

1 STATE OF NEW HAMPSHIRE
2 PUBLIC UTILITIES COMMISSION

3

4 May 20, 2008 - 10:11 a.m.
Concord, New Hampshire

5

6

RE: DE 07-045
7 BRIAR HYDRO ASSOCIATES:
Petition for Declaratory Ruling.
8 (Hearing for oral argument regarding
Motion for Reconsideration and Rehearing)

9

10

11 PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
12 Commissioner Clifton C. Below

13 Jody Carmody, Clerk

14

15 APPEARANCES: Reptg. Briar Hydro Associates:
Howard M. Moffett, Esq.

16

Reptg. Public Service Co. of New Hampshire:
17 Gerald M. Eaton, Esq.

18

Reptg. Residential Ratepayers:
Kenneth E. Traum, Asst. Consumer Advocate
19 Office of Consumer Advocate

20

Reptg. PUC Staff:

F. Anne Ross, Esq.

21

22

23 Court Reporter: Steven E. Patnaude, LCR

24

1

2

I N D E X

3

PAGE NO.

4 STATEMENTS BY:

5

Mr. Moffett 6, 57, 67

6

Mr. Traum 42

7

Mr. Eaton 42, 66

8

9

10

* * *

11

12

E X H I B I T S

13

EXHIBIT NO. DESCRIPTION PAGE NO.

14

A Three-page handwritten document 21
regarding N.H. Hydro Associates
Penacook Lower Falls Hydro

15

16

B Fixed Rate Future Escalating Contract 21
from Policy Statement, including
Option II, Option III, and Levelized
Rates Based upon PSNH

17

18

19

C Letter from Mr. Lyons to Mr. Mack 37
(March 5, 1982)

20

D RESERVED (Response from Briar Hydro 67)

to a question by Commissioner Below)

21

22

23

24

{DE 07-045} (05-20-08)

1 P R O C E E D I N G S

2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the hearing for the purposes of oral
4 argument in docket DE 07-045. On March 28, 2007, Briar
5 Hydro Associates filed a petition seeking a declaratory
6 ruling with respect to a 1982 contract for the purchase
7 and sale of electric energy. And, the Commission issued
8 an order containing its ruling on November 21, 2007.
9 Briar filed a motion for rehearing on December 21, to
10 which PSNH objected on December 31, 2007. And, on May 1
11 of this year we issued a secretarial letter scheduling
12 oral argument for today.

13 Before I go to procedure this morning,
14 let's take appearances please.

15 MR. EATON: For Public Service Company
16 of New Hampshire, my name is Gerald M. Eaton. Good
17 morning.

18 CHAIRMAN GETZ: Good morning.

19 CMSR. MORRISON: Good morning.

20 CMSR. BELOW: Good morning.

21 MR. MOFFETT: Mr. Chairman, I'm Howard
22 Moffett, with Orr & Reno, for Briar Hydro Associates, the
23 Petitioner. With me is Richard Norman, the President of
24 Briar Hydro Associates, and Susan Geiger from our office.

{DE 07-045} (05-20-08)

1 CHAIRMAN GETZ: Good morning.

2 CMSR. MORRISON: Good morning.

3 CMSR. BELOW: Good morning.

4 MR. TRAUM: Good morning, Mr. Chairman,

5 Commissioners. Representing the Office of Consumer

6 Advocate, Kenneth Traum.

7 CHAIRMAN GETZ: Good morning.

8 CMSR. MORRISON: Good morning.

9 CMSR. BELOW: Good morning.

10 MS. ROSS: Good morning, Commissioners.

11 Anne Ross, with the Public Utilities Commission Staff, and

12 with me today is Steve Mullen, an analyst in the Electric

13 Division, and Tom Frantz, the Director of the Electric

14 Division.

15 CHAIRMAN GETZ: Good morning.

16 CMSR. MORRISON: Good morning.

17 CMSR. BELOW: Good morning.

18 CHAIRMAN GETZ: The secretarial letter

19 on May 1 set out in general terms that we would take oral

20 argument today. And, that the -- especially looking at

21 the issues that's raised on Pages 7 through 15 of the
22 Briar motion, and that the parties should come prepared to
23 discuss their legal positions, present offers of proof
24 concerning what evidence, if any, they would produce at a

{DE 07-045} (05-20-08)

1 hearing in support of those positions.

2 In terms of procedure, I would begin
3 with the Petitioner, original Petitioner, Briar Hydro, and
4 would allow Briar an opportunity for a brief rebuttal. Of
5 course, there's a fair likelihood that there will be
6 questions from the Bench. Would expect to have -- that
7 PSNH go last. But let me turn to Mr. Traum, will you be
8 having oral positions to present today? Because,
9 otherwise, I think we would go from Briar, to the Consumer
10 Advocate, to Staff, then to PSNH.

11 MR. TRAUM: Certainly, at this point,
12 sir, the Office of Consumer Advocate has been, at this
13 point, expects to continue to support PSNH's position.
14 So, in that sense, I wasn't planning any additional
15 arguments, unless Mr. Eaton says something that I disagree
16 with.

17 CHAIRMAN GETZ: That might be too late.
18 Mr. -- or, Ms. Ross.

19 MS. ROSS: Thank you. I don't usually
20 get called a gentleman. I'm not planning on -- Staff is

21 not planning on taking a position in oral argument today.

22 CHAIRMAN GETZ: Okay. In terms of

23 normal order, I would start with the Petitioner, and let

24 the Company go last. So, I think we'll, unless are there

{DE 07-045} (05-20-08)

1 any other issues that we should raise that need to be
2 addressed before we proceed?

3 (No verbal response)

4 CHAIRMAN GETZ: Okay. Then, let's begin
5 with Mr. Moffett.

6 MR. MOFFETT: Thank you, Mr. Chairman
7 and members of the Commission. We very much appreciate
8 the opportunity to be here today and to try to call the
9 Commission's attention to some matters that we believe
10 were either overlooked or misconceived as part of the
11 Commission's November 21st, 2007 order.

12 CHAIRMAN GETZ: Actually, let me
13 interrupt for a second. It might be easier for everyone
14 if you sat, then you'd be speaking into the microphone.

15 MR. MOFFETT: That would be fine. It
16 certainly makes me more comfortable. Thank you. In
17 particular, we would like to focus on seven areas in the
18 Commission's November 21st order where we believe that
19 either explicit assumptions that were made by the
20 Commission in the order or conclusions that the Commission

21 came to in the order are either not supported by evidence
22 in the record or are specifically contradicted by evidence
23 or the precedent that is cited in the record.

24 I think maybe to try to frame where we

{DE 07-045} (05-20-08)

1 are today, it's fair to say that, when we started this
2 case, certainly Briar Hydro Associates felt that the
3 matter at issue was a fairly simple and straightforward
4 matter of contract interpretation. That is, we really
5 thought that the contract was clear. It talks about
6 energy, it does not talk about capacity. When we got into
7 the case, we discovered that Public Service Company of New
8 Hampshire also thought that the contract was clear, only
9 they thought it was clear in the opposite way that Briar
10 Hydro did.

11 CHAIRMAN GETZ: A very common occurrence
12 here.

13 MR. MOFFETT: Yes. The Commission, in
14 dealing with that disagreement, came to the conclusion
15 that, in fact, the contract was not clear, that it was
16 ambiguous, and that it required extraneous evidence in
17 order to sort out the actual meaning of the contract.

18 We're really here today because, if that is the
19 Commission's position, then we think it's only fair to
20 hear at length and in detail about the evidence that would

21 be brought forward by both parties in support of their
22 interpretation of the contract. So, with that
23 understanding, --

24 CHAIRMAN GETZ: In that regard, you mean

{DE 07-045} (05-20-08)

1 a subsequent hearing on --

2 MR. MOFFETT: Yes.

3 CHAIRMAN GETZ: -- a fact-based hearing?

4 MR. MOFFETT: And, let me make clear,

5 Mr. Norman is here today. I'm going to summarize, very

6 lightly, some offers of proof that we would intend to

7 make. But Mr. Norman is here, and he would be happy to

8 either explain those further, without being under oath or

9 to actually take the witness stand, if the Commission

10 wants him to do that. But we are really saying is, we

11 think that having -- having decided that the contract is

12 not clear on its face, and that it requires extraneous

13 evidence to interpret it, there is a whole lot of

14 evidence, much of it in the record, but not all of it in

15 the record that the Commission had when it decided the

16 case on November 21st, 2007.

17 CHAIRMAN GETZ: Okay. Well, let me make

18 one procedural point clear. We will not be taking

19 evidence from Mr. Norman today, because it wouldn't be

20 fair to the other parties in that record.

21 MR. MOFFETT: That's fine.

22 CHAIRMAN GETZ: But we will be hearing

23 your offers of proof.

24 MR. MOFFETT: That's fine. We don't --

{DE 07-045} (05-20-08)

1 We didn't expect that. We came prepared to do it, if the
2 Commission wanted it, we didn't expect it. So, I will go
3 ahead and summarize initially the offers of proof that we
4 would be prepared to make on the points that we think were
5 either misconceived or overlooked by the Commission.

6 And, as I said, I want to speak about
7 seven specific points. The first one has to do with the
8 Commission's statement at Page 15 of the November 21st,
9 2007 order, about run-of-river hydro facilities. This is
10 the first full paragraph on Page 15 of the November 17th
11 order -- excuse me, the November 21st order. And, in that
12 paragraph, the Commission says "We recognize that not all
13 hydro facilities qualifying under LEEPA were capable of
14 offering energy and capacity. When the Commission
15 differentiated in 1979 between facilities with dependable
16 capacity and those that would receive a lower rate because
17 they lacked this attribute, the example given for the
18 latter was run-of-the-river hydro plants. In the 1982
19 time frame," which is the time frame of the contract,
20 "therefore, an "entire output" contract for a

21 run-of-the-river hydro would not have included capacity."

22 The Commission goes on to talk about two memos that

23 ascribed specific capacity to the Penacook Lower Falls

24 Project. But those memos were internal to PSNH. They

{DE 07-045} (05-20-08)

1 were never shared with Briar Hydro.

2 For our purposes right now, the point
3 that we are concerned about is the statement that "In the
4 1982 time frame, an entire output contract for a
5 run-of-the-river hydro would not have included capacity."
6 Mr. Norman would be prepared to testify, under oath in a
7 later hearing in this docket, that the Penacook Lower
8 Falls facility was designed, began operating, and has
9 always operated as a run-of-river hydro facility. It
10 simply is a run-of-river hydro facility. So, by the
11 Commission's own guidelines, capacity should not have been
12 included and would not have been included in that
13 contract. That's point number one.

14 Point number two has to do with the
15 policy statement, the PSNH policy statement, that was --
16 that was attached as Exhibit B-3 to Briar Hydro's reply
17 memorandum of June 29, 2007. This is a policy statement
18 that was developed by PSNH, it was an internal policy
19 statement, it was not negotiated.

20 CHAIRMAN GETZ: Actually, let me

21 interrupt, because I want to try and work through these as
22 we go along. Let me return to your point about the
23 run-of-river. Well, first of all, you said that I guess
24 Briar was unaware that there was a dependable capacity

{DE 07-045} (05-20-08)

1 number assigned to Penacook?

2 MR. MOFFETT: That's correct. Briar was
3 never privy to the internal memorandum that Mike Cannata
4 did for PSNH that ascribed the 1.57 megawatts. Those were
5 never shared with New Hampshire Hydro Associates.

6 CHAIRMAN GETZ: But I'm wondering how
7 this really affects our decision here? Whether it --

8 MR. MOFFETT: I'll come back to it
9 later. But, for our purposes, all I wanted to indicate
10 was, we don't think those memoranda are relevant to the
11 point that the Commission itself has indicated that a
12 run-of-river hydro facility, selling its entire output in
13 this time frame, would not have been selling its capacity.

14 CHAIRMAN GETZ: But it appears from the
15 memoranda that, if Briar had selected Option I from the
16 three options put forth by PSNH, that it would have been
17 given a dependable capacity figure to which the higher
18 cents per kilowatt-hour rate would have been applied.

19 MR. MOFFETT: That's correct. But Briar
20 did not elect Option I. It could not have financed the

21 project under Option I.

22 CHAIRMAN GETZ: Yes, I understand that.

23 But I guess where I'm going is, I think you're making a

24 point that, with respect to whether Penacook was

{DE 07-045} (05-20-08)

1 run-of-river and how this dependable capacity would have
2 been applied, and I'm trying to understand the relevance
3 to the underlying decision. Because it seems like you're
4 saying that Penacook is run-of-river, but PSNH concluded
5 it had a dependable capacity, and therefore it would have
6 had the higher cents per kilowatt-hour rate that would
7 have been essentially an all-in pricing, including energy
8 and capacity.

9 MR. MOFFETT: I want to draw it back,
10 Mr. Chairman. I'm not trying to infer any of that more
11 complicated interpretation. All I'm saying, all I'm
12 pointing out, is that the Commission, in its order, said,
13 and I quote, "In the 1982 time frame, an entire output
14 contract for a run-of-river hydro facility would not have
15 included capacity." The Penacook Lower Falls Project was
16 a run-of-river hydro facility. That's all I'm saying.

17 CHAIRMAN GETZ: And, I'm trying to
18 understand the context. To the extent it's error, whether
19 it's harmless error, or something that would have an
20 effect on the ultimate decision in this case. So, okay, I

21 think I understand the points. So, if you want to proceed
22 to your second.

23 MR. MOFFETT: Okay. All right. Moving
24 on to point number two, we want to talk for a little bit

{DE 07-045} (05-20-08)

1 about the PSNH policy statement, which, as I said, is
2 Exhibit B-3 to the Briar Hydro reply memorandum of
3 June 29, 2007. This is a policy statement that was
4 developed internally by PSNH. It was not negotiated with
5 New Hampshire Hydro. It was sent to Mr. Norman, by John
6 Lyons of PSNH, on November 20th, 1981, as a way of PSNH
7 indicating the various bases on which PSNH would be
8 prepared to contract with New Hampshire Hydro Associates
9 for the purchase of energy from the Penacook Lower Falls
10 facility.

11 Now, the key thing about this is the
12 Commission's discussion of that policy statement on Page
13 13 of the November -- of the Commission's November 21,
14 2007 order. In the first full paragraph, the Commission
15 indicated that "PSNH's policy statement on contract
16 pricing was of primary relevance to the question of the
17 interpretation of the contract." And, we agree with that.
18 The Commission then goes on to characterize the three
19 alternatives or options that PSNH laid out in that
20 contract -- in that policy statement. It is our position,

21 and Mr. Norman would be prepared to testify, at some
22 length, on the basis of the language of the policy
23 statement and the exhibits that were sent with it. And,
24 we have copies of those here, and I'd like Mrs. Geiger to

{DE 07-045} (05-20-08)

1 pass them out while we're talking about it, so that they
2 can be part of the record.

3 CHAIRMAN GETZ: I'm sorry, are these in
4 addition to what was part of the filing on --

5 MR. MOFFETT: These particular -- These
6 particular --

7 CHAIRMAN GETZ: Mr. Moffett, excuse me,
8 one at a time so Mr. Patnaude can record what's being said
9 here.

10 MR. MOFFETT: The policy statement --

11 CHAIRMAN GETZ: Mr. Moffett, please.

12 MR. MOFFETT: Excuse me.

13 CHAIRMAN GETZ: What I want to
14 understand is, is this material that's already in your
15 filing from June 29 of last year or are these new
16 materials?

17 MR. MOFFETT: It's new material.

18 CHAIRMAN GETZ: Okay.

19 MR. MOFFETT: Sorry.

20 CHAIRMAN GETZ: That's okay.

21 MR. MOFFETT: These are memoranda that
22 were prepared by PSNH and sent to New Hampshire Hydro
23 Associates during the preliminary negotiations over the
24 contract. And, they were worksheets that helped to

{DE 07-045} (05-20-08)

1 explain -- that PSNH indicated would help to explain the
2 policy statement and the options that were being made
3 available in the policy statement.

4 Now, the central point that Mr. Norman
5 would testify to, and I would really like to defer to him
6 in terms of the way he explains this, but the central
7 point that he would testify to is that, contrary to the
8 Commission's assumption in the last full paragraph on
9 Page 13, that it is, and this is a quote from the last
10 sentence on Page 13 of the November 21 order, Commission
11 indicated "It is similarly reasonable to treat Options II
12 and III, which are long term options employing a 9 cents
13 per kWh index price, as reflecting an all-in price for
14 both energy and capacity."

15 Now, to be very clear about what we're
16 saying here, Briar Hydro Associates acknowledges, we
17 agree, we concede that Option I or Alternative I included,
18 for the amount of energy that was produced using
19 dependable capacity, Option I included what could fairly
20 be called an all-in price of 8.2 cents a kilowatt-hour for

21 both energy and capacity. So, we have no disagreement
22 about the fact that Option I included an all-in price for
23 energy and capacity. Where we take strong issue with the
24 Commission's conclusion in the last sentence on Page 13 is

{DE 07-045} (05-20-08)

1 that we think there is absolutely no basis in the record
2 for concluding that Options II and III also included an
3 all-in price for energy and capacity. To the contrary,
4 and this would be Mr. Norman's testimony, the record is
5 very clear that the only component of that, of the pricing
6 that was made available by PSNH under Options II and III
7 was an energy component. It did not include capacity in
8 any way. It was based on --

9 CHAIRMAN GETZ: Let me ask you this.

10 Let me ask, well, there's two things. One is just purely
11 administrative. This document that you've handed out that
12 has a December 15, 1981 stamp at the top, --

13 MR. MOFFETT: Yes.

14 CHAIRMAN GETZ: This may answer a
15 question that -- a related question I had had. When I
16 looked at your -- I was just looking at the documents and
17 trying to make sure I've got the chronology correct. And,
18 in your filing from June 29, in sub -- looks like
19 Attachment 4?

20 MR. MOFFETT: Yes. Attachment 4 is a

21 December 29, 1981 letter to Mr. Lyons from New Hampshire

22 Hydro Associates.

23 CHAIRMAN GETZ: That's right. And, in

24 the first sentence it says "NHHA has reviewed your letter

{DE 07-045} (05-20-08)

1 dated December 21, 1981." And, I did not see a letter
2 dated that date. I see, you know, previously the letter
3 from November 20th. And, I'm wondering, was this part --
4 either I've missed the December 21 letter or, you know,
5 perhaps this was part of that December 21 letter. But I
6 just wanted to see if we could --

7 MR. MOFFETT: Mr. Chairman, I can't,
8 unfortunately, answer your question directly. I honestly
9 do not recall at the moment whether or not the December 21
10 letter was -- I can't answer the Chairman's question
11 directly without going back and looking more carefully in
12 the files. I will say that, as everybody understands, the
13 documents that form the basis of this contract are now 26
14 years old. And, PSNH reviewed its files carefully and
15 provided us with copies of everything in their files that
16 they had, and we did the same thing, and provided those
17 copies to PSNH and the other parties. But there were some
18 documents, frankly, that were not available in either of
19 those files. I'll have to go back and look more
20 carefully. But I'm not sure that the December 21, 1981

21 letter is in the record or even that we found it. If I
22 can -- If I can have the opportunity to look in our files
23 and get back to the Commission on that, I'd like to --

24 CHAIRMAN GETZ: Well, let me put it this

{DE 07-045} (05-20-08)

1 way then is, to the extent either of the parties can find
2 the -- has the December 21, 1981 letter, ask that it be
3 submitted to us after the hearing.

4 MR. MOFFETT: Yes.

5 CHAIRMAN GETZ: And, the other issue I
6 wanted to follow up on is when you said the "evidence"
7 that Mr. Norman would speak to. Does that mean his
8 interpretation of what the policy statement means? The
9 evidence being the policy statement and his understanding?

10 MR. MOFFETT: Not just the policy
11 statement, but the exhibits that accompanied the policy
12 statement.

13 CHAIRMAN GETZ: Including the --

14 MR. MOFFETT: And the matter that has
15 just been introduced into the record, namely the --

16 CHAIRMAN GETZ: Okay.

17 MR. MOFFETT: RVP-1, 2 and 3 stands for
18 "Richard V. Perron", who was a colleague of Mr. Lyons at
19 PSNH.

20 CHAIRMAN GETZ: Okay.

21 MR. MOFFETT: And worked with him on
22 developing the formula for pricing under the PSNH policy
23 statement.

24 CHAIRMAN GETZ: Okay.

{DE 07-045} (05-20-08)

1 MR. MOFFETT: And, so, those are his
2 initials.

3 CHAIRMAN GETZ: All right. That answers
4 my questions. Sorry for dragging you off course.

5 MR. MOFFETT: That's okay. I would like
6 to be able to say more about this issue, but Mr. Norman is
7 actually much better qualified to speak about it than I
8 am. And, without putting him under oath, I would like to
9 ask if the Commission would allow him just to say a few
10 words about the significance of those worksheets, and why
11 we think it's important that the Commission actually here
12 testimony on that issue.

13 CHAIRMAN GETZ: I don't think -- that's
14 not the purpose of this oral argument today. You were put
15 in a position to make oral -- to make offers of proof
16 about that --

17 MR. MOFFETT: All right. Then, let's
18 leave it there, just by saying that we would like Mr.
19 Norman to have the opportunity to speak under oath and
20 provide actual evidence to the Commission on that, on that

21 issue.

22 Issue number three has to do with the

23 pre-contract negotiations. Oh, I'm sorry. There is -- I

24 got ahead of myself. There is one further document that

{DE 07-045} (05-20-08)

1 we would like to introduce into the record and include in
2 the documents that Mr. Norman would speak to at a later
3 hearing on the merits. And, these are a series of cases
4 analyzing the actual numbers that are used in Option II
5 and Option III in the PSNH policy statement, as compared
6 with the numbers that fall out from the actual pricing
7 formula in the 1982 contract that was signed between Briar
8 Hydro and PSNH, because they are different. In other
9 words, Mr. Norman will testify to the fact that, based
10 upon the numbers that would fall out from Option II and
11 Option III, under the PSNH policy statement, there should
12 have been a higher contract price than there was in the
13 actual contract that was signed in 1982 between PSNH and
14 New Hampshire Hydro Associates. And, again, Mr. Norman
15 would like the opportunity to explain to the Commission
16 just exactly how those numbers stack up.

17 CHAIRMAN GETZ: Okay. Just for purposes
18 of housekeeping, and recognizing this is not a hearing on
19 the merits, we'll describe the first document, the
20 three-page handwritten calculations, with a date

21 "December 15, 1981" at the top, as "Exhibit A". And,
22 we'll describe the four-page document, with the heading
23 "Option II Fixed Rate Future Escalating Contract" as
24 "Exhibit B". Though, it looks like we have two different

{DE 07-045} (05-20-08)

1 documents up here.

2 CMSR. BELOW: The front page of mine is
3 marked "Option III".

4 CHAIRMAN GETZ: You may just be missing
5 one.

6 CMSR. BELOW: And, the front page of --

7 CHAIRMAN GETZ: It's just in a different
8 order.

9 CMSR. BELOW: So, four pages?

10 CMSR. MORRISON: Four pages.

11 CMSR. BELOW: Okay.

12 (The documents, as described, were
13 herewith marked as Exhibit A and
14 Exhibit B, respectively, for
15 identification.)

16 CHAIRMAN GETZ: Okay. I think we have
17 it. Please proceed.

18 MR. MOFFETT: So, moving onto point
19 number three then, I'd like to refer to the Commission's
20 order of November 21 on Page 14. The Commission had

21 concluded its discussion about the PSNH policy statement
22 and had made the -- what we believe was an unwarranted
23 logical leap. That, because Option I could be fairly
24 characterized as included -- as including an all-in price

{DE 07-045} (05-20-08)

1 for energy and capacity, that therefore Option II and
2 Option III must necessarily also include an all-in price
3 for energy and capacity. And, then, on Page 14, the
4 Commission said "Consequently, we find that PSNH offered a
5 price for both energy and capacity, which NHHA ultimately
6 accepted", this is toward the bottom of the first
7 paragraph on Page 14 of the Commission's order.

8 We, again, we believe strongly that, if
9 the Commission concludes that the language of the contract
10 is ambiguous, there needs to be testimony on what the
11 parties' intent was. And, Briar Hydro Associates has
12 offered, as an attachment to its Motion for
13 Reconsideration and Rehearing, the Affidavit of Warren
14 Mack. Mr. Mack was a colleague of Mr. Norman's, who was
15 participating in the negotiations of this contract in late
16 1981 and early 1982, along with Mr. Norman. Mr. Mack's
17 affidavit has been submitted as part of the -- as an
18 attachment to Briar Hydro's Motion for Rehearing. And, I
19 would just like to read into the record one paragraph from
20 that affidavit, which summarizes Mr. Mack's recollection

21 of the discussions with Mr. Lyons on the central point,
22 the central factual point of whether or not this contract
23 includes capacity. Mr. Mack is not here today. We're
24 submitting this as an offer of proof. But, if the

{DE 07-045} (05-20-08)

1 Commission schedules a hearing, we would expect that we
2 would ask Mr. Mack to come back from California and
3 testify under oath on this, on this point. But this
4 affidavit is given under oath.

5 I call the Commission's attention to
6 Paragraph 5 at the bottom of Page 2 of the Mack affidavit.
7 He's talking about New Hampshire Hydro Associates'
8 negotiations with PSNH. And, he says "In our
9 conversations about the capacity issue, including those in
10 response to my three letters, Mr. Lyons did not waver from
11 his assertion that the capacity of the Lower Penacook
12 Project had no value to PSNH, that PSNH would not pay for
13 it, and that he would not include it in the contract. He
14 referred to PSNH having Seabrook and therefore no need for
15 additional capacity. Mr. Lyons on several occasions
16 referred to the contract being negotiated as being a
17 standard form of contract and that he was not going to
18 change the contract form for NHHA. Notably, he did not
19 state that PSNH was buying the capacity of the Lower
20 Penacook Project nor did he otherwise suggest that the

21 contract included capacity as well as energy. We both

22 understood clearly that it did not."

23 Now, that statement on the record is

24 simply incompatible with the Commission's conclusion at

{DE 07-045} (05-20-08)

1 Page 14 of the Commission's order. And, there is no --
2 there is no evidence in the record that controverts that.
3 Now, I'm not saying that PSNH might not have evidence that
4 could be taken to controvert that. I'm just saying that,
5 on the record, as it stands today, if you go to extraneous
6 evidence, if you go to extrinsic evidence to explain the
7 meaning of the contract, based on the record I think you
8 have to conclude that this contract was a contract solely
9 for energy and did not include capacity. Neither party
10 understood that it included capacity. This despite the
11 fact that PSNH knew, but did not share with Briar Hydro,
12 that the project had capacity. Okay. So, that's point
13 number three.

14 Point number four: We would like the
15 opportunity for Mr. Norman to present testimony on the
16 question of post-contract dealings, which, again, if the
17 contract is ambiguous on its face, we believe are helpful
18 in showing the intent of the parties and the way they
19 acted after the contract. Now, the Commission expressly
20 said, at Page 17, that it was not -- at Page 17 of the

21 November 21st order, that it was not going to consider the
22 post-contract dealings. It said it didn't have to,
23 because it had already come to the conclusion that the
24 contract was based on an all-in price for energy and

{DE 07-045} (05-20-08)

1 capacity. But we would like the opportunity for Mr.
2 Norman to present testimony on a series of post-contract
3 dealings between PSNH and New Hampshire Hydro Associates
4 that we think shed light on the question of whether PSNH
5 ever ascribed any capacity value to the contract.

6 One is the PSNH letter of February 6,
7 1984 to NEPEX, regarding the fact that PSNH was claiming
8 the capacity of the Penacook Lower Falls Project. The
9 point that Mr. Norman would testify to on that score is
10 simply that, although PSNH may have sent that letter to
11 NEPEX, it never copied New Hampshire Hydro Associates on
12 that letter. So, there was no basis for New Hampshire
13 Hydro Associates to understand that that capability
14 responsibility claim had been made to NEPEX by PSNH. In
15 other words, it was a unilateral claim. It was never
16 acknowledged, it was never acceded to by New Hampshire
17 Hydro Associates. And, it can't be taken now as evidence
18 that both parties understood that capacity was included in
19 the contract.

20 CHAIRMAN GETZ: Well, let me make sure I

21 understand. So, you're not advancing this as support for
22 your position in the first instance. Basically, it sounds
23 like it's a defensive argument that --

24 MR. MOFFETT: That's correct. That's

{DE 07-045} (05-20-08)

1 correct.

2 CHAIRMAN GETZ: But we didn't take it
3 into consideration --

4 MR. MOFFETT: The point is -- The point
5 is simply --

6 CHAIRMAN GETZ: Mr. Moffett, you've got
7 to -- Mr. Patnaude is not going to capture all of this if
8 we're both talking.

9 MR. MOFFETT: Excuse me.

10 CHAIRMAN GETZ: But you're not saying
11 that the Commission use that as part of its decision in
12 the first instance?

13 MR. MOFFETT: No, I'm not, because the
14 Commission expressly said, on Page 17, that it would not
15 consider the post-contract dealings between the parties.

16 The second evidence of post-contract dealings that we like
17 Mr. Norman to be able to testify to is a letter that was
18 sent by PSNH, specifically Todd Wicker, to Tom Tarpey, who
19 was associated with Mr. Norman and New Hampshire Hydro
20 Associates, in 1990, May 14, 1990. And, in that letter,

21 Mr. Wicker included a spreadsheet, which purported to
22 demonstrate how PSNH had arrived at an offer that it was
23 making to New Hampshire Hydro Associates to buy out the
24 front-end loading value of the contract. It is a

{DE 07-045} (05-20-08)

1 spreadsheet with a series of columns. And, the columns
2 include several columns that purport to address capacity,
3 but they are filled with zeros. We'd like Mr. Norman to
4 be able to address the impact and the significance of that
5 spreadsheet and what it says about whether PSNH considered
6 that the contract included capacity; we think it's pretty
7 clear that it didn't. So, that is point number -- excuse
8 me. I'm sorry, yes. This is already in the record. It
9 is Exhibit D to the Briar Hydro reply memorandum of
10 June 29th, 2007. And, there is an analysis attached to
11 that, it's called Appendix B-1, which Mr. Norman would
12 like to be able to speak to.

13 As a third component of this point
14 number four, we would like Mr. Norman to be able to
15 comment on an e-mail that he received from John MacDonald
16 of PSNH on November 7th, 2006, related to the point of
17 whether or not PSNH had bothered to keep track of capacity
18 value for any of these contracts, other than the rate
19 orders. That's already in the record. It is Exhibit C to
20 Briar Hydro's original March 28th, 2007 Petition for

21 Declaratory Ruling.

22 And, finally, we would like Mr. Norman

23 to be able to address the question of the actual invoices

24 that were used in compensating New Hampshire Hydro

{DE 07-045} (05-20-08)

1 Associates, and then Briar Hydro Associates, for what was
2 sold to PSNH under the contract. A sample copy of those
3 invoices is attached as Exhibit B to the original Briar
4 Hydro Petition for a Declaratory Ruling. And, it makes it
5 clear that PSNH is paying for energy only, no capacity, at
6 the rate of 3.53 cents per kilowatt-hour.

7 So, those four points are points on
8 which we would like Mr. Norman to have the opportunity to
9 offer sworn testimony on the record. We would also like
10 the opportunity to revisit several points in the
11 Commission's order that deal perhaps not so much with
12 factual questions as legal arguments. And, in the notice
13 of today's hearing, the Commission invited us to summarize
14 any legal arguments that we thought were misconstrued or
15 overlooked, in addition to factual points.

16 The first of these, so this is point
17 number five, is the whole argument about whether or not
18 output, as it's used in the contract, equates to capacity
19 or to energy. In response to the Chairman's invitation at
20 the original prehearing conference on May 23rd last year,

21 we presented in our reply memorandum a series of cases,
22 notably including several from New York and Virginia, but
23 also some from Indiana and Maryland, in which other courts
24 had construed the term "output" in a way that clearly

{DE 07-045} (05-20-08)

1 identified the term "output" with energy, rather than
2 capacity. It was -- It was surprising to us when the
3 Commission, in its order of November 21st, noted that we
4 had presented those cases, but then said nothing about
5 them. It didn't distinguish -- The Commission didn't
6 distinguish them. It didn't say why they thought they
7 might not be relevant. It just mentioned them and then
8 passed on. So, we would only say that, to the extent that
9 legal precedent has value, which we took from the
10 Chairman's question it should have, we felt that the
11 Commission had essentially overlooked the legal
12 precedential value of those cases.

13 Point number six: The Commission, on
14 Page 16 of its November 21st order, makes the following
15 statement: This is toward the bottom of the page. It's
16 the last couple of sentences on Page 16. It says
17 "Generation capacity does not exist in the abstract
18 entirely separable from the energy produced by a facility.
19 Energy output is the result of the using generating
20 capacity over time." We agree with the second statement

21 incidentally, it's the first statement that gives us
22 trouble. We think, in fact, that the industry, including
23 the parties, PSNH and New Hampshire Hydro Associates, and
24 the Commission and FERC have clearly differentiated

{DE 07-045} (05-20-08)

1 between energy and capacity since 1979, when FERC issued
2 its Order 69 in the PURPA case. We talked about that at
3 some length in our reply memorandum. I don't want to
4 rehash the arguments here. But, in fact, throughout Order
5 69 from FERC, the distinction is made between energy and
6 capacity, and FERC explains in some detail the reason why
7 they are different and the reason why they have to be
8 considered differently, in terms of capturing the value
9 that comes from a generating facility.

10 CHAIRMAN GETZ: But isn't it true, at
11 the time of the formation of this contract, that energy
12 and capacity was compensated through a cents per
13 kilowatt-hour rate that included both attributes of energy
14 and capacity?

15 MR. MOFFETT: Only for short-term
16 contracts. Only for contracts that specifically used the
17 Commission's 8.2 and 7.7 cents bifurcated pricing.

18 CHAIRMAN GETZ: And also the Option I --

19 MR. MOFFETT: This was -- I'm sorry?

20 CHAIRMAN GETZ: And also the Option I

21 under the policy statement.

22 MR. MOFFETT: Option I specifically

23 referred to and incorporated the Commission's bifurcated

24 price, which included an all-in price for energy and

{DE 07-045} (05-20-08)

1 capacity up to -- up to the amount of dependable capacity,
2 and then a strict energy price, a lower price of 7.7 cents
3 for any energy in excess of that dependable capacity.
4 That was captured in Option I of PSNH's policy statement,
5 but that was not the basis for the New Hampshire Hydro
6 Associates' contract in 1982. The basis for that contract
7 was Option III. And, as we would like to give Mr. Norman
8 a chance to testify to, Option III plainly did not include
9 capacity.

10 CHAIRMAN GETZ: Plainly did not include
11 capacity or assigned no value to capacity?

12 MR. MOFFETT: It just didn't deal with
13 capacity. It was based strictly and entirely, solely on
14 PSNH's incremental cost of energy. And, that phrase
15 "incremental energy cost" is very clearly defined both in
16 the PSNH policy statement and in the contract to include
17 energy alone.

18 CHAIRMAN GETZ: Is it fair to conclude
19 that what the Commission was doing at the time, in terms
20 of the cents per kilowatt-hour price that included both

21 attributes of energy and capacity, was it was a pricing

22 mechanism for administrative ease?

23 MR. MOFFETT: Well, Mr. Chairman, that

24 may be. I wouldn't want to speak to that. I wouldn't

{DE 07-045} (05-20-08)

1 want to characterize what PSNH or the Commission had in
2 mind when it set that bifurcated price. The major point
3 here is, we don't have any argument with the Commission or
4 with PSNH that Option I included an all-in price for
5 energy and capacity. We simply don't understand how the
6 Commission could make a logical leap that, because
7 capacity was included in an all-in price in Option I, that
8 therefore necessarily had to be included -- that capacity
9 had to be included in an all-in price under Options II and
10 Options III. There is, in fact, no evidence in the record
11 that would support that, and there is evidence in the
12 record that contradicts that, that suggests otherwise.

13 CMSR. BELOW: Just to focus on the
14 sentence that you seem to be taking exception to, the
15 statement that "Generation capacity does not exist in the
16 abstract entirely separable from the energy produced by a
17 facility." Are you simply -- Are you saying that sort of
18 troubles you or that you think there's a logical -- you
19 have a logical disagreement with that statement?

20 MR. MOFFETT: Both. And, we think --

21 And, we think that the industry has long recognized the
22 difference and has compensated energy and capacity
23 differently.

24 CMSR. BELOW: Well, in looking at this

{DE 07-045} (05-20-08)

1 specific power plant, are you suggesting it had the
2 ability to generate electricity that could be used for
3 some other purpose than to deliver that electricity in its
4 entirety to PSNH.

5 MR. MOFFETT: No. No, Commissioner
6 Below, I'm not suggesting that. We don't argue that the
7 energy from that, from that plant, has to go to PSNH under
8 the contract. What we're saying is --

9 CMSR. BELOW: So, isn't the entire
10 capacity of that generation facility obligated to meet its
11 contractual obligation to deliver the entire output to
12 PSNH?

13 MR. MOFFETT: No, because, and in order
14 to make this point maybe as simply as I can, we're clear
15 that New Hampshire Hydro Associates, or Briar Hydro
16 Associates now, is obligated to provide all of its energy
17 or, if you want, all of its output to PSNH, but capacity
18 is different. And, in order to make that point, I would
19 simply call your attention to the fact that ISO-New
20 England and FERC have recognized that capacity has a

21 separate value in the Forward Capacity Market, which
22 basically says "we're going to ascribe value to steel and
23 concrete in the ground that represents the capacity to
24 produce electric energy, even though the actual energy

{DE 07-045} (05-20-08)

1 that it produces might be sold to a different party."

2 CMSR. BELOW: But are you saying they're
3 willing to recognize the ability to generate electricity
4 capacity distinct from and separate from actually
5 producing that electricity, in the sense that, if the
6 plant is not actually contractually capable of delivering
7 the electricity or, you know, actually using that
8 capacity, is that a different concept?

9 MR. MOFFETT: What the capacity -- What
10 the capacity value represents is the ability to produce
11 the energy. But you could have the capacity to produce
12 the energy without having an obligation to sell the
13 energy, and vice versa. You can have an obligation to
14 sell the energy, without being obligated to give the value
15 that's represented by the capacity to the same party.
16 That's what the Forward Capacity Market stands for. And,
17 I understand the point that you're making. I just think
18 -- I just think it's important to recognize that the
19 industry ascribes different values to capacity and energy.
20 It does not assume that, because one party is entitled to

21 the entire output, that is all of the energy that is
22 produced by a plant, that that party also has an
23 entitlement to the value of the capacity.

24 Another way of saying it would be simply

{DE 07-045} (05-20-08)

1 to say that there are -- you can imagine circumstances
2 under which a plant that has a given capacity might shut
3 down, it might stop selling energy. But, as long as it
4 has the capacity to start up again and produce energy,
5 ISO-New England and FERC and NEPOOL will recognize that
6 capacity separately from the energy that could have been
7 produced using that capacity.

8 CMSR. BELOW: But, just to be clear,
9 you're not asserting that this generation unit could use
10 its capacity to produce electricity for any customer other
11 than PSNH?

12 MR. MOFFETT: That's correct. All of
13 the energy, all of the energy produced by the Penacook
14 Lower Falls facilities is obligated to be sold to PSNH
15 under the contract.

16 CMSR. BELOW: Okay.

17 MR. MOFFETT: Okay. Point number seven,
18 and this is my last one: In PSNH's memorandum of June 15,
19 2007, I'm trying to find it here, at Page 3 I believe,
20 PSNH deals with the FERC regulations and the Code of

21 Federal Regulations that define the obligations of
22 qualifying facilities. And, it makes the statement, which
23 we believe is unsupported, that "a qualifying facility
24 selling under these regulations to an electric utility

{DE 07-045} (05-20-08)

1 cannot sell energy without selling capacity." We don't
2 believe there's any support for that in FERC Order 69,
3 which we -- which we analyzed at some length in our reply
4 memorandum of June 29th. But the more salient point, for
5 purposes of this morning, and this gets to a factual point
6 that again I'd like Mr. Norman to have the opportunity to
7 testify to, PSNH makes a distinction between a qualifying
8 facility that it says is obligated to sell both energy and
9 capacity together, under 18 CFR Section 292.303(a). This
10 is at the bottom of Page 3 in the PSNH memorandum. And,
11 then, it goes onto say "But there's an exception under
12 Section (d) of 292.303. And that exception would allow
13 capacity to be sold separately from energy in the case of
14 a qualifying facility that is not directly connected to
15 the purchasing utility", in this case PSNH, "but rather
16 has to wheel through an interconnecting utility." Mr.
17 Norman would like the opportunity to testify that the
18 Penacook Lower Falls facility is not directly connected to
19 PSNH. It is connected to Concord Electric, or what is now
20 Unital, and Unital wheels that power to PSNH. So, it

21 falls directly within the exception to what PSNH we
22 believe mistakenly calls a general rule that a qualifying
23 facility cannot sell capacity separately from energy.

24 And, with that, Mr. Chairman, I'll stand

{DE 07-045} (05-20-08)

1 down. I've talked an awful lot. And, we -- oh, I'm sorry
2 Mrs. Geiger is calling my attention to the fact that we're
3 not sure that a second -- actually, it's a third document
4 that we had meant to include in the record got into the
5 record this morning. This is a March 5th letter to Mr.
6 Mack, from John Lyons, with an attachment that shows the
7 basis for PSNH's pricing formula based on the incremental
8 energy cost. And, if we could, I'd like to make sure that
9 that gets into the record as well.

10 CHAIRMAN GETZ: Okay. Let's mark this
11 as "Exhibit C".

12 (The document, as described, was
13 herewith marked as Exhibit C for
14 identification.)

15 CHAIRMAN GETZ: I want to return for a
16 moment, Mr. Moffett, to the policy statement. I think
17 you've indicated that you agree that Option I is an all-in
18 price cents per kilowatt-hour that includes energy and
19 capacity?

20 MR. MOFFETT: Up to the point of

21 dependable capacity, yes.

22 CHAIRMAN GETZ: And, then, it seems that

23 we have two options with respect to Options II and III.

24 Is that, and the one that we -- the conclusion we made in

{DE 07-045} (05-20-08)

1 the order was that Options II and III are equivalent in
2 nature to Option I, to the extent that there are both
3 attributes of energy and capacity being purchased by PSNH.
4 It's simply that PSNH assigned no value to that capacity.
5 The other option, the other alternative is that Options II
6 and III do not include capacity. And, it seems that the
7 crux of that conclusion would have to be based on the fact
8 of the way the word "energy" was used. That it was only
9 meant to buy energy, and that it was basically saying "you
10 keep the capacity." Is that a fair characterization of
11 the alternatives of how to interpret?

12 MR. MOFFETT: With this qualification,
13 Mr. Chairman. I don't think I would agree with your first
14 statement that PSNH was -- said "we're buying the
15 capacity, but we're not ascribing any value to it." In
16 fact, the internal PSNH memoranda from Mike Cannata to
17 Henry Ellis in this same time frame made it clear that
18 PSNH did ascribe a value, specifically 1.57 megawatts of
19 capacity. It's just that that was not shared with NHHA.
20 So, when John Lyons took the position that the contract

21 had no value, and he didn't want to pay for it and he
22 didn't want to include it in the contract, the only fair
23 inference was they understood there was capacity, they
24 just didn't want to include that in the contract.

{DE 07-045} (05-20-08)

1 CHAIRMAN GETZ: Well, I guess I have a
2 hard time reconciling what you just said with the
3 November 21, 1981 letter from Mr. Lyons, which is the
4 cover to the policy statement. It seems that you could
5 read this package as saying, in this communication to Mr.
6 Norman, "You have" -- "We're providing three options.
7 Pick an option." And, why would we not conclude that they
8 were comparable options, in terms of we will -- this is
9 the value we will provide you for all of what you have,
10 with Option I being specific about having both attributes,
11 and in this letter saying "This policy is somewhat more
12 liberal in compensation for purchased energy", I realize
13 he uses the word "energy", but the options conclude all
14 three, which -- and you've already admitted, in Option I,
15 includes energy and capacity. So, this is what I'm having
16 trouble reconciling.

17 MR. MOFFETT: Well, let me just say
18 first, I'd really like to give Mr. Norman a chance to
19 speak to that, because I think he's more grounded in the
20 details. But I will tell you that there are at least two

21 answers to that question. One is that, unlike Option I,
22 PSNH made very clear in the policy statement that Option
23 II and Option III were based on PSNH's incremental cost of
24 energy. That term "incremental cost of energy" or

{DE 07-045} (05-20-08)

1 "incremental energy cost" was very specifically defined by
2 PSNH in an addendum to the policy statement, it's at Page
3 4 of the policy statement, and it's entitled "Definition
4 of Incremental Energy Cost", and that same definition is
5 included in the contract itself in Article 3, the price
6 formula. So, that's --

7 CHAIRMAN GETZ: Yes, I recognize that.
8 But that seems to me you're taking that as the means of
9 calculating what Briar would be paid to mean that PSNH
10 expressly waived any interest in the capacity.

11 MR. MOFFETT: No, that's not what we're
12 arguing. We're not arguing that in connection with the
13 policy statement. We are arguing that in connection with
14 the evidence that we would proffer on the pre-contract
15 negotiations between Mr. Mack and Mr. Norman on the one
16 hand and Mr. Lyons and Mr. Perron on the other. But, for
17 purposes of an analysis of the policy statement, we're not
18 -- all we're arguing is that, by its own terms, the policy
19 statement drafted and developed by PSNH specifically links
20 the pricing under Options II and III solely and entirely

21 to PSNH's incremental cost of energy. And, that is very
22 specifically defined by PSNH in the policy statement and
23 in the contract. That's one thing.

24 The second thing, the second reason I

{DE 07-045} (05-20-08)

1 would respectfully take issue with your characterization
2 is really something that, again, I'd like Mr. Norman to
3 have the opportunity to testify to, but the worksheets
4 that were attached to the policy statement, one of which
5 was already in the record, the others of which have been
6 submitted into the record this morning, really speak
7 volumes about how PSNH viewed the pricing and the basis
8 for the pricing under Option II and Option III, but
9 specifically Option -- well, both Option II and Option
10 III. It's clear that Option II and Option III were
11 supposed to have an equivalent economic value. That point
12 was not -- did not extend to Option I, okay? Option I had
13 a different economic value. It was a short-term contract.
14 Option II and Option III were based on PSNH's projections
15 about the cost that it would bear to produce energy,
16 energy only, over time, over the term, the long term of
17 the contract, 30 years. And, we just think that, if the
18 Commission -- if the Commission really believes that the
19 contract is not clear on its face, and that it requires
20 extraneous evidence to interpret the meaning of "energy"

21 and "output" and things like that, we'd like Mr. Norman to
22 have the -- and Mr. Mack, for that matter, to have the
23 opportunity to testify about what they understood going
24 into -- going into the signing of that contract.

{DE 07-045} (05-20-08)

1 CHAIRMAN GETZ: Okay. Thank you. Mr.

2 Traum, did you --

3 MR. TRAUM: After having listened to
4 Briar Hydro's comments this morning, the OCA continues to
5 support the arguments laid out by PSNH previously and the
6 Commission decision.

7 CHAIRMAN GETZ: Thank you. And,
8 Ms. Ross, you had not intended to make argument this
9 morning?

10 MS. ROSS: Staff takes no position on
11 the issues. Thank you.

12 CHAIRMAN GETZ: Okay. Mr. Eaton.

13 MR. EATON: Thank you, Mr. Chairman. As
14 I understand the task this morning we are to address is
15 whether rehearing ought to be granted so that a further
16 evidentiary hearing can be held. More discovery would be
17 taken and witnesses presented as to what was in the minds
18 of the persons who negotiated this agreement more than 25
19 years ago. PSNH believes that the Commission's Order
20 Number --

21 CHAIRMAN GETZ: Well, let me stop you
22 there. I guess Briar has offered the testimony of Mr.
23 Norman and Mr. Mack. Is there anyone available from PSNH
24 who could testify to these matters?

{DE 07-045} (05-20-08)

1 MR. EATON: Well, that -- I was going to
2 bring that up in my -- in comments, but I can address them
3 now. Mr. Lyons joined PSNH in 1948. He retired in 1990.
4 We know that he still is alive, but he is at least in his
5 late 80's, and may be approaching 90 years old. He, in
6 his last official duties for the Company, supervised the
7 supplemental energy supply matters. He had many special
8 contracts or contracts and rate orders to deal with. And,
9 we have not contacted him, we have not asked him if he
10 remembers this particular negotiations. And, we think
11 we're at a distinct disadvantage by the fact that this is
12 someone who has left the Company almost 20 years ago and
13 his recollection may not be good. It --

14 CHAIRMAN GETZ: Well, what about
15 Mr. Perron, who's --

16 MR. EATON: Mr. Perron has also left the
17 Company in the past, I think, five years. And, I spoke
18 with him about this, but he said he was mostly a person
19 who didn't negotiate, but who did do the calculations, and
20 he did do the calculations that are in Exhibit A. So,

21 we're at a disadvantage.

22 CHAIRMAN GETZ: Well, let me then ask

23 this question, in terms -- I guess I don't think we've had

24 formal discovery, but -- that's correct?

{DE 07-045} (05-20-08)

1 MR. EATON: Well, we have exchanged
2 documents that were in our possession that relate to this
3 contract.

4 CHAIRMAN GETZ: So, you have provided
5 Briar all the documents relevant to the policy statement
6 and to this contract?

7 MR. EATON: Yes, everything that we had.

8 CHAIRMAN GETZ: And, we have everything?

9 MR. EATON: I believe they were given to
10 Attorney Ross as well.

11 MS. ROSS: That's correct.

12 CHAIRMAN GETZ: Thank you. Okay.
13 Please proceed. And, to follow up on that, you know, all
14 of this or much of this information is hearsay of what Mr.
15 Mack may testify to and what Mr. Norman may testify to as
16 to conversations that took place. Mr. Mack, in the
17 paragraph that Mr. Moffett referred to, he concludes in
18 that paragraph that "we both understood that it did not",
19 so Mr. Mack is testifying as to what is in Mr. Lyons' mind
20 many, many years ago. Which brings me to the point of

21 whether the Commission is bound by the technical rules of
22 evidence. It's not, it doesn't follow the strict rules of
23 evidence, but that was described in a decision the
24 Commission made in Re: New England Electric Transmission,

{DE 07-045} (05-20-08)

1 and it was describing the difference between a civil court
2 matter and an administrative proceeding before the
3 Commission. And, this is at 67 NHPUC 408, that's where
4 the decision starts, and at 412 the Commission said that
5 "First, strict rules of evidence are not applied,
6 especially the hearsay rules. Second, most testimony and
7 documentary evidence will be expert testimony or exhibits
8 based on the expertise of the witness sponsoring the
9 exhibit. Third, the problems associated with drawing
10 inferences from eyewitness accounts of past behavior or
11 events are virtually nonexistent in these types of
12 proceedings." Well, that third point is exactly what Mr.
13 Mack and Mr. Norman will talk about, is what Mr. Lyons
14 said and what the conversations were back then. So, it is
15 eyewitness, earwitness accounts and memories of something
16 that happened 28 years ago, which I think is entirely
17 unreliable and, therefore, we shouldn't explore that area
18 of inquiry, and would not necessarily need a rehearing for
19 the Commission to conclude this matter.

20 We have already presented our arguments

21 in our June 6th memorandum in opposition to the Briar
22 Hydro petition and our objection to the Motion for
23 Rehearing, which we filed on December 31st. We think the
24 Commission's decision was correct. We won't repeat those

{DE 07-045} (05-20-08)

1 arguments at this time.

2 Motions for rehearing direct attention
3 to matters overlooked or mistakenly conceived in the
4 original decision and require an examination of the record
5 already before the fact-finder. Good reason is shown when
6 a party demonstrates that new evidence exists that was
7 unavailable at the original hearing. The Commission need
8 not grant a request for rehearing so that a party has a
9 second chance to present evidence that it could have
10 presented earlier. Those are quotes that I included in
11 our brief in opposition to the Motion for Rehearing.

12 It was Briar Hydro that suggested that
13 we could argue this case based upon the agreement and the
14 documents exchanged by the parties. Now, Briar Hydro
15 doesn't like the decision the Commission made, although
16 the decision is fully supported by the documents and the
17 regulatory context in which the agreement was negotiated.
18 After expressly waiving an evidentiary hearing, Briar
19 Hydro now requests on rehearing that the Commission hold
20 an evidentiary hearing. And, as I explained, why don't we

21 simply provide Mr. Lyons, and I'm not sure that we can or
22 that he will be a reliable witness, given his advanced
23 years, and the number of years he's been away from this
24 subject matter.

{DE 07-045} (05-20-08)

1 What I'd like to point out to the
2 Commission is that, which I haven't presented before, or
3 perhaps I did allude to it in our brief in opposition to
4 the Motion for Rehearing, is Briar Hydro can't legally
5 obtain the relief it seeks. And, without conceding our
6 original argument that capacity is included in the
7 contract, we still believe that, let's assume they're
8 correct, that the only thing that's in the contract is the
9 energy. For purposes of this argument, that's what I'm
10 going to assume. Now that ISO-New England is offering
11 Forward Capacity Market payments, Briar would like to
12 receive those payments. There's two ways that they could
13 do this; either outside of the contract with PSNH or as
14 part of the contract with PSNH.

15 If Briar Hydro were to offer the
16 capacity in a Forward Capacity Market, directly to ISO New
17 England, we believe they would be violating PURPA. PURPA
18 established two -- three distinct advantages for this
19 emerging small power industry. Number one, the local
20 utility could be required to purchase the output. And,

21 the local utility in this case was Concord Electric, but
22 Concord Electric could also wheel that output to another
23 buying utility. Number two, the utility could be required
24 to provide backup power or station service. Number three,

{DE 07-045} (05-20-08)

1 and the point that's most important for this inquiry, is
2 the qualifying facility could avoid regulation as a public
3 utility, if it sold its output to the local utility, under
4 rates established by the local Commission, or under
5 contracts that were approved and sanctioned by the
6 Commission, as these were, they avoided FERC jurisdiction.
7 Now, if they split things up and sell capacity to one
8 party and energy to another party, which they would do
9 outside of the contract, they'd blow up their QF status.
10 They're no longer a qualifying facility. And, they might
11 love that, because right now the contract has them selling
12 to PSNH at well below the market price. But we're not
13 going to let them get out of the contract. They still owe
14 us five years of below contract prices. And, we're going
15 to hold them to that contract, as they should. But
16 they're arguing all these facts about what was in, what
17 was out, they could not and did not attempt to sell any
18 capacity until the Forward Capacity Market happened.

19 The second --

20 CMSR. BELOW: Is this a new legal

21 argument that you're positing here that should have been
22 brought up earlier or is this sort of a defense to what
23 has been raised today?

24 MR. EATON: It's an argument, I believe

{DE 07-045} (05-20-08)

1 the second argument that we point out was in our brief or
2 in our opposition to the memorandum -- I mean, the Motion
3 for Rehearing.

4 CMSR. BELOW: Your objection to the
5 Motion for Rehearing?

6 MR. EATON: Right. And, that's if -- if
7 they're trying to work through the contract, which I
8 believe they are, I believe the initial request of Mr.
9 MacDonald was "why don't you pass through the Forward
10 Capacity Market payments to us that you're receiving for
11 Penacook Lower Falls." Now, that changes the contract.
12 That alters the contract. And, the series of cases that
13 start with the Freehold Cogeneration and what the small
14 power producers bring up all the time, is the Commission
15 can't change the rules halfway through based upon changed
16 circumstances. That's what Briar Hydro wants to do.

17 CHAIRMAN GETZ: Well, but, I mean, isn't
18 that a distinction between whether PSNH purchased the
19 energy and capacity in the first instance, which is your
20 position, and versus Briar's position that you -- that

21 PSNH only purchased the energy, and the capacity was
22 waived, not purchased by PSNH?

23 MR. EATON: Well, PSNH has taken credit
24 for the capacity ever since the first month that that was

{DE 07-045} (05-20-08)

1 provided. Ever since the first month of the contract, we
2 have claimed capacity for this. And, --

3 CHAIRMAN GETZ: Well, I guess that goes
4 to perhaps what PSNH thought it was buying, but it doesn't
5 necessarily speak to what Briar thought it was selling.
6 Is that fair to say?

7 MR. EATON: Well, if we weren't entitled
8 to that value, I think it's incumbent upon the seller to
9 have discovered that in public documents, and also in --
10 periodically we have to have this capacity audited. In
11 fact, in January 31st of 1984, there was -- there was an
12 audit created, and it was sent to NEPEX. This is the
13 document that both PSNH and Briar attached to their
14 pleadings. It's Attachment B to ours. And, right there
15 there are some readings from the plant as to instantaneous
16 kilowatts of capacity, and our claim as to what the
17 capacity value was, which was 2.5 megawatts. I think our
18 initial position is that we resisted any payment for
19 capacity in the contract, we valued it at zero, but it was
20 included in the contract.

21 CHAIRMAN GETZ: Okay. Let me just stop
22 there for a second. I don't know if I got too far off on
23 the QF issue. Did you have additional inquiry,
24 Commissioner Below?

{DE 07-045} (05-20-08)

1 CMSR. BELOW: No. I mean, in your reply
2 objection, it was in the context of the jurisdictional
3 issue, which hasn't been orally argued today. But you're
4 saying this also implicates the interpretation of the
5 contract, this sort of legal constraint, as a QF, their
6 ability to sell energy and capacity to different entities
7 and different markets?

8 MR. EATON: Right. We don't believe
9 they have that -- they have that authority to do as a
10 qualifying facility. That they have to sell only to the
11 interconnecting utility or the utility to which it's
12 wheeled. Or else they're no longer a qualifying facility,
13 they become an exempt wholesale generator today, which was
14 not known back then. Back then they would have had to
15 file their capacity contract with FERC and have it
16 approved, and be subject to FERC jurisdiction. So, their
17 energy would have been -- would have been QF New Hampshire
18 regulated power or New Hampshire sanctioned power, and
19 their capacity somehow be FERC power. And, I don't
20 believe that there's any authority for splitting those two

21 things up if you are a qualifying facility. That's how

22 you got the -- that's how you got to buy from --

23 CHAIRMAN GETZ: Is that a timing -- Does

24 that apply just at the time of formation or does that also

{DE 07-045} (05-20-08)

1 apply today you're saying?

2 MR. EATON: I think it applies today,
3 because now we're going into the changed circumstances.
4 Wouldn't it be great if we could just say "gee, avoided
5 costs have really changed since we determined. And, so,
6 let's reopen all the rate orders because avoided costs
7 have changed." Briar is saying "Hey, there's now a great
8 capacity market. We ought to get that money. Either we
9 ought to be able to go out and apply for it separately,
10 because it's separate from the contract, or, PSNH, you
11 ought to flow that money through to us, because you never
12 purchased the capacity." And, now, you're changing the
13 express terms of the contract and getting paid for
14 capacity through the contract. Either way, I don't
15 believe they can do it.

16 CHAIRMAN GETZ: Well, let me step back a
17 second to your statement that "the contract included
18 capacity". That is what you said, correct?

19 MR. EATON: Uh-huh.

20 CHAIRMAN GETZ: If we take it a step

21 back to the policy statement, the PSNH policy statement.

22 So, is it also your position that Options II and III

23 included capacity?

24 MR. EATON: Yes, and it was priced at

{DE 07-045} (05-20-08)

1 zero. There was no reason to do a calculation of avoided
2 capacity costs, because under that offer the capacity was
3 priced at zero. And, all the way through, at that time
4 divestiture of -- I'm sorry, the sell-down of PSNH's share
5 in Seabrook had started, that started I believe in the
6 beginning of 1979, but PSNH still believed it was going to
7 have 36 percent of both Unit 1 and Unit 2, which was about
8 800 megawatts of capacity, and their offer was energy
9 priced at the 10 cents. And, PSNH made many changes to
10 its original offer. So, that 10 cents was paid for the
11 first eight or ten years under this contract, in order to
12 satisfy Briar -- New Hampshire Hydro Associates' need for
13 financing. And, so, they made changes. So, it wasn't
14 just simply a 9 cent contract. It was a front-end loaded
15 contract with 10 cents for several years. So, they got
16 the value of that, and they did their financing and they
17 signed the agreement.

18 So, to say that "We now are entitled to
19 payments for Forward Capacity Market through the contract"
20 flies in the face of their own arguments that "capacity is

21 not in the contract". And, alternatively, going around
22 PSNH and applying directly we think blows up their QF
23 status, which they are required to stay till the end of
24 the agreement. I have nothing further.

{DE 07-045} (05-20-08)

1 CHAIRMAN GETZ: Okay.

2 CMSR. BELOW: Are you assuming that the
3 documents that were attached to the various briefs are to
4 be considered in effect as evidence, even though there was
5 not an evidentiary hearing, because both parties waived an
6 evidentiary hearing, and both parties used documents to
7 substantiate their arguments?

8 MR. EATON: Yes, I am. I don't think
9 any party objected to the use of documents attached to
10 their pleadings. We exchanged those with the idea we
11 could use those documents, and I could be corrected if I'm
12 -- if Attorney Moffett or Attorney Ross has a different
13 opinion, but that the reason for exchanging the documents
14 is that these were documents that centered around the
15 formation of the contract and would help in
16 interpretation.

17 CMSR. BELOW: And, if we were to decide
18 that we should have an evidentiary hearing to more closely
19 scrutinize those documents, or have additional discovery,
20 I'm just wondering, I've heard the Forward Capacity Market

21 and how that plays in here, and we didn't really consider

22 that, that was not exactly part of the original arguments.

23 But now it seems like it's been brought in by both sides

24 as to how the Forward Capacity Market looks at capacity as

{DE 07-045} (05-20-08)

1 a concept. Do you have an opinion as to whether that
2 bears on our decision or not or whether that should be the
3 subject of examination, if we did go to an evidentiary
4 hearing?

5 MR. EATON: Well, I'll -- I think the
6 Commission asked us to address that, of how the Forward
7 Capacity Market looks at capacity, who owns it, who
8 controls it. And, so, I think both parties did address it
9 already. So, yes, I believe, if you go onto an
10 evidentiary hearing, that that's part of the evidentiary
11 hearing.

12 CMSR. BELOW: Okay.

13 CHAIRMAN GETZ: Mr. Moffett, an
14 opportunity for rebuttal?

15 MR. MOFFETT: I do have some rebuttal,
16 Mr. Chairman. But I'd like to ask, if I may, would it be
17 possible to take a four or five minute break, because I'd
18 like to -- I'd like to talk with Mr. Norman about some
19 points that were argued about earlier. Is that --

20 CHAIRMAN GETZ: I think Mr. Patnaude

21 would appreciate it as well. So, why don't we take 15
22 minutes.

23 (Recess taken at 11:38 a.m. and the
24 hearing reconvened at 11:55 a.m.)

{DE 07-045} (05-20-08)

1 CHAIRMAN GETZ: Before we turn to
2 Mr. Moffett, let me just make sure I understand. Mr.
3 Eaton, with the specific question that was in the
4 secretarial letter about what evidence you would produce
5 at a hearing, let me see if this is a fair
6 characterization. You basically said that, of the two
7 potential witnesses, one you spoke to and had no knowledge
8 of the negotiations, so you don't intend to produce him?

9 MR. EATON: That was my understanding.
10 I can -- I can circle back and talk to him again, and we
11 can talk to Mr. Lyons.

12 CHAIRMAN GETZ: Well, I mean, I'm just
13 saying, in terms of where you are today.

14 MR. EATON: Right.

15 CHAIRMAN GETZ: And, the other was that
16 you hadn't talked to the other witness, and you seemed to
17 be expressing a concern about his recollection. And,
18 then, so, is it fair to say then that there is no other
19 evidence that you would produce at a hearing, that you're
20 prepared to rely on the documents that have been

21 submitted, or is there other evidence?

22 MR. EATON: Well, there's other

23 evidence. I think it's -- we could put in the testimony

24 of concerning how we treated the capacity. Again, this is

{DE 07-045} (05-20-08)

1 a post-contract, but we could have a witness that would
2 show that we claimed the capacity and got credit for the
3 capacity during a period when capacity did have a positive
4 value. And, you know, we claim it today as part of our
5 portfolio for capability responsibility, when that was the
6 term, and ever since. It's part of our portfolio. And,
7 it's been recognized by NEPOOL and by ISO-New England as
8 part of PSNH's portfolio. And, so, we could put on a
9 witness to describe that. And, I think that's evidence
10 that either Briar Hydro knew or should have known about
11 that or they have sat on their rights for 18 years, 20
12 years of this contract.

13 CHAIRMAN GETZ: Okay. So, then, there
14 would be no other evidence that you would seek to produce?

15 MR. EATON: Not at this time.

16 CHAIRMAN GETZ: Okay.

17 MR. EATON: That I can think of.

18 CHAIRMAN GETZ: All right. Then, we'll
19 turn to Mr. Moffett, your opportunity for rebuttal. And,
20 I'm hopeful you'll be -- part of that rebuttal would be

21 responding to the QF issue raised by Mr. Eaton. Please.

22 MR. MOFFETT: Thank you, Mr. Chairman.

23 First, on the point that was just being discussed, it's

24 our position that we understand now, from having been

{DE 07-045} (05-20-08)

1 provided a copy of the "NEPEX letter" by PSNH, in
2 connection with the discovery or the exchange of documents
3 in this proceeding, that PSNH was claiming that capacity
4 "from the beginning". We did not understand it at the
5 time. Further to that point, I'd like to just refer
6 briefly to the e-mail, which is a part of the record, and
7 this is Exhibit D, I believe, in -- I'm sorry, Exhibit C
8 to the original Briar Hydro petition, in which Mr.
9 MacDonald is telling Mr. Norman, in an e-mail, in
10 reference to the short-term purchases, that he says "Up
11 till now, no real monthly capacity margin has existed.
12 Therefore, we have not paid and won't pay a capacity
13 component of short-term rates until the new ISO capacity
14 market starts in December. Therefore, FCM payments",
15 that's Forward Capacity Market payments, "will be passed
16 through and forwarded to the QF owner."

17 CHAIRMAN GETZ: I'm sorry, just before
18 you go into an explanation of that. Is that Exhibit C-3
19 to your June 29 filing?

20 MR. MOFFETT: I believe, Mr. Chairman,

21 that that is Appendix C to our original Petition for

22 Declaratory Ruling, dated March 28th, 2007.

23 CHAIRMAN GETZ: Well, in my Attachment

24 C, it looks like there's three numbered subsets.

{DE 07-045} (05-20-08)

1 MR. MOFFETT: Give me just a second

2 here.

3 CHAIRMAN GETZ: In which I have one and

4 two, but nothing after three.

5 MR. MOFFETT: I'm sorry, it was Appendix

6 3, you're correct and I'm mistaken. It was Appendix 3 to

7 the original Petition for Declaratory Ruling, dated March

8 28, 2007. And, the --

9 CHAIRMAN GETZ: I'm sorry, I hate to

10 belabor this, but I want to see the document. My Appendix

11 3 to your June 29 memorandum --

12 MR. MOFFETT: No, wrong document. It's

13 the original petition, the petition that initiated the

14 case, March 28th, 2007.

15 CHAIRMAN GETZ: Okay, I'm all set now.

16 MR. MOFFETT: Appendix 3. And, the

17 language that I was quoting from is in the second block of

18 text, toward the bottom of the second block of text.

19 Okay?

20 Next, I'd like to briefly address the

21 legal argument that Mr. Eaton made in summary, suggesting
22 that "a QF would be in violation of PURPA, if it attempted
23 to sell capacity separately from the energy that it was
24 selling to the purchaser of the energy." With respect, I

{DE 07-045} (05-20-08)

1 just don't think there's any support for that, either in
2 the PURPA rules or in the record. This contract, for one
3 thing, was not strictly speaking a LEEPA contract. The
4 FERC rule, FERC Rule 69, specifically allows small power
5 producers, QFs, to negotiate rates and terms that are
6 different from the rates and terms that are set by a
7 public utilities commission. And, those we have always
8 referred to in this state as "negotiated contracts", as
9 opposed to "rate orders" or contracts based on the avoided
10 cost rates that were set by the Commission.

11 CHAIRMAN GETZ: Well, that's I guess
12 what I, and maybe this is probably more for Mr. Eaton, but
13 I'm having trouble seeing how the contract rests on the
14 premise that "Briar is a QF". And, basically, you're
15 telling me that --

16 MR. MOFFETT: I think you're right.
17 It's virtually irrelevant. I mean, it's not -- we're not,
18 Briar was not counting on QF status when it negotiated
19 that contract with PSNH. It was a small power producer.
20 And, it happened to qualify for qualifying facility

21 status, but there is no -- there is no prohibition against
22 a QF negotiating a contract to sell energy separately from
23 capacity. In fact, FERC Rule 69 specifically says, you
24 know, that that's okay. It can sell either capacity or

{DE 07-045} (05-20-08)

1 energy or both.

2 I think the last thing I'd like to say

3 is there's sort of a -- there's sort of a counterintuitive

4 argument that I believe PSNH is making here. They're

5 conceding that the contract does not mention capacity, and

6 yet they're saying "it included capacity", and, more than

7 that, "we've got it, we've got it under the contract."

8 It's almost as if you had a rug maker that was selling

9 rugs, and he had a contract to sell rugs to a merchant,

10 and he said he was going to buy the entire output of the

11 rug factory, the loom, if you will. And, the merchant

12 who's buying the rugs takes that to mean that he owns the

13 loom as well. And, it's hard for me to imagine a contract

14 that is silent on a second discrete element, which is not

15 mentioned, and where the assumption would be that the

16 seller is buying it, rather than that the -- excuse me,

17 that the purchaser is buying it, rather than that the

18 seller is retaining it, if it's not mentioned in the

19 contract. Remember, this is not a situation where PSNH

20 and the Commission and the small power producers weren't

21 aware of the distinction between energy and capacity.
22 We've been aware of that for three years by the time this
23 contract was negotiated. It's not as if they didn't know
24 what capacity was and that it was different from energy.

{DE 07-045} (05-20-08)

1 So, to say that we've got a contract here that talks only
2 about energy, this is a contract for the purchase and sale
3 of electrical energy, and it talks about "output", yes,
4 but the courts have construed "output" to mean the energy
5 that is generated by the capacity, not the capacity
6 itself. So, to argue from that that the buyer is getting
7 the capacity, as well as the energy, is counterintuitive,
8 and I think it's contrary to the law and the evidence in
9 the record. It's certainly contrary to the contract. I
10 shouldn't say that. The contract is silent. But I think
11 it's very hard to argue, from the fact that the contract
12 is silent on capacity, that capacity went with the energy.
13 In fact, the evidence in the record is to the contrary,
14 that it did not. The contract was based strictly on
15 energy cost.

16 Just one final thing, to avoid any
17 misunderstanding about the documents that have been
18 presented in the record today, all three of those
19 documents, A, B, and C, are new in the sense that they
20 were not part of the record previously. But A and C were

21 documents that had been previously either in PSNH -- I
22 think, in both cases, in PSNH's files. And, we're simply
23 bringing them forward today because we think that it would
24 be important for the Commission to understand how Mr.

{DE 07-045} (05-20-08)

1 Norman would testify as to the significance of those
2 documents.

3 Exhibit B that was filed for the record
4 today is in a different category. PSNH has never seen
5 Exhibit B. Exhibit B was developed by Briar Hydro
6 Associates specifically in anticipation of this hearing or
7 a subsequent hearing at which there would be testimony.
8 And, we would certainly be happy to give PSNH a chance to
9 do discovery on that and depose or whatever they want to
10 do on that. But the point is, PSNH had not seen that
11 document prior to this morning, Exhibit B.

12 CHAIRMAN GETZ: Okay.

13 CMSR. BELOW: I'm intrigued by your rug
14 merchant analogy. And, I'm trying to understand your
15 argument about what's intuitive or counterintuitive
16 logical or not. If a merchant, Merchant A, had a contract
17 with a rug maker that obligated the entire output of a
18 loom to supply that merchant for the next ten years, the
19 owner of the loom still owns it, but does he have capacity
20 that he could offer to Merchant B during the ten year

21 period that that -- the entire output is obligated to

22 Merchant A?

23 MR. MOFFETT: Sure, he can offer to sell

24 the factory to Merchant B. And, then, Merchant B --

{DE 07-045} (05-20-08)

1 CMSR. BELOW: Well, that's the ownership
2 of the factory.

3 MR. MOFFETT: Right. But that's what
4 we're talking about with capacity.

5 CMSR. BELOW: If the entire output we're
6 obligated to Merchant A, isn't the entire capacity --
7 wouldn't Merchant A assume that the entire capacity of
8 that loom was committed to meet their needs? And, it
9 couldn't go to meet some other merchant's needs in terms
10 of producing rugs --

11 MR. MOFFETT: You can't use it to make
12 rugs to sell to somebody else. But that doesn't answer
13 the question about who owns the factory.

14 CMSR. BELOW: Is the ownership of the
15 power plant in question here?

16 MR. MOFFETT: No, but the capacity, we
17 would argue, and I think this is consistent with the ISO,
18 the Forward Capacity Market position, unless the capacity
19 is contracted away by the owner of the capacity, the
20 plant, then the owner retains it.

21 CMSR. BELOW: So, you're saying the
22 owner retains it, even though that entire capacity is
23 under obligation to meet -- to supply needs for energy,
24 electrical power, to PSNH?

{DE 07-045} (05-20-08)

1 MR. MOFFETT: That's correct,
2 Commissioner. The Forward Capacity Market rules make it
3 clear that what ISO is bargaining for is, when it -- when
4 it asks people to step up and bid into the Forward
5 Capacity Market, it's asking them to commit that, if they
6 don't already have an existing plant that will generate,
7 that they're going to build a plant that would be capable
8 of generating X megawatts in time to meet the commitment
9 period, the three-year commitment period covered by the
10 Forward Capacity Market on a rolling basis. And, the way
11 that works is, you can sell your energy separately, but
12 you are committing to ISO that you're going to have iron
13 in the ground that would be capable of producing energy
14 that you could sell to Party A, B, or C.

15 CMSR. BELOW: Well, in your
16 understanding of that, if Party A were outside of the New
17 England Control Area, and you obligated your capacity of
18 your generator, the entire output of that plant to sell to
19 a load-serving entity outside of the New England Control
20 Area, could that count as capacity for New England?

21 MR. MOFFETT: I want to be careful,
22 because I think the rule actually does speak to that
23 issue. But I'm not certain that I recall, without
24 reviewing it, exactly how it treats it. But I'll get an

{DE 07-045} (05-20-08)

1 answer for you on that.

2 CMSR. BELOW: Okay. And, furthermore,
3 if that plant didn't produce and supply power onto the
4 Grid for New England at the time it was called upon, could
5 it -- would it get paid for that capacity, just in the
6 abstract?

7 MR. MOFFETT: No, and that's a key
8 point. If the generator, you know, refuses to operate the
9 plant during the commitment period, refuses to make the
10 plant available for sales into the day-ahead market or the
11 same day market, then they lose their capacity payments.
12 They're penalized.

13 CHAIRMAN GETZ: Mr. Eaton.

14 MR. EATON: I have one point to raise,
15 based upon Mr. Moffett's arguments. And, if this wasn't
16 -- if this contract wasn't formed under the auspices of
17 PURPA, then it had to be filed with FERC as a FERC
18 wholesale rate. A generator that sells to a utility is
19 subject to -- it is considered to be, prior to PURPA, it's
20 considered to be a sale in interstate commerce, and it was

21 required to be filed with FERC at that time. And, I don't
22 believe it was. I believe it was a -- it was a contract.
23 And, I think the Commission's decision speaks to the fact
24 that PSNH went out to negotiate these agreements pursuant

{DE 07-045} (05-20-08)

1 to PURPA and LEEPA, and that, if it wasn't given an
2 exemption from FERC regulation, it had to be filed with
3 FERC, and I don't believe it has, and I don't believe
4 there has been any approval by FERC of this agreement.
5 That this is a QF agreement, and they're bound by the
6 rules of a QF.

7 CHAIRMAN GETZ: Okay. We're going to
8 give you the chance to go last, Mr. Moffett. But does the
9 Consumer Advocate or Staff have anything?

10 MR. TRAUM: No thank you.

11 CHAIRMAN GETZ: Well, then, let me just
12 address, it looks like we've made one commitment at least
13 with respect to one answer from the Company to -- or from
14 Briar to Commissioner Below's question. And, I guess we
15 will reserve Exhibit D for that, for that answer.

16 (Exhibit D reserved)

17 CHAIRMAN GETZ: Okay. If there's
18 nothing further from the other parties, then, Mr. Moffett,
19 you have the opportunity to go last.

20 MR. MOFFETT: Just quickly in response

21 to Mr. Eaton's last point. I didn't say, I certainly
22 didn't mean to say, and I hope I didn't say, that "New
23 Hampshire Hydro Associates was not a QF." I think,
24 clearly, New Hampshire Hydro Associates was a QF. What I

{DE 07-045} (05-20-08)

1 intended to say, what I hope I said, is that there is
2 nothing in the FERC rule that requires a QF to sell power
3 to an electric utility at rates and terms that are set by
4 a public utilities commission. There are such things, and
5 we call them "rate orders". But the FERC Rule 69
6 specifically provides, and this is cited in our brief,
7 specifically provides that a QF can sell to an electric
8 utility at negotiated rates and terms that are different
9 from those that are set up by the Public Utilities
10 Commission. And, it in no way implies that, if you do
11 that, you have to sell both capacity and energy.

12 CHAIRMAN GETZ: Okay. Well, thank you,
13 everyone. At this time, we'll close the hearing for the
14 purposes of oral argument and take the matter under
15 advisement. Thank you.

16 (Whereupon the hearing ended at 12:16
17 p.m.)

18

19

20

21

22

23

24

{DE 07-045} (05-20-08)