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STATE OF NEW HAMPSHIRE

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PUBLIC UTILITIES COMMISSION

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4

January 7, 2008 - 11:07 a.m.
Concord, New Hampshire

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RE: DE 07-122

7

PUBLIC SERVICE OF NEW HAMPSHIRE:

8

Petition for Clarification and

Interpretation of Commission Orders

Regarding Hemphill Power & Light Company.

9

(Prehearing conference)

10

PRESENT: F. Anne Ross, Esq.

11

(Presiding as Hearings Examiner)

12

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Connie Fillion, Clerk

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

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Reptg. Hemphill Power & Light Company:

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Bryan K. Gould, Esq. (Brown, Olson & Gould)

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Reptg. Residential Ratepayers:

Meredith Hatfield, Esq., Consumer Advocate

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Office of Consumer Advocate

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Reptg. PUC Staff:

Donald M. Kreis, Esq.

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Court Reporter: Steven E. Patnaude, LCR

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Mr. Kreis 11, 18, 25

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

2 MS. ROSS: Good morning. My name is
3 Anne Ross. I'm the Director of the Legal Division, and
4 the Commissioners have asked me to serve as Hearings
5 Examiner this morning for this prehearing conference.
6 This is the prehearing conference in docket DE 07-122,
7 which was commenced by a filing on November 9th by Public
8 Service Company of New Hampshire, which filed a petition
9 with the New Hampshire Public Utilities Commission seeking
10 a declaratory order concerning PSNH's obligations to
11 purchase power from Hemphill Power & Light Company, an
12 independent wood-burning power producer located in
13 Springfield.

14 Let's begin this morning by taking
15 appearances of the parties.

16 MR. EATON: Good morning. My name is
17 Gerald Eaton. I represent Public Service Company of New
18 Hampshire.

19 MR. GOULD: Good morning. Bryan Gould,
20 of Brown, Olson & Gould, for Hemphill Power & Light
21 Company.

22 MS. HATFIELD: Good morning, Madam
23 Hearings Examiner. Meredith Hatfield and Ken Traum, for
24 the Office of Consumer Advocate.

{DE 07-122} [Prehearing conference] (01-07-08)

1 MR. KREIS: Good morning. I am the
2 Commission's General Counsel, Donald Kreis, representing
3 Staff this morning. And, the gentleman to my left is
4 Mr. Steven Mullen, he is an analyst with the Commission's
5 Electric Division.

6 MS. ROSS: And, next, I would like to
7 indicate that we have received motions to intervene from
8 Pinetree -- excuse me, from Hemphill Power. We've also
9 received a letter from the Consumer Advocate's Office
10 indicating that it wishes to participate. Are there any
11 other intervenors that I have not mentioned?

12 (No verbal response)

13 MS. ROSS: Are there any objections to
14 the request for intervention by Hemphill?

15 MR. EATON: No objection.

16 MS. ROSS: Okay. This prehearing
17 conference was scheduled originally for December 27th,
18 2007, and, at the request of the parties, was delayed
19 until today. In the meantime, we have received a filing
20 from Hemphill on December 27th, which is a Motion to Stay
21 the Proceedings in this docket. What I would like to do
22 this morning is to ask that the parties address the Motion
23 to Stay, since I think the Commission will need to make a
24 determination on that issue before proceeding with this

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1 docket. And, since it was Hemphill's motion, I would
2 suggest that Hemphill go first. And, I would also ask, if
3 you would, for the Commission's benefit, if you could
4 summarize the timing and activities as they have occurred
5 to date in the Superior Court proceeding, so that we are
6 informed about the progress in that jurisdiction.

7 MR. GOULD: The Superior Court action
8 was commenced in April of last year by service of a writ
9 of summons on PSNH. PSNH has filed its statement of
10 defenses. We have served written discovery upon PSNH, and
11 PSNH has responded to that written discovery. And, within
12 the last few months, I can't tell you exactly when it was,
13 but PSNH filed the petition before the Commission in this
14 docket and also filed a Motion to Stay the Superior Court
15 action. We have had a structuring conference with Judge
16 Barry, this is pending in Manchester in the Hillsborough
17 Superior Court North. We have had a structuring
18 conference with Judge Barry and informed him that the
19 issue of staying the Superior Court action needed to be
20 argued. Hemphill has filed a cross motion to enjoin PSNH
21 from proceeding with this, the prosecution of this docket,
22 and the hearing on those two motions is set to take place
23 this Friday before Judge Barry. When the judge will issue
24 an order, I can't say. Typically, I've seen them 45 to 60

1 days after argument, but I don't know what Judge Barry's
2 practice is, and I can't tell you when that order will
3 issue.

4 I think that fairly summarizes where the
5 Superior Court action stands. If I can just pause, Jerry,
6 would you add anything to that?

7 MR. EATON: No.

8 MR. GOULD: Okay. This Motion to Stay
9 in this docket is premised on the idea that the Superior
10 Court is the only forum that has jurisdiction over all of
11 the claims being presented. The basis of PSNH's Motion to
12 Stay the Superior Court action is primary jurisdiction.
13 Its claim is that the Commission should make the decision
14 on the meaning of the rate order. We have argued in our
15 cross motion that the primary jurisdiction doctrine
16 doesn't apply and those issues are fully joined and
17 briefed now.

18 We argue in our motion to stay before
19 the Commission that, as a matter of comity and judicial
20 efficiency, this action or this docket should be stayed
21 until the Superior Court has been given the opportunity to
22 rule upon the motions now pending before it. It really is
23 as simple as that. I have not seen an objection to our
24 motion from PSNH, but I understand that Mr. Eaton is going

1 to address it orally here today.

2 Unless there are any questions, that's
3 really the sum and substance of the situation in the
4 Superior Court and the basis of our Motion to Stay.

5 MS. ROSS: Thank you.

6 MR. GOULD: Thank you.

7 MR. EATON: We brought this action in
8 this forum in order to adjudicate what we think is clearly
9 something that the Commission has jurisdiction to
10 adjudicate. Twice before PSNH has successfully brought
11 cases here from the Superior Court on essentially very
12 similar facts. The distinction perhaps in this case is
13 that Hemphill has asked for a jury trial in Superior
14 Court.

15 However, we believe that the cases that
16 construe the New Hampshire Constitution on the right to a
17 jury trial do not apply when there is a statutory scheme
18 for adjudicating disputes outside of court. And, I'm
19 saying this so that the Commission and getting around to
20 why the Commission should not grant the Motion to Stay.
21 In the Franklin Elks versus Marcoux case, which is 149 New
22 Hampshire 581, the Supreme Court found that discrimination
23 suits should be entertained before the Human Rights
24 Commission. And, in Hallahan v. Riley, which is at 94 New

1 Hampshire 338, an employment compensation matter should be
2 before the Department of Employment Security. I bring
3 those up because the one thing that distinguishes this
4 case from the other two is the request for a jury trial,
5 which I don't think applies to cases that involve public
6 utilities and utility regulation.

7 And, we have traded the same pleadings
8 that we traded in the Pinetree Power case, including the
9 Motion to Stay here and the Motion to Stay at the Superior
10 Court. And, eventually, the decision by the Superior
11 Court was not to take the case and to stay the
12 proceedings, in the Pinetree Power case, was appealed to
13 the Supreme Court, and that decision -- that case was not
14 taken by the Supreme Court. So, we think the same thing
15 will happen this time as happened before, and, therefore,
16 the Commission ought to proceed with this case.

17 As far as a summary of what we believe
18 this case is about, it starts with the Commission's
19 Generic Rate Order 17,104, in 1984, that laid down how
20 PSNH and other purchasing utilities ought to apply the
21 rules and ought to apply the rates in the rate orders.
22 And, subsequent to that generic order, Hemphill filed
23 their petition. And, in that petition, they included
24 rates for the years 1987 through 2006. The Commission's

1 Generic Rate Order said any projects that come on after
2 September 1st ought to have the next year's rates apply.
3 September 1st was beginning of the rate year. And,
4 Hemphill came on line on October 27th, 1987. So, we
5 applied the 1988 rates, because it was after
6 September 1st, we applied the 1988 rates. And,
7 subsequently changed to the 1989 rates on the anniversary,
8 and kept doing that until we got to the year 2006, and we
9 ran out of rates. There were no more rates to apply in
10 the schedules that were approved by the Commission. So,
11 that's the essence of our case here. And, we may have
12 done it wrong. But I think it's the Commission's clear
13 duty to decide whether we did it right or did it wrong,
14 and, therefore, it does -- primary jurisdiction does apply
15 in this case and the Commission ought to proceed.

16 MS. ROSS: Mr. Eaton, just a couple of
17 questions for you. Let me understand then, the parties
18 don't disagree on the end of the 20 year term, do they?
19 They agree that the end of the 20 year term is October 26,
20 2007?

21 MR. EATON: No.

22 MS. ROSS: Okay.

23 MR. EATON: I think we do disagree.

24 MS. ROSS: All right.

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1 MR. EATON: I think we believe it's
2 October 26, 2006, and Hemphill believes it's October 26,
3 2007. Is that --

4 MR. GOULD: That's correct.

5 MR. EATON: That's the essence.

6 MS. ROSS: Okay.

7 MR. EATON: And, we stopped paying rate
8 order rates in 2006.

9 MS. ROSS: Okay.

10 MR. EATON: And, I think it's that final
11 year that's in controversy.

12 MS. ROSS: And, can you give a rough
13 estimate of the differential between the short-term rates
14 that you paid and the final year contract rates that were
15 in effect?

16 MR. EATON: I think the final year rates
17 are 18 million, and I think we paid 6 million. But I
18 don't have the right numbers people with me, but that's
19 just a rough guess.

20 MS. ROSS: Okay. Thank you. Ms.
21 Hatfield.

22 MS. HATFIELD: Thank you. The OCA
23 supports PSNH's underlying Petition for Clarification in
24 this docket. And, we oppose the Motion to Stay that's

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1 filed by Hemphill.

2 MS. ROSS: Thank you. Mr. Kreis.

3 MR. KREIS: Thank you, Madam Hearings
4 Examiner. Just briefly, on behalf of Staff. I want to
5 state for the record Staff's understanding that one issue
6 that has not been raised here is the question of whether
7 the Commission is preempted pursuant to PURPA or any other
8 federal law from entertaining this case. And, the reason
9 I want to make that clear is that Staff's understanding is
10 that both PSNH and Hemphill are essentially waiving any
11 right later in the proceeding to contest whether the
12 Commission has jurisdiction under PURPA. And, although
13 our friends at Briar Hydro seem to think it's not
14 possible, you can, in fact, as a matter of law, waive
15 objection to the subject matter jurisdiction of a tribunal
16 before which you voluntarily appear. And, we have had
17 this issue come up in previous cases, including the
18 Pinetree and Bridgewater docket, and it does not appear to
19 have risen here.

20 With regard to the Motion to Stay, and
21 the timing of the various events in Superior Court that
22 Mr. Gould described vis-à-vis the timing of PSNH's
23 petition here, I have to say, on behalf of Staff, that I'm
24 experiencing a bit of confusion about why this scenario

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1 has played out as it has.

2 We have had, quite a number of months
3 ago, a fairly extensive set of discussions with both
4 Hemphill and PSNH about the merits of this case. And, my
5 understanding at the time is that PSNH wasn't terribly
6 interested in conducting settlement negotiations, and that
7 the parties had essentially agreed that they would let the
8 Superior Court decide the case. And, then, as Mr. Gould
9 has just described, the case has proceeded down the
10 discovery path and appears to be progressing towards
11 trial. And, then, for reasons I can't quite understand,
12 PSNH pops up and files a petition here and moves to stay
13 there. And, I think it would be useful to have some
14 clarity about exactly why those things happened as they
15 did.

16 Now, notwithstanding all of that, I
17 can't come up with any plausible reason why the Commission
18 shouldn't proceed to hear this case. As PSNH has pointed
19 out, on at least two other occasions the Superior Court,
20 in similar circumstances, has indicated that it would at
21 least defer to the Commission in the first instance, let
22 the Commission decide, and then, after that decision,
23 determine whether the court had any further relief it
24 needed to grant or any other action or whether there were

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1 any claims that still needed to be adjudicated over in the
2 Superior Court.

3 The last point I want to make is that,
4 in contrast to some of the other disputes that have arisen
5 between Public Service Company and PURPA qualifying
6 facilities, I think this dispute is fairly amenable to
7 resolution by settlement. And, I would like to indicate
8 to the parties and to the Commission Staff's willingness
9 to be of assistance in that regard. And, I have some
10 optimism that we might be able to resolve it that way.

11 MS. ROSS: Thank you. I would actually
12 like to follow up on one of the items that Mr. Kreis has
13 just raised, and that is the issue of the Commission's
14 jurisdiction to consider this matter. Can parties
15 indicate to the Commission today whether or not they are,
16 by submitting this matter, waiving a claim that this
17 Commission does not have jurisdiction to hear it?

18 MR. EATON: I think it's safe to say
19 that, because we brought the petition that opened this
20 proceeding, that we believe jurisdiction belongs in the
21 Commission.

22 MR. KREIS: Well, we used to think it
23 was safe to say that, but, apparently, it no longer is.

24 MS. ROSS: And, Hemphill, I would be

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1 interested to know what your portion is on the
2 Commission's jurisdiction?

3 MR. GOULD: Yes, we have not waived that
4 issue. The reason that I have not addressed it here today
5 is because I think it's premature. If the Motion to Stay
6 were granted and the Superior Court were to take
7 jurisdiction, we wouldn't even confront the issue.
8 Actually, that's one of the reasons that I think a stay
9 makes a lot of sense here, because, given the state of
10 federal law, if the Commission decides to go forward with
11 this, we would immediately ask that the Commission to
12 declare whether it has jurisdiction to grant the relief
13 that PSNH has requested. And, depending on the outcome of
14 that, on that motion, we may or may not be in Federal
15 Court challenging the PUC's exercise of jurisdiction.

16 So, it is by no means a waived issue.
17 And, I think, again, that it -- the fact that it is an
18 issue even more strongly suggests that a stay ought to be
19 entered at this point. But the principal concern is that,
20 once the Commission begins to hear the case and to
21 undertake the proceeding, there may be a point at which
22 Federal Courts will abstain. And, we think that, under
23 federal law, the time for a party to protect its interests
24 and challenge the Commission's jurisdiction is at the time

1 of the assertion of jurisdiction that is, in our view at
2 least, contrary to federal law.

3 MS. ROSS: So, there is a timing
4 element, in your mind, as to when it would be necessary
5 for you to protect your claim that the Commission has
6 jurisdiction to consider this?

7 MR. GOULD: That's correct.

8 MS. ROSS: And, that's why you haven't
9 filed yet any challenge to that jurisdiction?

10 MR. GOULD: It may be completely
11 unnecessary. And, just -- I'm sorry.

12 MS. ROSS: And, just so I understand, if
13 the Superior Court were to make a determination, would you
14 still have the option of transferring that claim to the
15 Federal Courts, if you were not happy with the Superior
16 Court's determination?

17 MR. GOULD: So, if -- the question is,
18 if the Superior Court were to decide upon the meaning of
19 the rate order, would there be a way to appeal it to the
20 federal system? Not that I know of. I mean, other than
21 going to the Supreme Court, the New Hampshire Supreme
22 Court, and then trying to persuade the U.S. Supreme Court
23 to accept a case like that.

24 MS. ROSS: Yes.

1 MR. GOULD: And, are you done with your
2 questions or can I --

3 MS. ROSS: Please continue.

4 MR. GOULD: Okay. I just wanted to -- I
5 wanted to address the opposition to a stay. I don't think
6 it's reasonable to assume anything about what a Superior
7 Court judge will do. It's not as if we have a Supreme
8 Court opinion that is controlling authority. There are
9 two cases in which the Superior Court stayed the action
10 before it and transferred the case to the Commission.

11 The first is the Franklin Power case.
12 And, in that case, Judge Conboy did not address whether
13 the Commission could provide complete relief to the
14 parties. That is the basis of the motion now pending
15 before Judge Barry or one of the bases. And, so, Judge
16 Conboy's decision is not authority for the idea that, when
17 there's an issue involving a Commission order, and that's
18 being litigated in both forums, that the Superior Court is
19 automatically going to stay its proceeding and transfer
20 jurisdiction to the PUC or defer to the PUC's
21 jurisdiction.

22 The second case, so now we're down to
23 one case, in which Judge Lewis stayed the proceeding.
24 And, that was in the Pinetree case, as Mr. Eaton said

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1 earlier. But, in that case, there was not a demand for a
2 jury trial. And, it was also an equitable case, it was a
3 petition in equity, not a writ of summons. So, we have
4 legal claims for damages that the Commission has no
5 jurisdiction over. And, in fact, PSNH has asserted
6 equitable defenses in that case. The right to set off is
7 an equitable defense, and, of course, the Commission does
8 not have equity jurisdiction.

9 Those are the kinds of arguments that
10 are going to play out in front of Judge Barry on Friday.
11 If the Commission is at all inclined not to stay this
12 proceeding, I think Judge Barry should be aware of that
13 before the hearing on Friday. If the Commission is going
14 to go forward, we ought to be able to tell Judge Barry
15 that that's the Commission's intent. But I would urge the
16 Commission to stay this as a matter of economy and as a
17 matter of comity to the Judicial Branch.

18 That's all I have.

19 MS. ROSS: And, may I ask you one other
20 question? Have you been actively involved in settlement
21 discussions with PSNH over the course of the last six
22 months or so?

23 MR. GOULD: In the course of the last
24 six months, no. After our structuring conference in

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1 Superior Court, I did speak with Mr. Eaton about it out in
2 the hallway, and he indicated that there would be some
3 interest in settlement discussions, but that he wanted to
4 wait and see what the Superior Court was going to do on
5 the pending motions. He also indicated to Judge Barry
6 that he thought the prospects of settlement were very
7 good.

8 But we have not, we have not -- we're
9 willing to sit down, and I know that PSNH is, but, for
10 reasons that, you know, I'm sure are completely legitimate
11 from PSNH's standpoint, they want to wait until the
12 Superior Court decides the pending motions. And, that's
13 perfectly reasonable.

14 MS. ROSS: Thank you.

15 MR. GOULD: Thank you.

16 MS. ROSS: Are there any other matters
17 that parties wish to raise today? Any procedural issues
18 that we should consider or other issues?

19 MR. KREIS: Well, I would just like to
20 respond on behalf of Staff to what I just heard from Mr.
21 Gould. And, it's fine that PSNH and Hemphill think it's
22 perfectly reasonable for them to play this thing out at
23 their leisure. But the fact is that these QF disputes
24 have consumed a great deal of Commission time and

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1 resources over the last several years. And, this case
2 happens to present an excellent opportunity to resolve,
3 once and for all, whether the Commission really has the
4 jurisdiction over cases like this or whether the federal
5 law actually preempts the Commission from having
6 authority.

7 What happened is, back in the 1990s, the
8 U.S. Court of Appeals for the Third Circuit decided a case
9 called "Freehold Cogeneration Associates". And, what
10 Freehold Cogeneration Associates was all about was our
11 counterpart agency in New Jersey decided that there was a
12 long-term rate order between a local utility and a
13 qualifying facility that it didn't like anymore, because,
14 as time went on and as circumstances evolved, the avoided
15 cost estimates proved to be overly optimistic from the
16 QF's standpoint. And, so, the Commission in New Jersey
17 decided that it wanted to substitute a new rate order.
18 And, what the Third Circuit said is "You can't do that.
19 See PURPA. You are preempted. That is", and the phrase
20 that the court used was "utility-type regulation."

21 Utility-type regulation is the kind of
22 regulation that utilities submit to as a matter of
23 routine. Where, based on changes in cost of service, the
24 Commission sets new rates, and raises them or lowers them

1 as the circumstances require.

2 Now, Staff concedes that that kind of
3 utility-type regulation is not appropriate. And, this
4 agency, at least in the last 20 years or so, has never
5 hauled a QF in here and said "Hey, QF, your rate order is
6 too lucrative and we're going to give you a new one."
7 There is a case, the Alden Greenwood case, where something
8 very much like that happened. But, then, Mr. Greenwood
9 came before the Commission and said "that's fine." And,
10 the effects of his having made that concession then are
11 now pending before the First Circuit.

12 But here we have, really for the first
13 time, a QF that is arguing that a dispute about the terms
14 of a long-term rate agreement between PSNH and a QF
15 require some clarification and interpretation based on
16 what actually happened. Nobody is asking the Commission
17 to enter a new rate order or to go back and change what
18 the Commission decided 20 years ago. The question is
19 really "what does what the Commission decided 20 years ago
20 mean today, in light of what actually happened on Planet
21 Earth after the Commission's determinations?"

22 I think, and Staff believes, that
23 there's no question that the Commission has jurisdiction
24 about that. But we have been arguing with one QF after

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1 another about this in various fora. It's taking up a lot
2 of time and resources. And, perhaps this is the time to
3 resolve it once and for all. I'm more than happy to take
4 the Commission and appear with the Attorney General down
5 the street at Federal Court and have this question
6 resolved.

7 MS. ROSS: Would either of the other or
8 any of other parties care to respond to the jurisdictional
9 issue further?

10 MR. EATON: Well, I believe this is --
11 this is not utility-type regulation. We haven't asked the
12 Commission to redo the Rate Order. We're asking the
13 Commission to look at the Rate Order as it was filed and
14 look at what PSNH did, in attempting to follow the
15 Commission's Generic Rate Order. And, if -- And, to
16 determine if that was correct. And, if it was correct, we
17 applied it -- the rates as they should have been applied
18 and we ended the Rate Order when it should have been
19 ended. Now, that's not changing avoided cost or anything
20 of that sort. It's not taking ten years off of their --
21 off of their Rate Order sua sponte. And, it's -- we think
22 that's why the jurisdiction is here.

23 As far as damages or setoffs or
24 counterclaims, these are rates. If the Commission

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1 determines that we should have paid those rates for
2 another year, we will pay them. But, if we paid this
3 particular QF too early, then they received a benefit of
4 our mistake. And, that's -- And, that some of those rates
5 that we owe Hemphill should be reduced by the time value
6 of those early payments. The Commission does this all the
7 time. This is what you do. You determine what rates
8 ought to be paid by customers, and you can determine what
9 rates should have been paid by PSNH under this Rate Order.
10 And, that's all we're asking the Commission to do. It's
11 very distinct and doesn't involve changing the orders
12 themselves.

13 MS. ROSS: Mr. Eaton, may I ask one
14 follow-up question? Is it PSNH's position that the
15 Commission is or is not -- does have jurisdiction or does
16 not have jurisdiction then to make a determination on
17 these rates?

18 MR. EATON: We believe it does have
19 jurisdiction under -- under law to make this
20 determination.

21 MS. ROSS: And, if this matter were to
22 be moved into the Federal Courts, would PSNH defend that
23 position?

24 MR. EATON: I'm not sure.

1 MS. ROSS: Okay.

2 MR. EATON: I haven't discussed that --

3 MS. ROSS: That may not be a fair
4 question.

5 MR. EATON: -- question with my client.

6 MS. ROSS: Mr. Gould.

7 MR. GOULD: Although I raised the issue,
8 I don't have quite the degree of enthusiasm as Mr. Kreis
9 does for federal litigation. I think that's a change in
10 position. This is an issue, the jurisdictional issue is
11 one that I think requires -- well, it requires briefing,
12 of course. I mean, Freehold is not the only case out
13 there on the subject. I know you're fully aware of the
14 line of cases dealing with this. And, sure, utility-type
15 regulation is one of the things that's preempted. But
16 there are other aspects of QF operations that are -- that
17 are not subject to state regulation.

18 And, I hope that we're -- we are not
19 going toward a decision by the Commission at this point on
20 its jurisdiction, because if -- I'm perfectly content to
21 discuss it just in terms of informing the Commission of
22 our general positions. But, if the Commission is going to
23 render a decision on its jurisdiction at this point, then
24 I think that ought to be briefed. And, as I said earlier,

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1 it is, under Freehold, as soon as the Commission asserts
2 jurisdiction it doesn't have, that's when the party needs
3 to go to Federal Court. Okay? And, so, I don't want this
4 to come across as a threat. It isn't. It's simply a
5 recognition of the process that has to be followed under
6 federal law to get this issue in front of a Federal Court
7 to preserve the issue and to avoid federal abstention.

8 So, I just want to caution, if I may,
9 against a decision, a hard and fast decision on
10 jurisdiction at this point. Certainly, it should be
11 briefed. But it may push us in a direction where we're
12 ending up litigating in Federal Court, instead of sitting
13 down and trying to hammer out an agreement, because
14 everything I've heard is that people here are interested
15 in trying to settle the case. And, it doesn't make a lot
16 of sense to me to have to run to Federal Court and
17 litigate, if there's a chance of settling.

18 On the issue of jurisdiction, I do just
19 want to give you this thought to kind of ponder. And,
20 that is, this is not traditional utility-type regulation.
21 But, if the Commission asserts that it has jurisdiction to
22 say that a 20 year rate can be terminated after 19 years,
23 we think that that creates a question of the Commission's
24 authority under PURPA to enter that kind of an order.

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1 That's the nature of the claim, at least in part, that the
2 Commission lacks jurisdiction. We were -- We were given a
3 20 year rate. We were -- That amounts to a certain amount
4 of revenue over that 20 year period. And, PSNH has
5 decided to cut off, after 19 years, that revenue. And, if
6 the Commission were to conclude that it has jurisdiction
7 to, in the name of construing the orders, to cut off a
8 year of rates, we think that raises a federal preemption
9 issue.

10 MS. ROSS: Is there anything further
11 from any of the parties?

12 MR. KREIS: Yes. Not to belabor this,
13 but just to clarify, for Mr. Gould's benefit. My zest for
14 federal litigation is probably about what it's always
15 been. I have to say, personally, I've never won a case in
16 Federal Court, so I have that record to defend. My
17 concern is prudential, though. And, I really think, in
18 the ordinary course of a Commission proceeding, the
19 Commission doesn't sua sponte say "Hey, parties, by the
20 way, we have jurisdiction. And, here's why we think we
21 have jurisdiction. And, I know you guys haven't raised
22 it, but here's our, you know, ten-page analysis of why we
23 have jurisdiction."

24 But, in these QF disputes, it's almost

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1 as if the Commission has to do that. Because the parties
2 walk through the door, they argue here about one thing or
3 another, and then, when they get a decision they don't
4 like, then they pop up later on, after having consumed a
5 lot of time and attention here, and then they claim that
6 the Commission had no authority whatsoever. If the
7 Commission has no authority whatsoever, then we shouldn't
8 even be sitting here today having this conversation about
9 whether the proceeding should be stayed, because we don't
10 have authority.

11 The other point I want to make is that
12 there's a lot of facile use of the word "jurisdiction" in
13 this context. And, there is a distinction between
14 "preemption" and "subject matter jurisdiction". And, what
15 we have here is an argument about whether the Commission
16 has the authority under PURPA to make certain kinds of
17 decisions and provide certain kinds of relief or whether
18 those decisions are preempted. Congress has not taken
19 subject matter jurisdiction away from the Commission over
20 anything. It has suggested that there are some kinds of
21 relief that the Commission cannot grant to either a QF or
22 a utility that's entered into one of these long-term
23 arrangements.

24 The other point I'd make for the record

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1 is, this is a dispute about money. And, like the other
2 cases that have come before us, the question about whether
3 the Commission has equitable powers or whether we should
4 let the Superior Court decide because it does have
5 equitable powers, is a really interesting one, and would
6 be fun to explore as a legal matter.

7 But, ultimately, it doesn't matter,
8 because I'm quite confident that the Commission, if
9 Hemphill is entitled to be made whole, in some sense or
10 another, has the authority to cause PSNH to do that. So,
11 I just -- I, on behalf of Staff, I would have been content
12 to see this case play itself out in Superior Court. I
13 have no reason to think that Judge Barry isn't perfectly
14 competent and wise and able to resolve this thing
15 correctly. I have no doubt that the people here who have
16 the authority are competent and wise and able to resolve
17 this thing appropriately. And, I have to assume that
18 whichever tribunal decides would come to exactly the same
19 decision, because there is a right answer out there.

20 It's just that, really, this kind of
21 game playing needs to come to an end. And, the QF world
22 has to know where it should go to address these problems.
23 PSNH has to know where it should go to address these
24 problems. And, all of this legal maneuvering is wasting

1 everybody's time. That's why I said, "Hey, let's go right
2 down to the Federal Court", and let one of the U.S.
3 District Court judges tell us once and for all whether
4 Freehold Cogeneration is the sweeping, you know, abolition
5 of subject matter jurisdiction that the various qualifying
6 facilities are always here arguing that it is. So, --

7 But Staff is very enthusiastic about
8 resolving this case by settlement. But I hear the parties
9 saying "well, we don't really feel like doing that right
10 now." Well, I feel like settling this case now, because I
11 don't think it's fair to consume any more of the agency's
12 time and effort on this.

13 MS. ROSS: Thank you. Are there any
14 other comments or --

15 MR. GOULD: I just want to clarify, we,
16 as I said, we raised with PSNH the idea of having
17 settlement discussions. And, I mean, I don't want -- the
18 reason I said "it was reasonable", what I meant was it's
19 PSNH's call whether it wants to participate. I wasn't,
20 you know, trying to suggest that PSNH was doing anything
21 underhanded. It has it's own reasons for doing things.
22 We remain willing to sit down and settle. But, you know,
23 you have to have two parties who are willing to do so.
24 And, I was simply suggest -- all I was saying is, I don't

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1 think PSNH did anything wrong by saying "we want to wait
2 until there's a decision." I just don't have strong
3 feelings about it. But I just wanted to be clear, we're
4 prepared to sit down and talk.

5 MS. ROSS: Thank you. I will close the
6 hearing and ask the parties to take some time, while
7 you're all in the same room, to work out a schedule for
8 some structured discussions around settlement. It sounds
9 to me as if you need numbers people, so I don't know
10 whether you'll be able to make any progress today, but
11 that is, obviously, the best way to resolve this case.
12 You've got a rate schedule, you've got a differential
13 between that last year of rates and what you actually
14 received. PSNH has some legitimate arguments about the
15 fact that it jumped into the schedule where it did. You
16 know, sit down and push some numbers around and see
17 whether you all can make some progress. And, please keep
18 the Commission informed.

19 I will have to make a recommendation to
20 the Commission on both the Motion to Stay and the
21 jurisdictional arguments that we've heard today. And, I
22 don't know whether the Commission -- I can probably make
23 that recommendation before Friday, but I certainly can't
24 commit the Commission to doing anything before the hearing

1 in the Superior Court. So, you may or may not know where
2 things stand here. But, at any rate, it seems to me that
3 settlement discussions would be very helpful. And, I
4 invite you all to take some time to explore that. Thank
5 you.

6 MR. GOULD: Thank you.

7 (Whereupon the prehearing conference
8 ended at 11:48 a.m. and was subsequently
9 reopened.)

10 MS. ROSS: I just need to acknowledge
11 that we received an affidavit of publication from counsel
12 for Hemphill indicating that the notice was published, the
13 order of notice was published on this hearing.

14 MR. GOULD: On December 24th it appeared
15 in the Union Leader.

16 MS. ROSS: Thank you. Thank you.
17 Apologize for that.

18 (Whereupon the prehearing conference
19 ended at 11:50 a.m.)
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