p. 10, lines 17-25), and again at the hearing, that the adjustments in Section 3.D.2. represent a "distinct pair of pricing adjustments" that are "separate and unrelated to those in Sections [3.A and 3.D.1]." Briar, on the other hand, contends that the third sentence in Section 3.A clearly provides that the "Contract rate" in years 1-8 is "subject to" the adjustment in Section 3.D.2 that applies during years 1-8: namely, the 1.0¢/kwh

deduction specified in the first sentence of Section 3.D.2. Both parties cannot be right, and if the Commission concludes that these provisions are ambiguous, then extrinsic evidence may appropriately be used to resolve the ambiguity.[1]

(b) Section 3.D.1. Section 3.D.1 of the Contract consists of two sentences:

> 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 exceed the index price.

Read together, these two sentences leave it open to question whether the 5.47¢/KWH deduction is to continue to the end of the 30-year Contract term regardless of whether the "excess payments" made by PSNH during the first eight Contract years have been fully recovered with interest, or whether the parties intended that the 5.47¢/KWH deduction would end once PSNH had fully recovered the excess payments.[2]

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[1] The clearest extrinsic evidence on this question is the September 7 hearing testimony of Mr. Labrecque, who conceded several times that the actual payments made by PSNH in Contract years 1-8 that exceeded the 9.0¢/kwh index price amounted to 1.0¢/kwh, not 2.0¢/kwh as PSNH had previously argued. See Hearing Transcript (Tr.) at p. 39, lines 14-18; p. 41, line 23 through p. 42, line 4; p. 43, lines 15-22; and p. 46, line 16 through p. 47, line 13. Other relevant extrinsic evidence includes Paragraph 8 of and Exhibit 2 to the Stipulation filed by the parties on January 25 and 26, 2010 (Exhibit 2 entered by PSNH at the hearing) and the July 31, 1990 invoice from New Hampshire Hydro Associates to PSNH (Exhibit 8 entered by Briar).

[2] There are at least three significant pieces of extrinsic evidence bearing on the resolution of the ambiguity in Section 3.D.1: (1) Mr. Norman's testimony about his January 2009 conversation with a PSNH representative who suggested that according to his calculations, Briar would have completed its recovery obligation two to three years before the end of the Contract term, and that the Contract rate should then be adjusted upward (Norman pre-filed testimony of June 14, 2010, at p. 4, lines 1-5, and Tr. p. 90, line 19 through p. 91, line 11); (2) Extrinsic evidence of an agreed-upon discount rate: although Mr. Labrecque argued in his pre-filed rebuttal testimony and at the September 7 hearing that Section 3.D.1 cannot be interpreted as Briar suggests because the Contract lacks a discount rate, Attachment 2 to his own pre-filed testimony of May 14, 2010 (Exhibit 3) is a March 19, 1982 letter from PSNH's John Lyons to NHHA's Richard Norman, which makes clear that the Section 3.D.1 deduction of 5.47¢/KWH was "based on an interest rate of 17.61%" (see Labrecque testimony at Tr. p. 56, line 2 through p. 57, line 11, and Norman testimony at Tr. p. 88, lines 15-20); and (3) PSNH's Policy Statement on Contract Pricing Provisions for Limited Electrical Energy Producers (Attachment 2-6 to Norman pre-filed testimony of June 14, 2010, Exhibit 9, entered by Briar). As Mr. Norman testified (Tr. p. 87, line 16 through p. 88, line 8), the 1982 Contract was negotiated under "Option 3", which provided that "...any payments above the index must be recovered by PSNH, in later Contract years, considering the present worth of money."

(c) The Legal Standard. Rules of contract interpretation require the Commission to interpret an agreement in accordance with the parties' intentions at the time the contract was made. General Linen Services, Inc. v. Franconia Inv. Associates, L.P., 150 N.H. 595, 597 (2004). Absent ambiguity, the parties' intent is determined from the plain meaning of the language used. Greenhalgh v. Presstek, Inc., 152 N.H. 695, 698 (2005). However, where an ambiguity exists, a court or the Commission looks to extrinsic evidence to glean what the parties understood the ambiguous language to mean at the time of contracting or to determine whether there was even a meeting of the minds. Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 504 (2006); General Linen Services, Inc. supra. See also the Commission's Order Following Briefs (No. 24,804, November 21, 2007) in Briar Hydro Associates v. PSNH, DE 07-045, at pp.12-13.

An ambiguity exists where the parties to the contract could reasonably disagree as to the meaning of the language in question. Lassonde v. Stanton,, 157 N.H. 582 (2008) cited in Anna H. Cardone Revocable Trust v. Linda K. Cardone, No. 2009-316, July 20, 2010; General Linen Services, Inc, supra; MacLeod v. Chalet Susse Intern., Inc., 119 N.H. 238, 243 (1979); Colony Ins. Co. v. Dover Indoor Climbing Gym, 158 N.H. 628, 630 (2009). As the Commission itself noted in its Order Denying Motion for Rehearing (No. 24,960, April 22, 2009) in DE 07-045, at p.9: "...the essence of an ambiguous contract is that the disputed language is susceptible to alternative interpretations". Ambiguity occurs where two contractual provisions are in conflict with each other, or where a reference is uncertain. Williston on Contracts §30:4.

In considering whether language is ambiguous, the contract must be read as a whole. In re Taber-McCarthy, 993 A.2d 240, 244 (N.H. 2010). The court must seek to "harmonize and to give effect to all the provisions of the contract so that none will be

rendered meaningless.'" West v. Turchioe, 144 N.H. 509, 516 (1999) (quoting 4 W. Jaeger, Williston on Contracts § 601 at 310 (3d ed. 1961)); see also Upton v. City of Manchester, 1875 WL 4814, *8 (N.H. 1875) ("in no event will a construction be favored which would render such words, terms, or phrases meaningless"). Indeed, a court may not simply choose to ignore an express contractual provision, unless the provision fails to reflect the actual intent of the parties at the time the contract was made. Heaton v. Boulders Properties, Inc., 132 N.H. 330, 336 (1989). Although one sentence of a contract may appear unambiguous when read by itself, ambiguity may arise when that sentence is read as part of the provision as a whole.[3]

When a contract is ambiguous and a court must determine what the parties mutually understood the ambiguous language to mean at the time of contracting, it "should examine the contract as a whole, the circumstances surrounding execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intention of the parties." In re Taber-McCarthy, 993 A.2d 240, 244 (N.H. 2010). In resolving the ambiguity, it is proper for a court to consider extrinsic evidence to aid its

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[3] See, e.g., United States v. Isom, 580 F.3d 43, 50 -51 (1st Cir. 2009). In Isom, the government entered into a plea agreement with a defendant. Id. at 51. At issue was the defendant's right to an appeal, which turned on the meaning of two sentences in the plea agreement:

> Defendant understands that Defendant may have the right to file a direct appeal from the sentence imposed by the Court. Defendant hereby waives defendant's right to file a direct appeal, if the sentence imposed by the Court is within the guideline range determined by the Court or lower.

Id. The government urged the court to look only to the second sentence and find that the defendant waived his right to appeal any issues. See id. The defendant contended that the first sentence qualified the second such that he waived only his right to appeal his sentence, and nothing else. See id. The court, applying general principles of contract interpretation, held that the two sentences must be read together, and that doing so created an ambiguity as to what the parties mutually intended. See id. In resolving the conflict, the court construed the language against the government, as the party who drafted the agreement. Id.; see also New York State Dept. of Labor (Unemployment Ins. Appeal Bd.) v. New York State Div. of Human Rights, 897 N.Y.S.2d 740, 742 -743 (N.Y.A.D. 3 Dept. 2010) (first sentence of collective bargaining agreement, which was otherwise unambiguous, was ambiguous when considered in conjunction with second sentence); Duchardt v. Midland Nat. Life Ins. Co., 265 F.R.D. 436, 446 (S.D. Iowa 2009) (contract was ambiguous where it was unclear the extent to which the second sentence limited or qualified the first).

interpretation. Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 501 (2006); Dillman v. New Hampshire College, 150 N.H. 431, 434 (2003).

II. The Article 10 Merger Clause.

The use of extrinsic evidence in aiding the interpretation of ambiguous language is not limited by the existence of a merger clause in the contract. See Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 504 (2006). This is so for two reasons. First, the mere inclusion of a merger clause in a contract is not determinative of whether the contract is a complete and final integration. Lapierre v. Cabral, 122 N.H. 301, 306 (1982). Indeed, the court must still evaluate the intent and understanding of the parties. Id. Second, and more importantly here, while the parol evidence rule generally bars the use of parol evidence to contradict a fully integrated written contract, it does not apply to evidence used to clarify ambiguities. See Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 504 (2006). Indeed, "Extrinsic evidence is admissible when it 'serves to aid in interpretation, or to clarify an ambiguity rather than to contradict unambiguous terms of a written agreement.'" Ouellette v. Butler, 125 N.H. 184, 187-88 (1984) (quoting Goglia v. Rand, 114 N.H. 252, 254 (1974)).

In Behrens, the contract at issue contained an integration clause. Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 504 (2006). The court determined, after noting that an integration clause is not determinative of the issue, that at the time the parties signed the agreement, they intended it to be a complete and final integrated expression of their agreement. Id. Parol evidence was nonetheless admissible because it was being used to clarify an ambiguity. Id. The court explained, "an integration clause does not necessarily render a contract unambiguous. As such, it was not error for the trial court to examine parol evidence in its effort to clarify and interpret the ambiguous financing terms."

Behrens v. S.P. Const. Co., Inc., 153 N.H. 498, 504 (2006) (internal citations omitted). Ultimately, the Behrens court affirmed the trial court's holding that there had been no meeting of the minds as to an essential term of the contract, and that the contract was therefore unenforceable.

Here, Section 3.D.1, when read as a whole, states as follows:

> 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.

When both sentences are read together, the meaning of Section 3.D.1 becomes ambiguous and open to more than one reasonable interpretation. On the one hand, PSNH asserts that under the first sentence, it is entitled to deduct 5.47¢/KWH from the index price until the end of the Contract. On the other hand, Briar asserts that under the second sentence the deductions were intended to continue only until full repayment has been made. PSNH's interpretation effectively asks the Commission to stop reading at the end of the first sentence. It claims that the second sentence has no effect on the force of the first sentence and should be disregarded. However, the contract terms must be read as a whole and construed to avoid rendering any meaningless. Briar's position is reasonable because if PSNH's reading is correct, there would be no purpose in including the second sentence. Accordingly, the Commission may appropriately consider extrinsic evidence to aid in its interpretation of the provision.

Although PSNH asserts that consideration of extrinsic evidence would be improper because the Contract contains a merger clause, the merger clause does not conclusively establish complete integration, and even if it did, the evidence is being

offered to clarify an ambiguity rather than to contradict the plain written terms. Because extrinsic evidence is being offered to clarify and interpret ambiguous terms, the presence of an integration clause is simply irrelevant. The Commission is entitled to review extrinsic evidence to aid it in interpreting the ambiguity created when Section 3.D.1. is read as a whole.

It is also important to note that even if the contract were not ambiguous, the parol evidence rule would not preclude the consideration of extrinsic evidence arising *after* the execution of the contract, such as Mr. Norman's testimony about his January 2009 conversation with the PSNH official who suggested that the Contract rate would be adjusted upward after PSNH had fully recovered its excess payments, some two to three years before the end of the Contract. When applicable, the parol evidence rule bars only the consideration of extrinsic evidence *contemporaneous with*, or *prior to* the execution of the contract. See Connell v. Diamond T. Truck Co., 188 A. 463, 464 (N.H. 1936). It does not bar conduct occurring after the contract's execution. Id. Such evidence is plainly admissible as evidence of the parties' practical construction and understanding of the contract. See id.; MacKay v. Breault, 121 N.H. 135, 140 (1981).

III. Power of the Commission to Order An Appropriate Remedy

RSA 362-A:5 provides that "Any dispute arising under the provisions of this chapter [RSA 362-A] may be referred by any party to the commission for adjudication." The Commission's statutory adjudicative powers have been interpreted broadly. See Appeal of Verizon New England, Inc., 153 N.H. 50, 63-4 (2005); Appeal of Granite State Elec. Co., 120 N.H. 536, 539 (1980). Indeed, "The PUC was established to provide comprehensive provisions for the establishment and control of public utilities in the State, and was endowed with 'important judicial duties' and 'large administrative and

supervisory powers.'" Appeal of Granite State Elec. Co., 120 N.H. at 539 (quoting Petition of Boston & Maine Corp., 109 N.H. 324, 326 (1969)) (internal quotations omitted). "As such, it must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power." Id. at 539.

In Appeal of Verizon New England, Inc., Verizon appealed a Commission order imputing to it earnings by the publisher of telephone directories for ratemaking purposes. Appeal of Verizon New England, Inc., 153 N.H. at 52. Verizon argued that the Commission lacked authority to impute revenues earned by the publisher of the directories pursuant to RSA 366.[4] Id. at 63. It contended that the only statutory power granted to the Commission to resolve the dispute was to disallow payments. Id. at 63-4. The court disagreed, declining to construe the Commission's remedial authority as being limited by such a strict reading of the statute. Id. at 64. Instead, the court reasoned, "That the legislature permitted additional specific remedies under the statute does not obviate its grant of broad remedial power." Id.

Similarly, in Appeal of Granite State Elec. Co., the electric company appealed a Commission order requiring it to refund certain revenues to customers. Appeal of Granite State Elec. Co., 120 N.H. at 537-8. The electric company argued that the Commission lacked the authority to compel such refunds. Id. at 538. The court again declined to narrowly construe the Commission's broad adjudicative powers. See id. at 539. Instead, it held that the Commission is obligated to exercise the inherent powers of its adjudicative role, which include the award of restitution. Id. Such powers are consistent with the Commission's broad grant of equitable powers. Id. at 541.

[4] RSA 366 is analogous to RSA 362-A in that each grants general adjudicative authority to the Commission to resolve disputes.

Here, RSA 362-A:5, entitled "Settlement of Disputes," grants the Commission the broad authority to adjudicate disputes arising under that chapter. As the present dispute involves a contract between PSNH and a limited electrical energy producer (as defined in RSA 362-A:1-a, III), it is plainly within the Commission's broad powers. The relief Briar seeks from the Commission is not explicitly enumerated as being within the Commission's statutory authority. However, like the remedies in Appeal of Granite State Electric and Appeal of Verizon New England, it falls within the powers inherent in the Commission's adjudicative powers, especially in light of the overwhelming evidence at the hearing that the excess payments made by PSNH in the first eight contract years amounted to 1¢/KWH, not 2¢/KWH as PSNH has claimed.[5] The Commission's power to fashion a fair and appropriate remedy should not be limited. Briar submits that, if the Commission finds that PSNH's excess payments during the first eight Contract years have been repaid with interest, it can properly order any of several appropriate remedies, including (a) reversion to the 9.0¢/KWH index price for the remaining term of the Contract, (b) termination of the Contract effective either as of the date PSNH has achieved full recovery or at such later date as the Commission equitably determines, or (c) such other relief as the Commission determines is just and equitable.

IV. Conclusion

The Article 3 pricing provisions of the Contract must be read as a whole. Sections 3.A and 3.D.2 must be read together and reconciled, and extrinsic evidence is admissible to resolve any remaining ambiguity. As to Section 3.D.1, when the second sentence is

[5] The implication of this arithmetic is that Briar has not only fully repaid PSNH and its ratepayers with interest at 17.61%, but has done so more than four times over. See Exhibit 6, the colored Pricing Payment Provisions chart entered by Briar, which shows that Briar had received "excess payments" of $1,488,685 by the end of Contract year 8, and had repaid $4,378,127 by July, 1996 and $18,850,132 by November 2009.

read in conjunction with the first, an ambiguity arises as to its meaning. A reasonable interpretation is that the deduction of 5.47¢/KWH was to cease upon full repayment of the funds advanced during earlier Contract years with interest, because that interpretation gives meaning to the second sentence, which would otherwise be rendered meaningless. Because Section 3.D.1. contains an ambiguity, it is necessary for the Commission to consider parol evidence to aid it in interpreting the parties' intent at the time of contracting. Article 10 does not foreclose the consideration of extrinsic evidence because the evidence is necessary to clarify an ambiguity, rather than to contradict a fully integrated contract. Finally, the Commission has the proper authority to grant fair and equitable relief pursuant to its broad adjudicative powers.

Respectfully submitted,

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