STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-386

December 8, 2000

CENTRAL MAINE POWER COMPANY
Petition to Resolve Dispute Regarding
Special Rate Contract for Reformed
Customer Service Agreement With
International Paper (pursuant to
35-A M.R.S.A. § 3204(10))

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

We deny International Paper Company's (IP) motion to dismiss Central Maine Power Company's (CMP) petition to unbundle the special rate contract between CMP and IP. We disagree with IP's assertion that CMP does not provide bundled electric service by the terms of the special rate contract. In addressing the merits of CMP's petition, we decide that the parties' dispute regarding the adder charge cannot be decided as a matter of law and must be set for hearing to resolve the matter. We also decide that the special rate contract does not impose an independent obligation on CMP to purchase excess energy from IP and that CMP's obligation to purchase IP's excess energy is terminated and is, therefore, not relevant to the reformed special rate contract.

II. BACKGROUND

IP was among a group of industrial customers which, in December 1994, entered into 5-year special rate contracts with CMP. Like the other special rate contracts, the IP-CMP agreement was reached while the Commission was considering a stipulated alternative rate plan (ARP) in Docket No. 92-345 (Phase II). The ARP constituted an incentive plan under which CMP's rates would be determined for five years, beginning January 1, 1995.[1] The special rate contracts, called customer service agreements (CSA), were to be in effect during the same time period as the ARP.

Under its 1994 CSA, IP secured a fixed price arrangement while CMP secured IP as a customer for its existing load for the five years of the ARP. Also as part of the 1994 CSA, CMP agreed to seek out competitively-priced, dedicated electricity purchase arrangements for all or a portion of IP's requirements (Package Power Rider), to offer

[1] The Commission approved the ARP stipulation by Orders issued on December 30, 1994 and January 10, 1995. The Industrial Energy Consumer Group, of which IP is a member, was a party to Docket No. 92-345(II) but took no position with regard to the stipulation.

CMP's own energy during times when it would have little value in the marketplace (Dump Power Rider), and to provide replacement power during unscheduled outages of IP's self-generation (Temporary Power Rate Rider).

During 1996, because of changed circumstances at IP and disputes concerning the proper operation of the 1994 CSA, CMP and IP engaged in further negotiations. As a result, CMP and IP entered into a new customer service agreement on November 27, 1996. The 1996 CSA terminated the 1994 CSA. Under the 1996 CSA, IP agrees to purchase from CMP and CMP agrees to supply IP "all of the electrical energy requirements relating to the business processes conducted by [IP] at its Jay, Maine facility (The Androscoggin Mill,) . . . with the exception of any electrical energy produced by [wholly-owned or partially-owned existing self generation] or any new generation owned, operated or maintained . . . for the benefit of [IP] and located in the general vicinity of the Androscoggin Mill."

The first part of Article III of the 1996 CSA describes the price for electric service. IP pays CMP

> for service and products received from CMP as follows: (i) a Monthly Access Charge to receive service, (ii) Electric Energy and Generating Capacity Charges and/or cost of any Packaged Power Service to obtain electric energy and generating capacity, (iii) the Adder applicable to specified charges or service, ...[2]

The Monthly Access Charges were $300,000 during 1997 through 1999, $150,000 in 2000, and $120,000 in 2001. The Monthly Access Charge "includes all costs for charges, including non-economic or so-called "stranded costs," that might be determined to be owed to CMP by IP for service through the termination of the 1996 CSA, "except for the other costs or charges specifically identified in the first paragraph of Article III, ..." Article III(a) of the 1996 CSA.

Article III(b) describes the "Electric Energy and Generating Capacity Charges." Subparagraph (i) provides for the Electric Energy Charge. Prior to the time when a market-clearing price becomes established, IP agrees to pay for energy at CMP's week-ahead, projected own-load marginal cost. When a market-clearing price becomes established, IP agrees to have its energy price established using the following options in any combination: (1) on a daily basis, the actual market-clearing price (after-the-fact), (2) on a daily basis, forecasted day-ahead prices based on CMP's market-clearing price

[2] Article III also describes (iv) and (v), concerning energy tax and charges for special facilities, not relevant to this proceeding.

estimates (with no true-up), or (3) on a monthly basis a fixed price as offered by CMP, for a minimum period of one month.[3]

Article III(d) provides that "the combined cost of all Electric Energy Charges, Generating Capacity Charges and Package Power Service, stated on a per-kWh basis," that CMP delivers to IP pursuant to the CSA, "shall be subject to a per-kWh Adder and together these components shall equal the price provided by [CMP] to [IP] pursuant to this Agreement." The Adder is determined on a hourly basis as follows: (1) when the combined cost of energy and capacity is less than 2¢ per kWh, the adder is 3 mills per kWh; (2) when the combined cost of energy and capacity is greater than 2¢ per kWh but less than 3¢ per kWh, the adder is 2 mills; (3) when the combined cost of energy and capacity is greater than 3¢ per kWh, the adder is 1 mill per kWh. However, if IP chooses to have its energy priced determined by the actual market-clearing price, the adder is 1.5 mills per kWh, except that if the combined cost of energy and capacity is greater than 3¢ per kWh, the adder is only 1 mill per kWh.

By Article X, paragraph (i) of the 1996 CSA, the parties "recognize that there are times when" IP sells excess energy to CMP, and agree to new methods to price the excess energy that CMP purchases. CMP's obligation to purchase the excess energy arose in a Short-Term Power Purchase Agreement entered into in May, 1986.

By letter dated December 23, 1996, the Director of Technical Analysis found that the CSA complied with the relevant criteria in CMP's ARP. Therefore, the CSA went into effect automatically on December 27, 1996.[4]

During February 2000, CMP approached IP about unbundling the generation service from the delivery service within the CSA pursuant to 35-A M.R.S.A. § 3204(10). After a meeting involving CMP and IP officials, it became clear that there were two main areas of disagreement. The first disagreement concerned whether IP should be required to pay CMP the Adder now that CMP no longer provides generation service. The second disagreement concerned CMP's obligation to purchase excess energy that is produced by IP's self-generation equipment.

Because negotiations did not produce a customer service agreement that was reformed for electric restructuring, CMP petitioned the Commission to resolve the dispute on May 1, 2000. In its petition, CMP asserts that it is entitled to continue to receive the Adder as part of the economic compensation for providing service to IP under the CSA. In CMP's view, the Adder is simply a component of the access

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[3] Subparagraph (ii) of Article III(b) describes Generating Capacity Charges and permits capacity charges alternatively to be set in accord with Article III(c), Package Power Service. The complex alternative for determining capacity charges are not relevant to this matter and therefore are not recited here.

[4] Special rate contracts in compliance with pricing flexibility criteria of the ARP went into effect automatically 30 days after being filed.

per-kWh price structure under the contract, and therefore CMP could continue to receive the Adder for the remaining term of the CSA. CMP states that IP views the Adder not as part of the delivery price but rather as compensation for providing energy and capacity that CMP is no longer providing, and therefore IP believes CMP should not receive the Adder on a going-forward basis.

In CMP's view, the language in Article X(i) of the CSA, related to CMP's obligation to purchase energy from IP during periods when output of IP's self-generation equipment exceeds IP's load, was intended only to amend the pricing provisions of the then-existing IP Excess Power Purchase Agreement. As CMP has lawfully terminated the IP Excess Power Purchase Agreement, CMP asserts the pricing provisions for excess energy within the CSA are now moot. CMP states that IP's position is that the language in Article X(i) creates an independent obligation beyond the scope of the IP Excess Power Purchase Agreement for CMP to continue buying energy from IP for the remainder of the term of the CSA.

Stating that CMP and IP have reached an impasse on the terms to include an unbundled agreement, CMP requests that the Commission resolve the dispute and establish a reformed customer service agreement in accordance with 35-A M.R.S.A. § 3204(10).

IP answered CMP's petition on May 30, 2000. As an initial matter, IP moved to dismiss CMP's petition on jurisdictional grounds. In IP's view, the 1996 CSA is not a contract for bundled electricity service and the Commission's jurisdiction provided by 35-A M.R.S.A. § 3204(10) to reform such contracts is inapplicable in this instance. IP argues that because the CSA establishes separate pricing for delivery services and for the sale of electric energy, the CSA is not bundled. As such, section 3204(10) does not grant authority to reform the contract and the Commission should dismiss CMP's petition.

Alternatively, IP argues that, even if the Commission has jurisdiction over the contract pursuant to 35-A M.R.S.A. § 3204(10), the CSA unambiguously provides that the Adder is part of the unbundled generation service. Therefore, in IP's view, the Adder should be excluded from the delivery price that should be paid CMP as part of any reformed CSA.

In addition, IP objects to documents referred to and attached to CMP's petition that contain CMP's understanding and expectations of the economic benefits CMP would receive under the operation of the 1996 CSA. IP claims that such parole evidence on the correct interpretation of the CSA is impermissible because the contract itself is unambiguous.

Last, IP claims that the dispute over CMP's obligation to purchase excess energy from IP is beyond jurisdiction of the Commission. Regardless of whether the Commission has jurisdiction under section 3204(10) to unbundle the CSA, the obligation to purchase excess energy from IP is not relevant to the unbundling of generation and

delivery service within the CSA. In IP's view, any contractual dispute between IP and CMP about the buy-back of excess energy must be resolved in court rather than at the Commission.

At the case conference, counsel for IP maintained the jurisdictional objection to the Commission's addressing CMP's purchase power obligation, but acknowledged that CMP can no longer be required to buy power after March 1, 2000. In counsel's view, however, CMP's purchase power obligation should be reformed into an obligation by CMP to facilitate IP's ability to sell the excess power into the market.

In an Examiner's Report issued on September 11, 2000, the Examiner recommended that the Commission deny IP's motion to dismiss, finding the dispute within the Commission's jurisdiction under 35-A M.R.S.A. § 3204(10). Although he agreed with IP that the adder dispute could be decided as a matter of law, he recommended a legal conclusion that the adder should be included in the unbundled, reformed contract. Lastly, the Examiner recommended a finding that the 1996 CSA did not impose an independent obligation to purchase excess energy from IP, but rather provided for the manner to price the power. Because the agreement that did impose the underlying obligation to purchase the excess energy, the 1986 PPA, was lawfully terminated by CMP, the 1996 CSA pricing provisions are now moot.

IP excepted to all three recommendations. As to the jurisdictional issue, IP points out that section 3204(10) only applies to contracts for bundled electric service. IP argues that the 1996 CSA separately prices generation and delivery and that separate pricing for services is a touchstone of unbundling those services. IP cites 35-A M.R.S.A. § 3213, which defines unbundled bills as the separate statement of generation prices and delivery prices, as support for its argument. If the 1996 CSA is not for bundled service, IP asserts, the Commission lacks jurisdiction to reform the contract under section 3204(10).

IP further asserts that contract reformation under section 3204(10) is an equitable matter for which factual inquiry is required. As such, deciding the "Adder" issue as a matter of law is erroneous. When the Commission undertakes the equitable inquiry, IP urges the Commission to find that imposition of the adder in a reformed contract is not equitable. In IP's view, the adder constitutes a broker's fee for a service CMP no longer provides.

On the third issue, IP asserts the Examiner committed legal error by concluding that the 1996 CSA does not impose an obligation on CMP to purchase power from IP. Not only does the 1996 CSA constitute a separate obligation on CMP to purchase excess generation, but the access charge provision constitutes the charge necessary for CMP to provide wheeling service to IP for delivery of electricity into IP or from IP. Thus, while CMP remains obligated to purchase excess energy and CMP violated the Restructuring Act by failing to auction the IP excess energy with its other QF entitlements, IP is willing to forego the 1996 CSA requirement for CMP to purchase the excess energy. However, IP asserts that the 1996 CSA grants IP the right to receive

wheeling for its excess energy for payment of the access charge, and that charge alone. IP argues that it should not pay the FERC's local transmission charge to wheel its power to the NEPOOL market.

CMP filed comments generally supporting the Examiner's recommendations but seeking certain technical corrections.

III. DECISION

A. IP's Motion to Dismiss

Before March 1, 2000, CMP sold electricity at retail to customers in Maine by generating the electricity, or purchasing wholesale electricity generated by another entity, and then delivering the electricity over CMP's transmission and distribution lines for use by the customer. As a regulated utility service, the sale of the generation, transmission and distribution services was accomplished in accordance with CMP's rate schedules, including terms and conditions, that were reviewed and approved by the Public Utilities Commission. *See generally,* 35-A M.R.S.A. §§ 304, 307 and 310.

Before March 1, 2000, both generation and delivery were utility services, and it was not possible for a retail customer to obtain one service without the other.[5] Moreover, it was (and remains) unlawful for CMP to charge more or less for any utility service than the rate as specified in CMP's Commission-approved rate schedules. 35-A M.R.S.A. § 309. Section 703 of Title 35-A provides the only exceptions to the § 309 requirement that utility service be charged in accordance with Commission-approved rate schedules. Only one of the section 703 exceptions is pertinent to this case. Section 703(3) allows a public utility to provide utility service at rates and upon terms and conditions by special contract between the utility and the customer. Utility service by special contract does not escape regulatory scrutiny, however, because such contracts must be approved by the Commission.

During the 1990s, CMP sought to expand the number of customers receiving service by contract rather than rate schedule. Because of high rates and technological changes, many large electric utility customers in Maine were presented with opportunities to self-generate electricity at considerable savings compared to the Commission-approved rates. Because of the threat that many large customers might not remain electric utility customers, or at least not firm customers, the Legislature enacted 35-A M.R.S.A. § 3195(6). Section 3195(6) allows an electric utility to enter into special rate discount contracts with limited or no express approval by the Commission if done as part of a pricing flexibility program approved by the Commission. All three investor-owned electric utilities in Maine had such pricing flexibility programs in place

[5] The one exception to this rule in 35-A M.R.S.A. § 3182 is not relevant to this proceeding.

during the 1990s as part of their formal or informal incentive rate plans. Because of the pricing flexibility programs, many special rate contracts were entered into during the 1990s.

Both the 1994 CSA and the 1996 CSA are special rate contracts that CMP entered into using the greater flexibility allowed by section 3195(6). In CMP's estimation, IP possessed the ability to obtain electricity from self-generation and could therefore bypass utility service at a significantly reduced cost. Because the marginal cost for CMP to serve IP was estimated to be less than the discounted rate offered to IP, CMP was able to maintain a contribution to CMP's fixed costs that would otherwise be lost if IP chose to self-generate.

Prior to March 1, 2000, however, electric generation could be obtained in Maine only from an electric utility through the grid owned by the utility or by self-generation. With electric restructuring, effective on March 1, 2000, the Legislature decided that electric generation would no longer be a utility service. As of March 1, 2000, electric utilities became transmission and distribution utilities (T&D), and T&D utilities are prohibited from owning or selling generation service.

To address the problem presented by special rate contracts with terms that extended beyond March 1, 2000, thereby contractually committing electric utilities to provide generation service pursuant to such contracts, the Legislature enacted 35-A M.R.S.A. § 3204(10). Recognizing that T&D utilities may not provide generation, this subsection states in part:

> If a transmission and distribution utility has entered into a contract to provide bundled electricity service to a retail customer at a price other than the applicable tariffed rate for a term extending beyond March 1, 2000, the utility shall attempt to renegotiate and reform the contract to preserve as nearly as possible the parties' benefits and burdens under the terms of the contract, except that an investor-owned transmission and distribution utility may not agree to provide directly or indirectly generation service to the customer on or after March 1, 2000.

The subsection further requires the utility to "reform the contract so that the customer pays a total price for delivered electricity on an annual basis during the remaining term of the contract equal to the price contained in the contract."

The final paragraph of this subsection applies when a utility and a customer are unable to agree on the terms of a reformed contract. It states, in part,

> If after good faith negotiation the contracting parties are unable to agree to a reformed contract, either party may petition the Commission to resolve the dispute. The

> Commission shall determine any unresolved issues and impose a reformed contract to preserve as nearly as possible the parties' benefits and burdens under the terms of the original contract.

Reading section 3204(10) in the context of the regulatory scheme contained in Title 35-A, we decide that IP's Motion to Dismiss must be denied. As part of the CSA, IP promised that it would purchase all of its electricity requirements from CMP, except for electricity that it self-generated from existing equipment.[6] All requirements meant both generation service and delivery. Prior to March 1, 2000, if IP did not self-generate, IP had to purchase both generation and delivery from CMP. Indeed, legally IP could not get electricity delivered by CMP without also receiving generation service from CMP.[7] Thus, in the CSA, delivery service was not unbundled from generation service. The fact that those two services were separately mentioned within the contract and were separately priced within the contract does not move the CSA out of the category of "a contract to provide bundled electricity service to a retail customer" within section 3204(10), because to the extent CMP provided any service, CMP provided both generation and delivery.

It is important to note that section 3204(10) mentions contracts to provide bundled electricity *service*. We disagree with IP that bundled service requires a single price. We also disagree that section 3213 supports IP's argument. Section 3213, which provides for unbundled bills, demonstrates that the Legislature understood the distinction between prices and services. In section 3204(10), the Legislature used the word "service." There is no principle of statutory interpretation that supports a holding that the word "service" should be synonymous with "price" within the context of section 3204(10).[8]

To summarize, the CSA is a special contract, permitting IP to take electric service from CMP at prices and under terms and conditions that are different from

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[6] Article II confirms that CMP and IP understood this principle by stating that "[IP] will purchase from [CMP] and [CMP] will supply to [IP] all of the electrical energy requirements" for IP's Androscoggin mill, "with the exception of any electrical energy produced by existing [self generation]."

[7] Even though, as explained at the case conference, the CSA permitted IP to arrange its own generation deals, IP could not legally enter into any contractual arrangement to procure generation service over the utility grid system; only CMP could. So, even if IP conducted all the negotiations, legally CMP took title to the electricity and CMP then delivered it over its utility grid system. Before March 1, 2000, retail service from CMP had to be "bundled electricity service."

[8] If IP is correct that unbundled prices means unbundled service, then when section 3213 was implemented in early 1999, all electricity customers in Maine received unbundled service for the year before March 1, 2000.

CMP's section 304 rate schedules. As a rate schedule substitute, the special contract required Commission approval, albeit the reduced scrutiny-approval of a pricing flexibility program under 35-A M.R.S.A. § 3195(6). IP agrees with CMP that the special contract requires reformation, because CMP cannot legally provide generation, as CMP is contractually committed to do. CMP remains contractually committed to provide delivery service. IP's argument that a court rather than the Commission must now decide the dispute between CMP and IP as to the correct price for that delivery service, if accepted, would make the court the ratemaking body for the newly reformed CSA. IP's suggested interpretation of section 3204(10) contradicts the legislative scheme of rate regulation within Title 35-A. The Commission and not a court of law must determine the correct pricing for the reformed delivery service contract. Accordingly, IP's motion to dismiss CMP's petition is denied.

B. Contract Price for Delivery Service

Although IP labels the conclusion of its argument that the Adder should not be included in the newly reformed delivery price as warranting dismissal of CMP's petition, the Examiner treated IP's pleading as a motion for judgment on the pleadings. The Examiner agreed with IP that the adder issue could be decided as a matter of law, but instead recommended that we grant CMP judgment on the pleadings, and include the adder in the reformed CSA that we order in this docket. We disagree, and set the issue for hearing.

Article III of the contract describes for the price to be paid CMP. Three of the five categories of payments listed within the first paragraph of Article III are relevant to this proceeding: the Monthly Access Charge, the Electric Energy and Generating Capacity Charges and/or costs of any Package Power Service to obtain electric energy and generating capacity, and "the Adder applicable to specified charges or service."

Described in Article III(a) at page 3, the Access Charge includes all costs or charges of being hooked up to the utility transmission grid, including stranded costs. IP and CMP agree that the Access Charge should continue to apply in a post-restructuring version of their contract. Article III(a) further provides that during the course of the agreement, no other stranded costs apart from the access charge, are meant to apply to IP, "except for other costs and charges or charges specifically identified in the first paragraph of this Article III[.]" The Adder is specifically identified in the first paragraph of Article III.

IP and CMP also agree that Energy and Capacity Charges[9] relate to the services that, in the post-restructuring world, CMP can no longer provide IP. Therefore, the parties agree these charges should not be included in the reformed contract.

IP and CMP disagree on whether the Adder should survive the contract reformation process. The Adder is described in Article III(d). By subpart (d), the combined cost of all energy charges received pursuant to Article III(b) and (c), stated on a per kWh basis, "shall be subject to a per kWh Adder and together these components shall equal the price provided by [CMP] to [IP] pursuant to this Agreement." The amount of the Adder varies inversely to the combined energy charges, as described above.

IP believes that, because the energy and capacity price of electricity clearly represents the generation service of the contract, and that the Adder is added to the charge for generation services, the Adder must be considered part of the generation service no longer provided by CMP. In addition, IP argues the Access Charge is the only charge for delivery and since the Adder is not added to the Access Charge, the Adder cannot be part of the charge for delivery service.

IP also claims that the Adder was meant to reimburse CMP for its administrative costs of arranging IP's power acquisition and to provide CMP an incentive, because the adder grew larger as the energy deals became cheaper. In IP's view, the Adder was like a commission for purchasing generation products.

CMP argues that the adder is simply part of the contribution to CMP's fixed costs, like the access charge, that the parties intended IP to make as part of the CSA. CMP disagrees with IP's assertions that the adder was meant to compensate CMP for its administrative costs for acquiring generation for IP or to provide an incentive-based commission.

While section 3204(10) provides guidance in reforming special contracts, the statutory language does not dictate a particular resolution of the dispute over IP's CSA. Parties are to receive the benefits of their bargain as nearly as possible. Furthermore, after reformation, IP should pay a total price for delivered electricity on an annual basis during the remaining term of the CSA equal to the price contained in the contract. For this particular contract, even before restructuring, IP did not pay a fixed price for delivered electricity. Once a market clearing price was established, IP was presented with a set of choices as to receiving energy and capacity. Those choices were meant to provide IP with energy at a market-based price, related to the price that CMP had to pay to acquire the energy. In other words, CMP might engage in a number

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[9] The Energy and Capacity Charges as described in Article III(b), provide for energy and capacity to be sold to IP by CMP at either the cost of production for such power by CMP or CMP's cost of obtaining such power or upon a market determination of the price of such power after a market clearing price is established. IP also may purchase some energy as Package Power Service described in Article III(c).

of short-term, even daily, power acquisition deals and IP's generation price paid to CMP was meant to fluctuate with the market price option as chosen by IP.

Thus, the benefit of IP's bargain is to pay market-based prices for generation. Whether the post-restructuring, market-based prices should include the adder, however, depends on whose interpretation of the adder is accepted. If the adder is to compensate CMP for its generation acquisition costs, as IP claims, the adder should not be included in the reformed CSA, because CMP no longer incurs generation acquisition costs and IP will still incur those costs in the future when it acquires its own generation service. However, if the adder is merely another contribution to CMP's fixed costs, as CMP claims, then IP receives the same post-restructuring benefit of its bargain if the reformed contract includes the adder in IP's delivery cost.

It is not clear, however, from the contract language whether CMP's or IP's interpretation of the term "adder" is correct. We agree with IP, at least in part, that combining the Adder to the energy price creates an inference that the Adder is meant to be part of the compensation for the generation component. Other than this inference and the implicit incentive mechanism related to energy price, there is no contract language that indicates the Adder is intended to reimburse CMP for generation acquisition costs.[10] Still, even if the Adder is intended to allow for recovery above marginal costs, the option to price the energy component based on CMP's "projected hourly own-load marginal energy cost" suggests that the Adder should be considered as recovery of above-marginal costs on the energy side of IP's unbundled rate, and thus, that the Adder should disappear with the elimination of the energy part of the CSA.

The contract language, however, also supports an inference in CMP's favor. In both the first paragraph of Article III and in the organizational structure of Article III, the Adder is presented separately from the energy and capacity charges. If the Adder were intended as nothing more than a component of the energy and capacity charges, the contract drafters would have included the adder with those changes and not stated the Adder as a separate item.

Similarly, Article III(d), on which IP principally relies, also supports an inference favorable to CMP's argument:

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[10]The CMP performance incentive mechanism is not the only explanation for the sliding scale of the Adder. The CSA is a self-generation deferral rate. As generation costs obtained through the utility grid decrease, one would expect that the economic justification for self-generation dwindles and thus a higher contribution is warranted. When grid-obtained generation costs increase, the decision to defer self-generation appears less beneficial and therefore the adder or the contribution logically should be less. Thus, the sliding scale for the Adder also could be explained as a logical means to measure the total benefits IP receives from remaining connected to the grid.

> The combined cost of all electric energy charges, generating capacity charges and package power service … shall be subject to a per kWh Adder and together these components shall equal the price provided by the Company to the customer pursuant to this agreement.

If the Adder were solely for generation services, Article III(d) should read that "together these components shall equal the price for energy and capacity," instead of "shall equal the price provided by the Company for the customer pursuant to this Agreement." The language of Article III(d) at least suggests the possibility that the Adder may be for all services under the contract and not just for energy and capacity.

Thus, we disagree with the Examiner and conclude that the contract is ambiguous as to the correct interpretation of the Adder. The matter must be set for hearing. Because the contract language is ambiguous, parole evidence concerning CMP's (or IP's) interpretation of the Adder will be permitted. We also invite evidence on the following matters that we believe will be helpful in resolving the ambiguity of the contract language:

1. Whether the term "Adder" is a term of art in utility special rate contracts and if so, the accepted definition of that term; and

2. Whether the Adder as a "brokerage fee" is proportional to the brokerage services rendered.

C. <u>CMP's Obligation to Purchase Energy.</u>

Article X of the CSA is titled "Other Agreements." Subpart (i) contains the contract language which produces the second area of dispute between CMP and IP over the reformed CSA:

> During the Term of this Agreement, the parties recognize that there are times when Customer-owned self-generation and load are such that IP is selling electric energy and, as appropriate, generating capacity to [CMP], in addition to the amount of Otis Hydro and Riley Hydro generation sold to the Company under separate agreements. [CMP] will pay [IP] either (i) [CMP's] own-load marginal energy cost until such time as a Market Price or Market Clearing Price, as determined in Article III, subpart (b)(i)(I) above, is established or (ii) the actual Market Price or Market Clearing Price for electric energy and, as appropriate, generating capacity for hours in which this occurs.

IP likewise seeks to dismiss this claim in CMP's petition on jurisdictional grounds. In IP's view, it is clear that any obligation on CMP to purchase power from IP has nothing to do with bundled electricity service that CMP is providing to IP as a retail customer. IP asserts that if CMP believes that a contractual dispute exists concerning CMP's obligation to purchase IP's excess generation, the contractual dispute does not fall within section 3204(10) but is a matter to be resolved in the courts, like most contractual disputes.

We deny IP's motion to dismiss the Article X subpart (i) dispute. The disputed issue arises from a provision within the special rate contract by which IP received retail electric service from CMP. The special rate contract was not valid until the Commission approved it. The reformed version of that contract, which is required because CMP can no longer provide generation service, cannot be effective until the Commission approves the reformed contract. The parties to the 1996 CSA decided and agreed to put the pricing of the energy purchase obligation by CMP into their special rate contract. Interpretation of special rate contracts is a matter for the Commission, just like interpretation of rate schedules. Because the Commission must reform the 1996 CSA, the Commission must have jurisdiction to review all matters within the 1996 CSA. Only then can the Commission meet its obligations under section 3204(10).

IP argues that, if the CSA required CMP to purchase office supplies from IP as part of the special rate contract, then obviously a dispute concerning office supply purchases would be beyond the jurisdiction of the Commission. In fact, we disagree with IP's conclusion. Regardless of the nature of a contract provision, if the provision is in the special rate contract that the Commission was statutorily required to approve prior to restructuring, which now needs to be reformed to remove CMP's obligation to provide generation service, the Commission has jurisdiction and the obligation to address the provision in deciding how to reform the special rate contract. Of course, the provision cited by IP concerning office supplies likely would not require reformation, in that the contractual activity remains lawful on the part of the utility and, therefore, no redistribution of the benefits and burdens of such provision would be required, unless the particular terms relating to office supplies were linked to obligations on benefits that failed under the restructuring law.

In its exceptions to the Examiner's Report, IP argues that the language of Article X(i) supercedes the termination provision of the 1986 Purchase Power Agreement, and that therefore CMP's termination of the 1986 agreement does not terminate Article X(i) obligations. For IP's argument to prevail, we must in effect find that the 1996 CSA eliminated the 1986 agreement. However, without the 1986 agreement, the 1996 CSA cannot establish an obligation on CMP to buy any power.

Article X(i) of the 1996 CSA simply states that [CMP and IP] recognize that there are times when [IP]-owned self-generation and load are such that [IP] is selling electric energy … to [CMP.] Article X(i) further indicates how much CMP will pay for the electricity during those times. Nothing within Article X(i), or the entire 1996 CSA, establishes an obligation on CMP to purchase from IP. The only change Article X(i)

purports to make is with respect to the price. If an obligation to purchase power exists, the obligation arises because the 1986 agreement is still in effect, and if still in effect, the termination provision must also be in effect. IP and CMP agree that the 1986 Agreement was lawfully terminated by CMP. As that termination eliminates CMP's obligation to purchase IP's excess energy, the pricing provision within the 1996 CSA, Article X(i) is now moot and need not be included in the reformed CSA.

As we conclude that CMP's obligation to purchase power was eliminated by the termination of the 1986 agreement, we do not need to decide the post-restructuring ramifications of CMP's power purchase obligations, including whether CMP failed to divest or auction the contractual entitlement, as were discussed in the Examiner's Report and exceptions.

Accordingly, we

O R D E R

1. That International Paper Company's motion to dismiss is denied;

2. That the dispute between Central Maine Power Company and International Paper Company as to whether the Adder should be included within the reformed Customer Service Agreement will be set for hearing; and

3. That the reformed Customer Service Agreement will not include the Article X(i) provision relating to the purchase by CMP of excess electric energy from IP.

Dated at Augusta, Maine, this 8th day of December, 2000.

BY ORDER OF THE COMMISSION

_____
Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as followss:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.