DE 00-110

CONNECTICUT VALLEY ELECTRIC COMPANY

Petition for an Order for Refunds under Section 210 of the Public Utility Regulatory Policy Act (PURPA)

Order on Petition

O R D E R N O. 23,939

March 29, 2002

I. INTRODUCTION

Section 210 of the federal Public Utility Regulatory Policy Act (PURPA) requires the nation's electric utilities to purchase energy from "qualifying cogeneration facilities and qualifying small power production facilities" (QFs). 16 U.S.C. §824a-3(a). Likewise, the New Hampshire Limited Electrical Energy Producers Act (LEEPA), RSA 362-A, provides for the sale of power by a "limited electrical energy producer[s]" to their local electric utilities. Under this joint federal-state statutory scheme to encourage the development of alternate sources of electricity, the Connecticut Valley Electric Company (CVEC) has been purchasing power since 1987 from a waste-to-energy plant (i.e., a garbage incinerator) in Claremont, New Hampshire, WM/Wheelabrator Claremont Company L.P. (Wheelabrator). In the latest phase of a dispute between CVEC and Wheelabrator that began here in 1993, and has since been heard before the Federal Energy Regulatory Commission (FERC) and the U.S. Circuit Court of

Appeals for the District of Columbia Circuit, CVEC has petitioned the New Hampshire Public Utilities Commission (Commission) for an order requiring Wheelabrator to refund $5,784,892.72 to CVEC as of March 31, 2000, with additional refunds and interest accruing thereafter, so that CVEC may pass these refunds on to its ratepayers.

The dispute involves the amount of output CVEC is authorized and/or required to purchase from Wheelabrator under the applicable Order of the Commission. As framed by CVEC, the question is whether the Commission authorized CVEC to purchase the net or gross output of the Wheelabrator facility. Net output consists of all the electric energy and capacity a power plant is capable of producing at the tailgate of the facility, after meeting the plant's internal operating requirements for heat, lighting and operational instruments, which collectively are known as "station service." Gross output consists of the amount of electricity and capacity available from the turbine prior to consumption of station service. Under a gross output arrangement, Wheelabrator could not operate the plant unless it was authorized to purchase station service requirements from CVEC. Wheelabrator has been charging CVEC for the gross output of the plant and has been purchasing station requirements from CVEC. According to CVEC,

it should only have been charged for the plant's net output and is entitled to a refund of payments made for anything other than net output.

Our jurisdiction over this dispute has its source in both LEEPA and PURPA. Because its output is less than 5 megawatts, Wheelabrator is a limited electrical energy producer under LEEPA, which vests the Commission with authority to set the per kilowatt-hour rate to be paid by CVEC to Wheelabrator based on CVEC's "avoided costs," i.e., the cost to CVEC of purchasing energy from conventional power plants. RSA 362-A:4. Further, section 210 of PURPA delegates to state utility commissions the authority to implement FERC rules governing the transactions between utilities and QFs. *See* 16 U.S.C. § 824a-3(f). As with LEEPA, PURPA rates for QFs are based on utilities' avoided costs of alternate power sources. *See id.* at (b) (precluding FERC from promulgating QF rules that "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy").

Upon careful review of the positions and arguments presented by the parties, including the intervenors, and in light of the responsibility vested in us under both state and federal law, we conclude that (1) we have the authority under PURPA and LEEPA to address this dispute, (2) our original

approval of the power purchase arrangement authorized CVEC and Wheelabrator to enter into a contract to purchase only 3.6 megawatts, but for reasons different than those advanced by CVEC (3) to the extent that CVEC has purchased anything more than the 3.6 megawatts we originally approved in 1983, it has exceeded the authority granted by the Commission, and (4) further proceedings are necessary to determine the extent of the refunds Wheelabrator owes to CVEC and the extent to which CVEC must further compensate ratepayers for having exceeded its authority to purchase power from Wheelabrator.

II. BACKGROUND AND PROCEDURAL HISTORY

On March 2, 1983 the Commission entered Order No. 16,232, setting forth the terms governing the sale of energy by the New Hampshire/Vermont Solid Waste Project (NH/VT), predecessor-in-interest to Wheelabrator, to CVEC. *See New Hampshire/Vermont Solid Waste Project*, 68 NH PUC 96 (1983). Our Order described the project as "a facility of 3.6 MW." *Id*. at 96. The 1983 Order approved a settlement agreement entered into among the project,[1] CVEC and the Commission Staff

[1] "The project," as of 1983, was the New Hampshire/Vermont Solid Waste Project (NH/VT), which appears here as an intervenor. The New Hampshire/Vermont Solid Waste Project subsequently assigned its rights to the plant itself to Wheelabrator's corporate predecessor. The Project persists as the representative of the municipalities that pay Wheelabrator tipping fees in exchange for the right to dispose

(Staff), whereby the project agreed to sell CVEC "all energy and capacity of the project" at a price of $0.09 per kilowatt-hour for a period of 20 years commencing with the project's in-service date, with the price subject to annual adjustment for inflation. *Id*. at 97 (emphasis added). The terms of the settlement did not quantify the term "all energy and capacity of the project," nor did they specify whether such energy and capacity would be measured on the basis of net or gross output. Our 1983 Order did not approve or discuss the terms of any underlying power purchase contracts between CVEC and Wheelabrator.

On December 12, 1984, the project and CVEC subsequently entered into a 20-year power purchase agreement. This contract was not reviewed or approved by the Commission. The terms of the contract do not specify whether CVEC is obligated to purchase net or gross output. The contract, however, included a new provision not previously discussed or included in the Commission-approved settlement. This new provision required the project to purchase any electricity it

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of solid waste at the facility. Generally speaking, once NH/VT assigned its rights in the project to Wheelabrator's corporate predecessor, the distinction between Wheelabrator and its predecessor is not germane to the issues in this case. Accordingly, we have in most instances used the word "Wheelabrator" to describe the entity that was responsible for the project subsequent to NH/VT's assignment of its rights.

required for station service from CVEC at the utility's tariffed rate.

The 3.6 megawatt figure given in our 1983 order notwithstanding, the project's gross output of electricity is 4.5 megawatts, its station service requirement is 0.6 megawatts and, therefore, its net output is 3.9 megawatts. FERC certified the facility as a QF in 1986 and, in 1987, the project began generating electricity and selling its gross output of 4.5 megawatts to CVEC at the rate specified in the 1983 order and subsequently signed power purchase agreement. Contemporaneously with those power sales to CVEC, Wheelabrator purchased station service from CVEC at CVEC's tariffed rate. Because CVEC's tariffed rate is significantly lower than the contract rate under which the project sells energy to CVEC, it is alleged that Wheelabrator's sale of more than 3.9 megawatts to CVEC has had a significant and adverse financial impact upon CVEC and its customers.

In 1991, the FERC issued a decision in the case of *Turners Falls Limited Partnership*, in which the FERC concluded that a facility selling its gross output as opposed to its net output "will no longer be a qualifying facility and the

facility will not qualify for PURPA benefits."[2] *Turners Falls Limited Partnership*, 55 FERC ¶61,487, ¶61-666-67, (1991). Two years later, CVEC requested that the Commission investigate whether Wheelabrator qualified as a QF in light of its sale of gross output. In response, the Commission determined in Order No. 21,000 that the FERC has exclusive jurisdiction over the decertification of QFs, and therefore CVEC was ordered to seek such relief there. *See Connecticut Valley Electric Co.*, 78 NH PUC 579 (1993).

The FERC made its decision in 1998. In *Connecticut Valley Electric Company v. Wheelabrator Claremont Company*, 82 FERC ¶61,116 (1998), the FERC reiterated that a QF may not sell power in excess of its net output, but determined that it would not revoke the QF status of any facility, such as Wheelabrator, that made sales in excess of net output pursuant to a valid contract entered into on or before the date of issuance of *Turners Falls*. *Id*. at 61,419. The FERC denied CVEC's request for rehearing; CVEC sought appellate review before the U.S. Circuit Court of Appeals for the District of Columbia Circuit.

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[2] As will be discussed *infra*, the requirement that QFs sell only their net output existed prior to *Turners Falls*. That decision simply clarified that cogenerators violate the principle at the risk of their status as QFs.

The D.C. Circuit concluded that the FERC had acted within its remedial discretion under PURPA in refusing to revoke Wheelabrator's QF status. *See Connecticut Valley Electric Company v. Federal Energy Regulatory Commission*, 208 F.3d 1037, 1047 (2000). However, the Court agreed with the FERC that the Court lacked jurisdiction to adjudicate alleged violations of section 210 of PURPA. *Id*. at 1043.

In its jurisdictional ruling, the Court made explicit reference to the scheme under section 210 by which the FERC promulgates regulations governing utility purchases of energy from QFs and state utility commissions (PUCs) implement the regulations. *Id*. According to the Court

> [i]f a PUC fails to implement the regulations, the [FERC] may bring an enforcement action against that PUC in federal district court. Alternatively, if a private party petitions the [FERC] to initiate an enforcement action against a PUC and the [FERC] declines, then the party may itself sue the PUC in federal district court to force implementation of the regulations.

Id. (citing 16 U.S.C. § 824a-3(h)(2), other citation omitted). The Court noted that the FERC satisfied its obligation under section 210 when it promulgated the relevant regulations and, therefore, "the Commission's decision not to take any action in response to [Wheelabrator's] apparent violation of [the rules] cannot be a violation of § 210 by the [FERC]." *Id*.

The Court continued:

> [CVEC] may have a valid claim that the NHPUC has violated § 210 by approving a contract that requires [CVEC] to purchase gross output and therefore to pay more than the utility's full avoided cost. As we have said before, the failure of a state commission to ensure that a rate does not exceed a utility's avoided cost is a failure to comply with a [FERC] regulation implementing the PURPA, which would ordinarily be challenged through an enforcement action brought in district court under § 210(h). Based upon the [FERC's] position as stated in the orders under review, that agency would presumably decline to bring an enforcement action if [CVEC] petitioned it to do so; and its declination would clear the way for [CVEC] to bring its own enforcement action in district court.

Id. (citation and internal quotation marks omitted).

Rather than seek further review from either the FERC or a federal district court, CVEC filed the instant petition with the Commission on May 12, 2000. The CVEC petition seeks refunds under both LEEPA and section 210 of PURPA. Testimony filed thereafter by CVEC described the extent of the refunds sought. According to CVEC, from March 1987 through March 2000 Wheelabrator purchased station service from CVEC at an average of $0.057 per kilowatt-hour and, by virtue of having sold its gross output to CVEC, effectively resold this station service power back to CVEC at an average price of $0.101 per kilowatt-hour. According to CVEC, this resulted in a windfall to Wheelabrator of $5,784,892.72 through March of 2000, with additional refunds and interest accruing thereafter.

The Office of Consumer Advocate (OCA) notified the Commission on June 21, 2000 of its intent to appear in this docket on behalf of residential ratepayers. The Commission conducted a duly noticed Pre-Hearing Conference on January 4, 2001, granting intervenor status to Wheelabrator, three individuals appearing jointly – Thomas E. Donovan, Jr., Judith Moriarity and Margaret North (collectively, Pro Se Intervenors) – and a Claremont-based advocacy group known as Working on Waste (WOW). *See* Order No. 23,632 (February 8, 2001), slip op. at 6.

Subsequent to the Pre-Hearing Conference, the Commission received a petition to intervene from the Sullivan County 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). NH/VT is comprised of 15 New Hampshire cities and towns as well as 14 Vermont municipalities, all of which are contractually obligated to dispose of their solid waste at the Wheelabrator facility. Over the objections of the Pro Se Intervenors and WOW, the Commission granted intervenor status to NH/VT. *See id.*

The parties and Commission Staff conducted a technical session following the Pre-Hearing Conference to

discuss the possibility of agreeing upon a proposed procedural schedule, stipulation of facts and a list of issues to be addressed in a preliminary round of briefs. On January 30, 2001, Commission General Counsel Gary Epler advised the Commission on behalf of Staff that the parties and Staff were unable to agree on a set of stipulated facts or a list of issues to address in preliminary briefs. However, Mr. Epler recommended that the Commission proceed with briefing notwithstanding this lack of agreement, a course of action to which no party has objected. It was Mr. Epler's recommendation that, to the extent that any party wishes to rely in its briefs on facts not before the Commission the party should clearly so indicate and, if necessary, either request that the Commission take administrative notice or submit an appropriate affidavit with the brief. Again, no party objected to this recommendation.

The Commission directed the parties to file briefs on or before February 19, 2001[3] with reply briefs due on March 3, 2001. The parties were directed to confine their briefs to the following issues:

1. Whether the sale of electric energy to CVEC from Wheelabrator violates Section 210 of PURPA;

[3] February 19 was a state holiday and, accordingly, the filings due on that date were accepted on February 20.

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 . . . and the decision of the United States Court of Appeals, District of Columbia Circuit.

Id., slip op. at 7-8.

Briefs were duly filed according to the schedule established by the Commission. In addition to its brief,

Wheelabrator filed a motion to dismiss the CVEC petition on February 20, 2001.

III. POSITIONS OF THE PARTIES AND STAFF

A. Connecticut Valley Electric Company

According to CVEC, the question of whether Wheelabrator's sale of gross output is violative of PURPA was settled by the FERC and, therefore, any arguments to the contrary are barred by the doctrine of collateral estoppel. Further, according to CVEC, even if the FERC had not already ruled, the Commission would have to resolve this issue in CVEC's favor on the merits.

In this regard, CVEC points to the explicit direction in section 210 that FERC's implementing rules not "provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). CVEC further notes that section 210 defines "incremental cost of "alternative energy" with regard to QFs as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." *Id*. at (d). According to CVEC, the implementing FERC regulations track this statutory language. *See* 18 CFR § 292.304(a)(2) ("Nothing in this subpart requires

any electric utility to pay more than the avoided costs for purchases") and 18 CFR § 292.101(b)(6) (defining "avoided costs" as per section 210(d)). It is CVEC's contention that Order No. 16,232 has imposed a pricing system on CVEC and its customers that has been in violation of this avoided-cost price cap contained in both section 210 and the FERC regulations implementing it by requiring CVEC to purchase 0.6 megawatts of power that is outside the avoided costs associated with the Wheelabrator facility.

According to CVEC, the reference in Order No. 16,232 to 3.6 megawatts as Wheelabrator's capacity is not relevant to the issues in this docket. CVEC avers that it does not know whether the Commission misstated the capacity of the proposed facility or whether the facility's as-built output was simply greater than that represented to the Commission prior to the issuance of the 1983 Order. According to CVEC, the Order's reference to a "proposed" 3.6 megawatt facility was for "recitation" or "informational" purposes and was obviously not intended as setting a limit on Wheelabrator's output. CVEC Brief at 17.

CVEC draws the Commission's attention to its authority under RSA 365:28 to "alter, amend, suspend, annul, set aside or otherwise modify any order made by it" after notice and hearing. According to CVEC, the Commission should use this authority to modify Order No. 16,232 *nunc pro tunc* to provide for the sale of only Wheelabrator's net output to CVEC. CVEC also takes the position is that the Commission unwittingly violated both PURPA and LEEPA by requiring the purchase of gross output, that Order No. 16,232 was therefore *ultra vires* and that the Commission should declare the order to be void *ab initio*.

Anticipating that other parties will argue that a

refund order would be an improper exercise in retroactive ratemaking, CVEC draws a distinction between setting the price CVEC is required to pay Wheelabrator for power and establishing the amount of energy for which CVEC is obligated to pay the established price. According to CVEC, while the prohibition against retroactive ratemaking may protect reasonable expectations of paying only rates that were in effect at the time the power was consumed, Wheelabrator had no reasonable expectation of profiting from what CVEC characterizes as an unlawful application of PURPA.

CVEC further asks the Commission to modify the power purchase agreement between CVEC and Wheelabrator, *nunc pro tunc* to the contract's effective date, to provide for the purchase of only Wheelabrator's net output. According to CVEC, it entered into this contract "based on the false premise that Wheelabrator was entitled, as a QF, to sell its gross output." CVEC Brief at 24. CVEC contends that the equitable remedies of rescission and restitution are appropriate for invocation here, and that the Commission has the authority to order such relief in light of the principle that the Commission "retains jurisdiction over all contracts filed with it for its approval." *Public Service Company of New Hampshire*, 84 NH PUC 110, 113 (1999) (citing RSA 365:28).

According to CVEC, a full refund of the difference between what it paid for Wheelabrator's gross output and what it should have paid for net output is necessary in order to ensure compliance with the requirement in section 210(b)(1) of PURPA that rates for purchases from Qualifying Facilities "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. § 824a-3(b)(1). According to CVEC, its calculation of a refund entitlement of $5,784,892.72 through March of 2000 is based on conservative assumptions, provides for interest at the Prime Rate and takes into account the fact that some purchases of Wheelabrator for station service took place at times when the plant was not running (and thus not reselling the station service energy to CVEC). According to CVEC, as early as 1981 the FERC was describing the capacity of QFs as their net output and, thus, the relevant law was unambiguous well before the FERC's *Turners Falls* decision.

In the view of CVEC, the FERC's refusal to provide a remedy to CVEC – something the D.C. Circuit concluded was within the agency's discretion – does not preclude the Commission from providing such relief. Indeed, CVEC speculates that the FERC may have been deliberately abstaining in favor of state regulators. CVEC further offers to provide

refund calculations as of June 25, 1991 if the Commission determines that the date of the FERC's *Turners Falls* decision is a more appropriate refund commencement date.[4]

Again anticipating arguments that other parties might advance, CVEC urges the Commission to conclude that federal preemption does not deprive the Commission of jurisdiction over this dispute. CVEC points to the fact, recognized in the D.C. Circuit's opinion, that Congress specifically reserved to state PUCs the task of implementing FERC regulations governing QFs. CVEC notes that the FERC has referred to this state PUC authority as a continuing obligation and one that state PUCs are free to implement on a case-by-case basis (as opposed to the enactment of state laws or regulations, efforts which are also permissible). CVEC contends that it would have the right to bring an enforcement action in state or federal court to compel the Commission to meet its obligations, noting that the D.C. Circuit explicitly referred to the federal option in its opinion. However, according to CVEC, it would be premature to file a complaint in federal district court before providing the Commission with

[4] CVEC stresses that it is not seeking to decertify Wheelabrator as a QF and expresses doubt that the Commission would have the authority to do so in any event. However, CVEC avers that it has no objection to decertification.

an opportunity "to exercise its mandatory Section 210 implementation authority." CVEC Brief at 8.

CVEC notes that Wheelabrator has previously invoked *Freehold Cogeneration v. Board of Regulatory Commissioners of the State of N.J.*, 44 F.3d 1178 (3rd Cir. 1995), in support of the notion that the Commission should refrain from acting here. In the *Freehold* case, a QF had brought a declaratory judgment action in federal district court seeking a determination that New Jersey's state utility regulatory commission was preempted under PURPA from modifying the terms of a previously approved power purchase agreement between the QF and its local electric utility. The district court dismissed the action, concluding it lacked jurisdiction. The Third Circuit vacated this determination, concluding that jurisdiction was proper. *Id*. at 1185.

According to CVEC, *Freehold* is of little use here because (1) this case does not involve issues of whether a federal court would have jurisdiction over disputes arising out of the Commission's determinations as to Wheelabrator, and (2) the *Freehold* court expressly noted that state PUCs have PURPA authority to implement the FERC regulations. *See id.* at 1182. Moreover, CVEC points out that in the *Freehold* case the New Jersey commission conceded that the QF's federal court complaint was not brought to obtain judicial review of a commission proceeding to implement the FERC rules. *See id.* at

1185.

Discussing *Freehold* further in its reply brief, CVEC seeks to distinguish the case on its underlying facts. According to CVEC, the underlying issue in *Freehold* was whether a state PUC was free to order a QF to renegotiate a previously approved power purchase agreement in the face of lower market prices for electricity. According to CVEC, such an order was precisely the kind of "utility-type" regulation denied to state PUCs under PURPA, whereas the present situation involves a request that the Commission simply enforce PURPA's regulatory scheme.

It is also CVEC's position in reply to the other parties that judicial rulings to the effect that the FERC cannot modify power purchase agreements approved under PURPA do not suggest that the Commission lacks such authority. In CVEC's view, "[i]n order for PURPA to be implemented effectively, *some* regulatory body must have continuing authority over the agreements. Because FERC does not have that authority under the statutory scheme, the duty falls to state regulators." CVEC Reply Brief at 5 (emphasis in original).

CVEC further contends that neither *res judicata* nor collateral estoppel preclude its requested relief, notwithstanding the FERC's 1998 order as affirmed by the D.C.

Circuit. CVEC concedes that *res judicata* applies to the decisions of an administrative agency, but only to the extent that the agency is acting in a judicial capacity. According to CVEC, the FERC was doing just that when it concluded that Wheelabrator is entitled to sell only its net output to CVEC. Thus, according to CVEC, it is Wheelabrator that is collaterally estopped from relitigating that issue here. Conversely, according to CVEC, the FERC was acting in a policymaking (as opposed to a judicial) capacity in deciding not to revoke the QF status of entities that entered into contracts to sell gross output prior to *Turners Falls*. CVEC contends that this decision does not involve the resolution of any legal or factual issues against it. Therefore, according to CVEC, the Commission is free to reach a different result, i.e., to establish a different policy as to when a QF in violation of section 210 is subject to remedial action.[5]

CVEC further contends that the D.C. Circuit's opinion itself makes clear that the FERC's determination to take no action against Wheelabrator has no preclusive effect

[5] In reply, Wheelabrator's position is that, "[w]hile FERC's decision as to QFs that were not parties to those cases might be characterized as policy decisions, certainly FERC's decision as to the applicability of its remedial policies to [Wheelabrator and CVEC] . . . were specific adjudicatory findings." Wheelabrator Reply Brief at 4-5.

here. According to CVEC, the Court stressed that it is the FERC's role to make the regulations and the Commission's role to implement them – a distinction that, according to CVEC, prompted the Court to invite it to seek elsewhere the very remedy FERC declined to provide.

CVEC's final point as to *res judicata* is that it is a judge-made doctrine that need not be applied when considerations such as fairness and the need to avoid unjust enrichment take precedence. According to CVEC, such considerations should govern here even if the Commission were to conclude that the FERC decision would otherwise be banned by the doctrine of *res judicata* as to CVEC's request for relief under section 210.

Finally, in reply, CVEC takes exception to certain exhibits attached to the NH/VT brief and the inferences CVEC believes NH/VT to be urging on the Commission from these exhibits. Exhibit 6 to the NH/VT brief is a July 1986 letter from CVEC to a representative of the Claremont project, transmitting a copy of a 1985 FERC order to the effect that QFs should be selling net rather than gross output. Exhibit 7 is the project manager's July 1986 response, in which he informs CVEC that it will be installing "metering to determine sales based on gross generation with simultaneous buyback," a

determination "based on input from the NH/VT Solid Waste District and our joint belief that we have a contract that specifies gross sales with simultaneous buyback." According to CVEC, the proper inference to draw from this exchange of letters is that Wheelabrator's corporate predecessor deliberately chose to ignore FERC policy. CVEC rejects what it presumes to be NH/VT's point, that CVEC did not adequately press the issue of net vs. gross output in the months before the plant went on line. According to CVEC, the "fundamental flaw" in such an argument is that the refunds at issue will be refunded to ratepayers and "only ratepayers can waive the rights of ratepayers." CVEC Reply Brief at 14. According to CVEC, the Commission must act regardless of CVEC's position because the Commission has a duty to enforce PURPA.

CVEC also uses its reply brief to express the concern that because Wheelabrator is not a public utility subject to the Commission's plenary oversight, Wheelabrator may divert funds that should be set aside for refunds. Therefore, CVEC asks the Commission to impose some kind of bond or security requirement in order to guarantee that refunds would be available if ordered by the Commission.

B. WM/Wheelabrator Claremont Company, L.P.

We begin with the arguments presented in

Wheelabrator's motion to dismiss. In its motion, Wheelabrator takes the position that federal authority under PURPA is "exhaustive and preemptive," with the statute having carved out a "discrete, but limited, role" for state PUCs. Brief in Support of Motion to Dismiss at 6. Noting that sales of electricity at wholesale are generally under the jurisdiction of the FERC pursuant to the Federal Power Act, Wheelabrator points out that PURPA leaves with FERC the authority to certify or to revoke a facility's QF status but has delegated to the states the ratemaking jurisdiction over QFs for the limited purpose of determining their avoided costs. In light of this scheme, according to Wheelabrator, any attempt either to modify the agreement between a QF and a utility or to revoke state approval of such an agreement is "utility-type regulation" that was deemed pre-empted in the *Freehold* case. Wheelabrator further contends that the FERC has "steadfastly refused to disturb existing QF contracts" absent evidence that a party challenged the agreement at the time of its execution and continuously thereafter. *Id*. at 8-9. According to Wheelabrator, in light of *Freehold* it is settled law that once a state commission approves a wholesale power purchase agreement between a utility and a QF that is consistent with the commission's avoided cost rules, the state commission's

delegated authority is at an end and any further action to review or to modify the agreement is preempted.[6]

On the preemption issue, Wheelabrator seeks to distinguish this dispute from *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities*, 159 F.3d 129 (3rd Cir. 1998), in which the Third Circuit concluded that a state commission was not preempted from construing its order approving a QF power purchase agreement. In Wheelabrator's view, a state PUC may arguably clarify such an order of approval but may not revisit a prior determination that, as here, was unambiguously made.

As anticipated by CVEC, Wheelabrator contends in its dismissal motion that CVEC's request for a refund order is barred by the doctrines of *res judicata* and collateral estoppel. Wheelabrator's position is that the FERC decision, as affirmed by the D.C. Circuit, involved an adjudicatory (as opposed to a legislative or policymaking) determination and satisfies the requirements for preclusion as stated in section 83(2) the *Restatement (Second) of Judgments*: (1) that CVEC had adequate notice of the proceedings, (2) that it had an opportunity to present evidence and legal argument, (3) that

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[6] Wheelabrator also relies upon these authorities as consistent with *Freehold: Agrilectric Power Partners, Ltd. v. Entergy Gulf States, Inc.*, 207 F.3d 301 (5th Cir. 2000) and *West Penn Power Co. v. Pennsylvania Public Utility Commission*, 659 A.2d 1055 (Pa. Commonwealth 1995).

the FERC decision amounted to formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, and (4) that a rule of finality attached to the FERC's decision as rendered.

Wheelabrator points out that CVEC's petition before the FERC requested revocation of Wheelabrator's QF status, rescission or reformation of the power purchase agreement and a refund of certain payments made by CVEC to Wheelabrator. According to Wheelabrator, the only difference here is that CVEC is not seeking revocation of Wheelabrator's QF status. In Wheelabrator's view, CVEC is seeking to avoid the same transactional obligation here that it challenged before FERC, advancing the same legal theory, i.e., that it should be obligated to purchase only net output as opposed to gross output.

Further, according to Wheelabrator, to the extent that CVEC's claim arises under section 210 of PURPA, CVEC is in the wrong forum. In Wheelabrator's view, the D.C. Circuit's opinion plainly directed CVEC to file a claim against the Commission before the FERC under section 210(f), with recourse to a federal district court thereafter under section 210(h).

Beyond its dismissal motion, Wheelabrator has also submitted a "position paper" outlining its position on the seven issues set forth in the Commission's Pre-Hearing Conference order. Wheelabrator "vigorously denies" that its energy sales under the power purchase agreement violate

section 210 of PURPA. Wheelabrator Position Paper at 1. It cites *Meserve v. State*, 119 N.H. 149 (1979), without further elaboration, in suggesting that the Commission should refrain from taking action under RSA 365:28.

Wheelabrator asks the Commission to consider itself bound by its previously stated conclusion, in Order No. 21,1000, that "certification and de-certification of QFs is a determination that lies wholly within the jurisdiction of the Federal Energy Regulatory Commission." 78 NH PUC at 579. According to Wheelabrator, this is a correct interpretation of the Commission's authority and, thus, it would be inconsistent with established Commission policy for the Commission to exercise jurisdiction here. In Wheelabrator's view, the FERC and D.C. Circuit have already found that no refunds are required under section 210 of PURPA and the Commission should not revisit the question.

Wheelabrator also draws the Commission's attention to two other previously issued orders. In *Public Service Company of New Hampshire*, 78 NH PUC 582 (1993) (Order No. 21,003), the Commission directed Public Service Company of New Hampshire to inform all QFs from which it was then purchasing power on a gross output basis that "such an arrangement is no longer possible under rates approved by the Commission" under

section 210 of PURPA. The Commission's follow-up order was *Public Service Company of New Hampshire*, 84 NH PUC 384 (1999) (Order No. 23,261). That order noted that the Commission had stayed any action until the FERC ruled on the applicability of *Turners Falls* to purchase power agreements that antedated the ruling. *Id*. at 385. The Commission then noted that, in light of various FERC decisions post-*Turners Falls* (including its rulings as to Wheelabrator), it was clear that there is no distinction between "rate orders" and "contracts" with regard to "net versus gross metering of sales by QFs to utilities." *Id*. at 385-86. According to Wheelabrator, these Commission decisions make clear that the Commission had adopted the FERC's Wheelabrator rulings as binding and legal precedent.

Wheelabrator also takes the position in reply to the other parties that when the Commission issued its order in 1983 approving the Settlement Agreement among NH/VT, CVEC and the Commission Staff, the approved arrangement was consistent with both LEEPA and PURPA. In support of this view, Wheelabrator cites the observation in the FERC order that, prior to 1983, this Commission as well as several counterpart state commissions had adopted what was then a "plausible interpretation" of PURPA as permitting QFs to sell gross output. *See* 82 FERC at 61,418. In that sense, according to

Wheelabrator, its arrangement with CVEC is consistent with the applicable statutes. Wheelabrator's theory is that, since the power purchase agreement was consistent with PURPA and LEEPA at the time it was signed, the Commission may not now order its modification under the rule announced in *Freehold*.

C. New Hampshire/Vermont Solid Waste Project

As did Wheelabrator, NH/VT contends that federal law preempts the Commission from providing the relief requested by CVEC. The NH/VT brief contains an extensive disquisition on the history of the Federal Power Act and PURPA, noting that section 210 of the latter required the FERC to develop regulations specifying the extent to which QFs would be, "in whole or in part," exempted from the Federal Power Act, the Public Utility Holding Company Act and from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." 16 U.S.C. § 824a-3(e)(1). NH/VT then points to FERC orders promulgating its QF regulations, particularly language noting that FERC intended to exempt QFs from the provisions of the Federal Power Act that "reflect traditional rate regulation or regulation of securities of public utilities." NH/VT Brief at 13 (citing 45 Fed. Reg. 12,232 (Feb. 25, 1980)). NH/VT further notes that the regulations themselves contain a broad

exemption from state laws or regulations respecting "the rates of electric utilities" and "[t]he financial and organizational regulations of electric utilities." *Id*. (citing 18 CFR § 292.602(c)(1)). In the view of NH/VT, this exemption from state regulation must be at least coextensive with the exemption granted QFs from regulation under the Federal Power Act.

It is further the contention of NH/VT that CVEC is essentially asking the Commission here to do an "end-run" around "the FERC's determination that modification or recission [sic] of the Wheelabrator QF contract and the ordering of refunds based upon the Wheelabrator QF's sale of gross output would be 'inconsistent with Congress's directive to encourage small power production'." NH/VT Brief at 17-18 (quoting 82 FERC at 61,419-20). And, as did Wheelabrator, NH/VT takes the position that when the Commission in 1999 revoked a previous order directing Public Service Company of New Hampshire to convert to net purchases from all QFs, the Commission was recognizing the preemptive effect of FERC rulings on this issue.

Agreeing with Wheelabrator that providing the relief requested by CVEC would mean subjecting Wheelabrator to the kind of "utility-type" regulation that is precluded by the

Freehold decision, NH/VT invokes authorities to the effect that a state PUC cannot revise a QF's rates even if it is subsequently determined that the utility's avoided costs turn out to be lower than those assumed at the time the power purchase obligation became enforceable. According to NH/VT, what these authorities demonstrate is that once a state PUC has established the avoided cost rate, its jurisdiction is terminated.

In reply to positions articulated by CVEC, NH/VT contends that RSA 365:28 does not provide a basis for the Commission to modify or otherwise revisit its 1983 order. Conceding that the modification power granted by RSA 365:28 is one of general application under New Hampshire law, NH/VT nevertheless takes the position that its requested application here would constitute improper utility-type regulation. According to NH/VT, there is no parallel here to cases cited by CVEC that relate to state PUC orders imposing refunds of improper surcharges or the issue of retroactive ratemaking for the simple reason that QFs are not subject to rate regulation by the Commission.

NH/VT rejects the suggestion by other parties that the Commission may revisit or revise the power purchase agreement between CVEC and Wheelabrator. Relying on *New York*

State Electric & Gas Corp. v. Saranac Power Partners, L.P., 117 F.Supp.2d 211, 228, 235 (N.D.N.Y. 2000), NH/VT contends that neither the Commission nor FERC have the authority to take such action.

According to NH/VT, the only issue the Commission is free to revisit is the prudence of CVEC's decision to enter into the power purchase agreement with Wheelabrator. NH/VT points out that, unlike Wheelabrator, CVEC remains subject to utility-type regulation by the Commission. Thus, in the view of NH/VT, if the Commission believes that CVEC should have contested its obligation to purchase Wheelabrator's gross output, the Commission may and possibly should modify previous orders so as to sanction CVEC – as long as the Commission does not disturb CVEC's agreement with Wheelabrator.

NH/VT takes exception to CVEC's contention that Order No. 16,232 should be deemed void or *ultra vires* to the extent that it requires CVEC to purchase gross output. According to NH/VT, Order No. 16,232 imposes no such requirement and, rather, CVEC undertook the gross output obligation on its own as part of the underlying Settlement Agreement. According to NH/VT, the Commission could not have disapproved of the arrangement between Wheelabrator and CVEC in making its 1983 decision. In the view of NH/VT, the only adverse action the Commission could have taken would have been to deny the passthrough of CVEC's costs. In support of this position, NH/VT relies on RSA 362-A:4 (LEEPA provision authorizing utilities and QFs to agree to rates that vary from

those otherwise required by law) and 18 CFR § 292.301(b)(2) (similar, as to PURPA). According to NH/VT, the 1983 Settlement Agreement entered into by CVEC and Wheelabrator, conditioned by its parties on the Commission's acceptance of it, became a binding contract between CVEC and Wheelabrator once the condition precedent (Commission approval) was satisfied and, therefore, the Commission is not free to modify or to void it now. Finally, NH/VT contends that if CVEC believed Order No. 16,232 to be *ultra vires* or otherwise void, the available recourse was to seek rehearing and thereafter direct appeal to the New Hampshire Supreme Court. Absent such action, according to NH/VT, the 1983 order became final and binding on CVEC.

D. Thomas E. Donovan and Judith Moriarity

The Pro Se Intervenors[7] contend that the Commission has the authority to amend the power purchase agreement between CVEC and Wheelabrator. According to the Pro Se Intervenors, the agreement should be voided because Wheelabrator has sought "to extort monies directly from CVEC and indirectly from the public." Pro Se Intervenors' Brief at

[7] Of the three Pro Se Intervenors who were jointly granted intervention status at the beginning of the proceedings, only the names of Mr. Donovan and Ms. Moriarity appear on the briefs actually submitted.

1. They further contend that the Commission should decertify Wheelabrator as a QF. According to the Pro Se Intervenors, the Commission should not only order the refunds requested by CVEC and pass them on to ratepayers, but should also impose a substantial fine against Wheelabrator. Generally, the Pro Se Intervenors complain, neither Wheelabrator nor CVEC can adequately protect the public's interest in this proceeding and both parties have "tak[en] advantage of the little guy." *Id*. at 2.

E. Working on Waste

WOW asks the Commission to decertify Wheelabrator as a QF on the ground that, while PURPA is designed to encourage non-traditional sources of electricity that conserve energy and promote efficiency, Wheelabrator is a "dirty source of expensive power" that wastes resources in the incineration process while still resulting in CVEC charging among the highest rates in the nation to its customers. WOW Brief at 1.

WOW further draws the Commission's attention to what it characterizes as "irregularities" in the 1983 Settlement Agreement (among CVEC, NH/VT and the Commission Staff) and the subsequently signed power purchase agreement between CVEC and Wheelabrator. According to WOW, counsel for NH/VT signed the agreement even though NH/VT itself was not officially created

until nearly five months later. Further, according to WOW, the subsequent assignment of rights by NH/VT to Wheelabrator's corporate predecessor in connection with the power purchase agreement is "unclear and warrants clarification." *Id*. at 2. According to WOW, agreements signed in 1985 resulted in Wheelabrator shifting its obligations to the municipalities using the facility for waste disposal. WOW requests an investigation. In the view of WOW, the parties to the power purchase agreement have failed to consider issues such as public benefits, just and reasonable rates and environmental impacts. Therefore, according to WOW, the Commission has authority under LEEPA to investigate and order appropriate relief.

F. Office of Consumer Advocate

OCA takes the position that Wheelabrator's sale of its gross energy output to CVEC violates section 210 of PURPA. OCA concedes that, pursuant to FERC rule, QF rates based on estimated avoided costs do not violate PURPA simply because actual avoided costs differ from the previous estimate at the time the actual energy is delivered. But, according to OCA, this does not leave a QF free to sell energy at a price above avoided costs for the life of the agreement, as opposed to at any given moment during the life of the contract.

OCA further directs the Commission's attention to 18 CFR § 292.301(b), which notes that nothing in the FERC rules governing QF rates is intended to limit "the authority of any electric utility or qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart." OCA points out that the rates charged by Wheelabrator to CVEC, although based on avoided costs, were actually negotiated and thus approved by the Commission under this provision. According to OCA, having opted to employ the FERC definition of avoided costs in approving the rates to be charged by Wheelabrator, it would be a violation of both PURPA and LEEPA to deviate from that standard.

OCA further points to the requirement in RSA 378:7 that rates approved by the Commission be just and reasonable. According to OCA, sales of QF power at the utility's avoided cost are just and reasonable because, over the long term, they leave the utility's customers in the same position they would be if the utility had been purchasing energy under traditional ratemaking principles. OCA's position is that, at the time the Commission acted in 1983, the only tool available to the Commission for determining whether Wheelabrator's rates were

just and reasonable was the projection of CVEC's long-term avoided costs. Therefore, OCA reasons, when subsequent events prove that the projection was wrong, the rate is no longer just and reasonable and the Commission must make adjustments in order to comply with section 210(b) of PURPA, which also mandates just and reasonable rates.[8]

OCA urges the Commission to act pursuant to RSA 365:28 to amend its previous orders concerning Wheelabrator and CVEC. According to OCA, although the D.C. Circuit referred to CVEC's ability to seek redress in federal district court for Commission violations of section 210, the Commission itself has a duty to comply with the law.

OCA's next point is that the power purchase agreement as it was ultimately executed between Wheelabrator and CVEC was not consistent with the approval that had previously been granted by the Commission in Order No. 16,232. According to OCA, the agreement as executed is therefore either invalid or only valid to the extent it complies with the Commission's order.

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[8] In reply, Wheelabrator characterizes this argument as "directly contrary to FERC's rules and precedent." Wheelabrator Reply Brief at 3, citing 18 CFR § 292.304(b)(5) (noting that a QF should not be "deprived of the benefits of its commitment as a result of changed circumstances") (other citation omitted). NH/VT makes a similar point.

According to OCA, it is appropriate for the Commission to revoke Wheelabrator's QF status based on Wheelabrator's failure to inform the FERC that the Commission had approved only a 3.6 megawatt facility in Order No. 16,232.[9] OCA's view is that the Commission did not object to the power purchase contract itself because it may not have known, and had no basis for being aware, that Wheelabrator was actually planning to sell more than 3.6 megawatts of power to CVEC. On the question of refunds, OCA takes the position that such relief is justified given Wheelabrator's sale of power in excess of the 3.6 megawatts authorized in Order No. 16,232.

OCA notes that the power purchase agreement does not itself specify the plant's capacity or the amount of power to be sold to CVEC. It simply avers that CVEC will purchase "all of the kilowatt-hours produced for sale from the Seller's facility." Appendix B to CVEC Brief at 4. "Facility," in turn, is defined as "all of the Seller's plant and equipment used to incinerate solid waste and wood chips, bark and fines

[9] In rebuttal to this argument, Wheelabrator cites (and agrees with) the contention in CVEC's brief that the Commission's reference to 3.6 megawatts in its 1983 order was not a material provision of the Commission's determination. According to Wheelabrator, the parties and the Commission have been on notice since 1986 that Wheelabrator would be generating 4.5 megawatts of power, based on a representation in a Site Survey Form submitted to the Commission that specified a rated capacity of 4.485 megawatts.

to produce energy and capacity to the Buyer." *Id*. at 2. According to OCA, in order to interpret this agreement in a manner that is consistent with Order No. 16,232, the Commission should assume that "facility" refers to a 3.6 megawatt plant.

IV. COMMISSION ANALYSIS

A. Jurisdiction

CVEC, Wheelabrator, NH/VT and OCA appear to be in agreement that *Freehold* is the leading and properly decided authority as to the limits of state PUC ratemaking authority under section 210 of PURPA. The *Freehold* court characterized "utility-type regulation," including the revision of price terms in a QF contract due to changes in economic conditions, as "exactly the type of regulation from which [a QF] is immune under section 210(e)." *Freehold*, 44 F.3d at 1192.

However, deciding this case on its merits does not require us to engage in utility-type ratemaking. The CVEC petition does not raise issues typical of cases where the Commission's task is to determine whether a requested retail charge is just and reasonable. We are not asked to require Wheelabrator to open its books and records, or to defend the rate contained in the power purchase agreement with reference to CVEC's past or present avoided costs or, indeed, any other benchmark. There is no inquiry here into whether Wheelabrator is earning an appropriate rate of return on its investments, the prudence of such investments, or whether such investments are used and useful – all traditional exercises in the field of utility regulation. Wheelabrator's organization,

ownership, capitalization or finances are not under review.

Nor does the petition seek "reconsideration" of the power purchase agreement in the sense the *Freehold* court used the word. The kind of "reconsideration" that is impermissible under *Freehold* would involve subjecting a QF to reevaluation of its previously approved power purchase agreement in light of changed circumstances. The issue in this docket relates to the *original* circumstances – i.e., whether Wheelabrator was ever authorized to sell CVEC anything more than 3.6 megawatts and, if not, whether the law allows us to act now to correct a wrong that dates from the very genesis of the power purchase agreement. To resolve this issue, the Commission need not engage in traditional utility-type regulation.

To the contrary, the Commission's role here is to interpret and clarify the meaning of its 1983 Order approving the power purchase arrangement between CVEC and Wheelabrator. *See, e.g., Panda-Kathleen L.P. v. Clark*, 701 So.2d 322, 327 (Fla. 1997) (concluding that state commission ruling was not utility-type regulation prohibited under *Freehold* where commission was construing "conflicting provisions that were included in the contract from the its inception, not a modification in the terms of the contract so as to adjust rates paid by consumers).

Additional useful insights are provided by *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc*., 159 F.3d 129 (3rd Cir. 1998). The underlying dispute involved whether the utility could be compelled, under the power purchase agreement approved by the New York Public Service Commission (PSC), to purchase at the contract rate energy generated by capacity that had been added by the QF subsequent to the PSC's approval of the agreement. The PSC answered the question in the negative, and "carefully drew a distinction . . . between interpreting the agreement between the parties and interpreting its approval of that agreement, holding that it possessed the jurisdiction to do the latter." *Id*. at 138. The Third Circuit, reviewing the PSC decision, called this jurisdictional determination a "close question" in light of *Freehold*, *id*. at 135, and concluded simply that because the PSC explicitly said it had not interpreted the contract, the PSC decision had no preclusive effect in a breach-of-contract case, *id*. at 139.

These authorities lead us to the conclusion that we have the jurisdiction, based on our implementation authority under section 210 of PURPA, to explain what our 1983 decision was intended to accomplish. To do that, we are not required to interpret, and thus to revisit, any questions as to the

power purchase agreement itself. Instead, our task is to interpret our 1983 Order and provisions of the underlying Stipulation and Agreement. In so doing, we are not construing the agreement between CVEC and Wheelabrator – a document that had not been signed at the time of our 1983 decision and was never submitted to us for approval.

The Settlement Agreement we approved in 1983 refers simply to "all energy and capacity of the Project." As several parties have pointed out in various contexts, only Order No. 16,232 contains a reference to the actual amount of energy to be produced by the plant – a number that is below both the gross and the net capacity of the plant as it has actually operated. We have the authority to resolve this significant ambiguity.

Having determined that we are not preempted from deciding the central issue of the case, we next confront the question of whether we have the authority to order the relief requested by CVEC. None of the parties have pointed to any federal authorities suggesting that, assuming clearance of the *Freehold* hurdle, a state commission lacks the power to correct misapplications of its approval of a power purchase

arrangement between a QF and a utility.[10] We find the requisite authority in LEEPA, which both authorizes the Commission to establish the rates for such purposes, RSA 362-A:4, and to resolve "[a]ny dispute arising under the provisions" of LEEPA, RSA 362-A:5.[11]

B. Effect of Order No. 16,232

Having determined that we have the authority to act on CVEC's request, we turn now to the substance of the petition. Central to this task, in our view, is an accurate and precise understanding of our 1983 decision approving the Stipulation and Agreement, its surrounding circumstances and the chain of events that followed the determination.

Our analysis starts with an interpretation of Order No. 16,232. The interpretation of Commission orders should be based on the plain meaning of the words contained in them. *See Appeal of University System of New Hampshire*, 129 N.H. 632, 637 (1987) (applying plain meaning rule in context of

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[10] The separate question of whether res judicata or collateral estoppel bar such relief, in light of the FERC's 1998 order, is discussed *infra*.

[11] One issue over which we agree we do not have authority is the possible decertification of Wheelabrator as a QF. The certification and decertification of QFs is a matter plainly consigned to the FERC under the PURPA rubric. *See Independent Energy Producers Association v. California Pub. Utils. Comm'n*, 36 F.3d 848, 855 (9th Cir. 1994).

administrative agency decision); *see also Garita Hotel Limited Partnership v. Ponce Federal Bank*, 958 F.2d 15, 18 (1st Cir. 1992) (to same effect regarding trial court orders construed on appeal). As several parties have been at pains to point out, Order No. 16,232 describes what was then the "proposed" Wheelabrator facility as one of "3.6 MW capable of burning 10 tons per hour of solid waste at full load or the equivalent of 60 - 67,000 tons per year." *New Hampshire/Vermont Solid Waste Project*, 68 NH PUC at 96. Neither Wheelabrator nor CVEC took issue with the Commission's description of the facility output as 3.6 megawatts. There is nothing in the record leading up to the issuance of Order No. 16,232 indicating that the parties disagreed with the description of the Wheelabrator plant as one that would be capable of generating 3.6 megawatts.

An analysis of the text of Order No. 16,232 supports the conclusion that the capacity of the facility was not among the issues in dispute. In the sentence immediately preceding this description of the facility, we noted that "[t]here existed at the beginning of these proceedings a dispute between a small power producer and the utility as to the rate and other terms involving the sale of energy from a proposed waste energy site." *Id*. The sentence immediately following

the facility description notes that the referenced dispute as to the rate and other terms had been resolved via settlement agreement that was then pending before the Commission for approval. These three declaratory statements at the beginning of the 1983 order make clear that, although certain key matters had been in dispute, the proposed facility's power output and waste-burning capacity were not among them. Thus, the plain and undisputed meaning of Order No. 16,232 is that the Commission approved a facility of a certain defined capacity – 3.6 megawatts.

CVEC has an alternative view. According to the utility, the reference in Order No. 16,232 to "a facility of 3.6 megawatts" is a statement that "appears to be a recitation for informational purposes rather than a material provision of the order." CVEC Brief at 17. We disagree. Although the issue was not a contested one, the question of the plant's capacity was central to the determination.

The original petition of NH/VT described the plant as having a 2,600 kilowatt turbine generator. At a hearing held before the Commission on February 2, 1983, in response to a direct question from the Chairman of the Commission as to how many kilowatt-hours were proposed to be produced annually, representatives of CVEC and NH/VT both referenced numbers

consistent with the original petition. *See* Transcript of February 2, 1983 hearing in Docket No. DE 82-343 at 27. Thus, it cannot be argued that the Commission had before it at any time a facility greater than 3.6 megawatts – or that the issue was of no more than "informational" interest to the Commission. If there had been any question as to that, the appropriate recourse would have been a rehearing motion filed within the requisite 30-day period.

While the FERC and the federal courts charged with reviewing FERC decisions have grappled, through a period of many years, with confusion and ambiguity over whether PURPA requires sale of nothing more than net output as a condition of enjoying the federally conferred benefits of QF status, this Commission's exercise of its PURPA and LEEPA jurisdiction has been notably consistent in maintaining the focus on defining with precision the capacity to be sold to the utility. When, in 1981, we first issued a generic and comprehensive order describing how we would treat requests for rate orders under these statutes, we gave QFs the "option" of being "treated on either a simultaneous purchase and sale basis or a net purchase and sale basis for billing purposes." *Small Power Producers and Cogenerators*, 66 NH PUC 83, 86 (1991); see also Public Service Company of New Hampshire, 84

NH PUC 384 (1999) (noting that, as to QFs that exercised such option prior to *Turners Falls* so as to sell gross output, unilateral imposition of net billing would be inappropriate). Clearly, and apart from the question of whether the sale of gross output is consistent with PURPA, the Commission put QFs on notice that they must make an election as to how they intend to be billed and, thus, to establish with precision as a matter of state and federal law how much energy they would be providing to the local utility at the established avoided cost rate. The determination in Order No. 16,232 must be read in this context, and the fact that the amount of output – 3.6 megawatts – was not a matter of controversy does not mean that Wheelabrator and CVEC were not bound by it.

A key PURPA and LEEPA decision by the Commission subsequent to Order No. 16,232 is consistent with this view. In Docket No. DR 89-148, we opened a proceeding at the request of the state's largest electric utility, Public Service Company of New Hampshire (PSNH), to determine whether the QFs in PSNH's service territory could take advantage of the rates approved in the applicable rate order with regard to energy and capacity in excess of that specified in the filing that led to the issuance of such rate order. *See Public Service Company of New Hampshire*, 76 NH PUC 489, 491 (1991). Our

analysis of that question was grounded in RSA 362-A:4-a, the LEEPA provision that explicitly authorizes QFs to increase their capacity and/or energy output, but prohibits such purchases from being made "under the rates established by existing orders of the commission."

Citing previous orders dating from 1986, 1987 and 1989, we noted that "the commission's expectation that its rate orders applied to an explicit amount of capacity that achieved commercial operation at a specific point was clearly and frequently expressed." *Id*. at 494 (citations omitted). We stressed that such a view grew out of concerns that QFs would otherwise seek to ***avoid*** the terms of the rate orders in later years in certain circumstances, *id*. at 494, and because the Commission has a statutory responsibility "to assure the safety and adequacy of the electric system" that interest justified pinpointing "the size and location of generating facilities connecting to the system." *Id*. at 492, 493.

> Therefore, capacity that does not match the amount specified in the developer's petition, either because the developer modified the project size during construction or added to the capacity after commercial operation, falls outside of the amount that can be deemed to be approved under the facility's rate order. Such incremental capacity, like any other offer of additional capacity and associated energy, is subject to separate arrangements between the developer and the

purchasing utility.

Id. at 496.

The figure enshrined in Order No. 16,232 becomes all the more important because, inasmuch as CVEC is a small utility serving only 10,000 customers, a power purchase obligation approaching 4 megawatts represents a significant percentage of the company's energy load even though a similar contract would be less significant to larger electric utilities. Indeed, LEEPA authorized the Commission to reject CVEC's power purchase arrangement with Wheelabrator if the Commission determined that the relationship "fail[ed] to protect both parties against excessive liability or undue risk." RSA 362-a:2-a, I(a). Clearly, restricting purchased capacity was a way of limiting CVEC's risk by not making the company more reliant than necessary on this one, waste-to-energy source.

In other words, the Commission has never suggested to Wheelabrator, to CVEC, or to any other party that this or any other QF is entitled to use the seller-favorable terms of a rate order for energy sales that exceed the amount specified in the rate order. To the contrary, the Commission has consistently sent the message that rate orders apply only to the specified capacity stated therein. Thus, as the OCA has

argued, when Wheelabrator sold one electron more than the 3.6 megawatts specified in Order No. 16,232, it was acting beyond the authority of that order – not for the reason stated in *Turners Falls,* but because this Commission never authorized the sale to CVEC of anything more than 3.6 megawatts.

In its reply brief, Wheelabrator points to language in the underlying settlement that obligates CVEC "to purchase for twenty (20) years *all energy and capacity* of the [Wheelabrator] Project at a price of 9 cents per kilowatt hour beginning on January 1, 1986 or the Commercial Production Date of the Project, whichever is later." Settlement Agreement in Docket DR 82-343 at Paragraph 2.0 (emphasis added). Presumably, Wheelabrator makes this point in support of the view that the Commission should be deemed to have approved not simply the sale of 3.6 megawatts but whatever capacity the plant ultimately proved capable of generating.

The quoted language from the Settlement Agreement does not have the consequence attributed to it by Wheelabrator. Unlike Order No. 16,232, the Settlement Agreement contains no description of the capacity of the generation plant.[12] In other words, we confront here a

[12] The other matters taken up in the Settlement Agreement concerned the rate to be paid by CVEC should Wheelabrator produce any power before the Commercial Production Date, an

situation in which our Order resolves an ambiguity contained in the Settlement Agreement adopted therein. Had this been the opposite situation – i.e., if the Order were silent as to capacity and the Settlement Agreement could be read so as to fill in the necessary details – then the Commission's approval of the Settlement Agreement could possibly be deemed to bind the parties in the manner suggested by Wheelabrator. But when an Order clarifies what a Settlement Agreement leaves to speculation, or adds specific language or terms to what had been general language or missing terms, the language of the Order obviously governs. Again, if Wheelabrator believed that the Commission's Order approving the Settlement Agreement varied that document's terms by providing for only 3.6 megawatts of output, a motion for rehearing submitted within the requisite 30 day period would have been the appropriate recourse.

Wheelabrator further contends that the Commission

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inflation adjustment factor to be applied to the 9 cent rate each year, the necessity of the Commission determining that CVEC's costs incurred in connection with its Wheelabrator purchases are reasonable and therefore recoverable in retail rates, the necessity of asking the FERC to adjust CVEC's wholesale rate to reflect energy purchased from Wheelabrator, Wheelabrator's agreement to make every attempt to produce power on a schedule advantageous to CVEC, and the parties' obligation to negotiate in good faith on a new contract "at the expiration of this contract." Settlement Agreement at paragraph 2.7.

had been on notice since 1986 that the facility would be generating 4.5 megawatts instead of the 3.6 megawatts referenced in the Commission Order. The basis of this contention is the filing in 1986 by Wheelabrator of a "site survey" form that, according to Wheelabrator, referenced a "rated capacity" for the plant of 4.485 megawatts.

There is no basis for Wheelabrator's apparent assumption that the Commission acceptance of its site survey for filing constituted a rescission of the 3.6 megawatt capacity referenced in Order No. 16,232 and approval of the purchase of 4.5 megawatts' gross output. A site survey form is required to be filed by all facilities generating electricity, to allow the Commission to discharge its responsibility under RSA 374 to assure the safety and adequacy of the state's electric system. The receipt of information on the size and location of facilities connecting to that system is simply a means to that end. While a site survey is a prerequisite to a rate petition under N.H. Admin. Code Puc 301.01(a), the filing of a site survey without an accompanying rate petition simply cannot support a claim that it provided notice to the Commission of Wheelabrator's intent to apply the rates approved in the Settlement to that increased capacity, or somehow bound CVEC to purchasing more output. If

Wheelabrator's intent was to put the Commission on notice of its belief that it was authorized to sell 4.5 megawatts, it should have submitted its 1986 site survey with a request for clarification that CVEC was obligated to purchase 4.5 megawatts.

There is another sense in which it is important to understand what Order No. 16,232 is not. Although, as several parties have pointed out, the section 210 rules we are required to implement in New Hampshire permit utilities and QFs to enter into power purchase contracts that deviate from the avoided cost principles in the statute, this is not what occurred here. As we would later make clear in Order No. 23,261, there are two kinds of Commission determinations approving QF purchase power arrangements – contracts and "rate orders." *Public Service Company of New Hampshire*, 84 NH PUC at 385. Order No. 16,232 was the latter.

The distinction is significant. What we were doing in 1983 was *not* giving our imprimatur to a contract authorizing Wheelabrator to recover from CVEC something other than CVEC's avoided costs. Rather, we were issuing a rate order that was plainly intended to bring Wheelabrator and CVEC into compliance with the principle, so central to PURPA, that avoided cost forms the basis of what electric utilities like

CVEC should pay cogenerators for power. CVEC and Wheelabrator, in turn, were obligated to enter into an agreement that was consistent with our rate order.[13] Thus we are unable to agree with those parties who find support for their positions in 18 CFR § 292.301(b), which places beyond PURPA regulation contracts voluntarily entered into between QFs and utilities.

Consistent with this analysis, and pursuant to the authority granted by Order No. 16,232, CVEC and Wheelabrator ultimately entered into a Power Purchase Agreement on December 12, 1984. In a reprise of the language contained in the Settlement Agreement, the two parties agreed that CVEC would purchase "all of the kilowatt-hours produced for sale from the Seller's Facility." Power Purchase Agreement at 4. Nothing in the Purchase Power Agreement speaks either directly or indirectly to the question of whether "all of the kilowatt-hours produced for sale" would exceed those that can realistically be produced by a 3.6 megawatt facility.

Further, at no time was the Power Purchase Agreement reviewed by the Commission. Neither CVEC nor Wheelabrator nor

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[13] We also note that the settlement agreement approved in Order No. 16,232 was itself not a contract. *See Public Service Company of New Hampshire*, 84 NH PUC 605, 609 (1999) (discussing legal significance of settlement agreements involving Commission Staff).

any other party requested that we embark upon a formal process to consider the document – an omission that we can only attribute to each party's view that the agreement into which it had entered was fully consistent with the approval already granted by the Commission.

Order No. 16,232 limits CVEC to buying and Wheelabrator to selling whatever the output is of "a facility of 3.6 megawatts." Accordingly, apart from Wheelabrator's decision to sell CVEC its gross output at Order No. 16,232 rates, there is a question of whether *both* CVEC and Wheelabrator exceeded the authority granted by Order No. 16,232 when Wheelabrator sold and CVEC purchased energy that may have exceeded the 3.6 megawatts described as plant capacity in the Order.

Under LEEPA, "[a]ny qualifying small power production facility already subject to rates established by order of the commission may increase its capacity and energy or energy." RSA 362-A:4-a. However, "[s]uch capacity addition and associated energy additions or energy additions shall not be purchased under the rates established by existing orders of the commission." *Id*. In other words, although increasing Wheelabrator's capacity beyond the authorized 3.6 megawatts was not inconsistent with LEEPA, the sale of

additional power beyond the output of the actually approved 3.6 megawatt facility at other than the short term energy rates as established by the Commission from time to time required additional Commission action. The parties could not simply apply the rates established by Order No. 16,232 to any additional power purchases.

C. *Res Judicata* and Collateral Estoppel

We next take up the question of whether the FERC's 1998 order, as affirmed by the D.C. Circuit, operates as a bar to relief here based on the doctrines of *res judicata* or collateral estoppel. We conclude that it does not.

In order for *res judicata*, or claim preclusion, to apply to a finding or ruling, "there must be a final judgment by a court of competent jurisdiction that is conclusive upon the parties in a subsequent litigation involving the same cause of action." *Canty v. Hopkins*, 146 NH 151, 155 (2001) (citing *Petition of Donovan d/b/a Donovan Group Home,* 137 NH 78, 81 (1993). "The term 'cause of action' is defined as the right to recover, regardless of the theory of recovery." *Blevens v. Town of Bow*, 146 NH 67, 73 (2001). "Thus a crucial question in determining whether to apply res judicata ... is always whether the action brought in the second suit constitutes a different cause of action than that alleged in

the first suit." *West Gate Village Association v. Dubois*, 145 N.H. 293, 296, 761 A.2d 1066, 1070 (2000). When an administrative proceeding resolves "private rights," the agency's determination may be deemed to have *res judicata* effect.[14] *Appeal of White Mountains Education Assn.*, 125 N.H. 771, 775 (1984).

Collateral estoppel, or issue preclusion, "precludes the relitigation by a party in a later action of any matter actually litigated in a prior action in which he or someone in privity with him was a party." *Warren v. Town of East Kingston*, 145 N.H. 249, 252, 761 A.2d 465, 467 (2000).

> For it to apply in a particular proceeding, the issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.

Id. As with *res judicata*, "under appropriate circumstances," collateral estoppel may apply to an administrative

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[14] With regard to this requirement of adjudication, there is potential relevance to CVEC's contention that FERC's decision not to order any relief against Wheelabrator was an exercise in policymaking. Because we conclude on other grounds that neither issue preclusion nor claim preclusion apply, we need not address CVEC's contention about policymaking.

determination. *Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605, 731 A.2d 996, 998 (1999). With regard to both issue preclusion and claim preclusion, "[s]uch repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Federal Savings & Loan Assn. v. Solomino*, 501 U.S. 104, 107 (1991).

Neither *res judicata* nor collateral estoppel are applicable here. As explained elsewhere in this Order, our decision is based on the definition of the terms of the power purchase agreement regarding a key element of the Rate Order – the facility's authorized output – an issue flaw that does not form the basis of any prior decision concerning the Wheelabrator-CVEC relationship. In other words, our prior determination has involved neither the same "cause of action" as that term is defined for res judicata purposes nor a "matter actually litigated in a prior action" as that phrase is defined for purposes of collateral estoppel.

D. <u>The Requested Relief</u>

CVEC asks us to resolve this case by ordering Wheelabrator to refund to the utility and its ratepayers the

money it collected from CVEC which represents the difference between the rates paid for the net output Wheelabrator was entitled to supply to CVEC and the rates payable for the gross output Wheelabrator should have supplied. We are unable to grant CVEC's request in this regard inasmuch as it is contrary to the prior determinations of the Commission in Docket No. DE 80-246 that under LEEPA a QF may elect to be treated on either a simultaneous purchase and sale basis or a net purchase and sale basis and in Docket No. DR 93-200 that QFs that made the election prior to the *Turners Falls* decision were grandfathered as to their elections. *See* 66 NHPUC 83, 86 (1981). However, the so-called "creep" principle established in Docket No. DR 89-148 which limits a QF to its approved capacity under a rate order does apply.

For the reasons already discussed, the relevant question is not whether Wheelabrator violated LEEPA and PURPA by selling its gross output, but whether, and if so to what extent, either or both of CVEC and Wheelabrator have exceeded the authority granted under Order No. 16,232, by engaging in transactions purportedly under the rate order that exceeded the 3.6 megawatts approved in the order. The factual record is notably undeveloped with regard to the two companies' conduct in the wake of Order No. 16,232, and it is precisely

this conduct that we believe will be outcome-determinative. We firmly agree with CVEC that its ratepayers have been overcharged to the extent that CVEC has paid for Wheelabrator power in excess of 3.6 megawatts at the favorable avoided cost rate approved in Order No. 16,232. The unresolved issues concern the calculation of the overcharge and who should make the ratepayers whole: CVEC, Wheelabrator or both.

Accordingly, it will be necessary to hold an additional hearing to develop an appropriate factual record. To that end, we will require the parties to convene for an additional pre-hearing conference, for the purpose of discussing what additional proceedings (including, if necessary, discovery) will expeditiously lead to the conduct of a hearing at which all parties can be fully heard on the matters remaining in controversy.

In so deciding, we stress two things. First, the upcoming hearing is not an opportunity to re-litigate matters decided in this order, with regard to the meaning of Order No. 16,232 or our authority to make such a determination. Second, the parties should be fully aware that we approach the question of how to make CVEC ratepayers whole with no preconceived hypothesis as to how to allocate that responsibility. Approaching such an issue with impartiality

is consistent with our statutory and constitutional responsibilities and we have no difficulty in adopting such a stance here.

A remaining issue as to CVEC's requested relief is the contention, stated in CVEC's reply brief, that Wheelabrator should be required to post a bond or make some other kind of security arrangement to cover the amount of the refunds CVEC seeks. CVEC indicated that it expected to file a motion to this effect. We will hold this issue in abeyance pending the receipt of such a motion.

E. Other Issues

Several other issues, raised by various intervenors, remain. Without actually requesting a Commission investigation, NH/VT has suggested that the appropriate method for redressing the problem presented in this docket would be for the Commission to consider the prudence of CVEC having entered into its contract with Wheelabrator. To the extent that we have already approved this contractual relationship in Order No. 16,232, a prudence investigation would be outside our authority under PURPA. To the extent that CVEC and Wheelabrator have, by contract or otherwise, acted beyond the authority conferred in the rate order, we agree that CVEC's prudence may be an issue to be addressed at the upcoming

hearing.

The Pro Se Intervenors ask us to void the power purchase agreement and impose a fine on Wheelabrator. Likewise, WOW requests a full Commission investigation of Wheelabrator, citing certain alleged irregularities in Wheelabrator's relationship with NH/VT. We view such actions as the kind of utility-type regulation that is foreclosed to us under *Freehold*; we lack the kind of plenary authority over Wheelabrator that such actions would require. We therefore do not address these additional issues.

Based upon the foregoing, it is hereby

ORDERED, that motion to dismiss filed by WM/Wheelabrator Claremont Company L.P. is DENIED; and it is

FURTHER ORDERED that, to the extent CVEC is presently purchasing any power from WM/Wheelabrator Claremont Company L.P. in excess of 3.6 megawatts at rates above the CVEC short-term energy rates approved by the Commission, it discontinue doing so immediately; and it is

FURTHER ORDERED that the Petition of Connecticut Valley Electric Company for refunds from WM/Wheelabrator Claremont Company L.P. is GRANTED IN PART AND DENIED IN PART, consistent with the discussion herein; and it is

FURTHER ORDERED, that the parties shall appear for a status conference on May 16, 2002 at 10:00 a.m. for the purpose of establishing a schedule for the conduct of a full evidentiary hearing to develop the record necessary for establishing the relief due CVEC ratepayers in light of the determinations made herein.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of March, 2002.

Thomas B. Getz	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director and Secretary