

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6565

Board Investigation into Station Service)
Agreements between Green Mountain Power)
Corporation and Ryegate Associates, Green)
Mountain Power Corporation and the City of)
Burlington Electric Department (as agents on)
behalf of the Joint Owners of the McNeil)
Generating Station), and the City of Burlington)
Electric Department and Future Energy)
Resources Corporation)

Order entered: 4/25/2002

ORDER RE: PHASE II

I. INTRODUCTION

This Order sets out the process for moving forward with Phase II of this proceeding. The first phase, prospective approval of two special contracts, was completed by a January 23, 2002, Order of the Public Service Board ("Board"). In that Order, the Board ruled on prospective approval of the following special contracts:

- (1) Special Contract No. 477, between the City of Burlington Electric Department ("BED") and Future Energy Resources Corporation ("FERCO") which holds the Certificate of Public Good for the McNeil Biomass Gasification Unit (the "FERCO Contract"); and
- (2) Special Contract No. 478, between Green Mountain Power Corporation ("GMP") and BED for "Station Service" at the Joseph C. McNeil Generating Station ("McNeil"), a plant fueled largely with wood chips (the "McNeil Contract").

In the January 23rd Order, the Board approved (1) the contract for electric service (Special Contract No. 477) between BED and FERCO;¹ and (2) the contract for electric service (Special Contract No. 478) between GMP and BED.² A third special contract was also filed with the Board and originally included in this investigation: Special Contract No. 467, between GMP and Ryegate Associates ("Ryegate"). However, on December 11, 2001, GMP filed a notice with the Board that it was withdrawing its request for Board approval of this contract.

The January 23rd Order resolved some, but not all, of the issues presented by the proposal for decision ("PFD") issued by the Hearing Officer on January 16, 2002; namely, prospective approval of Special Contract Nos. 477 and 478, and treatment of the energy efficiency charge and demand-side management requirements for those two contracts. The Board issued the January 23rd Order without addressing a number of other outstanding issues so as to grant the special contract approvals expeditiously in order to allow these beneficial contracts to take effect promptly.

This Order addresses the procedure and schedule for deciding all remaining issues presented by the PFD.

II. PROCEDURAL HISTORY

This investigation was originally opened to determine whether and under what conditions the Board should approve the proposed Special Contract Nos. 467, 477, and 478. The Board, in its Order opening the investigation, identified some similarities in the three contracts as well as issues that were to be examined in this proceeding, including prospective approval of the contracts and GMP and BED's original request for retroactive approval of the contracts. The Board assigned Board Member John D. Burke, Esq., as Hearing Officer.

1. The January 23rd Order approved this contract for the period beginning with the effective date of the Order and continuing through the earlier of February 28, 2002, or the end of the FERCO demonstration project. On February 28, 2002, the Board granted an extension to Special Contract No. 477 between BED and FERCO through the earlier of April 30, 2002, or the end of the FERCO demonstration project.

2. The January 23rd Order approved this contract for the period beginning with the effective date of the Order and continuing through June 30, 2002.

On November 9, 2001, the Vermont Department of Public Service ("Department" or "DPS"), GMP, and BED submitted a stipulation ("Initial Stipulation"), a joint proposal for decision, and prefiled testimony on the issues relating to prospective approval of the McNeil and FERCO contracts. A technical hearing on the Initial Stipulation was held on November 19, 2001. Additional information was submitted by BED and GMP on November 21, 2001.

Shortly after the technical hearing held on the Initial Stipulation, the Department submitted a letter on behalf of the parties reiterating certain points in the Initial Stipulation, and also proposing that the following issues should be resolved in the second phase of this Docket:

- (1) treatment of the energy efficiency charge and demand-side management requirements for the McNeil and FERCO contracts;
- (2) retroactive approval of the special contracts;
- (3) prospective approval of the Ryegate Contract; and
- (4) resolution of the amount due GMP, if any, for the arrearage accruing between BED and GMP for the unpaid portions of GMP's bills to McNeil since GMP converted McNeil to GMP's Rate 63.³

The Department's letter further indicated that the parties agreed that the question of penalties, if any, under 30 V.S.A. §§ 30 and 230 should not be addressed in this Docket, but instead should be included as part of the Department's general investigation into special contracts.

On December 11, 2001, GMP filed a notice with the Board that it was withdrawing its request for Board approval of its proposed special contract with Ryegate Associates (Special Contract No. 467). Also on December 11, 2001, the Department submitted two additional stipulations – one between the Department and GMP, and one between the Department and BED – and supporting testimony of William Steinhurst. The stipulation between the Department and GMP would resolve the fourth of the phase two issues identified above, i.e., the arrearage that has accrued between GMP and BED for unpaid portions of GMP's bills to McNeil. This stipulation provides that GMP will not pursue collection of the McNeil arrearage, that "GMP shall not be subject to any adverse effect for not collecting the Arrearage in any future proceeding

3. Department letter of 11/26/01.

before the Board," and that GMP may correct and/or modify its financial statements as a result of this treatment of the arrearage. The stipulation between the Department and BED would also have resolved the arrearage issue from BED's perspective by providing that BED would not be required to pay GMP the amount of the arrearage as described above. The DPS/BED stipulation also resolved the treatment of the energy efficiency charge and demand-side management requirements for the McNeil and FERCO contracts – issues which the Board reflected in its January 23rd Order.

The Hearing Officer issued the PFD on January 16, 2002. The Department filed comments on the PFD on January 1, 2002, and BED and GMP filed comments on January 11, 2002. On January 23, 2002, prior to issuing its Order of that date, the Board heard oral argument in this Docket. Dixie Henry, Esq., appeared for the Department, David John Mullett, Esq., appeared for Ryegate, William Ellis, Esq., appeared for BED, and Donald Rendall, Esq., appeared for GMP.

III. DISCUSSION

In the Proposal for Decision, the Hearing Officer recommended that the following three issues be set aside for a second phase of this Docket:

- (1) retroactive approval of the special contracts;
- (2) the resolution of the amount due GMP, if any, for the arrearages accruing between BED and GMP for the unpaid portions of GMP's bills to McNeil since GMP converted McNeil to GMP's Rate 63; and
- (3) the penalties, if any, under 30 V.S.A. §§ 30 and 230, that should be imposed on the involved utilities for provision of service under these special contracts without required prior Board approval.

As to the first issue, we have considered the Hearing Officer's recommendation that retroactive approval of the special contracts be addressed in a second phase of the Docket. We have also considered the stipulation between the DPS and BED filed on December 11, 2001, as well as the stipulation between the DPS and GMP filed on that same date. We have also

considered the comments of the Department on the PFD.⁴ Finally, we have considered the positions taken by the parties at oral argument.

We cannot agree to the Department's request to summarily deny the requests for retroactive approval at this time. The issue of retroactive approval was not specifically addressed in the December 11th stipulations. While this issue was not reserved for further consideration as the Department indicates, it was also not specifically resolved by the terms of the agreements. We note that in an earlier stipulation of November 26, 2001, the parties agreed that retroactive approval of the contracts remained to be resolved through further proceedings in this Docket. Rather than deciding the issue based on the evidence and argument at hand, we remand this issue back to the Hearing Officer for taking further evidence, and for further briefing, on whether retroactive approval is consistent with the law and Board policy. The Department will have an opportunity at that time to present its case that the Board should deny the requests for retroactive approval.⁵

On December 11, 2001, GMP filed a notice with the Board that it was withdrawing its request for Board approval of its proposed special contract with Ryegate Associates (Special Contract No. 467). Thus, the issue of retroactive approval to be reviewed in a second phase to this Docket is limited to Special Contract Nos. 477 and 478 only. However, at the oral argument we asked when, and in what context, the issue of whether GMP was charging Ryegate unauthorized rates might be addressed. The Department agreed to include this issue in its generic investigation of special contracts. The Department also requested that the Board specifically reserve the issue of penalties, if any, under 30 V.S.A. §§ 30 and 230, that should be imposed on GMP for provision of service to Ryegate under a special contract without required Board approval for future treatment. We grant the Department's request.

4. In its comments, the DPS urges the Board to deny the requests of both GMP and BED for retroactive approval of these special contracts without further proceedings since, the DPS asserts, under the terms of the stipulations this issue was not reserved for further consideration. In its comments, the DPS also points out that the Board has repeatedly held that 30 V.S.A. § 229 does not permit retroactive approval of special contracts.

5. We also note that the two December 11th stipulations each provide that it is not binding on the signatories if the Board does not approve each stipulation in its entirety. As we are not approving the stipulations, it follows that even if the Department is correct in its interpretation of the stipulations, BED and GMP remain free to advocate for retroactive approval.

As to the second of the three issues listed above, the parties have proposed a resolution in which BED would not be required to pay the arrearage accruing between BED and GMP for the unpaid portions of GMP's bills to McNeil since GMP converted McNeil to GMP's Rate 63. The resolution also provides that BED and GMP would be authorized to modify their financial statements accordingly. The Hearing Officer recommends that the Board not accept the stipulations that would resolve this issue. The Hearing Officer noted that the parties presented no justification for this proposed treatment of the arrearage.⁶ Instead, the Hearing Officer recommended that the proper treatment of the arrearage should remain an issue to be addressed in the second phase of this Docket, to give the parties an additional opportunity to demonstrate why their proposed resolution is appropriate.

At oral argument, the Department argued that the resolution to this issue, as proposed in the December 11th stipulations, would lead to just and reasonable rates and urged the Board to accept the stipulations under its broad authority pursuant to 30 V.S.A. §§ 9 and 209.⁷ It is clear from the parties' statements at oral argument that the proposed settlement of this issue is conjoined with the first issue – that of retroactive approval. Thus, our decision here follows from our decision on retroactive approval – that further information and briefs are required to determine the legality, justness and reasonableness of the parties' proposed resolution. Thus, we accept the Hearing Officer's recommendation that this issue should be decided in a second phase of the Docket, and we remand this issue back to the Hearing Officer for further proceedings.

As to the third issue of the penalties, if any, under 30 V.S.A. §§ 30 and 230, that should be imposed on the involved utilities for provision of service under these special contracts without required Board approval, the Hearing Officer also recommended that they be addressed in the second phase of the Docket. At the oral argument, the Department contended that whether the proposed settlement impacts ratepayers or shareholders is also related to the issue of penalties.⁸

6. PFD at 10.

7. Tr. 1/23/02, at 16; *see also*, DPS letter of 1/02/02 at 5.

8. Tr. 1/23/02 at 26.

GMP argued that the Board should be cautious in relying on the arrearage issue as a relevant factor in setting any penalty.⁹

Rather than deciding the merits of penalties in this Docket, the Department requests that the issue of penalties be addressed as part of the Department's generic investigation into special contracts. The Department has regularly kept the Board apprised of the status of that investigation. The Department's most recent status report on that investigation states that it anticipates that individual companies will be contacted in April, 2002, as the DPS intends to work with each of the companies "to determine whether a joint recommendation can be developed and presented to the Board."¹⁰ The Department notes that it is reluctant to have any penalties that might be assessed in this Docket set a standard for penalties in the generic investigation, particularly since the DPS sees the McNeil contract as an outlier.¹¹

We recognize the dilemma noted by the Department. However, because the issue of penalties may ultimately be tied to some of the other issues raised in this Docket, we are reluctant to sever the penalty issue from the facts, and final adjudication, of this case. Thus, we will not grant the Department's request to address any penalties related to cases in this Docket in the Department's generic investigation. However, we will agree to *deferral*, for a reasonable time (defined in the following paragraph), of the ultimate resolution of whether any penalties should be imposed on the involved utilities for provision of service under these special contracts without required Board approval. Any settlement that results from the Department's generic investigation with either GMP or BED must clearly indicate the amount of penalty that is proposed for each company for each of the special contracts at issue in this Docket, so that the penalty issue in this Docket can be appropriately documented.

The Department initiated its generic investigation into expired and unapproved special contracts on March 13, 2001, and has been working on the investigation since that time. We wish to afford the Department a reasonable opportunity to complete its generic investigation

9. *Id.* at 36-38.

10. Department filing of April 1, 2002.

11. Tr. 1/23/02 at 21.

prior to the consideration of what, if any, penalties should be imposed in this Docket. At the same time, we are unwilling to defer indefinitely the issue of penalties to be assessed in this Docket. Accordingly, we remand the issue of penalties back to the Hearing Officer, with consideration of the issue to be deferred until the earlier of (1) the completion of the Department's generic investigation; or (2) September 1, 2002.

The parties' proposed settlement still leaves us with concerns on a number of points, including: (1) whether the proposed resolution is, in effect, a *de facto* retroactive approval of Special Contract No. 478; (2) whether the proposed settlement passes any costs on to ratepayers of GMP or whether the settlement costs are borne by GMP's shareholders; and (3) whether the proposed settlement is consistent with 30 V.S.A. § 229 and past orders of this Board on retroactive approval for special contracts. Thus, we are unable to approve the December 11th stipulations without further information, which we expect the Hearing Officer to require and consider upon remand.

IV. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The issue of retroactive approval of Special Contract Nos. 477 and 478 is remanded to the Hearing Officer.

2. The issue of the resolution of the amount due GMP, if any, for the arrearages accruing between BED and GMP for the unpaid portions of GMP's bills to McNeil since GMP converted McNeil to GMP's Rate 63 is remanded to the Hearing Officer.

3. The issue of the penalties, if any, under 30 V.S.A. §§ 30 and 230, that should be imposed on the involved utilities for provision of service under these special contracts without required Board approval is remanded to the Hearing Officer. Consideration of the issue shall be deferred until the earlier of (1) the completion of the Department's generic investigation; or (2) September 1, 2002.

4. GMP's withdrawal of its request for Board approval of its proposed special contract with Ryegate Associates (Special Contract No. 467) is hereby accepted. The issue of penalties, if any,

under 30 V.S.A. §§ 30 and 230, that should be imposed on GMP for provision of service to Ryegate under a special contract without required Board approval is, however, reserved for future determination outside the current Docket.

SO ORDERED.

Dated at Montpelier, Vermont, this 25th day of April, 2002.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED:

ATTEST: s/Judith C. Whitney

Acting Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.