

1 **State of New Hampshire**

2 **before the**

3 **New Hampshire Public Utilities Commission**

4
5 Public Service Company of New Hampshire

6 Petition for Declaratory Ruling Re: Penacook Lower Falls Pricing

7 Docket No. DE 09-174

8
9 **Pre-filed Testimony of Richard A. Norman**

10 **on Behalf of Briar Hydro Associates**

11
12 **Q. Please state your name, position and business address.**

13 A. My name is Richard A. Norman. I am the President of Essex Hydro Associates, LLC, one
14 of the general partners of Briar Hydro Associates. My business address is Briar Hydro
15 Associates, % Essex Hydro Associates, 55 Union Street, 4th floor. Boston, MA.

16
17 **Q. In what capacity are you employed and what are your responsibilities?**

18 A. I am the President of Essex Hydro Associates, LLC (EHA), a developer and operator of and
19 investor in small power producer (SPP) hydroelectric facilities. In that capacity I am
20 responsible for overseeing and participating in all legal, financial, technical and operational
21 aspects of EHA's business. EHA serves as the general partner or manager of nine entities
22 that own and operate small hydroelectric facilities. With respect to this proceeding, EHA is
23 the entity responsible for the management, administration and operation of Briar Hydro

1 Associates. I was involved in the negotiations that resulted in the contract that is the subject
2 of this proceeding.

3
4 **Q. What is your educational background?**

5 A. I received a Bachelor of Science degree in general science from the United States Naval
6 Academy in 1961 and in 1970 a Masters Degree in Business Administration from the
7 Harvard Graduate School of Business Administration. I also am a graduate of the Navy's
8 Nuclear Power training program.

9
10 **Q. Please summarize your professional background.**

11 A. In 1983, as a founding partner, I formed EHA, a company that now directly or indirectly
12 operates and manages thirteen hydroelectric projects located in the northeastern part of the
13 United States. EHA and several affiliated companies were responsible for all activities
14 necessary to develop six of these hydroelectric projects (including the Penacook Lower Falls
15 Project), including permitting, design, construction, legal, organization and financing.
16 Seven of the EHA projects were purchased from other companies. A description of my
17 other business experience is attached as Exhibit 1 to my testimony.

18
19 **Q. Have you testified previously before the New Hampshire Public Utilities Commission
20 or other regulatory bodies?**

21 A. Yes, I have testified on several occasions before the New Hampshire Public Utilities
22 Commission ("NHPUC"). I also have testified before the Federal Energy Regulatory
23 Commission on behalf of the United States Maritime Administration, the Vermont Public

1 Service Board and the Oregon Water Resources Board. In addition, I served as a member of
2 the unsecured creditors' committee in the Public Service Company of New Hampshire
3 ("PSNH") bankruptcy proceeding.
4

5 **Q. What is the purpose of your testimony?**

6 A. The purpose of my testimony is to explain Briar Hydro Associates' ("Briar's") position with
7 regard to the pricing issues raised in PSNH's Petition for Declaratory Ruling.
8

9 The Contract for the Purchase and Sale of Electric Energy with Public Service Company of
10 New Hampshire dated April 28, 1982 (the "Contract"¹) that is the subject of this proceeding
11 was negotiated and executed by New Hampshire Hydro Associates ("NHHA"). Briar later
12 succeeded to NHHA's rights and obligations under the Contract. For the sake of simplicity,
13 I will use Briar to refer to either or both NHHA and Briar in this testimony.
14

15 **Q. Please describe the circumstances that led to PSNH filing its Request for Declaratory
16 Ruling.**

17 A. The Contract was signed on April 28, 1982 and has been in effect since then. Until 2006,
18 there had been no controversy over the administration of the Contract. However, in late
19 2006 a dispute arose concerning the entitlement to capacity payments to be paid by ISO-
20 New England for the account of the Penacook Lower Falls Project under the ISO-NE
21 Forward Capacity Market. That dispute was the subject of a recent NHPUC proceeding

¹ The Contract was attached to the Petition for Declaratory Ruling filed by PSNH on September 21, 2009

1 which is now on appeal at the New Hampshire Supreme Court. Then, in early 2009, during
2 an informal meeting between a representative of PSNH and me, the PSNH representative
3 made the comment that PSNH expected that it would have recovered all payments in excess
4 of the "Index Price" two to three years before the end of the Contract's term, and that at that
5 point Briar could expect the Contract price would be increased. As a result of that
6 comment, Briar reviewed the terms of the Contract and did a detailed analysis of the pricing
7 provisions. Following completion of that analysis, Briar requested a meeting with PSNH to
8 discuss and seek resolution of the matter (i.e., the recovery by PSNH of excess payments).
9 The parties were unable to agree upon a resolution. PSNH then filed its Petition for
10 Declaratory Ruling with the NHPUC on September 21, 2009.

11
12 **Q. Before turning to the specifics of the Contract, would you please provide a summary**
13 **of the negotiations that led to the signing of the Contract?**

14 A. Briar began development efforts for the Penacook Lower Falls project in 1980. In mid-1981
15 Briar approached PSNH to obtain a power contract to provide financial support for its
16 development efforts. From August through December 1981, there were a number of
17 meetings and exchanges of correspondence relating to the rate structure that would be
18 incorporated into the power purchase agreement. Although it does not appear in the record,
19 I assume that in late 1981 PSNH provided a generic draft power contract to Briar for the
20 Penacook Lower Falls project. From that time through April 1982 there were a number of
21 further meetings and exchanges of correspondence that led to the signing of the Contract on
22 April 28, 1982.

1 **Q. Are the exchanges of correspondence that document the course of the negotiations**
2 **included in the record?**

3 A. Yes. On Monday, June 7, 2010, PSNH, in response to a data request from Briar, provided
4 copies of all such correspondence and internal memoranda in its records that relate to this
5 matter. For convenience, the documents produced by PSNH are attached in a package as
6 Exhibit 2, items 2-1 through 2-38.

7 **Q. Would you describe the issues that were in contention during those negotiations?**

8 A. The negotiations were based on a "standard contract" PSNH was using for SPP contracts,
9 based upon an "Index Price" of 9.0 ¢/KWH, subject to adjustment during the contract term.
10 The only significant issue was the price provision. From August 1981 until late December
11 1981, the parties exchanged information that related to the pricing provisions to be
12 incorporated into the contract. Due to the requirements of Briar's lenders, Briar had told
13 PSNH that it needed payments in excess of the Index Price during the early contract years,
14 and that it would repay those "excess payments" in later contract years. PSNH agreed at an
15 early stage in the negotiations to adjust the price provisions to meet Briar's requirements.
16 The negotiations then focused on how the price provisions were to be modified. As shown
17 in a PSNH hand-written memorandum dated 14 Dec. 81, "RVP-1" (Exhibit 2-8), PSNH had
18 established a discount formula that it used in calculating the recovery method for excess
19 payments. This methodology was consistently used by both PSNH and Briar throughout the
20 course of the negotiations.

1 As the negotiations progressed to addressing a specific form of contract, Briar sent a marked
2 copy of the PSNH standard contract to PSNH in a letter on January 7, 1982² (Exhibit 2-12).
3 Rider A to that marked up contract contained proposed revised pricing provisions to the
4 “Standard Contract.” Significantly, the recovery methodology was set forth in very specific
5 detail *and followed the methodology established by PSNH in Exhibit 2-8*. In all of the
6 pricing negotiations that followed, this formula never changed. Both parties accepted it as
7 an equitable methodology by which Briar could accomplish its objective, i.e., payments
8 higher than the Index Price in early contract years, and PSNH could accomplish its
9 objective, i.e., recovery of those payments in excess of the Index Price in later years with
10 recognition given to the time value of money.

11
12 **Q. Is that the basis upon which the final Contract was signed on April 28, 1982?**

13 A. Yes. That was the basic quid pro quo.

14
15 **Q. Turning to the specifics of the Contract, what do you believe to be the principal issues**
16 **raised in this filing?**

17 A. I believe there are two major issues in this case.

18
19 The first is whether the 5.47¢/KWH deduction in the “Contract Rate” (the price Briar
20 receives for energy sold to PSNH under the Contract) ceases when PSNH has recovered the
21 payments it made to Briar in excess of the 9.0¢/KWH “Index Price” during the first eight

² I believe the January 7, 1981 date is in error and should have been January 7, 1982 as evidenced by the date stamp, November 19, 1981, of the attached contract and the “January 21, 1982” receipt stamp from RVP at PSNH.

1 contract years, or whether the 5.47¢/KWH deduction continues for the duration of the
2 Contract, even after PSNH has fully recovered payments in excess of the Index Price.

3
4 The second issue is whether the 5.47¢ figure used for the “recovery amount” deduction in
5 Section 3.D.1 has any legitimate basis, given the fact that it was apparently based on the
6 erroneous assumption that PSNH made “excess payments” of 2.0¢/KWH during the first
7 eight Contract years, when in fact, PSNH’s excess payments during that period amounted to
8 only 1.0¢/KWH.

9
10 **Q. Would you please explain Briar’s position regarding the first issue arising from the**
11 **pricing provisions in Article 3 of the Contract?**

12 A. Article 3 is two and a half pages long, complicated, and confusing, but the only sections
13 relevant to this issue are Sections A and D. Section B does not change the operation of
14 Section A and D. Section C can be disregarded because it never came into play, since 96%
15 of PSNH’s “incremental energy cost” never exceeded the 9.0¢ Index Price.

16
17 Article 3, Section A states, in relevant part:

18
19 “For the first eight (8) years of the Contract, the Contract rate shall be
20 11.00 cents per KWH. This rate exceeds the index price by 2.00 cents per
21 KWH; and *all payments made by PSNH to SELLER which exceed the*
22 *index price must be recovered by PSNH, during later Contract years, in*
23 *accordance with Section D.1., Article 3 (emphasis added). This rate is*
24 *subject to the adjustment provided for under Section D.2., Article 3...”*

25
26 Article 3, Section D.1. states:

27
28 “Beginning with the ninth Contract year, and continuing for the term of
29 the Contract, a *recovery amount* equal to 5.47 cents per KWH shall be

1 deducted from the Contract rate. *This deduction allows PSNH to recover*
2 *payments made under Section A, Article 3, which exceeded the index*
3 *price”(emphasis added).*
4

5 Article 3, Section D.2 states:
6

7 *“For the first eight Contract years, the Contract rate shall be adjusted by*
8 *subtracting 1.00 cents per KWH from the rate (emphasis added).* For the
9 ninth through the twentieth Contract Years, the Contract rate shall be
10 adjusted by adding 0.67 cents per KWH to the rate. The total of said
11 additional payments, for any given year, shall not exceed one-twelfth
12 (1/12) of the money subtracted during the first eight Contract years.”
13

14 Briar believes that Sections A and D, fairly read, provide that the 5.47¢/KWH deduction
15 from the Contract Rate is effective until PSNH has recovered payments that it made to Briar
16 during Contract years 1-8 that exceeded the Index Price. Briar believes the purpose of
17 Section 3.D.1 is solely to provide a recovery mechanism for those excess payments and that
18 once payments in excess of the Index Price made during years 1 through 8 have been
19 recovered by PSNH, the 5.47¢ deduction in Section 3.D.1 ends.
20

21 **Q. Does PSNH agree with this interpretation?**

22 A. No. PSNH believes the 5.47¢/KWH deduction from the Contract Rate is effective until the
23 term of the Contract has expired, notwithstanding the fact that PSNH would have recovered
24 all payments in excess of the Index Price years before the end of the Contract term.
25

26 **Q. Why does PSNH believe the 5.47¢/KWH adjustment continues to be applied to the**
27 **Contract Rate even after all excess payments have been received?**

1 A. PSNH points to the provision of Section 3.D.1 that states “Beginning with the ninth
2 Contract year, and continuing for the term of the contract, a recovery amount equal to 5.47
3 cents per KWH shall be deducted from the Contract rate.”
4

5 **Q. Why do you disagree with the PSNH contract interpretation?**

6 A.. PSNH ignores the language of Sections 3.A and 3.D.1 regarding the intent of the recovery
7 of excess payments. Specifically, PSNH’s interpretation ignores the sentence in Section
8 3.D.1 that states, “This deduction allows PSNH to recover payments made under Section A,
9 Article 3, which exceeded the Index Price.”
10

11 **Q. Assuming that Briar’s interpretation of its repayment obligation is correct, has PSNH
12 recovered the excess payments that it made during the first eight Contract years?**

13 A. Yes. On January 26, 2010 Briar submitted to the NHPUC Staff its “Revised Analysis of
14 PSNH Excess Payment Recovery Under 1982 Contract,” attached for convenience as
15 Exhibit 3. That analysis showed that PSNH had fully recovered the payments it made during
16 the first eight contract years in excess of the 9.0¢ Index Price by as early as July 1996. In a
17 December 18, 2009 submission to the NHPUC Staff, PSNH has presented its own analysis
18 of its recovery of the excess payments (Exhibit 4), which showed PSNH had fully recovered
19 its excess payments by October 2009.
20

21 **Q. Why is there such a substantial difference between Briar’s and PSNH’s calculations as
22 to the date by which PSNH had recovered the excess payments?**

1 A. This is the second issue raised by PSNH's filing. Briar and PSNH make substantially
2 different assumptions as to the amount of excess payments made by PSNH during the first
3 eight contract years. PSNH assumes it paid Briar 11.0¢/KWH, or 2.0¢/KWH in excess of
4 the 9.0¢ Index Price. Briar holds that PSNH paid Briar only 10.0¢/KWH, or 1.0¢/KWH in
5 excess of the Index Price.

6
7 **Q. Why does Briar believe PSNH only paid 1.0¢/KWH in excess of the Index Price for
8 the energy sold to PSNH during the first eight Contract years?**

9 A. Because it is very clear as a factual matter that during the first eight Contract years,
10 payments in excess of the Index Price amounted to 1.0¢/KWH, not 2.0¢/KWH, and the
11 language of the Contract provides that the 5.47¢/KWH adjustment is intended to *“recover*
12 *the payments made...which exceeded the index price”* (emphasis added). The introductory
13 language in Article 3 states that the price charged by Seller to PSNH for the sale of
14 electrical energy shall be based upon an Index Price of 9.00¢/KWH. Section 3.A then
15 establishes a **“Contract Rate”** (emphasis added) for the first eight years of the Contract.
16 The **Contract Rate** is set at 11.00¢/KWH, *“subject to the adjustment provided for under*
17 *Section D.2., Article 3.”* Section D.2 states that *“For the first eight Contract years, the*
18 *Contract rate shall be adjusted by subtracting 1.00 ¢/KWH from the rate.”* Therefore, the
19 adjusted Contract Rate for the first eight contract years was 10.0¢/KWH. This is the amount
20 that Briar received as payment and it exceeded the Index Price by 1.00¢/KWH. As
21 evidence that both Briar and PSNH used the 10.0¢/KWH adjusted **Contract Rate** as a
22 basis for their business dealings, I have attached a representative invoice dated July 31,

1 1990, prepared by New Hampshire Hydro Associates which shows that the adjusted
2 Contract Rate upon which PSNH payments were based was 10.0¢/KWH (Exhibit 5). During
3 the term of the Contract PSNH never disputed this adjusted Contract Rate and paid for all
4 generation during the first eight contract years based upon that adjusted Contract Rate. The
5 Contract Pricing Provisions exhibit to Mr. Labrecque's testimony also clearly shows that
6 PSNH used an "estimated payments" rate of 10.0¢/KWH for contract administration. Both
7 parties understood that the amount actually paid by PSNH was 10.0¢/KWH, not
8 11.0¢/KWH.

9
10 **Q. Are there any Contract terms that support PSNH's assertion that Briar's repayment**
11 **obligation should be based upon 2.0¢/KWH?**

12 A. No. Section 3.A plainly states that the 11.0¢/KWH Contract Rate is to be adjusted pursuant
13 to the terms of both Section 3.D.1 and Section 3.D.2. At page 2, lines 11-12, and throughout
14 his pre-filed testimony of May 14, 2010, Mr. Labrecque refers to a "2.00 cents per KWH
15 adder applied to the index rate of 9.00 cents per KWH during the first eight years of the
16 contract," as if the 2.00 cent adder in Section 3.A were the only adjustment to be made in
17 the Contract Rate for the first eight years. But Section 3.A also plainly states that "this
18 [Contract] rate is subject to the adjustment provided for under Section D.2, Article 3."
19 Section 3.D.2 provides for two adjustments: (1) a 1.00¢ deduction from the Contract Rate
20 during the first eight Contract years, and (2) a 0.67¢ adder to the Contract Rate during
21 Contract years 9 through 20. On the last page of his testimony, at lines 4-10, Mr. Labrecque
22 discusses these two adjustments as if they had nothing to do with the Contract Rate during
23 the first eight years of the Contract, but this interpretation simply cannot withstand a careful

1 reading of Sections 3.A and 3.D.2. Read together, as Section 3.A requires them to be, these
2 provisions make it very clear that PSNH was to pay an adjusted Contract Rate of
3 10.0¢/KWH (not 11.0¢/KWH) during the first eight Contract years. And as Exhibit 5
4 shows, 10.0¢/KWH is what PSNH actually paid. The “2.00¢/KWH adder” is twice the
5 amount of front-loaded “excess payments” actually received by Briar during the first eight
6 Contract years, as PSNH’s own calculations set forth in Exhibit 2-21 clearly demonstrate.

7
8 **Q. If the 1.00¢/KWH deduction in Section 3.D.2 is applied to reduce the Contract Rate in**
9 **Section 3.A from 11.00¢/KWH to 10.00¢/KWH, what happens to the 0.67¢/KWH**
10 **adder in Section 3.D.2?**

11 A. The 0.67¢/KWH adder in Section 3.D.2 also becomes an adjustment to the Contract Rate,
12 but not until Contract years 9 through 20. Starting in Contract year 9, the adjusted Contract
13 Rate is reduced by the 5.47 cent deduction in Section 3.D.1 and simultaneously increased by
14 the 0.67 cent adder in Section 3.D.2, for a net adjusted Contract Rate of 4.2¢/KWH. In
15 Contract year 21, the 0.67 cent adder no longer applies, so the adjusted Contract Rate
16 becomes 3.53¢/KWH (the 9.0 cent Index Price less the 5.47 cent deduction) until such time
17 as the recovery amount due to PSNH has been fully repaid. At that point, under the
18 Contract, the Contract Rate should become the Index Price.

19
20 **Q. Has PSNH provided you with any repayment calculations other than Exhibit 4?**

21 A. Not until Monday, June 7, 2010, a week before this Testimony was filed. Two of the
22 discovery documents produced by PSNH relate to earlier payback calculations that were
23 forwarded by PSNH to Briar on May 14, 1990 and September 14, 1990 (seven years into the

1 Contract) at a time when PSNH and Briar were discussing a potential contract buyout (see
2 Exhibits 2-34 and 2-35). Although these exhibits did not refer to the specific terms of the
3 Contract, they show that PSNH was then using a discounted cash flow methodology to
4 calculate Briar's repayment obligation. This methodology is generally consistent with the
5 methodology used by PSNH and Briar in the contract negotiations. However, those
6 calculations also clearly show that PSNH accepted that the actual payment received by
7 Briar in Contract years 1-8 was 10.0¢/KWH, not 11.0¢/KWH.

8
9 **Q. Has PSNH provided any repayment calculations that are more recent?**

10 A. No. Given that the PSNH representative told me early in 2009 that Briar's recovery
11 payment obligation would be fulfilled prior to the end of the Contract term, I believe it is
12 reasonable to assume that at some time prior to or during early 2009, PSNH prepared
13 recovery calculations that served as the basis for the statement about Briar's fulfillment of
14 its repayment obligation. However, other than the PSNH recovery calculation that was
15 submitted to the NHPUC (Exhibit 4), no such additional calculations have been provided to
16 Briar or introduced into the record.

17
18 **Q. Assuming that PSNH has recovered all amounts in excess of the Index Price that were**
19 **paid to Briar, what Contract Rate should be paid by PSNH for the remaining term of**
20 **the Contract?**

21 A. Briar should be paid a Contract Rate of 9.0¢/KWH. Article 3 Section B states that if
22 PSNH's incremental energy costs have not exceeded the Index Price (9.0¢/KWH), "*the*
23 *Contract rate beginning with the ninth contract year shall be the index price of 9.0 cents*

1 *per KWH; and this rate shall remain in effect until superceded by the provisions of*
2 *Section C, Article 3.*" (emphasis added). Section C deals with circumstances under which
3 96% of PSNH's incremental energy rate would exceed the Index Price, which did not
4 happen.

5
6 **Q. Are there any others matter to which you would like to offer testimony?**

7 A. Yes, I would like to respond to the testimony of Mr. Labrecque concerning the derivation of
8 the 5.47¢/KWH deduction in Section 3.D.1. Mr. Labrecque has introduced a March 19,
9 1982 letter that includes an Exhibit 1 entitled "Contract Pricing Provisions, Penacook
10 Lower Falls Hydro" (Exhibit 2-21). He argues that if an 11.0¢/KWH front-end rate is paid
11 for Contract years 1 to 8, then it is necessary to have a 5.47¢/KWH recovery rate for the
12 remaining 22 years of the Contract term in order to recover the 2.0¢/KWH front-loaded
13 excess payments, assuming a 17.62 % discount rate is used. He states that the present value
14 of the 5.47¢/KWH recovery rate is equal to the 2.0¢/KWH adder in the first 8 years.

15
16 **Q. Do you understand why Mr. Labrecque might make such an argument?**

17 A. I believe so. As Mr. Labrecque has testified, he was not personally involved in the
18 negotiation of the contract. Thus, in his testimony he offers an arithmetic calculation that
19 shows that if Briar received excess payments of 2.0¢/KWH during the first eight contract
20 years, then Briar would have to make a 5.47¢/KWH repayment for the remaining 22 years
21 of the contract, based on PSNH's generation assumptions.

22
23 **Q. Do you agree with Mr. Labrecque's argument?**

1 A. No. Mr. Labrecque would be mathematically correct regarding the present value
2 equivalence of the adjustments over a 30-year term at a discount rate of 17.62%, based on
3 PSNH's generation assumptions, if Briar had in fact "borrowed" 2.0¢/KWH from PSNH
4 during the first eight contract years. However, this calculation is completely misleading
5 because, as I have noted above, Briar "borrowed" only 1.0¢/KWH, not 2.0¢/KWH, during
6 the first eight Contract years.

7
8 As explained previously, Sections 3.A and 3.D.2 together establish an adjusted Contract
9 Rate of 10.0¢/KWH for contract years 1-8 and therefore establish that PSNH's recovery
10 right should be based on 1.0¢/KWH, not 2.0¢/KWH. A present value equivalence
11 calculation based upon a 2.0¢/KWH excess payment does not comport with the plain
12 language of the Contract or the payments received by Briar.

13
14 **Q. You note that Mr. Labrecque based the 5.47 cent deduction on a 17.62% discount**
15 **rate. Does Briar agree with the discount rate?**

16 A. Yes, we accept a discount rate of 17.62%.

17
18 **Q. Do you have any further comment regarding the 5.47¢/KWH adjustment?**

19 A. Yes. Although I was personally involved in the negotiations, I have no specific recollection
20 of how the 5.47¢/KWH adjustment was added to the form of contract that had been the
21 basis of the negotiations. However, in reviewing the documents PSNH has now provided, I
22 believe I understand how the 5.47 cent deduction was introduced into the negotiations.

23

1 **Q. Please explain.**

2 A. As the early items in Exhibit 2 show, all negotiations that occurred in 1981 and were
3 included in the mark-up of the standard contract contained in the January 7, 1982 letter
4 (Exhibit 2-12) assumed that the Contract Rate for the first eight contract years would be
5 10.0¢/KWH. The form of contract at that time did not include adjustments now contained in
6 Section 3.D.2. However, a PSNH letter dated March 2, 1982 to Briar (Exhibit 2-16),
7 incorporating the substance of an internal PSNH memorandum from "RVP" dated March 2,
8 1982 (Exhibit 2-18) outlined two significant changes to Article 3. First, PSNH changed the
9 basic "Contract Rate" from 10.0¢/KWH to 11.0¢/KWH. Second, PSNH then added the
10 1.0¢/KWH and 0.67¢/KWH adjustments that are now incorporated into Section 3.D.2 of the
11 Contract.

12 **Q. What effect did those changes have on the recovery rate?**

13 A. The "recovery amount" necessary to recover front-end excess payments based upon
14 11.0¢/KWH rather than 10.0¢/KWH increased substantially—doubled, in fact. As shown in
15 a PSNH letter dated December 21, 1981 (Exhibit 2-9), PSNH previously had calculated that
16 a recovery amount of only 2.77¢/KWH would be necessary to recover the front-end loaded
17 payments if the Contract Rate was 10.0¢/KWH for the first 8 contract years. After March 2,
18 1982, the recovery rate became 5.47¢/KWH.

19
20 **Q. If PSNH calculated that a recovery rate of 2.77¢/KWH was necessary to recover a**
21 **front end "excess payment" of 1.0¢/KWH for eight years, how then was the Contract**
22 **changed to include a payback obligation of 5.47¢/KWH?**

1 A. Because PSNH controlled the drafting of the Contract, I can only speculate, based on the
2 documents provided by PSNH. A March 5, 1982 PSNH letter to Briar (Exhibit 2-20)
3 includes a calculation that shows that receiving 2.0¢/KWH in excess of the Index Price for
4 the first eight years contract years would be offset by a recovery adjustment of 5.54¢/KWH
5 for the next 22 years on a present value equivalence basis. Apparently, on the basis of a
6 similar calculation, on March 19, 1982, PSNH changed the required recovery amount to
7 5.47¢/KWH, added Section 3.D.2 to the draft contract and modified the language of Section
8 3.A to reference and incorporate adjustments to the Contract Rate provided in Sections
9 3.D.1 and 3.D.2 of the Contract. (Exhibit 2-21).

10
11 **Q. Does the addition of Section 3.D.2 have any significance in terms of the operation of**
12 **the Contract language?**

13
14 A. Yes. It was at this point in the negotiations that PSNH introduced a substantial
15 inconsistency between the contract language and the methodology used to calculate the
16 recovery adjustment. On the one hand, PSNH increased the recovery amount (from
17 2.77¢/KWH to 5.47¢/KWH) by assuming that the excess payment would be 2.0¢/KWH.
18 However, at the same time, it added Section 3.D.2, which reduced the “excess payment”
19 from 2.0¢/KWH to 1.0¢/KWH. It also added language to Section 3.D.1 that stated that the
20 recovery amount of 5.47¢/KWH would be deducted for the term of the Contract. If the
21 recovery amount had remained at 2.77¢/KWH, the phrase “for the term of the contract”
22 would at least have made sense under PSNH’s construction of the Contract pricing
23 provisions. However, even under PSNH’s construction, the Contract, as it ended up,

1 provides for an over recovery by PSNH, since Briar never received the 2.0¢/KWH excess
2 payment.

3
4 **Q. What was the origin and purpose of the adjustments contained in Section 3.D.2?**

5 A. I did not understand the purpose of the adjustment when the Contract was being negotiated
6 and do not, to this day, understand its purpose. The only document in the record that
7 addresses this point is a hand-written draft of a letter to N. H. Hydro Associates dated
8 March 2, 1982. (Exhibit 2-17). Paragraph 5 of that letter initially described the rate
9 adjustments as an "incentive." The word "incentive" subsequently was struck from the
10 contract language forwarded to Briar in a letter dated March 2, 1982 (Exhibit 2-16). I do
11 not understand how a 1.0¢/KWH reduction in the Contract rate could be considered an
12 incentive.

13
14 **Q. How does PSNH explain the Section 3.D.2 adjustments?**

15 A. Mr. Labrecque implies on the last page of his testimony that the Section 3.D.2 adjustments
16 should be treated independently from the "2.00¢/KWH adder" in Section 3.A and should
17 not be considered as adjustments to the Contract Rate. He contends that Briar's recovery
18 payment obligation should be based upon a front-end Contract Rate of 11.0¢/KWH and a
19 recovery rate of 5.47¢/KWH, referencing Exhibit 1 of the March 19, 1982 letter from
20 PSNH (Exhibit 2-21) as the basis for this position.

21
22 **Q. Do you agree with this interpretation?**

1 A. No. First of all, PSNH ignores the plain language of Section 3.A that states that
2 adjustments specified in Section 3.D.1 and 3.D.2 are to be made to the Contract Rate. They
3 are not to be treated separately. Second, as I will discuss in more detail below, PSNH was
4 inflexible with regard to changes in “standard” contract language. If PSNH intended that
5 the recovery amount calculation be based upon the unadjusted 11.0¢/KWH “Contract Rate”
6 rather than the adjusted Contract Rate (the actual *payments* made during the first eight
7 Contract years), it had ample opportunity to make that clear in the language of Section 3.A.

8
9 **Q. What do you mean?**

10 A. PSNH could have drafted the Contract to say what it meant. For example, if PSNH’s
11 interpretation is correct, then the second to the last sentence of Section 3.A, which states
12 “This rate is subject to the adjustment provided for under Section D.2,” should not have
13 been included in the Contract. PSNH also should have used consistent language with
14 regard to the Contract Rate. Paragraph 3.A states, “...and all *payments* (emphasis added)
15 made by PUBLIC SERVICE to SELLER which exceed the index price must be recovered
16 by PUBLIC SERVICE...” PSNH made payments of 10.0¢/KWH, of which only
17 1.0¢/KWH exceeded the 9.0¢/KWH Index Price. If PSNH wanted to use a Contract Rate of
18 11.0 cents (i.e. 2.0¢/KWH above the Index Price) as the basis for the recovery amount, it
19 should have referred to “Contract Rate” rather than “payments” in the second clause of the
20 second sentence of Section 3.A.

21
22 **Q. Do you think this was merely an oversight on the part of PSNH?**

1 A. I can only speculate. The internal PSNH hand-written spreadsheet dated 2 Mar 82, attached
2 to Exhibit 2-20, shows in detail the payment and adjustment provisions of the Contract.
3 This spreadsheet contained a final column entitled "Contract Rate" which was struck out
4 and changed to "Estimated Payment." It would appear that PSNH at that time in the
5 negotiations recognized the difference between the unadjusted "Contract Rate" of
6 11.0¢/KWH that Briar never received and the 10.0¢/KWH "payment" (the adjusted
7 Contract Rate) that it actually received. However, if PSNH intended to base its recovery
8 upon a 2.0¢/KWH excess payment, then it should not have added the adjustments provided
9 in Section 3.D.2. As it stands, PSNH should have retained an adjustment of 2.77¢/KWH in
10 Section 3.D.1 rather than increasing the adjustment to 5.47¢/KWH. The sum effect of
11 increasing the Section 3.D.1 deduction to 5.47¢/KWH while at the same time reducing the
12 front-end payment from 11.0¢ to 10.0¢ totally changed the basis upon which PSNH and
13 Briar were negotiating. The intent of the recovery adjustment was to recover front-end
14 excess payments, not enrich PSNH in the bargain.

15
16 **Q. Has PSNH presented any evidence that shows the Section 3.D.2 adjustments should be**
17 **made independently of the "Contract Rate"?**

18 A. No. Given that the language of Section 3.A stated that PSNH was entitled to recover only
19 "payments made by Public Service to Seller which exceed the index price;" given that the
20 adjusted Contract Rate was established at 10.0¢/KWH pursuant to the provisions of
21 Sections 3.A and 3.D.2; and given that Briar only received 1.0¢/KWH in excess payments, I
22 can find no evidence that contains mathematical calculations to support an adjustment of
23 5.47¢/KWH.

1 **Q. Under your understanding of the Contract, at what point in the Contract term did**
2 **PSNH recover the excess payments that it made and how should the provisions of**
3 **Section 3.D.1 apply thereafter?**

4 A. As I previously stated, our computations show that PSNH recovered all payments in excess
5 of the Index Price by Contract year 13 (1996). From that point on, I believe Section 3.D.1
6 no longer applies. Section 3.A states simply that "... all payments made by PSNH to Seller
7 which exceed the Index Price must be recovered by PSNH, during later Contract years, in
8 accordance with Section D.1, Article 3." If all excess payments have been recovered, no
9 further adjustments are necessary or appropriate. Secondly, language within Section 3.D.1
10 itself also clarifies and limits the intent of the paragraph. The language states "... This
11 deduction allows PSNH to recover the payments made under Section A, Article 3, which
12 exceeded the index price." The Contract does not entitle PSNH to recover any additional
13 payments beyond the excess payments actually made to Briar.

14
15 **Q. On the second-to-last page of his testimony, Mr. Labrecque addresses Article 3,**
16 **Section C, which would apply should 96% of PSNH's incremental energy cost ever**
17 **exceed the Index Price of 9.00¢/KWH. Is that testimony relevant to this proceeding?**

18 A. No. In my opinion the only aspect of the Contract that is relevant to this proceeding is the
19 amount of payments made by PSNH to Briar that exceeded the Index Price and the recovery
20 amounts received by PSNH.

21
22 **Q. Do you have anything further you would like to add to your testimony?**

1 A. Yes. I'd also like to comment on the conduct of the negotiations between PSNH and Briar
2 and the formulation of the contract language.

3
4 **Q. Please elaborate.**

5 A. The Contract contains internally inconsistent language and confusing pricing terms. I have
6 testified that I do not have specific recall regarding the final development of the pricing
7 terms of the Contract. However, I do have a specific recollection of the general conduct of
8 the negotiations.

9
10 This Contract was negotiated at an early point in the development of SPP contracts. Rate
11 Orders were not yet available to SPP developers. Although PSNH was supportive of SPP
12 development, their negotiator was very inflexible when it came to the formulation of
13 contract language. In many instances, when Briar would suggest alternative language, Briar
14 was told that the language provided by PSNH was the "standard language" and that PSNH
15 would not make a change. In particular, during the negotiations, Briar questioned why the
16 adjustment provisions contained in Section 3.D.2 could not be incorporated into a plain
17 statement of the net rate that would be paid to Briar. Their negotiator was unyielding on
18 that point. In essence, Briar was presented with a "take it or leave it" situation.

19
20 Thus, if the language is inconsistent or confusing (and it clearly is both), I believe it is
21 PSNH, the drafter of the inconsistent Contract language, against which any inconsistency
22 should be resolved.

23

1 **Q. Can you give me a specific example of such language inconsistency?**

2 A. Yes. As I've noted, Briar and PSNH have both submitted exhibits that show that PSNH has
3 recovered all payments that it made during Contract years 1-8 in excess of the Index Price.
4 Yet PSNH argues that it should continue to receive a recovery amount of 5.47¢/KWH for
5 the remaining term of the Contract. PSNH relies upon only one sentence in Section 3.D.1 to
6 argue that the 5.47¢/KWH adjustment should continue for the term of the Contract. Yet
7 PSNH ignores the Contract language in Sections 3.A and 3.D.1 that limits this adjustment to
8 the recovery of "payments made under Section A, Article 3 which exceeded the index
9 price." Given the confusing and inconsistent language in Section 3.A and Section 3.D.1,
10 recognition should be given to the fact that regardless of whether one accepts PSNH's
11 calculations or Briar's, PSNH has already fully recovered all payments that it made during
12 Contract years 1-8 in excess of the Index Price.

13
14 **Q. Do you have anything further to say about the evidence that has been presented in this
15 case?**

16 A. Yes. The record now contains a number of documents that show the conduct of the
17 negotiations over an eight month period. I believe the record clearly establishes that the
18 basis of the negotiations between PSNH and Briar was founded upon one premise: that in
19 return for front-end-loaded payments in excess of an Index Price of 9.0¢/KWH, PSNH
20 would have the right to recover those excess payments, taking into account the time value of
21 money at the agreed discount rate of 17.62%. The methodology used by PSNH and Briar
22 throughout those negotiations never changed. Absent the front-end loading, the Contract
23 provided that Briar had the right to receive an Index Price of 9.0¢/KWH.

1 Briar has shown that PSNH has recovered those excess payments under any reasonable set
2 of assumptions. PSNH ignores the plain language of the Contract regarding adjustments to
3 the Contract Rate. It ignores the fact that it controlled the negotiations and could have
4 modified the Contract to read as it now would like it to read.
5
6

7 **Q. How do you believe this matter should be resolved?**

8 A. The bargain that was struck has more than been fulfilled. Long ago PSNH and its
9 ratepayers recovered payments made in excess of the Index Price. Since then they have
10 received electricity at a significant discount. I believe, given the Contract language, that
11 Briar has more than fulfilled its contractual obligation. I believe an equitable resolution of
12 this Contract dispute is called for. Briar is not seeking retroactive payments for electricity
13 delivered subsequent to recovery by PSNH of its excess payments and prior to PSNH's
14 filing in this case. I believe Briar should either receive the Index Price of 9.0¢/KWH,
15 effective as of the date of the filing in this case, for the remaining term of the Contract, or
16 receive authorization to terminate the Contract, effective within 30 days of an NHPUC
17 decision, with provision for a payment adjustment to the Index Price for any electricity
18 delivered from the date of the PSNH NHPUC filing to the termination date of the Contract.
19

20 **Q. Does this conclude your testimony?**

21 A. Yes.
22
23