

**STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION  
INTER-DEPARTMENT MEMORANDUM**

Date: January 10, 2008

**TO:** Commissioners  
**FROM:** F. Anne Ross, Hearing Examiner  
**RE:** DE 07-122 Public Service Company of New Hampshire  
Petition re Hemphill Power and Light Co.

**HEARING EXAMINER'S REPORT**

At your request, I presided over the January 7, 2008 prehearing conference in the above referenced case. On December 20, 2007, Commissioner Getz informed the parties by letter that he would not participate in this docket stating that his decision was consistent with his earlier decisions in Dockets DE 05-150, Alden T. Greenwood and DE 05-153, Public Service Company of New Hampshire.

On January 24, 1985, Hemphill Power & Light Company (Hemphill) requested Commission approval of a twenty-year rate order. On April 2, 1985, the Commission approved Hemphill's long term rates by Order Nisi. *Hemphill Power and Light Company*, 70 NH PUC 142 (1985) (Order No. 17,524) (Rate Order). Hemphill operates a 12,500 kilowatt wood-fired generation facility pursuant to 16 U.S.C. § 824a-3, the Public Utility Regulatory Policies Act (known as PURPA) and New Hampshire's state counterpart, RSA Ch.362-A, the Limited Electric Policy Act (known as LEEPA).

Pursuant to the Rate Order PSNH has been purchasing power produced by Hemphill since the facility began operating on October 27, 1987. On October 26, 2006, PSNH made its final payment to Hemphill under the Rate Order and since that date has been paying the short term rate for Hemphill's power. PSNH argues that the Rate Order ends on October 26, 2006, because that is the last year shown on the rate schedules attached to the Rate Order. Hemphill, on the other hand, claims that the Rate Order ends on October 26, 2007, twenty years after the facility became operational. This dispute concerns the termination date, as well as the appropriate rates to be paid by PSNH, if the rate order continues past October 26, 2006.

**Hillsborough County Superior Court Action Docket 07-C-294**

Hemphill filed a Writ of Summons on May14, 2007, in Hillsborough County Superior Court, Northern District (Docket 07-C-294) (Superior Court Case) seeking both damages and declaratory relief. PSNH filed a Motion to stay the Superior Court Case on November 9, 2007. On November 20, 2007, Hemphill filed an Objection to PSNH's Motion to Stay and a Cross Motion to Enjoin PSNH's pursuit of Commission Docket DE 07-122. On November 29, 2007, the Superior Court set a hearing on pending motions for January 11, 2008.

### **Commission Docket DE 07-122**

On November 9, 2007, PSNH filed a Petition for Clarification and Interpretation of Commission Orders Regarding Hemphill Power & Light docketed as DE 07-122. The Office of Consumer Advocate filed a letter on November 27, 2007, indicating its intent to participate in Docket DE 07-122. The Commission issued an Order of Notice on November 29, 2007, setting a prehearing conference for December 27, 2007. On December 14, 2007, Hemphill filed a Motion to Intervene and a Motion to Continue the prehearing conference. The Commission granted Hemphill's continuance and issued a supplemental Order of Notice, setting a prehearing conference for January 7, 2008.

On December 27, 2007, Hemphill filed a motion to stay the proceedings before the Commission. Hemphill's motion to stay was not assented to and argues that Docket DE 07-122 should be held in abeyance pending a decision by the Superior Court on Hemphill's motion to enjoin PSNH from proceeding before the Commission.

The prehearing conference was conducted as provided in the Order of Notice, but was limited to: 1) petitions to intervene and objections thereto; and 2) arguments in support and in opposition to Hemphill's motion to stay. In addition, I confirmed that the prehearing conference notice had been published as required and I discussed generally the parties' and Staff's view of the proper venue for this dispute.

### **Appearances**

Gerald M. Eaton for PSNH  
Bryan K. Gould for Hemphill  
Meredith A. Hatfield for Office of Consumer Advocate  
Donald M. Kries for Commission Staff

### **Intervention Requests**

Hemphill is a signatory to the Rate Order and is directly affected by the outcome of this docket. There were no objections to Hemphill's intervention,

### **Motion to Stay**

In its motion to stay, Hemphill argued that only the Superior Court has jurisdiction to decide all of the issues raised in the Superior Court writ. Specifically, the writ includes a request for jury trial, and claims for damages and declaratory relief. Also, in the Superior Court Case PSNH has raised a defense of unjust enrichment. Hemphill claimed in its motion, and again during the prehearing conference, that the Commission should stay this proceeding to promote judicial efficiency and as a matter of comity toward the Superior Court.

At the prehearing conference, PSNH opposed the stay and argued that the Commission has primary jurisdiction to determine the meaning of its own Rate Order. PSNH disputed Hemphill's

right to a jury trial and explained that there is no right to jury trial in New Hampshire when there is a statutory scheme to provide for adjudicating disputes outside of the courts. Further, PSNH asserted that Hemphill should have exhausted its administrative remedies before the Commission prior to filing suit in Superior Court. PSNH claimed that the Commission has jurisdiction to order PSNH to pay Hemphill appropriate rates under the Rate Order and can therefore grant the relief sought by Hemphill in its Superior Court Case.

At the prehearing conference, the Office of Consumer Advocate opposed the motion to stay and supported PSNH's petition for relief in this docket.

At the prehearing conference, Staff opposed Hemphill's motion to stay and also raised the question of whether the Commission has jurisdiction to interpret the Rate Order. Staff argued that by seeking a determination from this Commission the parties have arguably waived challenges to the Commission's jurisdiction. Staff also pointed out that the Superior Court, in two other similar cases, has deferred to the Commission for an interpretation of a long term rate order. Finally, Staff asserted that the disputes in this docket are amenable to resolution by settlement and offered to facilitate settlement discussions among the parties.

Hemphill responded to Staff's discussion of two prior Superior Court decisions by distinguishing both based upon: 1) Hemphill's request for jury trial; and 2) the Court's failure in the prior cases to consider arguments that only the Court and not the Commission could provide all of the forms of relief sought.

### **Commission Jurisdiction**

I asked the parties to comment on the question of the Commission's jurisdiction. PSNH stated that jurisdiction to decide the issues in its petition belongs to the Commission. Staff stated that the assumption has always been that the Commission has jurisdiction to interpret the terms of long term rate orders. Staff noted, however, that the question of whether the Commission is preempted by federal law from interpreting long term rate orders is currently unresolved.

Hemphill stated that it had not waived any arguments that the Commission lacks jurisdiction, but that it had not asserted such arguments yet because it believed those arguments are premature. Hemphill indicated that if the Commission decides to go forward with this docket and asserts jurisdiction over the matter, then Hemphill would appeal that decision to the federal courts. Hemphill stated that the question of the Commission's jurisdiction to interpret Hemphill's Rate Order should be briefed before the Commission makes any decision on its jurisdiction.

### **Technical Session**

As reported by Staff, by letter of January 7, 2008, the parties met in a technical session following the prehearing conference and explored the potential for a settlement. Staff reiterated that Hemphill intends to file suit in federal court to contest the Commission's jurisdiction if this docket is not stayed. Staff expressed the hope that before January 11, 2008, the parties would ask both the Commission and the Superior Court to stay their respective proceedings in order to allow for ongoing settlement negotiations.

### **PSNH Letter regarding Settlement**

On January 9, 2008, prior to my completion of this report, PSNH filed a letter requesting that the Commission hold this docket in abeyance pending further settlement discussions among the parties. PSNH also indicated that it would be joining Hemphill in seeking a stay of the Superior Court proceeding in order to allow settlement discussions to proceed.

### **Recommendations**

I recommend that Hemphill be granted intervention without condition.

In view of PSNH's and Hemphill's request to stay this docket and pursue settlement discussions, I recommend that the Commission suspend further proceedings pending settlement discussions and memorialize that decision by issuing a secretarial letter.

As to questions concerning the Commission's ability to hear this matter, I recommend that the Commission's secretarial letter include a statement that the Commission will defer addressing federal preemption issues until the parties reach a settlement, or alternatively, notify the Commission that further litigation will be necessary.

By  \_\_\_\_\_  
F. Anne Ross, Hearing Examiner