

1                                   **STATE OF NEW HAMPSHIRE**  
2                                   **PUBLIC UTILITIES COMMISSION**

3       **December 5, 2023** - 9:04 a.m.  
4       21 South Fruit Street  
5       Suite 10  
6       Concord, NH

7                                   *[Hearing also conducted via Webex]*

8                   RE: **DE 23-026**

9                   **ELECTRIC DISTRIBUTION UTILITIES:**

10                   Potential Jurisdictional Conflicts  
11                   Related to Authorization of Pilot  
12                   Programs Under RSA 362-A:2-b.

13       **PRESENT:**       Chairman Daniel C. Goldner, *Presiding*  
14                                   Commissioner Pradip K. Chattopadhyay

15                                   Ben Martin-McDonough, *Esq./PUC Legal Adv.*

16                                   Tracey Russo, *Clerk & PUC Hybrid*  
17   *Hearing Host*

18       **APPEARANCES:**   **Reptg. Public Service Company of**  
19                                   **New Hampshire d/b/a Eversource Energy:**  
20                                   David K. Wiesner, Esq.  
21                                   Jennifer L. Key, Esq. *(Steptoe & Johnson)*  
22                                   Jason Stark, Eversource Energy

23                                   **Reptg. Liberty Utilities (Granite State**  
24                                   **Electric) Corp. d/b/a Liberty Utilities:**  
                                 Michael J. Sheehan, Esq.

**Reptg. Unitil Energy Systems, Inc.:**  
                                 Matthew C. Campbell, Esq.

                 Court Reporter:     Steven E. Patnaude, LCR No. 52

**APPEARANCES: (C o n t i n u e d)**

**Reptg. Community Power Coalition of  
New Hampshire (CPCNH):**

Michael R. Postar, Esq. *(Duncan Weinberg)*  
Gelane L. Diamond, Esq. *(Duncan Weinberg)*  
Clifton C. Below, Chair/CPCNH  
Brian Callnan, CEO/CPCNH

**Reptg. Residential Ratepayers:**

Michael J. Crouse, Esq.  
Office of Consumer Advocate

**Reptg. New Hampshire Dept. of Energy:**

Matthew C. Young, Esq.  
Daniel Phelan, Wholesale Administrator  
*(Regulatory Support Division)*

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**P R O C E E D I N G**

CHAIRMAN GOLDNER: Okay. Good morning, everyone. I'm Chairman Goldner. I'm joined by Commissioner Chattopadhyay. We're here this morning for Docket DE 23-026. The authority to convene this matter is provided in RSA 362-A:2-b. We are considering oral arguments considering any jurisdictional issues related to the implementation of the pilots authorized by RSA 362-A:2-b.

We've received briefs, reply briefs, and a supplemental letter filed by the Community Power Coalition on September 7th, and the Utilities' reply response dated October 2nd in this matter.

First, we'll begin by taking appearances. Attorney Wiesner, I'm not sure how you want to do this, but I'll begin with you, sir, and Eversource.

MR. WIESNER: I'm happy to start, Mr. Chairman, and we'll go from there.

So, good morning, Commissioners. I'm David Wiesner, representing Public Service Company of New Hampshire, doing business as

1 Eversource Energy. With me this morning, to my  
2 immediate right, is Jason Stark of the Company's  
3 ISO and Transmission Policy Group; and appearing  
4 remotely from Washington is our outside counsel,  
5 Attorney Jennifer Key, with the law firm of  
6 Steptoe & Johnson.

7 CHAIRMAN GOLDNER: Very good. And  
8 we'll move to Liberty?

9 MR. SHEEHAN: Good morning. Mike  
10 Sheehan, for Liberty Utilities (Granite State  
11 Electric) Corp. And, as indicated in the  
12 filings, we are supportive of the documents filed  
13 by the so-called "Joint Utilities".

14 Thank you.

15 CHAIRMAN GOLDNER: Okay. Thank you.  
16 And Unutil?

17 MR. CAMPBELL: Good morning,  
18 Commissioners. Matt Campbell, for Unutil Energy  
19 Systems, Incorporated.

20 CHAIRMAN GOLDNER: Very good. And the  
21 Office of the Consumer Advocate?

22 MR. CROUSE: Good morning,  
23 Commissioners. My name is Michael Crouse, Staff  
24 Attorney to the Office of the Consumer Advocate,

1       representing residential ratepayers in this  
2       matter.

3               CHAIRMAN GOLDNER: Thank you. The New  
4       Hampshire Department of Energy?

5               MR. YOUNG: Good morning. Matt Young,  
6       on behalf of the Department of Energy. With me  
7       today is Dan Phelan, who is our Wholesale  
8       Administrator.

9               Thank you.

10              CHAIRMAN GOLDNER: Very good. Clean  
11       Energy New Hampshire?

12              *[No indication given.]*

13              CHAIRMAN GOLDNER: Okay. Not present.  
14       The Community Power Coalition?

15              MR. POSTAR: Good morning. Michael  
16       Postar, on behalf of the Coalition. And -- I'm  
17       sorry. Thank you. Can you hear me now? Is that  
18       better?

19              CHAIRMAN GOLDNER: Yes, sir.

20              MR. POSTAR: Thank you. Good morning.  
21       Michael Postar, on behalf of Community Power  
22       Coalition of New Hampshire. I'm joined by Gelane  
23       Diamond, to my left; Clifton Below, Chair; and  
24       Brian Callnan, Chief Executive Officer of the



1 Coalition.

2 CHAIRMAN GOLDNER: Okay. Thank you  
3 very much.

4 Are there any preliminary matters that  
5 the parties wish to raise before we get started?

6 MR. WIESNER: I think our plan, if it  
7 please the Commission, is to have the parties  
8 make opening statements, before we move into the  
9 Commissioner questioning phase, if that's  
10 acceptable?

11 CHAIRMAN GOLDNER: Oh, of course. Yes,  
12 absolutely. Do you have an order of go?

13 MR. WIESNER: We're happy to go first.

14 CHAIRMAN GOLDNER: Okay. Any  
15 objections?

16 MR. POSTAR: No, no objection.

17 CHAIRMAN GOLDNER: Okay.

18 MR. CROUSE: No objections.

19 CHAIRMAN GOLDNER: Thank you. Attorney  
20 Wiesner, please proceed.

21 MR. WIESNER: I will proceed by turning  
22 over the microphone to Attorney Key, in  
23 Washington.

24 MS. KEY: Thank you. And good morning.

1 As noted, my name is Jennifer Key. And I  
2 represent Eversource Energy in this case,  
3 although my opening remarks are going to be on  
4 behalf of the Joint Utilities.

5 As perhaps as evidenced from the Briefs  
6 of the Joint Utilities, the legislation relating  
7 to electric distribution utility-proposed pilot  
8 programs for limited producers is deeply flawed.  
9 Indeed, it's rather unclear what the very purpose  
10 of the legislation is, given that generators that  
11 meet the definition of "limited producers", and  
12 that are connected to the distribution system of  
13 the electric distribution utilities are free  
14 today to sell wholesale power.

15 But issues regarding the purpose of the  
16 statute and whether it will result in just and  
17 reasonable rates for New Hampshire ratepayers are  
18 not at issue today. The focus is on one set of  
19 flaws in the legislation, jurisdictional  
20 conflicts and preemption issues either nullify  
21 provision of the legislation, or could nullify  
22 provisions of the legislation, depending on what  
23 those provisions mean or how they would be  
24 implemented. The Joint Utilities have tried to

1 identify and address all the possible  
2 jurisdictional and preemption issues, despite the  
3 statute being, in large part, inscrutable.

4 The Community Power Coalition of New  
5 Hampshire, which I'll refer to as the  
6 "Coalition", asks you to solve this  
7 inscrutability issue by interpreting away any  
8 jurisdictional or preemption issues, but the  
9 issues are so severe in some cases they simply  
10 can't be ignored or willed away. We have fully  
11 demonstrated the existence of several such  
12 conflicts and presumption issues in the case.  
13 And, although the focus here is largely conflicts  
14 with federal law and tariffs, at times, the  
15 legislation also does not reflect how retail  
16 electric service is provided in the State of New  
17 Hampshire, such that existing state laws may  
18 conflict with aspects of the proposed pilot  
19 program.

20 Our fundamental conclusion is that no  
21 pilot program can be implemented in the manner  
22 intended under this legislation, such that this  
23 docket should not move forward, and there are  
24 more than sufficient legal reasons to end the

1 docket. That said, if the Commission is inclined  
2 to interpret away conflict and preemption issues  
3 by, for example, finding that if the statute  
4 provides for an Option A or an Option B, and only  
5 Option B is preempted, and only Option A will be  
6 permitted, we think it's very important that the  
7 Commission's order state that explicitly.

8 Similarly, if entire sections or paragraphs of  
9 the statute are preempted and void, any order  
10 should say that.

11 I'm going to start with an example of  
12 that. An example of the way a Commission might  
13 eliminate a preemption issue relates to  
14 Paragraph XIII of the statute, which addresses  
15 "capacity supply obligations". It's our opinion,  
16 now that we have seen no response from the  
17 Coalition or the OCA, that they have basically  
18 conceded, through their silence, that this  
19 paragraph of the statute addresses a topic very  
20 far afield from any jurisdiction of this  
21 Commission, namely the ISO mandated supply  
22 obligations of generators or other resources that  
23 participate in, and win supply obligations, in  
24 the ISO-New England's capacity auction. There is

1 no way to interpret this provision regarding  
2 capacity supply obligations as implementable by  
3 this Commission; it's a legal nullity. So, if  
4 this docket were to move forward, any order  
5 should be clear that Paragraph XIII is of no  
6 effect because it is preempted by the ISO Tariff.

7 And I would note that this is just one  
8 of several examples of the statute not reflecting  
9 the ISO-New England Tariff, which creates many of  
10 the conflicts. Indeed, if through interpreting  
11 away jurisdictional conflicts, a pilot was  
12 approved that was in direct conflict with the  
13 words of the statute, the distribution utilities  
14 would need to be immunized from litigation that  
15 they were violating the statute.

16 And, now, I'm going to move on to the  
17 substance of the issues we have raised regarding  
18 the conflicts of preemption. And I want to  
19 address first what I think is the most important  
20 issue to us, which is this fiction of wholesale  
21 sales in intrastate commerce in the State of New  
22 Hampshire. Indeed, when I looked at the statute,  
23 the very first thing that indicated to me that  
24 there was a major preemption issue with the

1 statute was seeing those very words "intrastate  
2 wholesale sales" in a statute involving the State  
3 of New Hampshire. Given all the regulated New  
4 Hampshire distribution utilities are connected to  
5 the Eastern Interconnection, there simply could  
6 not be any wholesale sales in intrastate commerce  
7 by limited producers, because one of the few  
8 bright jurisdictional lines that FERC has drawn  
9 is that all wholesale sales are deemed to be in  
10 interstate commerce, unless they occur in  
11 electrically islanded areas, such as ERCOT, for  
12 the Reporter, that's the "Electric Reliability  
13 Council of Texas", Alaska, or Hawaii.

14 In their attempt to rebut FERC  
15 precedent on this issue, all the other side can  
16 do is cite cases that parrot the words of the  
17 Federal Power Act that do mention the words  
18 "intrastate wholesale sales", which are also  
19 called "within-state" wholesale sales in the  
20 Supreme Court case known as *FERC versus the*  
21 *Electric Power Supply Association*, also known as  
22 "*the EPSA*" case. The Coalition has not cited a  
23 single case in the last fifty years where FERC or  
24 a court has found, based on the facts concerning

1 a wholesale sale, that an intrastate wholesale  
2 sale has occurred outside of the islanded areas  
3 that I mentioned.

4 Indeed, as pointed out in our Brief in  
5 response to the Supplemental Letter, the  
6 Coalition's own Supplemental Letter merely cited  
7 time and again the fact that the courts have used  
8 the words "intrastate wholesale sales" in  
9 defining or limiting FERC's jurisdiction, rather  
10 than locating a single modern case that finds  
11 such an intrastate wholesale sale actually has  
12 occurred.

13 Oddly, the Coalition claims that we are  
14 the ones who cannot submit any support for a FERC  
15 ruling that wholesale sales taking place only on  
16 local distribution facilities are wholesale sales  
17 in interstate -- in interstate commerce. But, in  
18 making this argument, what they seem to be saying  
19 is that *the EPSA* case, which is a case having to  
20 do with demand response, and nothing to do with  
21 wholesale sales, changed very clear precedent on  
22 the subject of wholesale sales in interstate  
23 commerce.

24 The Joint Utilities have readily

1 dismissed the notion that *EPISA* or any of the  
2 other cases cited by the Coalition analyzes this  
3 issue of a wholesale sale in interstate -- and  
4 whether it's an interstate or intrastate  
5 commerce. We are not disputing the truism that  
6 the Federal Power Act reserves regulatory  
7 authority over both retail sales and intrastate  
8 wholesale sales to the States; but we simply have  
9 not seen a case where anyone has found there to  
10 be a intrastate wholesale sale on a distribution  
11 system.

12 The relevance of the "precedent" that  
13 postdates the relief brief in the Supplemental  
14 Letter is best described by the word "none".  
15 And, in response to that Letter, we demonstrated  
16 why each and every case mentioned had absolutely  
17 nothing to do with the issue of what constitutes  
18 an intrastate wholesale sale. Also, in that  
19 Letter, the Coalition pointed to five factors it  
20 claims were guidance on the issue of what's an  
21 intrastate power sale. But those were all cases  
22 that really were about the issue of when state  
23 actions are preempted, and none of the cases  
24 actually had anything to do with the



1 determination of whether a sale was made, and  
2 whether that sale was in intrastate or interstate  
3 commerce.

4 Basically, as to this issue, the facts  
5 and outcome of what we call the "CPUC",  
6 California Public Utilities Commission, feed-in  
7 tariff case, at 132 FERC 61,047, are what matter  
8 here. In our Supplemental Brief, we described  
9 exactly what they are, an intervenor, who goes by  
10 the name of "SMUD", or "Sacramento Municipal  
11 Utility District", they were a proponent of  
12 intrastate wholesale sales being found, and they  
13 argued exactly what's being argued here. That,  
14 if power originates on the distribution system,  
15 and never enters the transmission system, but  
16 remains at the distribution level, the wholesale  
17 sale should be found to be state jurisdictional  
18 and made in intrastate commerce. FERC rejected  
19 this argument outright. That case has never been  
20 overturned.

21 And, indeed, it was recently -- more  
22 recently confirmed in the *California Independent*  
23 *System Operator* case, or "CAISO case" as we call  
24 it, at 181 FERC 61,035, and it similarly states

1       that sales by distributed generators are in  
2       interstate commerce no matter the location of the  
3       load to be served. And that *CAISO* case is  
4       important, it even eliminated the notion that the  
5       excess energy for which credits are provided to  
6       net-metered customers are intrastate sales to the  
7       utility, FERC confirmed there that they are just  
8       not sales at all.

9               And, as explained also in the *SunEdison*  
10       case, if you do have any, like a net-metered  
11       customer, that is paid in other than credits at  
12       the end of a billing period, is paid cash, that's  
13       a wholesale sale in interstate commerce, of  
14       course, it's usually not rate-regulated by FERC,  
15       because there is an exemption in PURPA, the  
16       Public Utility Regulatory Policy Act, and that  
17       does exempt sales from rate regulation by  
18       entities that are the same sort as limited  
19       producer.

20              Also, a final note on this point, that  
21       any other approach that could be used to try and  
22       distinguish intrastate from interstate wholesale  
23       sales, such as an approach to jurisdiction is  
24       whether you actually try and distinguish whether

1       any electrons from a generator interconnected to  
2       distribution flow onto the transmission system,  
3       for example, when load is low, or say several  
4       limited producers were on the same circuit, that  
5       this type of electron tracing approach would be a  
6       nightmare from an implementation standpoint, and  
7       it was abandoned, you know, many, many decades  
8       ago. It was somewhat in use briefly by the FERC,  
9       but it was abandoned, and that was well before  
10      there were what are now millions, literally, of  
11      generators sitting on the distribution system.

12               And, also, I just want to note, we do  
13      recognize the statute does allow retail sales  
14      from these limited producers. We don't have any  
15      jurisdictional objection to that. And, in  
16      theory, you could move forward with a pilot  
17      program under which limited producers only made  
18      retail sales. But even that approach wouldn't  
19      cure some of the other relevant legal flaws in  
20      the statute.

21               And I'm going to move on to some of  
22      those other flaws now. One of the issues -- one  
23      of the flaws relates to Paragraph X, which is  
24      related -- which addresses reduction of load

1 obligation. As the Joint Utilities understand  
2 it, after reading the Coalition's Brief as to  
3 what they believe this section addresses, and we  
4 found it very unclear what this section  
5 addressed, as to what load obligation, as there's  
6 many different services that go into the act of  
7 providing electricity to customers, clearly, the  
8 Coalition is interpreting this as the amount of  
9 energy needed, or the amount of energy to be  
10 purchased out of the ISO market should be reduced  
11 when you have a limited producer providing some  
12 power. And the Coalition provided an example  
13 where you had a community power aggregator with a  
14 gross load of 12 megawatts, and a net load of 8  
15 megawatts, and 4 megawatts of generation that was  
16 operating during that hour and selling to it. It  
17 was -- and I think they used both a combination  
18 of net-metered and -- or, excess net-metered  
19 generation and limited producer generation. And  
20 the Coalition wants Paragraph X to be read that,  
21 in the example, that the aggregator would be  
22 treated as having to buy the 8 megawatts from the  
23 ISO-New England to serve the load, so that its  
24 load would be reduced by 4 megawatts.

1           But one of our issues with the statute  
2           is how it tries to ensure that the limited  
3           producer's output is treated as reducing the load  
4           from 12 megawatts to 4 megawatts. The statute  
5           requires the limited producer to have a meter and  
6           report hourly meter data to the distribution  
7           utility, and then would be reported on to the  
8           ISO-New England for daily load settlement. The  
9           problem with this is that the generator meter  
10          data that the -- that the distribution utility  
11          has to report to the ISO-New England can only be  
12          data from registered generators with an ISO-New  
13          England Asset ID. The ISO-New England data  
14          reporting form does not even accept meter data  
15          from the output of an unregistered generator,  
16          such as a limited producer.

17                 And this is a point we didn't get to  
18          mention on brief, but the ISO-New England Manual,  
19          it's M-28, Section 7, is very clear on the point.  
20          Such that the means for implementing load  
21          reduction in the statute directly conflicts with  
22          the ISO Tariff.

23                 The other major problem that we  
24          stressed in our Brief with Paragraph X of the

1 statute is it said that the load reduction or  
2 offsets to the loads -- or, to the load should be  
3 offsetting the obligation -- it should be  
4 offsetting the load-serving entity serving the  
5 limited producer in the ISO-New England wholesale  
6 market. That statement or clause was very  
7 difficult to parse, because it doesn't say that  
8 the load obligation of the community power  
9 aggregator or the entity purchasing the limited  
10 producer's energy is reduced, it says it should  
11 be the load-serving entity of the limited  
12 producer itself.

13 Well, all generators have retail  
14 station power load and thus limited producers  
15 themselves would have a load-serving entity that  
16 serves that station power load. And the statute  
17 also doesn't require limited producers to be in  
18 the service area of a community power aggregator,  
19 and thus a retail customer -- and thus a limited  
20 producer could be a limited -- could be a --  
21 sorry -- a retail customer, for example, on a  
22 distribution utility. So, a very serious problem  
23 arises if that limited producer is not a retail  
24 customer of the entity to whom it is selling

1 energy, because Paragraph X is so clear that the  
2 load obligation being reduced has to be "the load  
3 obligation of the load-serving entity serving the  
4 limited producer for load settlement in the  
5 ISO-New England wholesale electricity market."  
6 Of course, that limited producer isn't  
7 participating in the market. So, its only  
8 relation to the market is that limited producer  
9 has load that would be part of a load asset. So,  
10 that's just one example where you just change a  
11 fact, a simple fact in that example, and there is  
12 just no way to logically interpret the statute.  
13 It would force the Joint Utilities to reduce the  
14 load obligation of the entity for no reason.  
15 It's not entitled to that reduction.

16 Also, Paragraph XI(c), dealing with the  
17 avoided transmission charges, it also refers to  
18 the load-serving entity of the limited producer,  
19 raising the very same type of issue, that the  
20 credit may be going to the wrong entity. And,  
21 given this proceeding is about the existence of  
22 these type of conflicts, not how and whether they  
23 can be fixed, which would require new  
24 legislation. Again, it's another reason that we

1       don't see there's a reason to move forward with  
2       the pilot program under this legislation.

3               Next, I want to move on to the topic of  
4       the transmission avoided charge payments. And,  
5       for the purpose of the oral argument, the Joint  
6       Utilities will assume that such avoided charges  
7       could be found to exist. Now, all the parties in  
8       their briefs and statements agree the amount of  
9       load reportable to the ISO-New England must  
10      reflect the rules of the ISO-New England for  
11      reporting load for transmission purposes. And  
12      that the ISO -- we also all agree that ISO-New  
13      England now does not include load as transmission  
14      load if it's served by unregistered generators,  
15      such as limited producers.

16             We also all agree that the Commission  
17      here has no authority to set transmission rates  
18      or charges for FERC-regulated transmission  
19      services to network customers. And it's because  
20      of this, because the Coalition is still asking  
21      through the statute that a credit be paid to  
22      limited providers, that credit has to be paid by  
23      the distribution utilities through a retail rate  
24      mechanism. And the Joint Utilities even agreed,



1       in their Reply Brief, that, you know, if there  
2       was this credit to be paid, that you couldn't  
3       change the FERC allocation of transmission  
4       charges. Rather, basically, you would have --  
5       the Commission would authorize, basically, what,  
6       for lack of a better term, would be a retail  
7       subsidy to the limited producer. So, it's a  
8       limited producer subsidy.

9               And we do agree that the prohibited  
10       cost trapping that would be prohibited by  
11       preemption laws could be avoided, if this  
12       Commission said that the retail customers would  
13       have to pay a limited provider subsidy, so that  
14       would keep the distribution utilities whole, so  
15       they could collect both the amount of the credit  
16       they would have to pay, and that they could  
17       collect their full -- the full amount that  
18       ISO-New England would bill them for transmission.

19              Now, if this -- so, you know, if it  
20       were the notion of increasing the rates of retail  
21       customers through a limited provider subsidy does  
22       make the possibility of the improper  
23       cost-trapping go away, in which case then we  
24       would visit the issue of whether there are

1        avoided transmission charges down the road in a  
2        later proceeding. But the Commission first must  
3        agree, to avoid that preemption issue, that there  
4        could be such a limited producer subsidy and that  
5        it could be collected from retail customers.

6                Related to this issue, the Consumer  
7        Advocate claims that the treatment in the  
8        legislation that's proposed with regard to these  
9        avoided transmission charges would be very  
10       similar to Unitil's Kingston Solar Project. But,  
11       actually, the treatment is nothing at all like  
12       the proposal of Unitil in Kingston. Unitil has  
13       indicated that all its retail customers would  
14       benefit from its reduced transmission load by  
15       having, you know, a generator that was  
16       interconnected to distribution that wouldn't be  
17       counted by the ISO-New England, or the load  
18       served would not be counted. And it's very  
19       unclear to us whether the Consumer Advocate  
20       supports this retail subsidy that I just  
21       mentioned that would be necessary to avoid the  
22       cost-trapping and federal preemption.

23               But, again, to find that no  
24       cost-trapping would occur, the Commission's order

1       here should affirmatively state the Commission is  
2       willing to compel retail customers to pay the  
3       limited producer subsidy, and approve the  
4       necessary retail -- and that the Commission would  
5       approve any retail tariff changes needed to do  
6       so, which, of course, would be another expense  
7       added to retail ratepayers of entities such as  
8       the distribution utilities.

9               Another issue related to preemption  
10       also related to Paragraph XI, and this one is, we  
11       admit, only a potential preemption issue, because  
12       there are two options in Paragraph XI, in  
13       Subparagraphs (b) and (c). And (b) is the one  
14       that is preempted by federal law. And, if this  
15       case were to go forward, you know, any order  
16       should say that (c) is the only available option.  
17       And the option in Subparagraph (b) is preempted,  
18       because it requires a compelled sale of wholesale  
19       transmission from the distribution utilities to  
20       load-serving entities.

21              In its Initial Brief, the Coalition  
22       suggests that the distribution utility sponsors  
23       of a pilot program could petition the Commission  
24       to allow the load-serving entity, such as CPAs,

1 to directly charge groups of retail customers for  
2 their share of transmission costs.

3 While I seriously doubt that a  
4 distribution utility would petition the  
5 Commission to allow load-serving entities to buy  
6 transmission service from them for their retail  
7 customers, and then have the LSEs charge the  
8 retail customers for that service, the Joint  
9 Utilities just do not have that obligation, and  
10 they can't be compelled to do so, because that  
11 sale of transmission would be a wholesale sale  
12 from one of the Joint Utilities to a load-serving  
13 entity. Also, that entire system would require a  
14 significant overhaul of our billing systems, and  
15 create entirely new wholesale and retail tariffs.  
16 In addition, there are existing state laws and  
17 regulations restricting what services the  
18 community power aggregators and competitive  
19 electric suppliers can lawfully provide, as  
20 discussed at Page 21 of our Reply Brief. So,  
21 this whole issue, in Subparagraph (b), of selling  
22 transmission to the load-serving entities, could  
23 actually require new legislation.

24 I want to reinforce that, in the one

1 case that the Coalition cited, of where  
2 competitive suppliers, rather than the  
3 distribution utilities, procure transmission  
4 service in retail choice states, most of the  
5 competitive suppliers in that case were all  
6 arguing to be relieved of the task of obtaining  
7 transmission service for their retail loads they  
8 serve. Load-serving entities that aren't fully  
9 regulated state utilities generally are not and  
10 do not want to become transmission suppliers to  
11 retail customers. The Coalition seems to be  
12 asking to take on a task virtually no other  
13 supplier or aggregator in the country wants to  
14 do. And, again, the Joint Utilities cannot be  
15 compelled to sell transmission at wholesale.

16 The next thing I want to mention  
17 briefly is the whole problem with the statute not  
18 using the term "market participant", which is the  
19 entity with which ISO-New England interacts and  
20 sets the obligation of. The Coalition's answer  
21 to this argument is that this Commission should  
22 just basically assume that "load-serving entity"  
23 means "market participant" under this  
24 Commission's own rules. But the two words really

1       can't be interchanged, as evidenced by the fact  
2       that there are, for example, community power  
3       aggregators, such as like the Keene Community  
4       Power Aggregator or the Nashua Community Power  
5       Aggregator that are not market participants in  
6       ISO-New England. The Coalition simply cannot ask  
7       the PUC to pretend that "load-serving entity" in  
8       the statute means "market participant",  
9       especially because some community power  
10      aggregators use the same market participant to do  
11      business. This -- it just the use of that  
12      term -- their lack of use of the term "market  
13      participant" causes a whole host of problems.

14               And, so, in sum, I just want to say  
15      that, you know, we have, in our Briefs, in  
16      detail, pointed out these numerous problems with  
17      the statute, even given this proceeding's narrow  
18      scope, and we have received unsatisfactory  
19      responses or no response at all to the issues we  
20      identified. And the Coalition's Briefs do not  
21      examine the wording of the statute, or analyze  
22      the cases properly. And it's the wording of the  
23      statute that's the heart of the most serious  
24      jurisdictional issues, including, as I mentioned

1       at the beginning, the capacity supply obligation  
2       issue.

3               And, finally, I want to say the Joint  
4       Utilities want to stress that there are programs,  
5       such as the Vermont SPEED Program or the NHEC  
6       battery program, they're examples of programs  
7       that involve sales at wholesale in interstate  
8       commerce, by entities like limited producers,  
9       that provide sufficient benefits for those  
10      developers of limited producers to, you know, to  
11      want to operate in that fashion. None of  
12      those -- none of those programs I just mentioned  
13      involve intrastate wholesale sales or direct  
14      retail sales. And none of those programs require  
15      accounting for or allocating or reporting load  
16      and generation in a manner that's inconsistent  
17      with the ISO-New England rules.

18             For example, I'll just say a few more  
19      words about the Vermont SPEED Program. Their  
20      participating generators' output data is not  
21      reported to the ISO-New England and the load  
22      reduction is not allocated based on the  
23      load-serving entity of the participating  
24      generator, as the statute here proposes. The

1       SPEED Program, unlike the statute here, follows  
2       the ISO-New England Tariff on load reporting and  
3       the allocation of the load reduction is not  
4       illogically based on the location of the  
5       load-serving entity, which has the station power  
6       load that has to be served. And I'll also say  
7       load-serving entities, such as community power  
8       aggregators, are free today to propose similar  
9       programs that do not cause conflicts with the ISO  
10      Tariff. And we think that is a much better  
11      approach than spending further time on this  
12      deeply flawed statute.

13               And I thank you for your time. And I'd  
14      be happy to address any questions. Thank you.

15               CHAIRMAN GOLDNER: Thank you. I think  
16      the plan today is to let everyone weigh in, and  
17      then I think the Commission would reserve  
18      questions to the end of the presentation.

19               So, if any other comments from the  
20      utilities today from folks in the room?

21               *[Multiple counsel for the Joint*  
22      *Utilities' indicating in the negative.]*

23               CHAIRMAN GOLDNER: Okay. Seeing none.  
24      Attorney Crouse, would the Office of the Consumer



1 Advocate like to go next?

2 MR. CROUSE: Yes. Thank you.

3 Commissioners, you opened this docket  
4 in response to the General Court directing you  
5 determine definitively the answer to two legal  
6 questions. First, whether any jurisdictional  
7 conflict exists concerning the use of the  
8 distribution or transmission system; and, two,  
9 whether the activities allowed by RSA 362-A:2-b  
10 would require a utility to violate its  
11 Transmission Owners Agreement, what I call a  
12 "TOA", or require a recalculation of any ISO-New  
13 England Open Access Transmission Tariff, what  
14 I'll refer to as "OATT" for convenience.

15 The OCA, in their Brief, took these  
16 questions in the order posed, and answered both  
17 in the negative. Through our Brief, we tried to  
18 demonstrate three primary points. First, the OCA  
19 explained that not only the Commission, but all  
20 the parties must employ the Constitutional  
21 Avoidance Doctrine pursuant to New Hampshire  
22 Supreme Court precedent, that's *Bedford versus --*  
23 *or, I'm sorry, Polonysky versus Town of Bedford.*  
24 The Constitutional Avoidance Doctrine simply

1 states that, whenever possible, a statute should  
2 be interpreted in a way that avoids placing its  
3 constitutionality in doubt, and the court may  
4 adopt an alternative interpretation which avoids  
5 constitutional conflicts.

6 All the parties, except the Joint  
7 Utilities, addressed this controlling precedent.  
8 And, so, it's mystifying to the OCA why the Joint  
9 Utilities were explaining in their Brief that  
10 this is a legal nullity, while avoiding how the  
11 Supreme Court in New Hampshire directs how to  
12 resolve constitutional conflicts.

13 Second, the OCA, in our Brief, tried to  
14 explain the process of interpreting RSA 362-A:2-b  
15 by applying the Constitutional Avoidance  
16 Doctrine. First, the OCA understands that there  
17 are potential preemption issues throughout the  
18 pilot statute, RSA 362-A:2-b. Traditionally,  
19 interstate wholesale sales of electricity are  
20 within FERC's jurisdiction pursuant to the  
21 Federal Power Act, whereas retail sale of  
22 electricity traditionally falls under state  
23 jurisdiction.

24 In practice, we typically only see

1 intrastate wholesale sale of electricity in  
2 islanded states, like Alaska, Hawaii, and the  
3 ERCOT Region of Texas. However, there is a  
4 narrow exception for intrastate wholesale sale of  
5 electricity to exist in law that's recognized in  
6 *Hughes v. Talen*. However, the OCA has yet to see  
7 a precedent that explicitly shows intrastate  
8 wholesale sales in practice. But we look forward  
9 to seeing what our friends at the Community Power  
10 Coalition have to say, since they've addressed  
11 some matters that they believe demonstrate that.

12 However, in applying the Constitutional  
13 Avoidance Doctrine, the OCA looked to RSA  
14 362-A:2-b, XI(a), as an example of how this could  
15 be construed to have preemption issues. But, in  
16 applying the Constitutional Avoidance Doctrine,  
17 even after the statute was amended, the OCA  
18 interpreted it to mean simply that, in applying  
19 the Constitutional Avoidance Doctrine, there is a  
20 reduction in coincident peak demand and avoided  
21 transmission costs through rates approved under  
22 state jurisdiction. This is important for three  
23 reasons.

24 First being, the OCA does analogize

1       Unitil's Kingston Solar Project as a  
2       constitutionally permissible value stack of the  
3       benefits of avoided transmission costs, for  
4       example, to emulate to which is constitutionally  
5       permissible, and to which the Joint Utilities  
6       would narrowly concede as logical in their Brief,  
7       as well as congruent with the relief that the  
8       Community Power Coalition seeks.

9               This further adds to the mystification  
10       that, if the Joint Utilities can at least  
11       narrowly acknowledge a logical alternative that  
12       is permissible under the Constitutional Avoidance  
13       Doctrine, that this could be one permissible  
14       alternative to how the statute is drafted that  
15       the Commission could so choose to adopt.

16              And, third, that such concession is  
17       contrary to the conclusion of the Joint  
18       Utilities' Reply Brief, saying that such  
19       conflicts cannot be overcome, when they recognize  
20       there is a possibility.

21              The OCA believes that the pilot  
22       programs introduced under RSA 362-A:2-b are not  
23       federally jurisdictional, because, when applying  
24       the Constitutional Avoidance Doctrine, from our

1 perspective, the pilots are untethered from the  
2 interstate wholesale market regulated under the  
3 Federal Power Act. This is because, as noted  
4 earlier, the OCA recognizes that traditionally  
5 interstate wholesale sales of electricity happen  
6 to be in FERC's exclusive jurisdiction, except  
7 for that limited exception under *Hughes v. Talen*,  
8 which recognizes that there is a narrow  
9 exception for the state to encourage generation,  
10 and particularly the clean generation, however,  
11 the Joint Utilities might rightly point out that  
12 that might be apropos of nothing, since the  
13 Supreme Court has not considered intrastate  
14 wholesale sales to fully function within the  
15 state in the last 60 to 80 years or so. So, we  
16 very much look forward to seeing examples that  
17 could otherwise expand on that.

18 But the OCA's argument is analogizing  
19 to the Kingston Solar Project as a retail product  
20 that community aggregators or municipal  
21 aggregators could use in order to facilitate a  
22 retail product that's being sold at distribution  
23 voltage that's untethered to the intrastate --  
24 or, interstate wholesale sale of electricity, as

1           allowed by *Hughes v. Talen*.

2                       Leading to our conclusion, the OCA  
3           believes that this is a constitutionally  
4           permissible matter, as it is congruent to the  
5           relief that the Community Power Coalition seeks,  
6           and is at least narrowly conceded as logical on  
7           Page 26 of the Joint Utilities' Reply Brief, and  
8           the value stack that they presented in their  
9           Joint Response to the same docket in Tab 9.

10                      Thank you.

11                      CHAIRMAN GOLDNER: Thank you. We'll  
12           move to the New Hampshire Department of Energy,  
13           Attorney Young.

14                      MR. YOUNG: Thank you, Commissioners.

15                      The Department does not have a position  
16           today. We're here to listen. After reviewing  
17           the various briefs, and listening to the oral  
18           arguments so far presented this morning, we are  
19           confident that the parties to this docket will  
20           provide a complete record for consideration by  
21           the Commission.

22                      Thanks.

23                      CHAIRMAN GOLDNER: Okay. Attorney  
24           Young, just a question for you, before we move

1 on.

2 Does the Department plan to file a  
3 position statement in the future or does the  
4 Department not plan on taking a position in the  
5 docket?

6 MR. YOUNG: We do not plan on taking a  
7 position in the docket.

8 CHAIRMAN GOLDNER: Okay. Thank you.  
9 We'll move to the Community Power Coalition, and  
10 Attorney Postar.

11 MR. POSTAR: Good morning,  
12 Commissioners.

13 The Community Power Coalition of New  
14 Hampshire is here because of the overriding  
15 importance of accelerating clean energy in New  
16 Hampshire. And this statute presents an  
17 important opportunity to accelerate the process  
18 that has not moved forward at the speed that  
19 consumers want. Consumers want clean energy.  
20 This is an important opportunity.

21 The program, the statute, in our view,  
22 provides the Commission with the authority to  
23 establish a limited producer's pilot program for  
24 the benefit of a load reducer under the ISO-New

1 England Tariff that is established under RSA  
2 362-A:2-b.

3 To hear the Utilities' position is to  
4 disregard the revisions that have been made to  
5 the tariff, to not fully interpret the actual  
6 language of the Federal Power Act, to ignore the  
7 words that the Supreme Court has used in a number  
8 of cases, particularly beginning in 2016, to find  
9 that no possible intrastate sale is possible, no  
10 intrastate state-regulated sale is possible, is  
11 to ignore the language of Supreme Court cases and  
12 numerous federal court cases, predominantly in  
13 New England.

14 Just focusing on the language briefly,  
15 as mentioned in the opening remarks, of language  
16 that may not match up evenly with ISO-New England  
17 language and terms. The counsel correctly  
18 pointed out the Constitutional Avoidance  
19 Doctrine, that the objective of a court, of a  
20 commission, in looking at statutory language, is  
21 not to reject it because it doesn't read exactly  
22 the way you want it to read, but to see whether  
23 an interpretation is possible, is permissible,  
24 that will allow you to achieve the objectives of



1 the Legislature.

2 We are here to work with the parties  
3 and the Commission to solve the problems that  
4 have been identified. That, certainly, in  
5 implementing any new statute, there are many  
6 nuances that need to be addressed, there are  
7 important points that need to be addressed, and  
8 we urge the Commission to establish a process for  
9 doing so.

10 Under the "under 5 megawatt program"  
11 that's proposed falls within the bandwidth  
12 Eversource and other New England ISO  
13 participating transmission owners have proposed,  
14 and FERC has approved for generation that need  
15 not register or transact through the ISO-New  
16 England market.

17 In essence, New England, we've already  
18 crossed this bridge that the pilot program  
19 proposes for small renewable generation. And  
20 Community Power Coalition of New Hampshire  
21 strongly supports a program that enhances the  
22 introduction of clean energy into New England.

23 In New England, interstate sales of  
24 energy occur through the ISO-New England market.

1       Participating transmission owners, including  
2       Eversource, have created an exception from that  
3       market for the very transaction proposed in the  
4       pilot program. To properly apply the Utilities'  
5       syllogism, the case for state jurisdiction over  
6       the wholesale intrastate transaction was  
7       previously made by their own FERC filings. Very  
8       simply, the pilot program will have no tie to the  
9       federally-regulated market, which the U.S.  
10      Supreme Court found to be the key in determining  
11      when state exercise of authority encroached on  
12      the federal jurisdiction.

13               Defining a program for small renewable  
14      generation that is untethered to the interstate  
15      wholesale market that is subject to FERC  
16      jurisdiction, along with the other four  
17      guideposts that CPCNH identified in our  
18      September 7, 2023, letter, will allow the  
19      Commission to develop pilot programs solely  
20      subject to state jurisdiction.

21               We begin with the fact that there are  
22      recognized exceptions to federal jurisdiction  
23      over interstate sales. The Federal Power Act  
24      expressly exempts wholesale sales by CPCNH, and

1       any other governmental entity in New Hampshire,  
2       from federal jurisdiction.

3               In addition, FERC does not exercise its  
4       full discretion over interstate wholesale sales.  
5       Net-metering, by every rooftop solar owner to  
6       their distribution utilities, has been permitted  
7       without a federally-regulated rate, even when the  
8       owner sells more on a net energy basis. By  
9       maximizing the benefit to the distribution energy  
10      producer, the state provides an appropriate  
11      signal for local resource development.

12             To the merits of the jurisdictional  
13      issue, the ISO-New England has already  
14      facilitated generation under 5 megawatts by  
15      allowing sales other than through its market. To  
16      ensure full value, ISO-New England recognizes  
17      such generation as a load reducer when  
18      calculating market costs, including transmission  
19      costs.

20             The Joint Utilities cite numerous cases  
21      where FERC and the courts have found entities  
22      selling in interstate commerce were subject to  
23      federal regulations. These rulings do not defeat  
24      the Commission's ability to design a program for

1        entities that sell in interstate commerce to be  
2        subject to state, not federal, regulation.

3                The emergence of a distributed -- of  
4        distributed generation shine new light on the  
5        federal statute's requirement of an interstate  
6        component for there to be federal jurisdiction  
7        over a sale, and the reservation of within-state  
8        wholesale sales or retail sales. Note, there  
9        will be no state -- I'm sorry, within-state  
10       wholesale sales or retail sales to state  
11       jurisdiction. We cite to the U.S. Supreme  
12       Court's decision in *FERC v. Electric Power Supply*  
13       *Association*, in short, "*EPSA*", as providing new  
14       recognition of how a state can incent distributed  
15       and renewable generation.

16                *EPSA* highlighted the Federal Power  
17       Act's reservation of interstate wholesale sales  
18       to the states. This 2016 ruling has not been  
19       fully explored, and is not surprising that there  
20       are not extensive decisions applying this  
21       decision -- this ruling. Although it's been  
22       referenced numerous times, it hasn't been fully  
23       explored.

24                As we noted in our September 7 Letter,

1 court after court has gone out of their way to  
2 cite *EPISA's* focus on the reservation to states of  
3 jurisdiction over intrastate wholesale  
4 transactions.

5 The Supreme Court also addressed the  
6 demarcation between federal and state authority  
7 in *Hughes v. Talen Energy Marketing*, stating that  
8 "Nothing in this opinion should be read to  
9 foreclose Maryland and other states from  
10 encouraging production of new or clean generation  
11 through measures untethered to a generator's  
12 wholesale market participation."

13 More recently, the United States Court  
14 of Appeals for the District of Columbia explained  
15 that the Congress left states with jurisdiction  
16 over facilities used in local distribution were  
17 only for transmission of electric energy in  
18 intrastate commerce over facilities for the  
19 transmission of electric energy wholly consumed  
20 by the transmitter, except as specifically  
21 provided in the Act. And this is a citation to  
22 *National Association of Regulatory Utility*  
23 *Commissioners v. FERC*, a case that the Utilities  
24 don't respond to. Exercising state authority

1 over an intrastate wholesale sale where FERC does  
2 not act does not invade FERC authority, and FERC  
3 has said as much.

4 The pre-*EPSA* cases the Joint Utilities  
5 cite fail for a variety of reasons to address the  
6 crux of the state program. Their reference to  
7 Alaska, Hawaii, and Texas as the only states  
8 where intrastate wholesale sales can be regulated  
9 by the state, fails to grapple with the Supreme  
10 Court's analysis that shows that a rate, not set  
11 by FERC, is not necessarily violative of federal  
12 authority. A small generator, with no connection  
13 to the markets, that sells intrastate, does not  
14 look like *Jersey Central, Public Utility --*  
15 *Public Utilities Commission -- California Public*  
16 *Utilities Commission, Detroit Edison*, or a host  
17 of other cases the Joint Utilities cite. The  
18 Joint Utilities' citations to pre-*EPSA* rulings  
19 that find the nation's giant utilities engaged in  
20 interstate commerce does not provide useful  
21 guidance to this Commission.

22 The generation of under 5 megawatt of  
23 renewable energy that is conveyed over  
24 state-regulated distribution facilities of a

1 single distribution utility, to a community power  
2 aggregation operating within the same utility's  
3 territory, and it is not sold to the regional  
4 market at a rate set by FERC, is a  
5 state-jurisdictional transaction.

6 The Commission should find that a  
7 tailored program that allows generators that fall  
8 within the "under 5 megawatt" band, that does not  
9 transact through the New England ISO market, is  
10 an intrastate wholesale transaction subject to  
11 state jurisdiction, as FERC already found in 2022  
12 by agreeing that generation can serve to reduce  
13 load.

14 Alternatively, the Commission should  
15 recognize that such a transaction is one that  
16 FERC does not intend to regulate, such that any  
17 conflict with FERC authority is avoided.

18 There's much more to say on this, but  
19 that's why we're here today. We look forward to  
20 today's discussion and to responding to your  
21 questions.

22 Thank you very much.

23 CHAIRMAN GOLDNER: Okay. Thank you. I  
24 think the plan next is to go through Commissioner

1        questions, and then, after that, of course, give  
2        all of the parties the opportunity to make  
3        further comment.

4                So, we'll start now with questions from  
5        Commissioner Chattopadhyay.

6                CMSR. CHATTOPADHYAY: As I can see,  
7        there is a disadvantage of being an economist and  
8        not a lawyer. A lot of the discussion also  
9        initially from the Joint Utilities was, in my  
10       opinion, going too fast, but I'll try to catch  
11       up.

12               So, I did hear about the Unitil  
13       project, the Kingston Project. Again, briefly,  
14       without getting into too much detail, distinguish  
15       that project from what a pilot project that is  
16       being proposed here?

17               And, so, I'll ask that question to  
18       everyone. First, let's begin with Joint  
19       Utilities. Can you stress that again?

20               MS. KEY: I think I can respond to  
21       that, although I believe someone from Unitil is  
22       in the room.

23               My understanding of the Kingston  
24       Project is that it is acting -- you know, in



1 acting as a load reducer, it would be only  
2 selling retail energy, you know, to Unitil's own  
3 retail customers. And, if it were to sell  
4 wholesale energy, Unitil, of course, has  
5 market-based rates at FERC, so that, if any  
6 wholesale sales were made out of the Kingston  
7 Project, they would be sales in interstate  
8 commerce, you know, and would be  
9 FERC-jurisdictional. And, to the extent that it  
10 is used as a load reducer, that they're making  
11 retail sales, you know, Unitil has retail  
12 customers, and its, you know, the power is being  
13 sold at retail to its customers.

14 And, if Unitil wants to provide a  
15 different answer, --

16 MR. CAMPBELL: Please.

17 MS. KEY: -- but that's our view. And,  
18 you know, we certainly view the Coalition -- or,  
19 a community power aggregator can own a generator  
20 and use it to serve its own load, sell power from  
21 that generator, to its load at retail, and that  
22 is -- and a limited producer can sell at retail.

23 MR. CAMPBELL: So, I guess the most  
24 obvious difference is the Kingston Solar Project

1 is being developed by our state-regulated public  
2 utility company pursuant to a completely  
3 different statute, RSA 374-G. And, as Attorney  
4 Key correctly noted, Unitil intends to operate  
5 the unit as a load reducer. And what that means  
6 is the energy that's going to be produced by the  
7 project will be delivered directly into the  
8 Company's distribution system. The Company will  
9 not be selling power into the ISO-New England  
10 market, and it's not wheeling power over the  
11 transmission or distribution network.

12 In addition, Until will be passing all  
13 the benefits generated by the project back to  
14 customers, including any avoided transmission  
15 charges.

16 RSA 362-A:2-b, and I'm at XI(a), seems  
17 to complement -- contemplate, excuse me, that  
18 credits are going to be paid to someone for  
19 avoided transmission charges. Under the Kingston  
20 Solar Project, Unitil benefits by reducing its  
21 monthly regional network load costs, and that  
22 benefit will accrue to all Unitil retail  
23 transmission customers, regardless of their  
24 load-serving entity.

1           So, in short, this analogy that's being  
2       drawn by the OCA and the Coalition is a  
3       distraction, and I would urge the Commission to  
4       disregard it.

5           MR. POSTAR: Commissioner?

6           CMSR. CHATTOPADHYAY: Any response  
7       from --

8           MR. POSTAR: Yes.

9           CMSR. CHATTOPADHYAY: Go ahead.

10          MR. POSTAR: With the Commissioner's  
11       permission. Like the Unitil program, the limited  
12       supplier is going to deliver the energy into the  
13       distribution system of the same customer. So,  
14       the power doesn't go -- it is functionally moving  
15       in the same way that Unitil's program describes.  
16       There really isn't a difference there. An  
17       important difference, though, is that the --  
18       under the pilot program, the producer is not a  
19       utility engaged in interstate commerce. It's --  
20       the definition of "small power producer" excludes  
21       permit -- a utility that's already so engaged.

22                 With the Commissioner's permission, the  
23       Chair of the Coalition, Mr. Below, I would ask  
24       him to supplement as well?

1 CMSR. CHATTOPADHYAY: Please.

2 MR. POSTAR: Okay.

3 MR. BELOW: Okay. Thank you.

4 I think you heard the Joint Utilities  
5 argue that, if there's a credit for avoided  
6 transmission costs, that would cause a retail  
7 subsidy. What the Joint Utilities calls a  
8 "subsidy", in the case -- in the case of a  
9 potential pilot; they call a "just and reasonable  
10 rate" when it applies to them. Specifically --  
11 or two of them.

12 Specifically, Unitil's investing  
13 ratepayer dollars, in essence, funds that will be  
14 covered from ratepayers, and they're justifying  
15 that investment by a set of benefits, a large --  
16 a significant one of which is avoided  
17 transmission costs. So, if it's a potential  
18 subsidy in the pilot, it would be a subsidy to  
19 Unitil itself, because they're getting  
20 compensation that is a large portion of the  
21 avoided transmission costs. In other words,  
22 avoided transmission costs are coming down, but  
23 the delivery charge, because they're rate basing  
24 the investment to achieve that reduction, is

1       increasing, but not by as much as the savings are  
2       expected to be. So, the savings are expected to  
3       exceed the costs to ratepayers.

4               Likewise, Liberty Utilities justifies  
5       its Battery Pilot Program, which the Coalition  
6       supports both of these kinds of investments, but,  
7       in the Battery Pilot, likewise, Liberty justifies  
8       a portion of its investment to be recovered from  
9       ratepayers by the value of avoided transmission  
10      costs. It's just that they're not recovering it,  
11      *per se*, through a transmission charge mechanism,  
12      they're recovering it through their distribution  
13      rate.

14             But the same thing that they would call  
15      a "subsidy" here is part of what the Commission  
16      has determined to be just and reasonable rates,  
17      because the benefits exceed the costs.

18             One of the distinguishing differences  
19      with the pilot approach is that the investment --  
20      that the ratepayers, as a whole, are not at risk  
21      of the investment not paying off. If the  
22      assumptions made to justify those two investments  
23      by utilities don't pan out to produce more value  
24      than the cost of the investment recovered from

1       ratepayers, then the ratepayers remain on the  
2       hook for that investment. In the case of the  
3       limited producer pilot statute, those customers  
4       are potentially, if they're being served by a CPA  
5       or a competitive power supplier, that is getting  
6       power from a limited producer, and the benefits  
7       don't pan out, they're free to migrate to a  
8       different source of power supply, unlike -- and  
9       not have to pay that invested cost.

10               So, I think that's one way in which  
11       they're analogous, but in another way that  
12       they're different.

13               CHAIRMAN GOLDNER: Does the Consumer  
14       Advocate wish to weigh in on the Commissioner's  
15       question?

16               MR. CROUSE: Yes. Thank you.

17               I'm not sure I have much more to add  
18       than what Mr. Below has just addressed. But, for  
19       the Commission's benefit, on Tab 9, and in the  
20       Reply Brief of the Joint Utilities, the Consumer  
21       Advocate just states that the benefits would be  
22       the avoided purchase power, the avoided  
23       transmission costs, local transmission savings,  
24       regional transmission savings, and potential

1 renewable energy certificates.

2 And, in the Reply Brief of the Joint  
3 Utilities, on Page 26, that we alluded to in our  
4 opening Brief, they do state that our position,  
5 the OCA's interpretation, is logical under their  
6 own circumstances, such that, as long as there's  
7 no payment for the avoided transmission charge,  
8 but those benefits could be passed on, then it is  
9 logical. And it's not a distraction, because,  
10 under the Constitutional Avoidance Doctrine, and  
11 how we're supposed to read the statute in XI(a),  
12 and even as amended, the OCA has interpreted it  
13 to mean that this something that the aggregators  
14 can create a product at retail, just like Unitil,  
15 and, as Mr. Below pointed out, and then pass  
16 those benefits from avoided transmission costs to  
17 their rate base -- or, to the ratepayer.

18 Thank you.

19 MR. CAMPBELL: Commissioner  
20 Chattopadhyay?

21 CMSR. CHATTOPADHYAY: Go ahead.

22 MR. CAMPBELL: Pardon me. Didn't mean  
23 to interrupt.

24 I did just want to make one point of

1 clarification with regard to Mr. Below's  
2 statement that, if the costs of the project  
3 exceed the benefits, ratepayers would be "on the  
4 hook" for those costs.

5 As the Commission is well aware, for  
6 the Kingston Solar Project, Unitil is still going  
7 to be subject to a prudence review by the  
8 Commission, once that project is completed.

9 Thank you.

10 CMSR. CHATTOPADHYAY: And I actually  
11 wondered about that as well, when that issue was  
12 being discussed, as to there's always something  
13 that the Commission can do to ensure that, you  
14 know, that the ratepayers are not "on the hook",  
15 if it's -- that's what is required to be done.

16 And, again, just I'm trying to  
17 understand different situations, different  
18 scenarios.

19 So, the next question would be, given  
20 the nature of the pilot being described, again,  
21 assume it's less than 5 megawatts, what  
22 happens -- can you compare that situation with  
23 municipally-owned generation facilities  
24 interconnected to the distribution system?



1           If somebody has some thoughts on it, it  
2       would be very helpful to me.

3           MR. CROUSE: I'm not sure I have a  
4       perfect answer --

5           MS. KEY: I'll answer that.

6           MR. CROUSE: Oh. I'll just say real  
7       quick, --

8           CMSR. CHATTOPADHYAY: Yes.

9           MR. CROUSE: -- I don't have a perfect  
10      response to that. However, the primary  
11      difference that I'm concerned with when applying  
12      the Constitutional Avoidance Doctrine is, as the  
13      Joint Utilities rightly point out, if the  
14      aggregators are participating in the wholesale  
15      intrastate, if they're creating a local product  
16      that directly competes with a FERC interstate  
17      product at wholesale. And, under *Hughes v.*  
18      *Talen*, states are not allowed to disregard the  
19      wholesale rate. So, the understanding of the OCA  
20      is, that would be disregarding or directly  
21      impacting the wholesale rate.

22           But, in regards to municipal ownership,  
23      I think a municipal aggregator might still be  
24      able to, but I don't have that perfectly formed

1 out yet.

2 CMSR. CHATTOPADHYAY: Okay. Anyone  
3 else?

4 MS. KEY: This is Jennifer Key. And  
5 I'm not sure if I fully got the question. But  
6 the only -- the relevance of the 5 megawatts in  
7 this, as applies to this case, is to be eligible  
8 to be treated as a load reducer for transmission  
9 purposes or as a load reducer for, you know, in  
10 the energy -- in other markets in the ISO-New  
11 England, you know, 5 megawatts is the largest you  
12 can be without having to register the generator  
13 with the ISO-New England. So, any generator  
14 connected to the distribution system that's  
15 larger than 5 megawatts has to be registered with  
16 the ISO, and this has to sort of -- or, it has to  
17 participate in the ISO market. Smaller  
18 generators don't have to be registered and don't  
19 have to participate in the wholesale market.

20 But, in our view, of course, that has  
21 nothing to do with whether, you know, the size of  
22 the generator has nothing to do with whether, if  
23 it makes a wholesale sale, you know, even if  
24 it's not registered, whether that's in interstate

1 commerce.

2 And I just want to give a quick  
3 example, because there was something Mr. Postar  
4 said that was incorrect concerning, if you have a  
5 net-metered customer, you know, let's say, you  
6 have 10 kilowatts of solar power on your roof,  
7 and, if you're in a state where, at the end of a  
8 month or a year, you know, you have some -- you,  
9 overall, over the course of the year, have excess  
10 power, you know, let's say, you add up all that  
11 you consumed, you add up all that you produced,  
12 and the utility actually pays you for that in,  
13 you know, by check or wire, you know, however  
14 they pay you, that sale to the utility has been  
15 found in the *CAISO* case, and in the *SunEdison*  
16 case, to be a wholesale sale in interstate  
17 commerce, even from the 10-kilowatt solar  
18 generator on your roof. And it is -- it would be  
19 subject to FERC regulation, but for the fact that  
20 FERC has exempted generators of certain sizes,  
21 generally 20 -- renewables 20 megawatts and  
22 smaller, or I think any QFs 20 megawatts and  
23 smaller, from being FERC rate-regulated. So, you  
24 could be, literally, a 1-kilowatt generator,

1       under certain net-metering programs, you know,  
2       and your power is -- you know, you have excess  
3       power, it's effectively serving your neighbor,  
4       you're never buying transmission, you know, but  
5       you're still making a sale in interstate  
6       commerce, it's just exempt from FERC regulation.

7               And that's certainly a point we wanted  
8       to, in distinguishing these state programs, if  
9       you look at the SPEED Program, yes, there are  
10      hundreds of generators participating in that, but  
11      they all have QF status at FERC, which exempts  
12      them from FERC regulation. And they went and got  
13      that status, because even though, you know, well,  
14      they got that status because they were larger  
15      than 1 megawatt, because they can get it  
16      automatically if they're not. But these 1  
17      megawatt generators all over Vermont go to FERC  
18      to get that status, because, otherwise, their  
19      sales would be in interstate commerce.

20             MR. POSTAR: If I could, Commissioner?

21             CMSR. CHATTOPADHYAY: Yes.

22             MR. POSTAR: Just follow up on one  
23      point.

24             MS. KEY: I mean, it's already

1 interstate commerce --

2 [Court reporter interruption - multiple  
3 parties speaking at the same time.]

4 [Brief off-the-record discussion ensued  
5 with the Chairman, the court reporter,  
6 and Atty. Key regarding where she  
7 should continue on with her statement.]

8 MS. KEY: Okay. I was trying to make  
9 the point that Attorney Postar had said something  
10 about net-metered generators not -- and sales by  
11 them, and that, in a net-metering program,  
12 there's different types of net-metering programs.  
13 And, if a net-metered generator, at the end of a  
14 period of time, does sell electricity to its --  
15 you know, because it has more -- it produces more  
16 energy than the load consumes, and I was giving  
17 the example of a 10-kilowatt solar panel  
18 generator on somebody's house. If, at the end of  
19 the year, they get actually paid by the utility  
20 for that, whatever excess energy that they had,  
21 that is considered a sale in interstate commerce,  
22 and FERC said that in both *SunEdison* and the more  
23 recent *CAISO* case, FERC doesn't regulate that  
24 sale, that wholesale sale in interstate commerce,

1       and the reason it doesn't is because there's an  
2       exemption in the FERC regulations from  
3       rate-regulating certain sized renewable  
4       facilities. But it doesn't change the  
5       proposition that, even a generator as small as 10  
6       kilowatts, if its power is being sold at  
7       wholesale, it is treated as a being in interstate  
8       commerce. And that was the point I was trying to  
9       make.

10               And, again, just to go back to the  
11       original point, the 5 megawatts is just the upper  
12       limit to not participate in the ISO-New England  
13       market.

14               CMSR. CHATTOPADHYAY: Please.

15               MR. POSTAR: Thank you, Commissioner.

16               CMSR. CHATTOPADHYAY: Go ahead.

17               MR. POSTAR: And, just to note up  
18       front, among my economist friends, they would  
19       certainly see the nonlawyer status as being a  
20       major advantage, not a disadvantage. But we'll  
21       go on from there.

22               The question of jurisdiction is always  
23       a fact-specific determination. It depends upon  
24       the specific facts of the case. If a transaction

1 does not occur in the market, and FERC doesn't  
2 assert jurisdiction over it, there's no conflict.

3 And, so, where the Utilities have  
4 submitted to FERC, and FERC has approved, that,  
5 for generation under 5 megawatts, that can be  
6 treated as a load reducer, and not transact  
7 through the market, there's no conflict with FERC  
8 jurisdiction. There's no federal/state conflict  
9 there.

10 MR. BELOW: I think your question was  
11 about, is, if this is a generation owned by a  
12 municipality, does that distinguish it from  
13 something owned by a third party? My  
14 understanding, if it's correct, is that, if the  
15 generation is owned by a municipality, a  
16 subdivision of the state, then it's not subject  
17 to state jurisdiction, in terms of how it sells  
18 its power.

19 I expect the lawyers in the room to  
20 correct me if that's -- that's right. So, it's  
21 not subject to federal jurisdiction.

22 There was a comment about  
23 transmission -- about transmission not being  
24 something that community power aggregations could

1 do or municipalities could do. And I would just  
2 point out that the Coalition's Joint Power  
3 Agreement specifically cites the exercise of  
4 authorities granted by the state to  
5 municipalities under RSA 374-D, D:2, entitled  
6 "Powers", states that "Municipalities may design,  
7 develop, acquire, and construct small scale power  
8 facilities at sites owned or leased by them or  
9 otherwise made available to them." And it goes  
10 on. It says, they "may operate" it, or "enter  
11 into contracts for the operation". And it goes  
12 on and says "Power produced by such facilities  
13 may be transmitted and distributed by a  
14 municipality to any user of power or to any  
15 public utility, at such price and on such terms  
16 and conditions as may be agreed to by the  
17 governing board."

18 So, there is state statutory authority.  
19 Now, obviously, that has to comport with the  
20 overall scheme of regulating the distribution  
21 utilities and transmission utilities. But the  
22 notion that municipalities can't do this is, you  
23 know, or can't be involved in the transmission of  
24 power from their generation, you know, I don't



1 think is correct.

2 And it's important to note that I think  
3 some of the pilot opportunities we see are for  
4 municipally-owned generation. The City of  
5 Lebanon, for instance, is in the process of  
6 building and interconnecting a 1 megawatt  
7 landfill-gas-to-energy project, and would like to  
8 be able to use that power to serve customers  
9 within the City of Lebanon over the distribution  
10 grid. And that, to the extent it sells the power  
11 from one enterprise account to another, or sells  
12 the power from the City of Lebanon to the  
13 Community Power Coalition, which, while a  
14 separate and legal entity, is operating as an  
15 instrumentality of the City of Lebanon and other  
16 communities across the state, it seems a  
17 farfetched notion that that sale for resale  
18 within the municipality should be any way subject  
19 to FERC. And how is that not, according to the  
20 plain language of the Federal Power Act, not a  
21 sale of electric energy transmitted in interstate  
22 commerce, if it's transmitted from a state and  
23 consumed at any point outside thereof. That's  
24 the definition in the Federal Power Act of what

1 an "interstate wholesale sale" is. It's  
2 generated in one state and consumed at a point  
3 outside of that state.

4 And, so, I think, you know, a lot of  
5 this comes back to the plain language of the  
6 statute, and, in particular, how the Supreme  
7 Court has most recently interpreted in *FERC v.*  
8 *EPSA*.

9 MS. KEY: Can I respond to that please?  
10 There was several errors in what he said, and  
11 we -- and the Utilities need to respond to that  
12 claim.

13 CMSR. CHATTOPADHYAY: Please do.

14 MS. KEY: First of all, we were not  
15 discussing municipal utilities. Municipal  
16 utilities are entities that usually has the  
17 right, under the State Constitution, to own and  
18 operate a distribution utility to serve retail  
19 customers.

20 Community power aggregators, and  
21 what -- the term I'm using, load -- a municipal  
22 utility can be a load-serving entity, but nowhere  
23 have we been discussing municipal utilities,  
24 which have been in this country for well over 100

1       years. They can own transmission. They  
2       obviously own distribution. They can, you know,  
3       sell through -- you know, they can do whatever  
4       they want. They're just like an investor-owned  
5       utility, except FERC has said "we're not going to  
6       regulate them", and virtually every state has  
7       said "we're not going to regulate a municipal  
8       utility."

9               There's no -- when I was talking about  
10       the Joint Utilities not having to resell  
11       transmission, or when I was talking about  
12       entities serving load that don't want to be in  
13       the transmission business and buying transmission  
14       for their retail load, I was not speaking of  
15       municipal utilities. The municipal utilities in  
16       New Hampshire, they need to go to the ISO-New  
17       England to buy transmission. That's where, you  
18       know, and that's where they always have, before  
19       the ISO-New England existed, they would have gone  
20       to entities like PSNH and Unitil, if necessary,  
21       to buy transmission.

22               But municipal utilities have nothing to  
23       do with what we're talking about with these pilot  
24       programs. Municipal utilities, you know, already

1       have the right to put in as much generation as  
2       they want, you know, and own it and sell it, you  
3       know, to their retail customers, not making --  
4       not register with the ISO-New England.

5               So, I just wanted it to be clear that  
6       we were not discussing, in any of our discussion,  
7       true municipal utilities that own their own  
8       distribution systems.

9               And Mr. Below said a lot. But, at the  
10      very end, he said something about the definition  
11      of an "interstate sale", you know, "an  
12      "interstate sale" is power being sold from one  
13      state to another." Going back to the *FPL*, that,  
14      you know, the *FPC* case, you had a case where  
15      Florida Power & Light Company never sold any  
16      energy to any entity outside the State of  
17      Florida, yet they were found to be a  
18      FERC-regulated utility, because they engaged in  
19      interstate commerce, and that related to the fact  
20      that electrons produced by their generation that  
21      they sold to Florida Power Corp., Florida Power  
22      Corp. sold power to Georgia Power across state  
23      lines. And it wasn't the fact that Florida Power  
24      was selling power, it was the commingling of

1       electrons that resulted in a finding that it was  
2       interstate commerce.

3               So, the notion that "a sale has to be  
4       across state lines", that would be like saying  
5       "PSNH, you know, before the ISO-New England,  
6       selling power to Unitil would not be  
7       FERC-regulated", and that's just an absurdity.

8               MR. POSTAR: Commissioner, I don't want  
9       to belabor this, but there's an important point  
10      that I think is worth focusing in on, if I may?

11              CMSR. CHATTOPADHYAY: Keep it short  
12      please, because I'm going to go on to some other  
13      topics.

14              MR. POSTAR: I fully appreciate  
15      Attorney Key bringing up the *Florida Power &*  
16      *Light* case, because it goes back to a point that  
17      I just made. The jurisdictional issue is a  
18      fact-specific determination. What the Supreme  
19      Court didn't say, in *Florida Power & Light* is, is  
20      "these are big utilities, the grid is all  
21      interconnected, therefore -- and all of the  
22      generation is operated in parallel, therefore,  
23      this has to be a jurisdictional sale." That's  
24      not what they did. What they did was they looked

1 to the staff of the Federal Power Commission, and  
2 which found that some of the -- that the  
3 electrons at a particular bus were commingling.  
4 They were commingling, and then they were ending  
5 up with in-state and out-of-state power at a  
6 particular point. That's a fact-specific  
7 determination.

8 The facts of the case aren't that  
9 important to this discussion. What is important  
10 is, is how do you go about it? You have to look  
11 at the facts of the case. And, here, in New  
12 England, what you have that's different is that  
13 the "under 5 megawatt" is not going to be part of  
14 the market, it's a load reducer. It's an offset  
15 that doesn't transact through the same market.  
16 And that distinguishes the case. And it's a  
17 piece that has not been fully explored in New  
18 England, and that's why it's ripe for development  
19 here.

20 And I'll stop there. Thank you.

21 CMSR. CHATTOPADHYAY: Okay. I'm going  
22 to -- I'm going to continue.

23 MR. BELOW: If I may, I need to make an  
24 important correction as well?

1 CMSR. CHATTOPADHYAY: Then, go ahead.  
2 Keep it short please.

3 MR. BELOW: The statute I was referring  
4 to, RSA 374-D, is not about municipal utilities.  
5 The authority there is about developing small  
6 scale power facilities, whether there's a  
7 municipal electric utility involved or not.

8 There's a separate statute on municipal  
9 electric utilities. And that's all.

10 CMSR. CHATTOPADHYAY: Okay.

11 *[Chairman Goldner and Cmsr.*  
12 *Chattopadhyay conferring.]*

13 CMSR. CHATTOPADHYAY: Okay. This could  
14 be a little bit of a digressing, but I still --  
15 I'm trying to understand, the lay of land,  
16 really.

17 So, as far as New England is concerned,  
18 if a generation is producing less than 5  
19 megawatts, there was some discussion about this,  
20 "there's no need to register with ISO-New  
21 England."

22 I also want to understand, does that  
23 also mean that, in terms of the rates that are  
24 being set, they do not tie to ISO-New England

1 jurisdiction? Just out of curiosity. So, when  
2 that happens, ISO-New England is still trying to  
3 keep track it, right, somehow, so that -- or, is  
4 it not?

5 Somebody who knows ISO-New England  
6 rules and laws might be better able to answer  
7 this question.

8 MR. CROUSE: So, the only generation  
9 facilities that ISO-New England cares about are  
10 those identified in Section II, back to normal  
11 Arabic numerals, 21.2. And, essentially, they're  
12 looking for generator assets that are owned by  
13 participating facilities. So, for example,  
14 Liberty is not a participating facility, but  
15 Eversource and Unitil are.

16 So, in the instance of Unitil, with  
17 their Kingston Solar Project, it is owned by a  
18 qualifying facility that ISO-New England would  
19 care about, but it's identified as an "excluded  
20 asset", which means that it has, for this  
21 generalized explanation, certain privileges that  
22 allow it not, it can essentially pass those  
23 benefits without affecting the interstate  
24 commerce without causing that preemption issue.



1 Which is why the OCA is analogizing it, too, as  
2 an example of the constitutionally permissible  
3 example that the Commission can rely on.

4 In the instance where someone is not a  
5 qualifying facility, ISO-New England, I'm going  
6 to say this a little hesitantly, because I'm  
7 willing to be corrected, doesn't necessarily  
8 care, because it's not owned by one of their  
9 facilities, qualifying facilities. And, in that  
10 instance, it's the same process with an excluded  
11 asset, in a case of someone who owns like a  
12 community aggregator under the pilot program.  
13 So, it would provide that same value stack, being  
14 analogized to the Kingston Solar Project.

15 Hope that helps.

16 MR. POSTAR: If I can just --

17 CMSR. CHATTOPADHYAY: Please.

18 MR. POSTAR: To the Commissioner's  
19 question of someone very familiar with the  
20 ISO-New England to speak to this, if Mr. Callnan,  
21 from the Coalition, the CEO of the Coalition,  
22 could speak up for a moment, could address this,  
23 I would appreciate it?

24 CMSR. CHATTOPADHYAY: Please do.

1 MR. CALLNAN: Yes. Thanks for the  
2 question.

3 I think there's a nice way to highlight  
4 just exactly that, because there are examples  
5 where generators have elected to participate in  
6 New England markets, and then decided to no  
7 longer participate in New England markets, by  
8 simply retiring from the markets. And, in that  
9 case, they have once been participating and  
10 taking, you know, providing energy into the  
11 markets, the ISO is watching what their actual  
12 output is. When they decide to retire from the  
13 markets, that generator is no longer seen within  
14 ISO-New England, and it's really reducing the  
15 load, because it's no longer being adjusted at  
16 the ties any longer. So that the generation  
17 that's within the circle of the ties is simply  
18 just reducing the ties, rather than being added  
19 back into the ties for ISO to see.

20 CMSR. CHATTOPADHYAY: So, when you use  
21 the term "retiring", you're also sort of assuming  
22 that that generator continues to produce, even  
23 though it has retired for the purpose of --

24 MR. CALLNAN: Yes.

1 CMSR. CHATTOPADHYAY: -- being a  
2 participant in the ISO-New England market?

3 MR. CALLNAN: Yes. To clarify, and  
4 thanks for that, the "retirement" decision was on  
5 participating in the markets, not in continuing  
6 to generate electricity. And, in those cases,  
7 those generators have found, just like Kingston,  
8 as an example, that it's more beneficial to the  
9 community to keep that generator producing, but  
10 instead reducing load, because the value stack is  
11 higher for their citizens. So, they've removed  
12 themselves from the ISO-New England markets as a  
13 result of that.

14 CMSR. CHATTOPADHYAY: And, in that  
15 case, the rates that follow from ISO-New England  
16 rules do not impinge upon whatever rates might  
17 have been or may be being set?

18 So, I'm talking about, ultimately,  
19 somebody is paying for it. Is it being dictated  
20 by the ISO-New England rates, or is it, you know,  
21 or can it be done independently, in that example?

22 MR. CALLNAN: The way I can explain  
23 that one is load pays for everything. It doesn't  
24 matter what's happening out there. Load -- that

1       the folks that are consuming energy ends up  
2       paying for the load. So, that generation, in  
3       reducing the amount of energy that's being  
4       purchased by that load-serving entity, is the way  
5       that's getting paid.

6               CMSR. CHATTOPADHYAY: I'll let others  
7       respond. Anyone from the Joint Utilities?

8               MR. WIESNER: I will weigh in, and --

9               MS. KEY: I think that --

10              MR. WIESNER: Well, I'll let Jennifer  
11       weigh in.

12              MS. KEY: No. Go ahead.

13              MR. WIESNER: There are a number of  
14       issues swirling around here. I think that it is  
15       the case that, if a generator in New England  
16       under 5 megawatts is treated as a load reducer,  
17       then the ISO does not see it specifically or its  
18       output specifically for purposes of system  
19       planning and operation. There are assumptions  
20       made about distributed generation in the  
21       aggregate. Because there is quite a bit of  
22       distributed generation within New England,  
23       primarily solar, but other technologies as well.  
24       And the ISO certainly does care about that, in

1 terms of its impact on the total expected loads,  
2 from the perspective of both transmission  
3 planning and system planning and operation.

4 In terms of who is paying for that  
5 generation, which does not have its output flow  
6 through the ISO markets? Much of that generation  
7 is net-metered; some of it may be subject to  
8 feed-in tariffs, like the Vermont SPEED Program  
9 that we've referenced in the Briefs and been  
10 discussed here today; perhaps they're making  
11 exempt sales to utilities under PURPA, as  
12 qualifying facilities; and some of them may be  
13 selling directly to power marketers, subject to  
14 FERC-jurisdictional market rates authority.

15 So, in effect, somebody is paying for  
16 it in some way. It may be an entirely retail  
17 transaction, which is how net-metering works  
18 under the FERC exemption that has been outlined  
19 here this morning earlier, or it may be some --  
20 under some other model. None of that, and this  
21 is where I'm going to give a cue to Attorney Key,  
22 none of that means that it is -- that they are  
23 not interstate wholesale transactions, they're  
24 just subject to an exemption recognized by the

1           FERC.

2                   MR. CAMPBELL:   And could I make one  
3           other point of clarification?

4                   I thought I heard Attorney Crouse, and  
5           he can certainly correct me if I'm wrong, state  
6           that "the Kingston Solar facility would be  
7           registering as a qualifying facility."   That's  
8           incorrect.   The Kingston Solar Project is not  
9           registering as a qualifying facility.

10                  MR. CROUSE:   The correct I would offer,  
11           and thank you for the opportunity, is that  
12           Unitil, I believe, is the qualifying facility.  
13           But the Kingston Solar Project itself is an  
14           excluded asset.   But I'm happy to be corrected.

15                  CMSR. CHATTOPADHYAY:   Okay.   I'm seeing  
16           that you're baffled.

17                   *[Laughter.]*

18                  MR. CROUSE:   I apologize.   I might be  
19           misinterpreting the Owner's Operating -- the Open  
20           Access Transmission Tariff, and trying to  
21           understand where the qualifying facility is in  
22           that.   But should Unitil or one of its assets not  
23           be a qualifying facility, and then not being an  
24           excluded asset, because it's less than 5

1 megawatts, it still follows the same example of  
2 it being a -- or, an excluded asset under ISO-New  
3 England, in that ISO-New England only cares about  
4 what the Tariff defines as a "generator asset"  
5 pursuant to Section II, Arabic numbers 21.2.

6 So, I think the Joint Utilities in the  
7 room, I agree, correctly point out some of the  
8 mistakes I've made in my Initial Brief trying to  
9 explain how that works. But, ultimately, whether  
10 it's an excluded asset or an asset under 5  
11 megawatts, the result is the same. I just have  
12 more to learn, and humble enough to admit that.

13 MR. CAMPBELL: And that's fine. I  
14 don't need to belabor it. I just wanted to make  
15 sure the record was clear, that qualifying  
16 facilities are compensated by utilities at their  
17 avoided cost pursuant to PURPA. And the Kingston  
18 Solar facility does not fall into that particular  
19 category of asset.

20 Thanks.

21 MR. CROUSE: And thank you for the  
22 correction.

23 CMSR. CHATTOPADHYAY: Yes. And I  
24 understand.

1                   Okay, so just -- again, because there  
2                   is someone here who probably knows a lot more  
3                   about ISO-New England markets. So, one question  
4                   I have is, ISO-New England, you know, allows --  
5                   does it allow bilateral transactions? So, "yes"  
6                   or "no"?

7                   Can you use the mike to --

8                   MR. STARK: Yes, it does.

9                   CMSR. CHATTOPADHYAY: So, in those  
10                  cases, can you -- can you throw some light on how  
11                  the issue of jurisdictional conflict or the need  
12                  to avoid violation of the, let's say, the Open  
13                  Access Tariff agreement, do they pop up? Or is  
14                  my question so general that it all depends on  
15                  different situations?

16                  But just please help me understand,  
17                  though.

18                  MR. STARK: So, when you have a  
19                  bilateral transaction, they're actually doing a  
20                  transaction of the energy, and not specifically  
21                  of the transmission service. So, that's -- and  
22                  that's already -- that would still qualify under  
23                  as an interstate sale, wholesale sale, when it is  
24                  a bilateral. It would not be an intrastate, even



1       if the two parties are both within the same  
2       state.

3               CMSR. CHATTOPADHYAY:   Okay.   So, let me  
4       get it right then.   What you're saying is,  
5       something that is bilateral, within that  
6       construct, is -- doesn't matter whether it is  
7       between the buyer and seller being in the same  
8       state or across the border, all of it is still  
9       interstate wholesale?

10              MR. WIESNER:   And that model, as I  
11       understand it, both of the parties would be  
12       market participants within the ISO system, they  
13       would make their deal outside of the ISO market,  
14       and then the resources would be scheduled to  
15       participate in the energy market and qualify for  
16       participation in the capacity market.   And the  
17       parties would have allocated between themselves  
18       who gets the credit for whatever revenues flow  
19       out of those markets.

20              But the key is all of that is under the  
21       auspices of the ISO administration of the market,  
22       and all of it is FERC-jurisdictional.

23              CMSR. CHATTOPADHYAY:   Is there a  
24       possibility that some sort of bilateral

1 transaction is happening, and I'm not now  
2 distinguishing that from the ones that you just  
3 described being part of the ISO-New England  
4 process, that is happening between nonmarket  
5 participants? And, you know, do you know that  
6 there are instances that's happening already in  
7 New England since --

8 MR. WIESNER: I think what you may be  
9 suggesting is that there would be bilateral  
10 transactions among nonmarket participants --

11 CMSR. CHATTOPADHYAY: Yes.

12 MR. WIESNER: -- outside of the ISO  
13 market?

14 CMSR. CHATTOPADHYAY: Yes.

15 MR. WIESNER: I think that's where the  
16 fundamental premise that underlies the recent  
17 amendments to the LEEPA statute that we're  
18 looking at today. And the question is, whether  
19 it's possible to have those sorts of transactions  
20 and the related sales without them being  
21 FERC-jurisdictional? I'm not personally aware  
22 that there is any other model.

23 And I believe you actually asked about  
24 that in our prehearing conference. And the

1 example that was provided by the Coalition was  
2 the Vermont SPEED Program. And, as we pointed  
3 out in our Briefs, and as Attorney Key mentioned  
4 this morning, that is effectively a feed-in  
5 tariff, which represents a voluntary PURPA  
6 program. And, so, PURPA is a limited exemption  
7 from direct FERC regulation of sales which  
8 would -- which are, and would otherwise be  
9 regulated by FERC as, wholesale sales in  
10 interstate commerce.

11 CMSR. CHATTOPADHYAY: So, again, --

12 MS. KEY: Can I add one thing?

13 CMSR. CHATTOPADHYAY: Please do.

14 MS. KEY: Okay. I agree with what  
15 David just said. There is another exemption, of  
16 course, for, you know, municipally or  
17 government-owned utilities can sell power, you  
18 know, if they sell wholesale power, while, again,  
19 it's in interstate commerce, it isn't subject to  
20 FERC jurisdiction, because most -- virtually all  
21 government entities, excuse me, that own  
22 generation are not subject to FERC jurisdiction,  
23 but that, you know, much like PURPA is an  
24 exception to FERC jurisdiction, the Federal Power

1 Act exempts municipal-owned generators from FERC  
2 jurisdiction. But that doesn't get to the issue  
3 of whether the sale is in interstate commerce or  
4 not.

5 CMSR. CHATTOPADHYAY: In the example  
6 from Vermont, I mean, as I understood from the  
7 opening statements, it still technically is  
8 interstate wholesale. Does the CPCNH have any  
9 response to that? Like, do you agree that it is  
10 interstate wholesale?

11 And, you know, just respond to that  
12 question alone.

13 MR. POSTAR: Sure. So, there are  
14 aspects of the Vermont Program that, to me, look  
15 intrastate. The state has decided, for its own  
16 purposes, that the way it wants to proceed is  
17 everybody is going to be either a QF or subject  
18 to FERC jurisdiction through a market-based rate  
19 term. You can go either way. They have not  
20 attempted to take on the issue of whether they  
21 have sole state jurisdiction over any of the  
22 transactions. That's how they've decided, they  
23 have proven to move -- decided to move in that  
24 direction. That doesn't mean that there couldn't

1       have been state jurisdiction. That's how they  
2       have chosen to proceed.

3               CMSR. CHATTOPADHYAY: Do you know of  
4       any instance from some state, not necessarily,  
5       you know, from New England, as far as RTOs are  
6       concerned, multistate RTOs, not single state  
7       RTOs, where a transaction that is happening  
8       between a buyer and a seller, within the state,  
9       has been determined to be intrastate, and FERC  
10      has no jurisdiction?

11             MR. POSTAR: Yes, I don't have an  
12      example to give you. Take the New York ISO, for  
13      example, a single-state ISO, which all of the  
14      transactions there have been deemed to be  
15      interstate. They're federally --

16             CMSR. CHATTOPADHYAY: You said  
17      "interstate"?

18             MR. POSTAR: Interstate. They're  
19      federally regulated. There are many players  
20      within that market, when they make sales, if they  
21      make them outside of the New England ISO market,  
22      would not be subject to federal rate  
23      jurisdiction, not because FERC has decided it  
24      doesn't have jurisdiction, but because Congress

1       has decided, in the example that Ms. Key gave, of  
2       municipal entities, governmental entities not  
3       being subject to the Federal Power Act. That's  
4       been written out of the statute.

5               And the Commerce Clause is much broader  
6       than the Federal Power Act. The Federal Power  
7       Act extends jurisdiction, but not as broad as the  
8       entire Commerce Clause. As we can see, in the  
9       very language of the Federal Power Act, there's  
10      an exemption for -- there's an exception for  
11      other sale of electric energy. And, so, the  
12      question you're raising is "Well, give me an  
13      example? Where has that actually been  
14      implemented?" And, right now, we're here to tell  
15      you that there's not a specific example where  
16      that's been implemented.

17             But that doesn't mean it can't be done.  
18      It just means it hasn't been designed in a way  
19      that has successfully moved forward.

20             MR. BELOW: But there is one specific  
21      example, and we cited it in the Initial Brief.  
22      Which is the case of a Energy Storage Resource, a  
23      battery storage system, developed in the  
24      Electric -- New Hampshire Electric Co-op

1       territory, that buys and sells, at retail rates,  
2       with the Co-op. And our CEO was the person who  
3       helped design and implement that program, and he  
4       can speak more to it.

5               But, when it was implemented, ISO-New  
6       England didn't have a category for it. As I  
7       understand it, the Co-op did not require them to  
8       register with FERC. They chose to do so, but  
9       they did not register with ISO-New England as a  
10      generator asset, which is why they buy and sell  
11      at a retail rate, and the power that they sell to  
12      the Co-op is sold for resale, and, arguably, is a  
13      within-state sale for resale that is  
14      state-jurisdictional.

15             For their own purposes, they went ahead  
16      and registered with FERC, sort of as a  
17      belt-and-suspenders, but they did not register  
18      with ISO-New England as a generator asset.

19             Brian.

20             MR. CALLNAN: I can expand on how that  
21      works, if you'd like?

22             CHAIRMAN GOLDNER: Please do.

23             MR. CALLNAN: Okay. So, the  
24      registration for that resource is it's

1 participating as an "alternative technology  
2 regulating resource", which is, for storage, has  
3 the ability to act as a regulating resource as a  
4 load reducer. So, the ISO-New England is using  
5 that as a load reducer.

6 But all of the other attributes of that  
7 resource, such as the energy, the capacity, the  
8 ability to avoid transmission costs, are going to  
9 the Cooperative as a load reduction, based on a  
10 contract that they put together with them.

11 So, in that particular case, that  
12 resource is participating as an ATRR, a  
13 regulating resource as a load reducer, and also  
14 as a load reduction for New Hampshire Electric  
15 Cooperative.

16 CMSR. CHATTOPADHYAY: And I may have  
17 misheard, and they didn't need to register with  
18 ISO-New England?

19 MR. CALLNAN: The Co-op, they  
20 registered as an ATRR as a load reducer, which  
21 that means -- just means there's no real signal,  
22 it just has the load. There's no real signal as  
23 energy, they're not providing energy or capacity  
24 to the markets, just regulating resource.



1           The load side is where that gets  
2           impacted, because the Cooperative's actual load  
3           needs is reduced by every time that that  
4           generator either -- or, that storage resource  
5           either injects energy into the system or draws  
6           energy from the system. That's registered on the  
7           load asset ID.

8           CMSR. CHATTOPADHYAY: But it is  
9           registered with ISO-New England? You know, it  
10          doesn't -- I'm not trying to distinguish between  
11          producers and, you know, load reducers. It's  
12          that ISO-New England is tracking what's going on?

13          MR. CALLNAN: On the regulation side.

14          CMSR. CHATTOPADHYAY: Okay.

15          MR. CALLNAN: Not on the other products  
16          side.

17          MR. BELOW: It's important to note that  
18          this Alternative Technology Regulation Resource,  
19          ATRR, is a specific exemption, if you will,  
20          within ISO-New England from requirement to  
21          register as a generator asset. Storage that  
22          wants to buy and sell in the interstate wholesale  
23          market has to register as a generation asset.

24          If they only register as a regulation

1 resource, they don't have to report their buying  
2 and selling of electricity, they're only  
3 available to provide some regulation services.  
4 And, under the tariffs, they are still treated as  
5 a load reducer for energy, capacity, and  
6 transmission cost allocation.

7 CHAIRMAN GOLDNER: Commissioner  
8 Chattopadhyay, I'm thinking, it's 10:45, it might  
9 be time for a break. Unless you would like to  
10 come back later, or would you like to just  
11 continue with this line of questioning?

12 CMSR. CHATTOPADHYAY: Yes. Maybe I'll  
13 have some more questions.

14 CHAIRMAN GOLDNER: Okay. Okay. So,  
15 let's --

16 MS. KEY: Could I add one, before we  
17 break, and I apologize?

18 CHAIRMAN GOLDNER: Sure. Go ahead.

19 MS. KEY: I do want to note that, in  
20 our Reply Brief, that the battery that you just  
21 were discussing did, in its application to FERC,  
22 request to sell power from its 2.2 -- 2,455  
23 kilowatt AC lithium-ion battery storage. So, it  
24 did request authority from FERC to sell power to

1 NHEC.

2 CMSR. CHATTOPADHYAY: Okay.

3 MS. KEY: That's what it told FERC in  
4 its application.

5 CHAIRMAN GOLDNER: Any quick reply from  
6 Community Power before we take a break?

7 MR. CALLNAN: I can reply to that.  
8 That was not a requirement as of the contract in  
9 order for that unit to be produced, producing  
10 energy. That was a decision that was made by the  
11 actual producer.

12 MR. BELOW: And they don't exercise  
13 that authority that was given. So, it's just  
14 sort of a belt-and-suspenders thing, it appears.

15 CHAIRMAN GOLDNER: Okay. Let's take a  
16 break now, returning at 11:00 a.m. And we'll  
17 continue with Commissioner Chattopadhyay's  
18 questions then. Off the record.

19 *(Recess taken at 10:47 a.m., and the*  
20 *hearing resumed at 11:03 a.m.)*

21 CHAIRMAN GOLDNER: Okay. We'll go back  
22 on the record, and resume with Commissioner  
23 Chattopadhyay's questions.

24 CMSR. CHATTOPADHYAY: So, let's

1       hypothetically assume that demonstrably it can be  
2       shown that a particular transaction is indeed  
3       intrastate wholesale. Would the Joint Utilities,  
4       under that situation, would agree then that does,  
5       you know, it doesn't require FERC jurisdiction  
6       necessarily? And I'll also add, could it still  
7       have issues with how the OATT, that is the Open  
8       Access Tariff, is implemented?

9               You know, I'm just maybe not phrasing  
10       it as well as I should, but trying to understand,  
11       if something is determined to be intrastate  
12       wholesale, then what happens with respect to what  
13       position does the Joint Utilities take, in terms  
14       of is there a space where then the two parties  
15       can work and sort of allow this happening --  
16       allow this to happen, rather, yes?

17              MS. KEY: Let me start answering your  
18       question broadly.

19              If there was a finding that there could  
20       be an interstate wholesale sale, you know, I  
21       can't predict what any, you know, that issue  
22       would have such ramifications nationally, I can't  
23       predict, you know, what would happen. I know  
24       you're focusing on this case, but that could open

1 a can of worms of litigation at FERC and the  
2 federal courts that could last for years.

3 But your question is more for what  
4 would the New Hampshire utilities do in the  
5 meantime, whether they were a party to that  
6 litigation or not, is, you know, I think maybe  
7 that's a question better asked by the -- answered  
8 by the people in the room.

9 But, then, I think what you're asking  
10 is, are there still problems with the statute and  
11 preemption? And I would say this, is that given  
12 what I believe the statute is trying to achieve,  
13 there would still be fundamental problems that it  
14 would be difficult to move forward with the pilot  
15 program, because it's clear that the Coalition,  
16 for example, expects, you know, thinks the  
17 statute dictates something regarding capacity  
18 load obligation, when it doesn't. And, also, as  
19 we discussed, there is issues with the  
20 transmission issues, so that, and, of course, as  
21 I said, we would need assurance that any subsidy  
22 for this retail transmission credit, you know,  
23 would be recovered.

24 So that, certainly, this intrastate

1 issue is not the only preemption issue. But I  
2 would say my bigger fear is such a finding miring  
3 this Commission in litigation that could -- that  
4 might deter people from joining a pilot program  
5 until that legal issue is resolved, you know,  
6 which may, you know, could go all the way up to  
7 the Supreme Court of the United States.

8 CMSR. CHATTOPADHYAY: So, to be clear,  
9 and maybe I'm misunderstanding you, I wasn't  
10 trying to say that the Commission here determines  
11 that it's -- that that transaction is intrastate.  
12 I'm saying, if it is, indeed, intrastate, and  
13 that might require getting blessings from FERC  
14 somehow, but, under that scenario, what happens?

15 And I think what I'm taking away from  
16 the explanation that you're giving is that there  
17 might be other issues still. So, is that a fair  
18 characterization?

19 MS. KEY: Yes. That's a fair  
20 characterization.

21 CMSR. CHATTOPADHYAY: Okay.

22 MS. KEY: And we don't think that's the  
23 only --

24 CMSR. CHATTOPADHYAY: Understood.

1 MS. KEY: -- preemption or conflict  
2 issue that needs to be resolved. But, you know,  
3 that there are other issues to be resolved.

4 And, then, obviously, there's many  
5 issues regarding the justness and reasonableness  
6 of the statute and any pilot program that would  
7 need to be resolved.

8 CMSR. CHATTOPADHYAY: There was some  
9 discussion about, I think, Florida Power, and  
10 how -- where the electrons go that was sort of  
11 the deciding factor. Is it possible for  
12 something like that to be used for some  
13 transaction, forget about talking about pilots  
14 here, I'm just -- that is happening within a  
15 state, between a buyer and a seller, is it  
16 possible to conduct that kind of a study, and  
17 conclude "No, this is really intrastate"? A  
18 question.

19 MR. POSTAR: And it's a very  
20 interesting question. And just a slight  
21 digression to lead up to I think where you are.

22 In 2020, the United States Court of  
23 Appeals for the District of Columbia, in the  
24 *National Association of Regulatory Utility*

1        *Commissioners v. FERC*, ruled on storage, storage  
2        rules, a lot going on in the case. The one thing  
3        that the Court said, it said "States retain their  
4        authority to prohibit these local storage from  
5        participating in the interstate and intrastate  
6        markets simultaneously."

7                Does that provide guidance here? Could  
8        a program tell a supplier "You have to pick and  
9        choose. You can participate in the interstate  
10       market or you can participate in the intrastate  
11       market. If you're going to be in our program,  
12       you have to designate that you're participating  
13       in the intrastate program." The courts have  
14       found that that. They haven't responded to that.  
15       We spoke to that in our Briefs.

16               So, what does that mean? Could you  
17       take, within a single utility, a, you know, very  
18       small, renewable generator, that is going to  
19       provide energy to consumers, within that same  
20       utility, within the same franchise territory,  
21       have a seller who is not engaged in wholesale  
22       sales to small power producers, is not engaged in  
23       wholesale sales. And could you look at that and  
24       say "This energy is staying here. It's local.



1           This is intrastate. This is  
2           state-jurisdictional." Sure, you can do that.

3                   Now, your next one, "so, is there an  
4           example that you could point to?" Well, there's  
5           not a specific example, but we do have the  
6           storage facility that Mr. Callnan discussed.

7                   Let me stop there.

8                   CMSR. CHATTOPADHYAY: Yes. But that  
9           example is more about regulation service, that is  
10          what ISO-New England uses. So, I'm still not  
11          very clear. I don't -- and no need to further  
12          belabor on the same point, I'm just -- some of  
13          the discussions, I need time to process as well.  
14          All right.

15                   Now, back to CPCNH. If something is  
16          demonstrably shown to be intrastate -- sorry,  
17          interstate, "interstate", not "intrastate", in  
18          that case, it is -- you agree that that is going  
19          to have to deal with FERC jurisdiction, and  
20          you'll have to also address OATT, Open Access  
21          Tariff, and other considerations that ISO-New  
22          England requires for you to adhere to?

23                   MR. POSTAR: So, there could be OATT,  
24          Open Access Transmission Tariff, issues. There

1       could be a variety of aspects that need to be  
2       worked out. But, no, we don't agree that that  
3       necessarily means that it's FERC-jurisdictional.  
4       In fact, counsel described, that is, in a sense,  
5       this jurisdictional issue is somewhat of a red  
6       herring.

7               The first step is, is can this be an  
8       intrastate program that is just -- that is  
9       state-regulated? And we've had discussion about  
10      this. Is it in the market? Is it part of the  
11      market? Is it regulated? I don't want to  
12      revisit all of that.

13             But that's only Step 1. You have other  
14      options. Another option were that, to proceed to  
15      regulate it, if FERC doesn't step in and say "Oh,  
16      no, that is our rate, we're regulating it", if  
17      FERC simply sits back and doesn't do anything,  
18      it's still state-regulated. So, that's Step 2.

19             So, take Step 3. You then can say, in  
20      the program, that the only sellers could be  
21      entities that are not subject to FERC  
22      jurisdiction. That is any governmental entity  
23      within New Hampshire, or outside of New  
24      Hampshire, any governmental entity that builds a

1 piece of new generation, and sells energy, is not  
2 subject to FERC jurisdiction. And you can say  
3 "This is part of the program. This is all that  
4 the program contains."

5 We think a better program is to have a  
6 broader program that allows broad participation,  
7 but you could do that. You also could --

8 MS. KEY: I would like to chime in on  
9 that question.

10 CHAIRMAN GOLDNER: Please let him  
11 finish. Please, please let him finish.

12 MS. KEY: Okay.

13 CHAIRMAN GOLDNER: Yes. Thank you.

14 MS. KEY: Sorry. I thought he was  
15 finished. I apologize.

16 CHAIRMAN GOLDNER: Okay. Please  
17 proceed.

18 MR. POSTAR: Thank you. And sorry for  
19 the pregnant pause, it was just trying to get --  
20 the last step is, and then there's the QF option  
21 that's been discussed as well. So, it's not a  
22 question, in my mind, of whether this pilot  
23 program can be implemented, it's how do you  
24 implement it? And the first question is, and

1       we've gone through the steps, is can it be solely  
2       an intrastate program? Can it be a -- you know,  
3       how can we design it? And you have options, even  
4       if this were to be federally regulated, which,  
5       again, because of the options you have, we don't  
6       agree that it necessarily has to be. That there  
7       are -- you have other choices you can make.

8               And I'll stop there.

9               CMSR. CHATTOPADHYAY: Thank you.

10              CHAIRMAN GOLDNER: Attorney Key, please  
11      go ahead.

12              MS. KEY: Thank you. I think, in some  
13      respects, I agree with Mr. Postar, that this, if  
14      this program -- if the statute hadn't used the  
15      words "intrastate wholesale commerce", you know,  
16      we would have expected this program -- that any  
17      limited producer in this program would spend  
18      maybe an hour or less it takes to fill out the QF  
19      form and file it at FERC, or, in some cases, the  
20      seller might be a state entity, a state or local  
21      entity, such as a municipality. And, then, you  
22      know, this whole issue of "intrastate commerce"  
23      just disappears. It's a nonissue, as long -- as  
24      long as the limited producer just spends that

1 hour, you know, filling out the QF form, because  
2 the limited producer is going to be renewable,  
3 it's going to be under 80 megawatts, which makes  
4 it eligible to be a QF for a renewable project --  
5 sorry for my -- thus, as far as this one  
6 preemption issue, it's simply solved by just, you  
7 know, literally, an hour's worth of time.

8 And I want to put a caveat here is, we  
9 believe -- I don't want to speak for all the  
10 utilities, I'll speak personally, I believe  
11 there's a reason that the words "intrastate  
12 wholesale" appeared, in that they were trying to  
13 make the sale state-jurisdictional, as opposed to  
14 just a sale exempt from federal regulation. They  
15 can't be, that is not state-regulated, because  
16 it's subject to this exemption from -- under  
17 PURPA.

18 So, there was another motive behind the  
19 "intrastate" wording, other than, you know,  
20 because it's so easy, as the SPEED Program shows,  
21 it's pretty simple, you know, to fill out the  
22 form to be a QF. There's, you know, well over  
23 100 entities in Vermont, over 1,000 entities a  
24 year now get QF status, and the form is not

1       difficult to fill out. Except now, I think you  
2       have to add latitude and longitude, which may  
3       take a little bit longer, but, with GPS, I think  
4       you can fill it out. But it's a short form, it's  
5       free to file, and you get QF status.

6               CMSR. CHATTOPADHYAY: I think I'm going  
7       to stop here with the questions. I'm just going  
8       to add one thought.

9               Which is, in my opinion, there is value  
10      in gleaning information from what this pilot, you  
11      know, means for having a more competitive  
12      outcome, things like that.

13              So, I appreciate all the briefs and,  
14      you know, the raising of issues. There's this  
15      problem, that problem. I'm really hoping that  
16      the parties can talk to each other, figure out,  
17      doesn't matter whether it's about determining  
18      whether it's interstate or intrastate. It's more  
19      about, is there something that can be done that  
20      keeps everything in place? Meaning, you're not  
21      violating the OATT, you're not creating problems  
22      with FERC jurisdiction and all of that, and yet  
23      come up with a way to do this.

24              And I'll just, you know, that's where

1 I'll stop. Thank you.

2 CHAIRMAN GOLDNER: Okay. I'll pick up  
3 from there with some questions.

4 I just want to see if I can boil down  
5 the dispute as much as possible. I think the  
6 dispute is as simple as this credit relative to  
7 the -- relative to the transmission tariff. And  
8 I just want to give the parties a chance to  
9 respond to that.

10 In other words, if there was no cost  
11 issue residential relative to the transmission  
12 tariff, would we still have a dispute?

13 MR. CROUSE: If I may proceed?

14 I think the issue, as I tried to  
15 identify earlier, in regards to XI(a), and how  
16 the OCA tried to use the Constitutional Avoidance  
17 Doctrine to interpret this to mean, in a value  
18 stack analogous to Kingston, is that I think, as  
19 the Joint Utilities rightly point out, intrastate  
20 wholesale sales of transactions just don't really  
21 take place in practice outside of the islanded  
22 states of Alaska or Hawaii or the ERCOT Region of  
23 Texas.

24 Obviously, I differed from the Joint

1       Utilities in saying that there's a narrow  
2       exception under *Hughes* that allows for creative  
3       generation or the implementation of resources, so  
4       long as it doesn't directly affect wholesale  
5       rates. So, by presenting that alternative  
6       interpretation that's limited to retail, not  
7       wholesale, that's where we find that the  
8       jurisdictional conflict can be resolved pursuant  
9       to a Supreme Court's precedent.

10               However, regardless of that  
11       transmission cost, I think, if there's an  
12       intrastate wholesale sale, I think that goes  
13       against what *FERC v. EPSA* states, in saying that  
14       you can't have this direct impact on wholesale  
15       sales. And what *Hughes v. Talen* says is that  
16       states can't disregard that, because now you're  
17       implementing a product that competes with FERC.

18               And something as simple as *Wickard v.*  
19       *Filburn*, which I haven't addressed in my brief,  
20       but is common knowledge to most attorneys, is  
21       something as trivial as a wheat farmer growing  
22       wheat on their farm for their own purpose was  
23       considered by the Supreme Court to be "interstate  
24       commerce", even though it was wholly within the



1 state, and trivial action in and of itself.

2 So, as far as I'm aware, I think the  
3 Joint Utilities might make a persuasive point  
4 that the exception in *Hughes* is apropos of  
5 nothing, because, while there is this exception  
6 in law, we just don't see it in practice.

7 Thank you.

8 CHAIRMAN GOLDNER: Mr. Postar.

9 MR. POSTAR: Commissioner, I think you  
10 have it exactly right. I think that if there is  
11 no cost to the distribution utilities, I'm not  
12 sure what their issue is.

13 We're here, and absolutely willing to  
14 take up the Commissioner's suggestion, to meet  
15 with the utilities to figure out a way to ensure  
16 that this program can go forward without cost to  
17 the utilities. In fact, there's a provision in  
18 the language that says, if there's a cost, you  
19 know, we'll deal with the cost. Certainly, we  
20 can deal with that.

21 On the jurisdictional front, certainly  
22 we don't want this tied up in litigation for  
23 years. That doesn't serve anybody. But what I  
24 would suggest is, is that, where there is a

1 willing seller and a willing buyer, and they  
2 agree to a price, and it doesn't impact anybody  
3 else, it's a pretty hard case to make that FERC  
4 is going to have any interest in that  
5 transaction, is going to have any concern with  
6 that transaction. And that really is what this  
7 program is about. There's going to be a willing  
8 seller who's going to say "We agree to that  
9 price", and the buyer, hopefully, Consumer [sic]  
10 Power Coalition of New Hampshire, is going to say  
11 "And we agree to that price." There's not going  
12 to be a jurisdictional issue to follow.

13 Someone is going to have to be created  
14 to create a litigation to show that they actually  
15 have an interest in that. You have to have  
16 standing to challenge something. And, if there's  
17 no harm to you, or to any of your customers, and  
18 two parties agree, where do you have a basis to  
19 challenge that? What's the jurisdiction? What's  
20 the issue?

21 And I think that's where we are. So, I  
22 think that you boiled it down and simplified it.  
23 And, if we can identify a way to avoid imposing  
24 cost, I think you have a pretty clear path.

1                   CHAIRMAN GOLDNER: Thank you, sir. And  
2                   Joint Utilities, any comments?

3                   MS. KEY: I would say this is, and it's  
4                   hard not being in the same room as the clients,  
5                   if -- without the limited producers going and  
6                   getting QF status, the issue of an intrastate  
7                   wholesale sale opens a can of worms that's just  
8                   too large for the Utilities to ignore.

9                   CHAIRMAN GOLDNER: Okay. Thank you.  
10                  Attorney Wiesner, I'll pause here and let you  
11                  confer.

12                  MS. KEY: And I think, did you say you  
13                  were going to give us a chance to confer?

14                  CHAIRMAN GOLDNER: That would be fine,  
15                  too. I was -- Attorney Wiesner, I was just  
16                  allowing some time for a response.

17                  MR. WIESNER: And I think --

18                  MS. KEY: I would allow him to respond.  
19                  But, you know, I do think, you know, as Mr.  
20                  Postar said, that this issue should not be an  
21                  issue, because -- or, as I said, this issue  
22                  should not be an issue, because if you have a  
23                  willing buyer and a willing seller, and all the  
24                  willing seller has to do is fill out a form, as I

1       said, it takes an hour, and then it can sell all  
2       it wants without being subject to FERC  
3       regulation, then -- and, you know, my  
4       understanding is that, under this program, the  
5       Commission was not going to regulate the price at  
6       which the limited producers sold power at  
7       wholesale, then that whole issue just goes away.

8               So, it seems a choice of making the  
9       issue go away is through a very simple form, or,  
10      you know, a ruling that is incredibly disruptive  
11      to the entire utility industry. And that's, you  
12      know, that's what's being put forth before you.

13             But I do think the parties do and are  
14      willing to work on the program, as long as we get  
15      over this hurdle, and this hurdle is very, very  
16      easy to get over.

17             MR. WIESNER: And I think I'll just add  
18      to that, and say that I believe what Attorney Key  
19      is talking about are the parties to any such  
20      transactions involved in a pilot would take  
21      advantage of the available exceptions from  
22      federal regulation for wholesale sales that occur  
23      in interstate commerce. The issue goes away,  
24      because the exemption is already there, why not

1 take advantage of it.

2 The issue is that the statute itself  
3 refers to "intrastate wholesale sales". And, as  
4 the Joint Utilities have said in their Briefs, we  
5 can't be in a position where our systems and our  
6 processes are being used to facilitate something  
7 which is not permissible under federal law. And  
8 that's really what this is about.

9 Is there some other way to make it work  
10 without it being an intrastate wholesale sale?  
11 Well, first of all, as we've said, retail sales  
12 don't implicate that federal jurisdiction at all.  
13 And there are readily available exemptions from  
14 federal regulation, even for wholesale sales,  
15 that would otherwise be deemed to be within  
16 interstate commerce and subject to FERC  
17 regulation.

18 You know, the Legislature charged the  
19 Commission with making a decision about these  
20 threshold jurisdictional issues. And I think  
21 that that is something that the Commission needs  
22 to do, to provide guidance to the parties going  
23 forward, as to how a pilot might be implemented,  
24 if it's even possible to do that.

1           On the retail side, and some of these  
2       issues would also apply on the wholesale side,  
3       but the wholesale side has the additional issues  
4       that I just outlined. On the retail side, I  
5       think, you know, if a willing buyer and a willing  
6       seller, within the correct regulatory framework,  
7       want to make their own deal, and it really  
8       doesn't require anything from the Utilities, then  
9       maybe we don't have an issue. But the statute,  
10      as written, requires the Utilities to report load  
11      reductions in a certain way to the ISO for  
12      purposes of either transmission cost allocation  
13      or energy or capacity market obligations. And  
14      it's really not for the state to tread into those  
15      waters, which are federally jurisdictional and  
16      overseen by the ISO, which is a public utility  
17      under the Federal Power Act.

18           CHAIRMAN GOLDNER: Okay.

19           MR. WIESNER: And, if I misspoke, I  
20      would invite Attorney Key to, you know, clarify  
21      whatever I may have said not entirely correctly.

22           MS. KEY: No, that was very helpful,  
23      and I agree. A lot our issues are with the  
24      manner in which the load reduction is

1       implemented, and that's dictated by the ISO-New  
2       England, the manner in which load reduction is  
3       implemented.

4               So, I fully support what Mr. Wiesner  
5       just said.

6               CHAIRMAN GOLDNER:   Yes, I think I'll  
7       just pan back a little bit. I think if I -- I'm  
8       looking at the statute, and it looks like the  
9       Legislature is looking for any obstacles to a  
10      project that's 5 megawatts or less, no more than  
11      two pilots for any utility, with some reporting  
12      and so forth. So, the intent of the statute is  
13      to do a pilot project, and they just want to make  
14      sure that states aren't violating the law. So,  
15      that seems clear enough from the statute.

16              And I'll go to this place of sort of  
17      the physical implementation and this business of  
18      load reduction. What I'm having trouble  
19      understanding is the Utilities' concern in this  
20      area. And, so, I guess I'll point the first  
21      question to the Utilities.

22              So, we heard from Community Power folks  
23      about this business, from their point of view,  
24      this is just load reduction. We've got -- we

1        have ties that are sort of focusing the physical  
2        implementation of the electricity within the  
3        zone, within the region. And sort of in my mind,  
4        I'm having trouble distinguishing that from  
5        Hawaii or Alaska or Texas, in the sense of you  
6        have a physical implementation where you're able  
7        to reduce the load within a certain zone. So, it  
8        seems sort of applicable to me, in my mind, that  
9        those are symmetrical, sort of, properties.

10                And I don't understand at this point,  
11        and I would like to hear from everyone on this,  
12        why this isn't as simple as allowing the  
13        Community Power folks, or anyone within the  
14        state, from operating as sort of a load reduction  
15        entity, within the ties, in order to keep this  
16        transaction simple, and avoid sort of these  
17        jurisdictional conflicts with FERC?

18                So, I'll pause there. But I'm sort of  
19        puzzled as to the problem. And I guess anyone  
20        can go first, if that's helpful.

21                MS. KEY: Well, let me try it this way.

22                My under -- the limited producers are  
23        generators that produce electric energy that they  
24        have title to, and they want to sell that power



1 to another entity, who is going to either consume  
2 it or resell it. And the notion of load  
3 reduction in electricity, you know, there isn't a  
4 product of load reduction or negative generation  
5 or, you know, electricity is a product that's  
6 sold to somebody else. And saying "it's load  
7 reduction" doesn't --

8 CHAIRMAN GOLDNER: If I could pause you  
9 there? Attorney Key, if I could pause you there?

10 MS. KEY: You can't just say "it's load  
11 reduction", when it's actually a sale.

12 CHAIRMAN GOLDNER: If I could pause you  
13 there please?

14 Attorney Key, please? Attorney Key?  
15 Attorney Key, hello?

16 MS. KEY: Oh.

17 CHAIRMAN GOLDNER: You might need to  
18 pause a little bit more here, you might have some  
19 lag on your end of the phone.

20 I don't under -- I don't understand the  
21 analogy -- how is this different than  
22 net-metering? There's electricity going in,  
23 there's electricity going out. I'm unable to  
24 distinguish the difference. Netting electricity

1 is a common practice.

2 MS. KEY: Netting electricity on-site,  
3 behind a retail meter, is a common practice.  
4 But, in this case, what we have been talking  
5 about is energy being sold by a generator, to a  
6 third party, namely, a load-serving entity. I  
7 mean, let's put aside the retail sale. Or, let's  
8 not put it aside. It's either being sold to  
9 another retail entity -- to a retail entity  
10 that's in front of the meter, that's in front  
11 of -- or, you know, behind a different meter,  
12 that that's not net-metering. There's a meter --  
13 there's a meter on the generator that's running,  
14 and you can see electricity flowing out, and  
15 somebody needs to buy that electricity.

16 CHAIRMAN GOLDNER: Yes, to me, it's  
17 just an analogy. It's analogous. So, if there's  
18 a solar array that's being built in the community  
19 aggregation region of Lebanon, and they're using  
20 that power, such as it is, during the day, when  
21 it's clear, to reduce the load in their region,  
22 and they have some transactions that enable them  
23 to execute that system, then I don't see how  
24 that's federal jurisdiction or why there would be

1 tariffs, you know, tariffs involved from  
2 transmission or anything else?

3 It sort of seems like they should be  
4 able to handle that within sort of a net-metering  
5 kind of construct. In other words, there's  
6 electricity going in, there's electricity going  
7 out. And, in the end, if they're reducing the  
8 load for their ratepayers, then that seems like  
9 it would be good for everyone.

10 MS. KEY: I fully agree. And the City  
11 of Lebanon, they can own a generator, and it  
12 produces electrons, those electrons are sold at  
13 retail to the City of Lebanon's consumers. It's  
14 reducing the wholesale -- the wholesale load of  
15 the City of Lebanon in the eyes of ISO-New  
16 England. But what's going on is Lebanon is  
17 selling energy out of that generator.

18 There's another scenario where a third  
19 party is -- owns that generator, and it's selling  
20 energy from that generator to the City of  
21 Lebanon. If that third party is not a QF, is not  
22 owned by a governmental entity in order to do  
23 that, that third party is going to sell that  
24 energy to the City of Lebanon, that would be a

1       FERC-jurisdictional sale. In almost every case,  
2       it would be a QF, and it would be exempt from  
3       FERC jurisdiction, but it's a sale in interstate  
4       commerce. And the City of Lebanon can still  
5       treat it as a load reducer with the ISO-New  
6       England.

7               So, you're talking about wholesale load  
8       reduction versus whether there's a sale of power  
9       going on, and those are two different things.

10              CHAIRMAN GOLDNER: Yes. It could be --

11              MS. KEY: And you could have load  
12       reduction by selling power, I'll call it, "behind  
13       the wholesale meter". And ISO-New England has  
14       said you can have wholesale load reduction, you  
15       know, netting wholesale power, by having  
16       generation serve customers behind that meter.  
17       But there is still this sale of power, and if  
18       there's a wholesale sale of power, which is why  
19       we're having this big debate, in our view, that  
20       wholesale sale is in interstate commerce,  
21       although it's very simple to be exempt from FERC  
22       regulation.

23              CHAIRMAN GOLDNER: Attorney Postar.

24              MR. POSTAR: Commissioner, we think you

1        have it exactly right. Sometimes these increases  
2        can mothball -- snowball into something that's  
3        more complicated than it needs to be. Getting  
4        back to the notion that jurisdiction is a  
5        fact-specific determination.

6                In the load reducer example that you  
7        use, where you have a generator, and it is  
8        selling to an entity that's treated as a -- and  
9        the sale is being treated as a load reducer,  
10       there's no flow of energy to be measured.  
11       There's not a factual finding that is going to be  
12       made that I can conceive of that would allow you  
13       to determine whether it's interstate or  
14       intrastate. It is produced at Point A, and it is  
15       used at Point B, and, you know, the rest is  
16       something that we have to work out with the  
17       Utilities. It's something that we have to sit  
18       down and make sure that the OAT -- the OATT, all  
19       fit in, and that everything is -- that the terms  
20       are respected, and that they're implemented  
21       properly. Because, at the end of the day, you're  
22       trying to get, you know, in the first year, 15  
23       megawatt, no more, less than 15 megawatts of  
24       clean energy to New Hampshire customers.

1                   It just shouldn't be that complicated.  
2           And we think that it doesn't have to be. I think  
3           your question got it exactly right.

4                   CHAIRMAN GOLDNER: Thank you. Attorney  
5           Young?

6                   MR. YOUNG: Thank you, Commissioner. I  
7           believe Dan Phelan, our Wholesale Administrator,  
8           may just want to provide some context.

9                   MR. PHELAN: Sure. So, under the ISO's  
10          existing wholesale markets, resources can  
11          register as "demand response", and participate in  
12          the capacity and real-time markets.

13                   This would be sort of how you value  
14          load reduction, but those are subject to the  
15          federal rules and regulations of the ISO-New  
16          England system. There is not a payment stream  
17          associated directly with load reduction outside  
18          of that process.

19                   CHAIRMAN GOLDNER: So, Mr. Phelan,  
20          could you elaborate on how the process would  
21          work? Just maybe you can give us some more  
22          context?

23                   MR. PHELAN: Yes. So, there are active  
24          and passive demand response. Active can be

1       called upon to respond to market signals.

2       Passive is energy efficiency measures, and things  
3       like that, that are installed, and generally  
4       lower load, but don't respond to signals.

5               And the passive resources can be bid  
6       into the capacity market and receive capacity  
7       payments. The active ones can offer their energy  
8       in the day-ahead and real-time markets, and  
9       receive compensation that way.

10              CHAIRMAN GOLDNER: So, if I could just  
11       ask for you to elaborate on a specific example.  
12       So, we're back in Lebanon. We've got a  
13       2-megawatt solar array. And, so, how would that  
14       work in the construct that Community Power wants  
15       to operate, like, how would that work?

16              MR. PHELAN: I struggle, because I  
17       don't believe that would be able to participate  
18       as a demand response resource, and would not be  
19       able to participate in the ISO markets that way.

20              CHAIRMAN GOLDNER: That's what I mean.  
21       So, then, it's not participating in the ISO  
22       markets. So, therefore, I have trouble  
23       understanding the jurisdictional dispute. It  
24       seems like this sort of load reduction sort of

1       construct would be applicable, and that there  
2       wouldn't be any sort of jurisdictional issues?

3               MR. PHELAN:   So, part of the --  
4       something that -- something that has not come up  
5       today, or has sort of been danced around, is the  
6       concept that these resources -- pilot program  
7       resources would receive payments related to the  
8       avoided transmission costs.  And there's not a  
9       market for avoided transmission costs.  There's  
10      not someone paying on the other side.

11              So, this is a scenario where the  
12      revenue would have to come from somewhere, and  
13      that's undefined here, as we see it.

14              CHAIRMAN GOLDNER:  And thank you for  
15      engaging in the line of questioning here.  
16      Attorney Young, you may be taking a position yet,  
17      I can feel it coming.

18              So, here's where I'm struggling.  So,  
19      the Town of Lebanon, at noon, on Saturday, is  
20      consuming, I know they consume more than this,  
21      but they're consuming 10 megawatts in this  
22      example.  And the solar array is on, it's sunny  
23      outside, happy days, so they're only consuming 8  
24      at the moment, because of the solar array



1       producing energy. So, wouldn't the ratepayers in  
2       Lebanon benefit from no transaction, *per se*, but  
3       just consuming less energy at that moment in  
4       time? Why would you need any kind of  
5       transaction, I guess is my question? It would  
6       just be a lower load on the ratepayer.

7               Mr. Phelan, yes.

8               MR. PHELAN: If I could answer that?

9               So, the issue then becomes, so, you've  
10       got this 2 megawatts, and how is that  
11       compensated?

12              CHAIRMAN GOLDNER: Yes. In my mind,  
13       it's just a load reduction, like, physically,  
14       like there's less power needed. And, so, thus,  
15       the ratepayer only pays for 8 megawatts, instead  
16       of 10 megawatts, and so off you go.

17              MR. PHELAN: All right. So, who then  
18       owns the 2 megawatts? If it is the -- as in  
19       the -- as my understanding of the Kingston  
20       example, if it is the utility itself that owns  
21       the generating asset, I see no transaction  
22       occurring, there's not two parties to it, you  
23       know.

24              CHAIRMAN GOLDNER: Exactly.

1 MR. PHELAN: Yes.

2 CHAIRMAN GOLDNER: I agree.

3 MR. PHELAN: But, however, if they're  
4 owned by two separate companies, you've got the  
5 transfer occurring and a business transaction  
6 occurring, and then --

7 CHAIRMAN GOLDNER: But isn't -- I'm  
8 sorry for interrupting, Mr. Phelan, but isn't  
9 Community Power suggesting, and we can ask them  
10 directly, too, but aren't they suggesting really  
11 the same thing analogous to the Unitil  
12 implementation, where they're -- that, and  
13 Community Power would be analogous to Unitil  
14 completely in this example?

15 In other words, they're both producing  
16 power from a solar array, and they're -- all the  
17 transactions are internal to the entity. And,  
18 so, there's no need for transactions outside the  
19 entity, outside Unitil, in the case of the Unitil  
20 example, and Community Power, in the case of the  
21 Community Power example.

22 MR. PHELAN: These are describing  
23 situations where the power is generated and  
24 consumed behind the same utility delivery point

1 by the same entity.

2 CHAIRMAN GOLDNER: That's right.

3 MR. PHELAN: I don't believe that is  
4 what is considered under these pilot programs,  
5 and would -- would have to consider that  
6 separately.

7 CHAIRMAN GOLDNER: Yes. Thank you very  
8 much.

9 I'll turn to Community Power now, to  
10 see if -- what your opinion is on this question.  
11 Mr. Below, I can see that you're prepared to  
12 respond?

13 Or, maybe not. I don't mean to put you  
14 on the spot.

15 MR. BELOW: Yes. I think it is  
16 analogous. And there is a separate issue, sort  
17 of, you know, that could be addressed through the  
18 pilot, but may need to be addressed otherwise,  
19 which is that the Utilities account for that load  
20 reduction within the Load Asset ID that's being  
21 served.

22 So, in your example, we would still be  
23 serving 10 megawatts of load, so we would charge  
24 for that. And we would be buying 8 megawatts

1 from ISO-New England, and 2 megawatts from  
2 ourselves, or a third party, and using -- so, the  
3 customer is still going to pay, in this case,  
4 through our energy service rate. And, as long as  
5 that export to the local grid can be used to  
6 offset the positive loads, but not below zero,  
7 then it should be something that's doable, and  
8 would open up, potentially, many opportunities to  
9 more cost-effectively serve customers with local  
10 resources where those make economic sense,  
11 compared to buying the power through ISO-New  
12 England.

13 MR. POSTAR: If I could just  
14 supplement? I agree totally with that, but one  
15 additional point, in response to the  
16 Commissioner's question, of the benefit to the  
17 community will be the load reduction, and that's  
18 what they get.

19 And I just want to make sure we're  
20 careful to make sure we define all of the savings  
21 that occur from a transaction, you know, to do  
22 that now, but the full savings should accrue that  
23 are brought by that resource, and making sure  
24 that we carefully define all of those savings,

1       and capture all of them, and make sure that  
2       they're not peanut butter spread throughout the  
3       system, and everybody else benefits from your  
4       transaction, from your load reduction, making  
5       sure that the load reduction really captures the  
6       full benefit, I think is something I would  
7       encourage the Commission to keep on the table.

8               CHAIRMAN GOLDNER:   Yes.   Thank you for  
9       jumping in.   Because I understood, Mr. Below, you  
10      to say that, if the load in Lebanon that day was  
11      10 megawatts before the solar array, and even  
12      under the solar array was providing 2, the  
13      ratepayer would still be charged for 10.   And  
14      there's some magic somewhere that, to the DOE's  
15      point, that has to happen in order for the  
16      ratepayers to actually benefit from the solar  
17      array.

18             MR. BELOW:   Well, it would be  
19      presumably because it's a better deal, in some  
20      way, in either a lower rate or more stable rate  
21      that helps us stabilize the long-term rates in  
22      that situation.

23             CHAIRMAN GOLDNER:   And please elaborate  
24      on that for me, too, please, because I'm back to

1       being puzzled. So, if -- maybe give an example  
2       of how, in this particular instance, in this  
3       particular example, the ratepayer would benefit?  
4       Like, how would that work mechanically? How do  
5       they get benefit for that 2 megawatts?

6               MR. BELOW: Well, you know, it would  
7       depend on the contract price. I mean, currently,  
8       we're supplying customers a portion of that power  
9       that is bought in the day-ahead and real-time  
10      market, but the bulk of that power is bought  
11      through bilateral transactions, in which the  
12      buyer and seller agree to a particular price.  
13      And at this -- and, currently, those are mostly  
14      shorter term, although we've entered, too, a  
15      somewhat longer term.

16              But I think a key benefit that can  
17      occur here is to recognize more the full value  
18      stack as has been done with the Kingston Unitil  
19      solar array proposal, and as has been done with  
20      the Liberty battery storage proposal, which is to  
21      recognize that, under FERC-approved ISO-New  
22      England tariffs, without regard to whether it's  
23      net-metered data or a limited producer, or any  
24      other kind of generation, or storage, as long as

1       it doesn't register as a generation asset with  
2       ISO-New England, it's going to be treated as a  
3       load reducer for purposes of transmission cost  
4       allocation.

5               So, what I think the statute posits is  
6       that there should also be credit for the value or  
7       most of the value, share some of it with other  
8       customers, but most of the value of that  
9       reduction in transmission cost allocation. Now,  
10      that all occurs at a single hour of coincident  
11      peak demand in each month of the year. So, as  
12      this specific statute provides, with regard to  
13      the pilot, if the distributed generation or  
14      storage, which is expressly authorized to be part  
15      of pilots, include storage, does not actually  
16      export power to function as a load reducer with  
17      regard to those transmission costs, then it  
18      doesn't -- there's no credit to be had.

19             And what Unitil found is that a single  
20      access tracker was a better investment than  
21      mostly what occurs when all kilowatt-hours are  
22      valued the same, as is currently the case under  
23      net-metering.

24             So, there's additional potential value

1       in two ways. One is, if there can be credit for  
2       most, if not all, of the avoided transmission  
3       costs, then other ratepayers, who aren't  
4       participating, you know, can be neutral. In  
5       other words, if that hour that that demand --  
6       that that export occurred on was the monthly hour  
7       which transmission costs were incurred,  
8       coincident peak demand. And it was exporting 2  
9       megawatts onto the grid, that would be 2  
10      megawatts of transmission costs not allocated to  
11      Liberty Utilities, much as analogous in their  
12      battery pilot.

13               And, in doing so, if the credit is  
14      given at a similar or a lesser, you know,  
15      equivalent rate than what is paid otherwise to  
16      the transmission provider, then the customers are  
17      still paying the same for transmission costs,  
18      it's just that a portion of it is going to the  
19      asset that is reducing the load and reducing the  
20      transmission cost allocation.

21               And, then, there's the secondary effect  
22      that's beneficial of all that, which is it frees  
23      up capacity at coincident peak demand for other  
24      beneficial electrification to occur that might



1       add load during that coincident peak demand.  
2       And, if it's a storage device, it helps shift  
3       load to other hours where there isn't a capacity  
4       constraint, as there is during coincident peak  
5       demands. And all of that has a secondary effect  
6       of a demand of reduction-induced price effect,  
7       which has to do with the fact that, you know,  
8       prices tend to be very high when there's  
9       coincident peak demand, because we're nearing  
10      capacity for generation, as well as transmission  
11      and distribution. And, when you can shift that  
12      load or shave that load at those peak periods,  
13      then you're also going to lower the clearing  
14      price in the day-ahead and real-time markets,  
15      because, in New England, there's a price curve,  
16      and, as demand increases, the curve gets steeper  
17      and steeper. So, if you can clip the steep part  
18      of that curve, and shift that load to lower  
19      demand times, then there may be a small increase  
20      in the rates when you're charging that battery  
21      when rates are very low. But that is very small,  
22      compared to the reduction that occurs during the  
23      coincident peak demand times. And, obviously, to  
24      hit that single hour of coincident peak demand,

1       it's not known in advance, so you have to be  
2       strategizing to dispatch that resource on a  
3       regular basis to try to hit whenever that occurs  
4       to get the compensation.

5               CHAIRMAN GOLDNER:  And I think -- I'm  
6       sorry, Mr. Below, for interrupting.

7               MR. BELOW:  Yes.

8               CHAIRMAN GOLDNER:  I think it's --  
9       isn't it as simple as the lower -- if your  
10      solution, if the Lebanon's solar array is lower  
11      cost, in the aggregate, than what you're  
12      purchasing from ISO-New England, then you  
13      benefit.

14              MR. BELOW:  Yes.

15              CHAIRMAN GOLDNER:  I'm sure there's --

16              MR. BELOW:  Yes.

17              CHAIRMAN GOLDNER:  But, in the end,  
18      right, we want a lower cost, a lot lower-cost  
19      solution.  And, ostensibly, you wouldn't put a  
20      solar array in Lebanon, unless you had analyzed  
21      it, --

22              MR. BELOW:  Right.

23              CHAIRMAN GOLDNER:  -- and it was a  
24      lower-cost solution.

1                   So, then, I'm going back to Mr.  
2                   Phelan's point, so, you've got this lower-cost  
3                   solution in Lebanon, you've got this nice solar  
4                   array, it's producing power at a penny per  
5                   kilowatt-hour, whatever it is. And, then, like  
6                   help me with the mechanics?

7                   Like, how does that -- I'm still kind  
8                   of lost on the transaction itself. Like, how  
9                   does that get in the ratepayer's hands, in the  
10                  Community Power organization or Lebanon? Or, how  
11                  should I look at that? How do I understand that  
12                  transaction?

13                 MR. BELOW: Well, we're -- Mr. Callnan  
14                 is going to address that.

15                 But I will say that the actual real  
16                 project that we have being developed is a  
17                 landfill gas-to-energy project that produces  
18                 power 24/7. So, it's able to provide value,  
19                 essentially, as a baseload generator, always  
20                 offsetting a portion of the local load, and  
21                 not -- we know for a fact it's not of a scale  
22                 that would cause a reverse power flow onto the  
23                 transmission grid.

24                 MR. CALLNAN: So, I think, on how the

1       ratepayer benefits, I think you answered your own  
2       question there, is, because the cost is lower,  
3       the revenue requirement that you need to recover  
4       through rates is also lower. So that could be a  
5       direct transfer to the customers that are within  
6       the CPA or within Lebanon.

7               And I think a storage example is really  
8       easy to show here. If you've got a facility, and  
9       I'm just using numbers to make the illustration,  
10      worth \$20, and you break that into three  
11      different products, energy, capacity, and  
12      transmission, and, because it's a storage  
13      resource, it's not really used for energy, so the  
14      benefit is quite low, we'll say that's \$2; the  
15      capacity benefit is a bit higher, because it can  
16      produce when you want it to, and that's worth 8;  
17      and yet the transmission benefit, as we've  
18      learned through the Dunskey Study, those are  
19      increasing each year, so that's worth 10. The  
20      Coalition is able to contract with an entity to  
21      develop that storage resource, and take advantage  
22      of the energy component and the capacity  
23      component, if it was transferred correctly. But  
24      you would be leaving \$10 on that contract, with

1       that direct negotiation to that developer, that  
2       you could not monetize and help pass along to  
3       that developer. The only way to monetize that is  
4       for that developer to talk directly to the  
5       utility, who can, such as Unitil or any of the  
6       utilities in the room, so that they can use that  
7       avoided transmission cost transaction to help  
8       benefit and pass along those savings to the  
9       developer, and share it with their own  
10      ratepayers.

11               So, the Coalition would like to be  
12      able to do the same thing and help reduce those  
13      costs.

14               CHAIRMAN GOLDNER: So, in this example,  
15      Mr. Below, I think you said you've got like a  
16      methane gas operation going. So, it's continuous  
17      and it produces energy the whole time. And, so,  
18      just maybe just walk me through transactionally.  
19      I appreciate the storage example, but I'm trying  
20      to understand this one. Like, how -- forget  
21      about the transmission piece for a moment, I know  
22      that's at the center of this dispute, but let's  
23      leave that aside for the moment.

24               That 2 plus 8 that we were talking

1       about before, how does that get into the hands of  
2       the ratepayer or the Town of Lebanon, or  
3       Community Power? Where does that -- I don't  
4       understand the transaction, I guess, at this  
5       point?

6               MR. CALLNAN: I'll continue with that  
7       transaction, and just turn it into the landfill  
8       gas unit.

9               The example, as I think you highlighted  
10      better, actually, is the cost avoidance would be  
11      10 plus 2, or 12, if I have my numbers correctly,  
12      and that 8 plus 2 is what we'd be transacting  
13      with the developer for. So, there would be a  
14      savings of \$2.00 without that transaction that  
15      goes directly to the ratepayer. So, you can  
16      reduce your costs in the rate that you're asking  
17      to collect over the next six months, or whatever  
18      the term might be, by \$2.00.

19              CHAIRMAN GOLDNER: I see. And,  
20      Mr. Phelan, would you care to comment on this  
21      particular example?

22              MR. PHELAN: Respectfully, I would  
23      suggest we not set aside the transmission portion  
24      of the equation, because that, I believe, is

1       where we start running into these federal  
2       questions of jurisdiction, and run into the  
3       question of who, in fact, is paying the avoided  
4       cost that is supposedly accruing in the value  
5       stack, and that has been pointed to a few times,  
6       of this transaction.

7               CHAIRMAN GOLDNER:   Excellent.   So, I  
8       think, and I'm going to try to repeat back,  
9       because I think -- let me see if I can do it.

10              So, what is -- what nobody objects to  
11       is the -- is this prototype pilot, whatever it's  
12       called, this pilot going on the system, it's  
13       producing energy, it's benefiting ratepayers in  
14       many ways.   What's in dispute, as I mentioned in  
15       my first question, is this credit, this "avoided  
16       transmission", this "transmission cost", whatever  
17       you want to call it, that's the part that's in  
18       dispute.   That's the only thing that we're  
19       disputing here today, I think, is that \$10, or,  
20       in the example that we used, that cost.

21              Is that -- is that correct?   Or is  
22       there more to today's dispute?

23              Mr. Wiesner.

24              MR. WIESNER:   I think it's important to

1 keep in mind that the sort of "value stack", as  
2 it's often called, of avoided costs are  
3 essentially assumed, in many cases, for purposes  
4 of cost-benefit analysis, whether it's in the  
5 context of energy efficiency, net-metering,  
6 specific projects, like the Unutil Kingston  
7 Project or the Liberty Battery Pilot Project.  
8 And those benefits are -- they don't produce  
9 dollar flows. What they produce, if anything, is  
10 lower charges.

11 And, so, when someone says "Well, I  
12 want to be paid some share of those assumed  
13 benefits, because I invested in a renewable  
14 distributed generation project", which lowers  
15 load at the relevant times, there isn't a pot of  
16 money to support those transactions. So, that's  
17 one issue. And that's the issue we've identified  
18 with respect to the transmission charges, that  
19 someone is going to get a payment, when you don't  
20 have a pot of money to dip into, then it has to  
21 be the other utility ratepayers who support that  
22 payment.

23 But I will also say that the way the  
24 statute is written, there is also supposed to be



1 a specific load reduction allocated to  
2 load-serving entities. And, as a Attorney Key  
3 noted, it's not entirely clear which load-serving  
4 entity, or whether it's, you know, the "correct  
5 one", that would be credited. But that's a step  
6 beyond the current process. Because I think it's  
7 fair to say that, currently, the load reduction  
8 benefits of renewable generation on the system,  
9 again, under 5 megawatts, treated as a load  
10 reducer, is effectively socialized among all  
11 utility ratepayers and among all load-serving  
12 entities, similar to what we understand the  
13 Vermont model does. And what's different here is  
14 that there's an interest in having the load  
15 reduction metered at the generation level, and  
16 reported specifically for the benefit of one or  
17 another load-serving entity so its charges would  
18 be lower vis-à-vis all other load-serving  
19 entities within the utility's service territory.  
20 So, that's what's different.

21 And putting aside the policy  
22 implications, and whether that would be just and  
23 reasonable, if that requires the utilities to  
24 report load to the ISO for settlement purposes or

1       for regional network load allocation purposes, in  
2       a way that is different from the way they would  
3       otherwise do under the ISO tariff and rules,  
4       that's when we get into a federal preemption  
5       issue.

6               So, I wouldn't want to concede that  
7       it's just the transmission issue, and that can be  
8       solved by, you know, a "subsidy payment"  
9       recovered from all utility ratepayers, because I  
10      think there's more to it. And that's the case,  
11      even if we're talking about retail transactions,  
12      or transactions that might involve an exempt  
13      seller, such as a municipal owner of a generation  
14      facility.

15             And, so, I think, as Attorney Postar  
16      suggested, many of these issues are very  
17      fact-specific. And, in theory, there might be  
18      some pilot that could be designed that wouldn't  
19      involve any of these issues, although I have a  
20      hard time imagining what that would be.

21             But I think, even on the retail side,  
22      there are issues with how this would need to be  
23      implemented, to effectively take value stack  
24      benefits that are currently socialized, and

1       privatize them to a greater or lesser extent, if  
2       you're, you know, willing to hear that word, so  
3       that specific entities get the benefit of those  
4       reductions, versus all utility customers.

5               MR. POSTAR: Commissioner, there's one  
6       point that I did want to come back to. And that  
7       is the notion that, in developing a program, you  
8       can have "no effect on what is federally  
9       regulated", and that notion is incorrect. That's  
10      not the law.

11             It's very clear that a state can impact  
12      federally regulated transmission costs. There's  
13      no dispute about that.

14             For example, if New Hampshire decided  
15      that it wanted a generation facility to be built,  
16      and directed that facility to be built, and it  
17      was built. And the result of that facility  
18      reduced congestion on a transmission line, which  
19      impacted costs to consumers, reduced costs,  
20      that's an impact on federal rates; you're allowed  
21      to do that.

22             So, the notion here that we can't --  
23      "we cannot capture any change in transmission  
24      costs, and have those passed through, passed on

1 to those who are creating the reduction in costs,  
2 because we're now implicating, we're now  
3 affecting, we're now touching a federally  
4 regulated rate, we can't do that." No, that's  
5 not correct. You shouldn't be hearing that from  
6 anybody. That is simply not correct.

7 You can't change the rate, you can't  
8 tell them what to charge, that you can't do. But  
9 you can have an effect on what is charged that  
10 changes the costs. To the extent that costs do  
11 change, in the New England ISO, power or  
12 transmission costs, that doesn't -- that's not  
13 invading FERC's jurisdiction. You're not telling  
14 FERC what rate to set or utilities what to  
15 charge.

16 So, in designing a pilot program that  
17 stays on the right side of your jurisdiction,  
18 don't be dissuaded from capturing the full value  
19 that the transaction brings, and clip off some of  
20 the costs that, for example, Mr. Callnan  
21 described, because that doesn't get you on the  
22 wrong side.

23 CHAIRMAN GOLDNER: So, let me -- I'll  
24 ask a question or two more, and then we'll take a

1 break. I think we can confer, and probably the  
2 parties want to confer, too, on their closing  
3 statements and provide some time on that. We'll  
4 probably return at 1:00 with a few more  
5 questions, but I think you have the gist of our  
6 line of questioning, and that will give everyone  
7 time to work on their closing as well.

8 So, maybe a question for the Community  
9 Power Coalition. If these transmission costs  
10 were an unsolvable problem, for whatever reason,  
11 and that those would -- these avoided costs, this  
12 credit wouldn't be available, would that prevent  
13 you from moving forward with pilots?

14 MR. BELOW: I would guess, in all  
15 likelihood, because it's such a large part of the  
16 value proposition.

17 CHAIRMAN GOLDNER: It's like half or  
18 so, is what was quoted earlier?

19 MR. BELOW: Yes. Particularly for  
20 storage.

21 CHAIRMAN GOLDNER: Okay. Go ahead.

22 MR. CALLNAN: I could walk through a  
23 practical example of how those costs can be  
24 allocated, if that would be --

1                   CHAIRMAN GOLDNER: That would be  
2 helpful.

3                   MR. CALLNAN: Okay. And I think  
4 Attorney Wiesner talked about the Vermont program  
5 as an example. And I think that's a very good  
6 one to show how it's practically shared among all  
7 the utilities within Vermont.

8                   So, Vermont is set up a little bit  
9 differently. All the utilities own the  
10 transmission system. So, they share in that  
11 transmission system. And there's a state meter  
12 reader that helps allocate loads among the state.  
13 Their program, called the "Standard Offer  
14 Program", and it's that feed-in tariff program  
15 that we've heard about a little bit, they offer  
16 an auction each month -- each year. And I think  
17 it's now closed, but they ran it for quite some  
18 time. They ran the auction to try to get the  
19 lowest cost renewable resources to respond. That  
20 was to help keep costs down for everyone.

21                   The 20-year contracts that were granted  
22 to those folks that won those RFPs were to be  
23 split among, on a load ratio share, an equal  
24 share among all those utilities, based on how

1 much load they use each year.

2 So, that contract then kind of set up  
3 the allocation of the output for each of those  
4 individual facilities. So, as those facilities  
5 would produce energy, the state meter reader  
6 would transfer that energy allocation to each of  
7 those entities' load asset. And that helped keep  
8 that load asset down, based on the load reduction  
9 that that entity was -- the production it was  
10 creating.

11 I hope that made sense. But they would  
12 do that, I believe, on a daily basis, to transfer  
13 over that energy to those load assets. By doing  
14 so, they were able to realize all of the benefits  
15 that we've been talking about today. We've  
16 highlighted at just three, there's quite a few,  
17 because load pays for everything in ISO-New  
18 England, but energy, capacity benefits, which is  
19 a reduction in your capacity load obligation, and  
20 then also avoided transmission costs. So, that's  
21 a practical example of how to transfer those  
22 benefits among parties.

23 CHAIRMAN GOLDNER: Thank you. That's  
24 very helpful.

1                   And I'll just wrap up with a question  
2                   for the Utilities, a technical question. So,  
3                   this question of "measuring avoided costs", it  
4                   seems like it would be not complicated. You know  
5                   the load that's required. So, you know at all of  
6                   your nodes what, you know, the load is. You know  
7                   what's happening on Mr. Below's methane machine.  
8                   And, so, couldn't you then calculate,  
9                   mathematically, this avoided cost, and wouldn't  
10                  that be mathematically derivable, so that it  
11                  could be quantified without over much -- over  
12                  much effort?

13                 And, if that's something that you would  
14                 need to confer with some technical experts,  
15                 that's fine. I'm just trying to understand if  
16                 that's technically feasible. Because it seems  
17                 like, from an engineering point of view, it would  
18                 be something that would be not complicated, from  
19                 an outside observer.

20                 MR. WIESNER: I think, and I'm now  
21                 looking at Paragraph X of 362-A:2-b.

22                 CHAIRMAN GOLDNER: Uh-huh.

23                 MR. WIESNER: And, if you have the  
24                 metering installed that would measure on an



1 hourly basis imports and exports from the  
2 facility, the limited producer's facility, then  
3 the data would be available. The question is,  
4 "what do you do with it?" And, "how is that  
5 reported, and for whose benefit?"

6 And what we just heard about in Vermont  
7 is -- is sort of a collectivized approach, which  
8 is, as I understand it, typical of what Vermont  
9 has done in terms of PURPA implementation. It's  
10 very much "We're all in this together." Everyone  
11 shares the costs and everyone receives benefits  
12 on a *pro rata* basis.

13 But what's different with these  
14 amendments to the LEEPA statute that we're  
15 talking about today is that they contemplate that  
16 specific private entities, let's say someone who  
17 builds a 3-megawatt solar array in western New  
18 Hampshire, can sell directly to a community power  
19 aggregation or retail customer in Rochester, and  
20 that load reductions will be reported to benefit  
21 the specific participants in those transactions,  
22 so that they can take some of the value stack for  
23 themselves to support their private transaction,  
24 where those benefits would otherwise have accrued

1 to all of the utility ratepayers. So, that's  
2 different.

3 We are not claiming, just to respond to  
4 Mr. Postar's suggestion, we're not claiming that  
5 any impact on the ISO markets or the ISO systems  
6 would be prohibited. And the question is "where  
7 is that line?" And it may not be a clear  
8 black-and-white line, unfortunately, because, as  
9 you've heard, these are some novel concepts that  
10 really haven't been tested out, either in New  
11 England or, as we understand it, in other parts  
12 of the country as well.

13 But I do think that we are not saying  
14 that -- that any indirect impact on the ISO  
15 markets or transmission cost allocation is, *per*  
16 *se*, prohibited. What we're saying, I think, is  
17 that, if the utilities are required, by state  
18 authority, to report things and process  
19 information in a way that's different than what  
20 they would have done, that starts to bump up  
21 against federal preemption issues. And that's  
22 what we're concerned about, and that's really the  
23 focus of what we're talking about today.

24 CHAIRMAN GOLDNER: Thank you.

1                   So, let's do this. Let's take 45  
2 minutes or so, come back at one o'clock. We'll  
3 wrap up with Commissioner questions, and then go  
4 immediately to closing after that.

5                   So, I don't think there will be so many  
6 more Commissioner questions. But we'll just tie  
7 it off at the break and make sure that we have  
8 everything that we need.

9                   So, thank you. We'll go off the  
10 record, and return at 1:00 p.m.

11                   (Lunch recess taken at 12:16 p.m., and  
12 the hearing resumed at 1:00 p.m.)

13                   CHAIRMAN GOLDNER: All right. We'll  
14 just pick back up with the final Commissioner  
15 questions, and then go back to close.

16                   So, as Attorney Postar pointed out, I  
17 think this is a fact-based exercise. And my  
18 question for the parties is that, you know, if  
19 the Lebanon example was used -- that we used  
20 earlier, where you have power being generated in  
21 Lebanon, and it's being only used in Lebanon,  
22 it's hard for me to imagine how transmission  
23 lines would be used, but that is measurable. We  
24 can -- it's a fact-based exercise to see if

1 transmission lines are being used, and that could  
2 be measured. So, we could take some time, six  
3 months or something, and do some measurements,  
4 and figure out if transmission lines are being  
5 used.

6 If we're going from Lebanon to  
7 Rochester, transmission lines may yet still not  
8 be used, we don't know. But it seems to me,  
9 again, measurable. And we could know if there  
10 was a problem with FERC jurisdiction. If  
11 transmission lines are being used, that would be  
12 a separate problem. But, if they're not being  
13 used, then I think it's a relatively simple  
14 exercise.

15 So, I wanted to make those statements,  
16 which were really meant as questions, and get any  
17 comments that the parties would like to make  
18 relative to those statements?

19 MS. KEY: I can start by answering  
20 that.

21 And what you're discussing is electron  
22 tracing. And, if you read the *FPL* and *FPC* case,  
23 you will see that many, many decades ago, and, if  
24 you read FERC cases before that, there was a

1       desire to engage in electron tracing and that  
2       sort of thing, and that was abandoned for a  
3       bright line test many, many years ago. And the  
4       evidence of that bright line test cannot be  
5       clearer than in the *SunEdison* and the *CAISO*  
6       cases, where, you know, your rooftop throws off a  
7       kilowatt, it's reducing load, the utility doesn't  
8       have any idea that it's throwing off a kilowatt.  
9       And, lo and behold, under the net metering  
10      program in that state, at the end of year, let's  
11      say, that's the only kilowatt-hour that you have  
12      in excess of what you consumed, that FERC has  
13      said "Well, that's a sale in interstate  
14      commerce." No one -- you know, obviously, it was  
15      a kilowatt, it probably went to your neighbor  
16      next door, that FERC did not engage in any  
17      tracing of electrons, and just said, under both  
18      *SunEdison* and *CAISO*, you know, if residential net  
19      metering has some extra energy at the end of the  
20      year, and they're actually paid for it, we have  
21      jurisdiction over that interstate commerce sale,  
22      and they either need to be exempt under PURPA or  
23      have market-based rates.

24               So, I really don't think the -- the

1 Joint Utilities could never support going back to  
2 electron tracing, which was abandoned some 50  
3 years ago. And that's just not a workable  
4 solution for this case.

5 CHAIRMAN GOLDNER: So, Attorney Key,  
6 let me just ask you a follow-on question.

7 So, how is that different than what  
8 Unitil does today? They're not electron tracing,  
9 but it's the same model. Or, how is it different  
10 than what municipal utilities do today? It's the  
11 same model. I'm trying to understand the  
12 distinction you're making.

13 MS. KEY: Unitil is FERC -- Unitil is  
14 FERC-regulated. And, if one of those electrons  
15 is sold at wholesale, it has market-based rates,  
16 and it has authority. And, if it sells, you  
17 know, my understanding is that energy from the  
18 Unitil is intended to serve Unitil's own load, at  
19 retail. And that's very different than the  
20 example I gave of the one kilowatt for the  
21 residential house. It's being sold to a  
22 wholesale entity, the utility, who's paying for  
23 it. The Unitil example, they sell power, both at  
24 retail and wholesale for that project, my

1       understanding is it would be viewed as that power  
2       being sold at retail. But, if, let's say, they  
3       made a bilateral sale that was a slice of their  
4       system, that electrons could come from that  
5       plant, and they would have FERC authority to make  
6       that sale if it were wholesale.

7               But the issue is, if there's a sale at  
8       wholesale, in the Unitil example, there's not a  
9       sale at wholesale I'm seeing, Unitil sells power  
10      to retail customers, and, on occasion, may sell  
11      imbalanced energy or the like to the ISO-New  
12      England. But that's -- the very significant  
13      difference I see is, you know, the transaction  
14      going on. And here, if there's a limited  
15      producer, that's not a government entity, selling  
16      to a CPA or another load-serving entity, there is  
17      a wholesale transaction.

18             CHAIRMAN GOLDNER: Okay. No, thank you  
19      for the explanation. I'm confused, because, for  
20      me, it's -- the system is either open or it's  
21      closed. In a closed system, and I think Unitil's  
22      system is closed, but Attorney Campbell could  
23      clarify, and nothing is entering or leaving, then  
24      I don't see the difference. Maybe Unitil's

1 system is open, but, if it's open, that would be  
2 a complicated matter for some more discussion.

3 But, if the CPC system is closed, then,  
4 yes, I'm still struggling with why that would --  
5 why that would be sort of a FERC jurisdiction or  
6 any kind of electron counting would be required.  
7 I was suggesting before, on the fact-based thing,  
8 if facts were at issue, if there was a question  
9 of whether these -- if there was a question as to  
10 the facts in the case, it would be something that  
11 surely could be verified, I guess was the point I  
12 was trying to make, to verify that it was, in  
13 fact, a closed system.

14 But I'd like to give Community Power  
15 Coalition a chance to comment, as well as the  
16 OCA, and the DOE as well.

17 MR. POSTAR: Thank you, Commissioner.

18 We would urge that the Commission not  
19 be dissuaded from exercising its jurisdiction  
20 because of incidental impacts that may occur on  
21 FERC-regulated services. Incidental impacts do  
22 not cross the line. Indirect impacts can occur,  
23 and occur all the time, both ways. FERC does  
24 things that affects state jurisdiction, state



1 rates, and states do things that affect -- pass  
2 measures and adopt programs that affect  
3 federal-regulated rates.

4 More to that point, the Commission has  
5 a variety of options available to it to implement  
6 in a pilot program. It is not just -- this isn't  
7 a one-size-must-be. And what we've tried to  
8 explain today is describe what we see is a  
9 variety of options.

10 When it comes to resolving some of the  
11 issues that I think you correctly pointed out are  
12 really what's driving some of the cost issues  
13 that are really driving this. It's the Utilities  
14 that are going to propose the pilot program,  
15 that's the way the law is set up. And, in  
16 directing the Utilities to propose a program,  
17 they could be directed to propose measures that  
18 deal with capturing the full benefit of the  
19 costs, without harming their customers, without  
20 harming the Utilities. That all can be done.

21 And Community Power Coalition of New  
22 Hampshire is absolutely prepared to work with the  
23 Utilities, to develop measures, to develop  
24 accounting, to develop rate treatments, that

1 ensure that the program can go forward, and not  
2 harm those that are not participating, but give  
3 full value to those that are participating.

4 CHAIRMAN GOLDNER: Thank you. Does the  
5 OCA or DOE like to weigh in?

6 MR. CROUSE: Sure. On behalf of the  
7 OCA, I'm really intrigued by the proposal that  
8 CPCNH has presented. Obviously, an opportunity  
9 that could benefit ratepayers is hard for us to  
10 look away from.

11 But I'm looking at *FERC v. EPSA*  
12 currently, and I don't have an exact cite, but I  
13 think it's somewhere around 278. But the Court  
14 said "Expressly avoiding a gloss on the FPA that  
15 would give the federal regulator authority over  
16 indirect or tangential impacts on wholesale  
17 electricity rates, the Court therefore adopted  
18 what it characterized as a "common-sense  
19 construction" of the FPA, which focused  
20 exclusively on direct impacts on wholesale  
21 rates."

22 I'll admit that I'm taking the  
23 Community Power Coalition at face value that what  
24 they're saying is true and accurate. And, if it

1 is just tangential or an indirect impact, that  
2 seems consistent with both the argument that I've  
3 raised, as well as the exception under the  
4 Constitutional Avoidance Doctrine.

5 So, I'm intrigued to explore this  
6 further, but that's all I have to contribute.

7 CHAIRMAN GOLDNER: And, Mr. Postar, I  
8 guess my question would be, you make the  
9 assertion to the OCA's point of "incidental  
10 impact" or "indirect impact". How can you prove  
11 that or how can you show that? How could the  
12 Commission gain confidence that it is incidental  
13 and/or indirect?

14 MR. POSTAR: The way the New England  
15 ISO is set up today is that the 5-megawatt or  
16 less -- the less than 5-megawatt units that  
17 choose not to be -- to register as generators are  
18 not included in the market, they're not part of  
19 the market. So, they're doing something else.

20 And the point that the Joint Utilities  
21 would make is "Whatever they're doing, it still  
22 is subject to FERC jurisdiction." Well, depends  
23 what they're doing. The courts have not -- the  
24 absolute clear line that the Joint Utilities say

1 doesn't explain the repeated Supreme Court  
2 decision saying "There is such a thing as "state  
3 wholesale sales"." That's still out there.  
4 That's to be decided. Your question is, "Well,  
5 how will we know it when you see it?"

6 I think, when you have a generator,  
7 that is matched within a single utility, with a  
8 specific load, and that load is -- that utility  
9 is treated as a -- if the load treats it as a  
10 load reducer, the energy that it receives, such  
11 that it is not impacting the market, I think you  
12 have all that you need. I don't think you need  
13 to go out and be tracing -- tracing electrons.

14 So, one of the things that we tried to  
15 do in our Briefs is, is to lay out some of the  
16 touchstones that you might consider in designing  
17 a program that would satisfy the state wholesale  
18 exception.

19 If I could just turn for a moment to my  
20 colleague, --

21 CHAIRMAN GOLDNER: Sure. Take your  
22 time.

23 MR. POSTAR: -- Ms. Diamond, to provide  
24 that list. We've already discussed it a little

1 bit, but let's finish it off.

2 MS. DIAMOND: Yes. Sure.

3 So, to your question, Chairman, about  
4 the "incidental or indirect impact" on FERC-set  
5 rates, we may not, at this point, be able to  
6 measure what impact, if any, that it will have on  
7 FERC-set rates, given that we don't have pilots  
8 that we're implementing right now, but we can  
9 still look at existing case law and what the  
10 courts have examined and see how they analyze  
11 that.

12 So, the Second Circuit -- the Seventh  
13 Circuit in the Southern District of New York have  
14 looked at other state programs that, like this  
15 program, would promote generation development and  
16 increase the generation supply, albeit those  
17 programs are not identical to New Hampshire's,  
18 but they still were generation development  
19 programs. And, in analyzing those programs, the  
20 Court said that, "Yes, increasing the generation  
21 supply would have, in theory, an effect on the  
22 FERC-set wholesale rate with basic supply and  
23 demand. But any impact that would have they said  
24 would be incidental and indirect. We're not

1 directly affecting, directly altering the  
2 FERC-set rate."

3 And, so, if we look at the New  
4 Hampshire program, we're talking about small  
5 limited producers that are capped at 5 megawatts,  
6 and only so many pilots can be approved each  
7 year. So, just analogizing, we expect it would  
8 be an indirect and incidental impact, if any  
9 impact at all.

10 So, we believe that it would be  
11 consistent with that guidepost that we outlined  
12 in our September letter, which was to help this  
13 Commission identify what it can and cannot do in  
14 implementing the limited producer's pilot  
15 program, so as to not infringe on FERC's  
16 jurisdiction. And I think that gets to your  
17 question.

18 CHAIRMAN GOLDNER: Okay. So, just to  
19 repeat back.

20 So, if the state would have said that  
21 the limit was, you know, 5 terawatts, not 5  
22 megawatts, then you would say "Well, no, that  
23 would no longer be, you know, incidental, that  
24 would be large."

1           But your case is really, because it's  
2           small, that that's -- that's where -- that's the  
3           right translation? It's 5 megawatts is small  
4           relative to the total load?

5           MS. DIAMOND: I would -- go ahead.

6           MR. POSTAR: Sorry. If I could just  
7           jump back in, Commissioner?

8           The point, in pointing to 5 megawatts,  
9           it's not the size, it's the way the ISO-New  
10          England -- New England ISO treats generation of  
11          that size. It treats it as a load reducer. If 5  
12          tera was treated as a load reducer, you know,  
13          maybe there would be an argument there.

14          But that we're really very much focused  
15          on the "load reducer" notion.

16          CHAIRMAN GOLDNER: Okay. Okay. So,  
17          you're just trying to meet that criterion. Okay.

18          Okay. So, my final question, and then  
19          I'll turn back to Commissioner Chattopadhyay to  
20          see if there's any follow-on. And the Utilities  
21          made a diligent effort to explain this earlier, I  
22          just didn't understand.

23          So, if I have a solar array on my  
24          house, and it's producing more energy than I take

1 in, that's acceptable to the Utilities, because  
2 we already do that. So, we know that that's  
3 okay.

4 So, now, in my mind, I'm just scaling  
5 that up. So, now, I'm at one kilowatt or 10  
6 kilowatts, or something. Now, I go to a megawatt  
7 or two megawatts or three megawatts, I don't have  
8 that big of a roof, but what if I did? Then,  
9 why -- what's the difference?

10 I don't understand why my, you know,  
11 10 kilowatts is okay, but my 5 megawatts or 4.99  
12 megawatts is not okay?

13 MS. KEY: And I think that's a good  
14 question, Commissioner. And I think we explained  
15 it, I believe it was in our Reply Brief. And we  
16 had a thorough discussion of net metering, and  
17 what goes on in retail net metering programs.  
18 And that's this: You have solar panels --  
19 whoops.

20 CHAIRMAN GOLDNER: We can still hear  
21 you, Attorney Key. If you can't hear us, we --

22 MS. KEY: You can still hear me? Okay.

23 CHAIRMAN GOLDNER: We can, yes.

24 MS. KEY: I can get on, on my computer



1 in a second. But I have no idea why my video  
2 stopped.

3 You have the solar panels, you know, --  
4 I'll try to finish the question. You have solar  
5 panels on your house, and in one hour, let's say,  
6 you're using -- you're consuming more energy than  
7 the solar panels are producing. So, what's  
8 happening there is you're self-supplying your own  
9 load, there's no sale of energy going on at all.

10 And, let's say, in another hour, you're  
11 not home, and the solar -- the Sun is out, it's  
12 shining bright, and you're producing a bit of  
13 excess energy, and that's, you know, going on to  
14 the distribution system of your utility, and  
15 that's -- that is treated as a load reducer by  
16 your utility, that generation. And, let's say,  
17 during the course of the month, that, you know,  
18 if you look at your typical consumption, and you  
19 look at your total -- I'm sorry, excuse me. If  
20 you look at your total consumption and you look  
21 at the total output of your solar energy, there  
22 the utility is going to give you credits in  
23 exchange for some of those, you produced power in  
24 certain hours when you weren't at home, when they

1       weren't being used at that moment, and you're  
2       going to get credits on your bill for a monetary  
3       amount. And FERC has said that's not a sale of  
4       energy at all, you're just getting -- you are  
5       getting paid, so, it does look like a sale, but  
6       you're getting paid in bill credits, but that's  
7       not a sale of power. And the level of your bill  
8       credit is going to be -- is state-regulated, but  
9       it's a credit.

10               Now, in some states, and I'm not sure  
11       New Hampshire is one of them, but other states  
12       within the ISO-New England, and within the U.S.,  
13       something else might happen. It may be at the  
14       end of the year, or when you move out of your  
15       house, or after some period, the utility is going  
16       to look at, well, over this entire period, I'm  
17       going to take a year as an example, you did have  
18       a little bit more generation flow out than you  
19       consumed. And, thus, you know, you made a sale  
20       to the utility. The utility has, again, when  
21       that sale was made, nobody knows, the utility  
22       used that energy to reduce its load, whatever it  
23       was, but, at the end of the year, it's going to  
24       do a calculation and say "You know, overall, you

1       gave us an extra 100 kilowatt-hours." And it's  
2       going to -- and the utility is going to pay you  
3       for that extra energy.

4               And FERC has said that's a wholesale  
5       sale in interstate commerce, and it says you, as  
6       a residential homeowner of a solar facility,  
7       under one megawatt, you're automatically a QF.  
8       You don't have to do anything, sign any paper,  
9       fill out the form, but we're going to allow that  
10      utility to pay you for that energy, and  
11      because -- and it is exempt from FPA regulation.

12             Now, the state can't, because you are a  
13      QF, the state can't make the utility pay you any  
14      more than avoided cost. But, still, it's a sale  
15      of electricity at wholesale in interstate  
16      commerce.

17             And that's, you know, for the summary  
18      of how net metering works. So, with net  
19      metering, even at the retail level, there can be  
20      sales at wholesale interstate commerce. But,  
21      again, it depends on the state, and whether they  
22      have this type of program, where you're given  
23      money at the end of the period.

24             And I will now try to connect a

1 different way.

2 CHAIRMAN GOLDNER: Thank you, Attorney  
3 Key.

4 Any comments from the Community Power  
5 Coalition or others?

6 MR. BELOW: I do have a comment. In  
7 2020, the New England Ratepayers Association  
8 filed a complaint with FERC, that a number of  
9 states, including New Hampshire, were  
10 compensating net-metered customers at more than  
11 avoided cost. And an example of that that they  
12 gave in their petition was the fact that under  
13 100 kW, or up to 100 kW net-metered projects  
14 could get paid for 100 percent of the default  
15 service rate, plus 100 percent of the  
16 transmission rate, plus 25 percent of the  
17 distribution rate, which, arguably, is clearly in  
18 excess of avoided cost. It was mandated by  
19 Commission order.

20 I think NERA thought they had a very  
21 strong case, that FERC would look at this and say  
22 "This is jurisdictional, and this is a problem."  
23 But what ended up happening, after a lot of  
24 lawyers earned a lot of money filing a lot of

1       briefs in that case, FERC ended up sort of  
2       dismissing it on a technicality.

3               But some of the commissioners actually  
4       said "There's really important jurisdictional  
5       issues here that have been provoked." And one of  
6       the jurisdictional issues was a filing by NARUC  
7       that argued that, actually, this net metering is  
8       not really federal jurisdictional. But what  
9       ended up happening, and they said "The courts are  
10      a better place to resolve this jurisdictional  
11      issue. So, we're just going to leave this whole  
12      question about net metering jurisdiction for the  
13      courts to decide."

14             Now, this was after *FERC v. EPSA*. This  
15      was after FERC had been more aggressive in  
16      asserting its jurisdiction over net metering.  
17      This is probably the most recent case in which  
18      they have just looked at it and said "We're  
19      stepping away from this, and leaving it to the  
20      states to figure out what they're doing with net  
21      metering."

22             And it's not just the small amounts.

23             MS. KEY: May I respond to that,  
24      because it's incorrect?

1           MR. BELOW: This is sometimes -- let me  
2           just finish.

3           This is sometimes large, you know,  
4           hydro projects that are being compensated at  
5           these rates for most all of their output, with  
6           only modest behind-the-meter load.

7           CHAIRMAN GOLDNER: Thank you, Mr.  
8           Below.

9           Attorney Key, if you'd like to respond,  
10          that's fine.

11          MS. KEY: Yes. I would like to respond  
12          to that.

13          That net metering case, which was  
14          handled by my law firm, and I know all about it.  
15          It involved whether -- I described to you three  
16          situations. One situation where you were  
17          consuming your on-site generation; one situation  
18          where you weren't consuming your on-site  
19          generation in a given hour, but you were given  
20          credit for consuming that generation in a  
21          different hour. And the fight in that case was  
22          all about that Situation 2. It had nothing to do  
23          with Situation 3, which is a completely different  
24          situation, where, at the end of a period, you're

1       paid in money.

2               The question in the *NERA* case was "If  
3       you're paid a bill credit, isn't that just like  
4       being paid for a sale?" And, so, it was, of  
5       those three situations, which are fully laid out  
6       in our Reply Brief, the discussion being held is  
7       solely about Situation 2, where, over a billing  
8       period, you are being paid credit. So, you're  
9       "being paid something". But it has nothing to do  
10      with that third situation, where, at the end of a  
11      different period or maybe the same period,  
12      instead of being given credit, you're being given  
13      money.

14             So, there -- and the *CAISO* case that we  
15      have described came after the *NERA* case. And  
16      that was a case where the utilities in that case,  
17      in California, were highly concerned, because it  
18      had -- in an order, FERC had made it sound like,  
19      in that Situation Number 2, where you're being  
20      paid a bill credit where it is a sale of  
21      electricity. And the California utilities argued  
22      to the Commission that that makes it sound like  
23      that was an intrastate sale. And what you said  
24      in *SunEdison* is "There's no sale at all, if

1       you're paid by a credit, which is a very  
2       different thing, saying there's no sale at all,  
3       than if there's an interstate wholesale sale."  
4       And FERC said "You're right. We're not  
5       overturning *SunEdison*."

6               So, you have the situations of, one,  
7       self-supply; two, no sale, but a bill credit;  
8       and, three, you had a sale, and that was in  
9       interstate commerce.

10              And, as I said, I'm familiar with those  
11       cases. I wrote the pleadings in the California  
12       case as well. And, as I said, that was a 2022  
13       case. So, it was after the *NERA* case.

14              CHAIRMAN GOLDNER: Attorney Key, I  
15       might not have fully followed your logic. But,  
16       if the clever attorneys at CPC came up with a  
17       formulation that involved credits, and not the  
18       transfer of dollars, would that then be  
19       acceptable?

20              MS. KEY: Yes. If the limited producer  
21       is paid in bill credits, I'm not sure why, the  
22       limited producer doesn't have any load, so, I'm  
23       not sure what good the credits would do. But I  
24       think it would depend on the factual situation.



1 But I don't think that's an option here, because  
2 you need an entity with load to give bill credits  
3 to for the entity selling, you know, was being  
4 given bill credits against, meaning, they could  
5 only use the credits to offset their otherwise --  
6 to offset their electric bill. They couldn't  
7 transfer those credits to other people.

8 Like, you couldn't, if you produced  
9 excess energy, and yet earned \$300 in bill  
10 credits, you can't sell those to somebody else.

11 CHAIRMAN GOLDNER: I see. Okay. Any  
12 comments from the other parties?

13 MR. CROUSE: No comments from the OCA.

14 CHAIRMAN GOLDNER: Okay.

15 MR. BELOW: Only to observe, and I am  
16 not sure how this was addressed in that case, but  
17 only to observe that, in fact, even before the  
18 NERA petition, the compensation is not merely a  
19 bill credit, it is capable of being cashed out,  
20 and was before that case was filed, and continues  
21 to be something that can be cashed out, in the  
22 form of cash.

23 CHAIRMAN GOLDNER: This is a very  
24 interesting point. Thank you for the

1 clarification from both parties.

2 So, I'll just wrap up with something  
3 that's -- that I can't understand. So, I'll  
4 point the question to you, Attorney Wiesner.

5 So, in order for these pilots to move  
6 forward, it has to be brought forward by a  
7 utility. So, is this whole conversation moot,  
8 because I'm not hearing a lot of excitement from  
9 the Utilities in bringing forward the pilot? So  
10 I'm just trying to understand what would be the  
11 motivation for the utility to bring forward a  
12 pilot, and, you know, would that ever happen?  
13 And why would it happen? What would be your  
14 motivation to do so?

15 MR. WIESNER: I think it's fair to say  
16 that the utilities would be unlikely to propose a  
17 pilot that didn't involve some specific projects.  
18 And, so, the way I'm thinking of it is someone  
19 who wants to take advantage of the potential of  
20 this statute, you know, might be the City of  
21 Lebanon, could be somebody else, who says "I have  
22 a project. I don't want to just group net meter.  
23 I want to do some sort of state jurisdictional  
24 transaction, either at retail or at wholesale, if

1       it's permitted. And I want you to" -- you know,  
2       "I want to work with you, utility, on how that  
3       can be done, and how credits can flow, and how I  
4       might be compensated in some way."

5               And, if there's a meeting of the minds,  
6       and there are no jurisdictional issues, and the  
7       utility believes that it can be explained and  
8       defended to the PUC for approval, then that pilot  
9       might come forward.

10              So, I don't think it's likely that the  
11       utilities will create sort of a framework for  
12       projects to come forward, because I do think it  
13       is very fact-specific. And I think the facts of  
14       a landfill gas generator in the City of Lebanon  
15       are, you know, potentially quite different than a  
16       4.9 megawatt, you know, privately owned solar  
17       project, with no load behind the meter, that  
18       wants to sell across a utility's service  
19       territory to retail customers or to community  
20       aggregations on the other side of the state.  
21       There are very different issues there, although  
22       there are also some common issues.

23              I think one way to think of it is that,  
24       you know, you will only see a proposal if the

1 chief proponent of the proposal, the limited  
2 producer or the sponsoring community aggregation,  
3 let's say hypothetically, are able to reach  
4 agreement with the utility as to how it can be  
5 done and whether it can be done. And, then, it  
6 would come before you for approval as a specific  
7 pilot. And, then, some of the, you know,  
8 frankly, speculation that we've had to engage in  
9 this morning would be less of an issue, we'd have  
10 a concrete proposal to look at.

11 But that only works if some of these  
12 threshold jurisdictional issues that were  
13 identified by the Legislature for determination  
14 by the Commission are addressed in the first  
15 instance. And, so, I think that's the order of  
16 events here.

17 I hope that was helpful.

18 CHAIRMAN GOLDNER: It does. It does.  
19 I view it as an opportunity for speculation, but  
20 I understand the distinction.

21 So, what would be the benefit to  
22 Eversource? So, the City of Lebanon comes to  
23 Eversource with -- and I assume that's in your  
24 district, I hope it's in your district, and it's

1 not a bad example?

2 MR. WIESNER: I'm glad to report it's  
3 in the Liberty service territory.

4 CHAIRMAN GOLDNER: Excellent. Mr.  
5 Sheehan, here we go.

6 So, Mr. Sheehan, the City of Lebanon  
7 comes to you for this methane production. What  
8 would be the benefit for Liberty? Why would  
9 Liberty take time to consider this engagement? I  
10 don't see any profit in it or any motivation, any  
11 business motivation to move forward. Is there a  
12 reason for Liberty to go forward with such a  
13 recommendation or such a proposal?

14 MR. SHEEHAN: So, first, just a  
15 preliminary thought. I've been quiet for a  
16 reason, because a lot of this is beyond my  
17 understanding as well.

18 But your specific question, if a  
19 customer comes and says "We want to interconnect  
20 with your facility with X", we have an obligation  
21 to do our best. You know, we have tariffs and  
22 rules, they govern how we interconnect with a  
23 solar facility or a gas facility. So, we work  
24 with the client, the customer.

1           The issues we're talking about today  
2           come up when I would assume we're being asked to  
3           bill a customer a certain way, based on inputs  
4           from this aggregation of the supplier.

5           But, yes. We have every reason to  
6           engage with that customer, and, in fact, we  
7           support these kinds of projects.

8           CHAIRMAN GOLDNER: So, and I'll ask Mr.  
9           Campbell and Mr. Wiesner the same question, if we  
10          hypothetically put the City of Lebanon in your  
11          district. I'm just trying to understand, from a  
12          business perspective, I understand Mr. Sheehan's  
13          point, you sort of have an obligation to look at  
14          things that maybe aren't in your general business  
15          interest. But, I mean, I don't think it's unfair  
16          to say, or correct me if I say this wrong, but  
17          there's no business motivation to do this. This  
18          is something you do because it's required by the  
19          state or the federal government, or whatever the  
20          jurisdiction is in this particular example. Is  
21          that fair?

22          MR. CAMPBELL: I mean, no particular  
23          benefits come to mind, but I don't want to slam  
24          the door on that either. It may be that the

1       proponent of such a project may come to us and  
2       articulate a way that it does benefit our  
3       ratepayers. But nothing comes to -- springs to  
4       mind immediately.

5               CHAIRMAN GOLDNER: Yes. Especially, if  
6       this business of transmission, there's no -- you  
7       don't benefit from that. You know, that would  
8       be -- the beneficiary would be elsewhere, it  
9       wouldn't be the utility. So, there would be no  
10      financial benefit to the Company. And I'm not --  
11      this isn't a bad thing, it's just a business  
12      question. And, you know, businesses are in  
13      business to make money.

14             And, so, if there's no avenue for the  
15      utility to make money, then I'm challenged to  
16      sort of find a business motivation.

17             MR. WIESNER: I'll just chime in for  
18      Eversource, and I think this probably applies to  
19      the other utilities as well.

20             I think, as a public utility providing  
21      customer service, the analysis isn't going to  
22      always be "Well, what's in it for us?" Or, even  
23      "What's in it for other ratepayers?" If there's  
24      no harm to other ratepayers, if the utility's

1 costs of administration and implementation are  
2 recoverable, reasonable and prudent costs, then I  
3 think the utility is going to not stand in the  
4 way of moving forward with any such proposal.

5 Here, we have a statutory framework  
6 that could be read to require the utility to, in  
7 good faith, consider working to develop such a  
8 pilot program, and bringing it to the Commission  
9 for consideration and approval.

10 So, it isn't purely a business  
11 transaction, like "What can we get out of it for  
12 our shareholders or even for our other  
13 ratepayers?" It's more of a "do no harm" sort of  
14 an analysis.

15 But this is new ground. This is an  
16 untested type of proposal. And the statute is  
17 very broadly written. And there are certainly  
18 some proposals that could be brought to a  
19 utility's attention where I think the response  
20 would be "We continue to believe that there are  
21 federal jurisdictional issues, we just can't do  
22 it." Or, "We see that there's a very significant  
23 degree of cost-shifting among ratepayers, and  
24 we're not willing to bring that to the Commission



1       for its consideration. We don't believe it's  
2       just and reasonable."

3               But, short of that, there may be other  
4       potential proposals that could work. Again, if  
5       we stay away from these jurisdictional guardrails  
6       that we see as perhaps brighter lines than you're  
7       hearing from the Coalition.

8               CHAIRMAN GOLDNER: Okay. Thank you.  
9       And, yes, I would just say jurisdictional issues  
10      aside, which I know we can't do that, but  
11      ignoring that for the moment, in the end, from a  
12      Commission's point of view, you know, we, of  
13      course, by statute, as everyone in the room  
14      knows, balance the interests of the utilities and  
15      the ratepayers. And what I heard from the  
16      Utilities was "Hey, we, you know, we are willing  
17      to engage in this process", understanding that  
18      there's really no business benefit. Which means,  
19      on the other side of the teeter-totter, that it  
20      must benefit the ratepayer. There must be a  
21      showing that the ratepayer benefits from this  
22      exercise.

23              And, so, I think that's something that  
24      the parties can look for the Commission to

1       evaluate in any process is "Does the ratepayer  
2       benefit in the end, after all the transactions  
3       are finished, does the ratepayer benefit, because  
4       the utilities don't?" So, on my teeter-totter,  
5       on my balance, we need to see some benefit, I  
6       think, for the ratepayer.

7               Mr. Wiesner.

8               MR. WIESNER: Just a point of  
9       clarification. It's at least possible that some  
10      of these pilots would inquire system upgrades  
11      that would take the form of capital investments  
12      that would be entitled to earn a rate of return  
13      for the utility.

14              So, to the extent that that could be  
15      seen as a benefit to the utility and the  
16      shareholders, that may be there. That I don't  
17      think is the primary driver for utility  
18      consideration of any such proposals.

19              CHAIRMAN GOLDNER: And that would  
20      directly counterbalance the ratepayer benefit.  
21      So, that's kind of a -- that balances itself, I  
22      think.

23              So, I do appreciate the distinction,  
24      though. There could be benefits to the

1       utilities, which need to be measured and  
2       understood, and then, you know, the balance on  
3       the other side is what we need to understand.  
4       So, that benefit to the utilities would have to  
5       be more than offset on the ratepayer side, I  
6       think, in order for the Commission to move  
7       forward with any proposal, whatever it turns out  
8       to be.

9               MR. WIESNER:  It may never be a perfect  
10       balance, but that's why you have such a  
11       challenging job.

12              CHAIRMAN GOLDNER:  Thanks.  I  
13       understand.

14              MR. POSTAR:  Commissioner, if I could  
15       just offer one quick comment on the point?

16              CHAIRMAN GOLDNER:  Yes.

17              MR. POSTAR:  And that is that it's not  
18       atypical for a program to benefit one class of  
19       customers versus another, or one group of  
20       customers or one locale of customers.  It may  
21       build -- improve a distribution line in one area  
22       that everybody pays for, but it really benefits  
23       one particular area.

24              This program is only going to go

1 forward if there's a willing buyer. If there's  
2 an asset that can be -- that can generate  
3 electricity less costly, it's going to save the  
4 customer money. That's the only basis for the  
5 program to go forward.

6 CHAIRMAN GOLDNER: Yes.

7 MR. POSTAR: So, it may be that every  
8 single customer in the utility's territory  
9 doesn't benefit. It may be that certain  
10 customers really receive the benefit from a  
11 particular investment. As long as the others are  
12 held indifferent, there's a net benefit to  
13 customers.

14 CHAIRMAN GOLDNER: Totally agree with  
15 your calculation. Just, when we sum up  
16 everything, it just needs to be a net benefit in  
17 the end of the -- at the end of the transaction.  
18 So that your distinction is understood and  
19 appreciated.

20 At this point, let me turn back to  
21 Commissioner Chattopadhyay. Is there any  
22 follow-on, Commissioner, from your side?

23 CMSR. CHATTOPADHYAY: This is -- I'm  
24 almost already thinking about the next steps, in

1           the sense that an economist would do. So, bear  
2           with me.

3                       I'm curious -- and this is a question  
4           for, let's say, Eversource. Currently, when the  
5           transmission costs are recovered through the  
6           rates, you have this -- do you apply the same  
7           rate per kilowatt-hours or across all customers?  
8           Would you know that? Or, is it based on -- the  
9           numbers are different based upon coincident peak  
10          across for different -- for different classes of  
11          customers?

12                      MR. WIESNER: As I sit here, I don't  
13          know the answer to that, I'm sorry. That's the  
14          TCAM rate.

15                      CMSR. CHATTOPADHYAY: Yes.

16                      MR. WIESNER: And you recently approved  
17          that. And I was not handling that docket, even  
18          if I were, I'm not sure I could call it to mind  
19          quickly.

20                      CMSR. CHATTOPADHYAY: It's okay.  
21          That's just --

22                      MR. WIESNER: Yes. I think I can --  
23          the methodology there is well-established,  
24          consistently applied, and it is a pure

1 pass-through, --

2 CMSR. CHATTOPADHYAY: Yes.

3 MR. WIESNER: -- except that some other  
4 items are included in the TCAM that are related  
5 to the transmission charges that Eversource is  
6 assessed by the ISO.

7 CMSR. CHATTOPADHYAY: Correct.

8 MR. WIESNER: But, to your specific  
9 question, whether, you know, exactly how the rate  
10 design is implemented, --

11 CMSR. CHATTOPADHYAY: Yes.

12 MR. WIESNER: -- I'm pretty sure  
13 there's no one in this room that can answer that.

14 CMSR. CHATTOPADHYAY: Okay. So, that's  
15 fine.

16 MR. WIESNER: I'm pretty sure it's not  
17 me.

18 CMSR. CHATTOPADHYAY: Okay. How about  
19 the other utilities, if you know?

20 MR. CAMPBELL: I do not.

21 CMSR. CHATTOPADHYAY: Okay. Neither  
22 does Liberty?

23 *[Atty. Sheehan indicating in the*  
24 *negative.]*

1 CMSR. CHATTOPADHYAY: Okay.

2 MR. SHEEHAN: No, sir.

3 CMSR. CHATTOPADHYAY: Okay. I'm

4 just --

5 MR. BELOW: I think I do know.

6 CMSR. CHATTOPADHYAY: Then, please go  
7 ahead.

8 MR. BELOW: I do think that, at least  
9 for some of the New Hampshire utilities, it's  
10 differentiated by some of the rate classes.

11 CMSR. CHATTOPADHYAY: Okay.

12 MR. BELOW: And it is based on an  
13 analysis of the rate class, like residential  
14 ratepayers, --

15 CMSR. CHATTOPADHYAY: Yes.

16 MR. BELOW: -- what their, as a group,  
17 their share of the coincident peak is.

18 CMSR. CHATTOPADHYAY: Yes. That's  
19 helpful. So, it does -- that was my  
20 recollection, but I wasn't 100 percent sure.  
21 Like, it depends on the coincident peak of those  
22 different classes. So, the per kilowatt-hour  
23 rates could be different. So, is that --

24 MR. BELOW: There is some difference in

1 the per kilowatt-hour rate on the transmission  
2 charge --

3 CMSR. CHATTOPADHYAY: Okay.

4 MR. BELOW: -- of at least some of the  
5 utilities.

6 CMSR. CHATTOPADHYAY: Okay. That's all  
7 I have. I just wanted to --

8 CHAIRMAN GOLDNER: Okay. At this  
9 point, we can move to closing. And, if there's  
10 anything you haven't had a chance to respond to,  
11 please, enclose it in your closing.

12 Attorney Wiesner, I assume that the  
13 Joint Utilities would like to go last?

14 MR. WIESNER: Either way is fine.

15 CHAIRMAN GOLDNER: You're okay either  
16 way. Does anyone have a preference on the order  
17 of go?

18 MR. POSTAR: No.

19 MR. CROUSE: No preference.

20 CHAIRMAN GOLDNER: Okay. No  
21 preference. Okay. Well, that makes me have to  
22 make a decision.

23 Attorney Wiesner, please -- the Joint  
24 Utilities can please proceed.



1           MR. WIESNER: And I will once again  
2           invite Attorney Key to speak for the Joint  
3           Utilities.

4           MS. KEY: Thank you. And we certainly  
5           appreciate the lively discussion we had this  
6           morning, and fully appreciate the Commission's  
7           desire to find a workable solution here.

8           The Joint Utilities, though, still have  
9           to stand by their view on the bright  
10          jurisdictional line that they view as existing.  
11          And the main reason they simply cannot allow  
12          others to use their system in a manner, meaning  
13          their transmission or distribution systems, in a  
14          manner that would make them, you know, basically,  
15          an accomplice to trying to evade Federal Power  
16          Act regulation by the limited producers.

17          So, you know, unfortunately, that may  
18          mean you have to make a decision on the  
19          jurisdictional issue. But it doesn't mean that  
20          we can't have a pilot program that works.  
21          They're -- we've already discussed how limited  
22          producers can readily get an exemption from FERC  
23          regulation, whether by being owned by a  
24          governmental entity or by becoming a QF.

1           The trouble, though, here is a pilot  
2           program, based on the statute here, and I think  
3           the last few minutes of discussion kind of hit  
4           the nail on the head, of given the program that  
5           was drafted by the Legislature, and is addressed  
6           here, we have several problems, in that that  
7           statute sort of makes the utilities try and serve  
8           two masters that are telling it two different  
9           things. The ISO-New England is saying "You're  
10          going to do things our way", where, you know,  
11          things are under FERC jurisdiction. The  
12          Legislation is saying "Do things the way the  
13          State of New Hampshire wants them done." And, if  
14          they're in conflict, that puts the Utilities in a  
15          very bad position.

16                 And, then, while it's not an issue on  
17          the table today, you know, there was a lot of  
18          discussion of "Well, who's going to benefit?"  
19          And I think the statute before us, the Utilities  
20          have the view is this isn't a case of  
21          indifference, we have a statute before us that's  
22          going to cause harm to the other utility  
23          ratepayers.

24                 And, thus, you know, while we see a way

1 forward with some sort of a pilot program, I'm  
2 not sure it's a pilot program under this statute.  
3 But the Coalition, or anyone else, you know, can  
4 come to us and come to the Commission with some  
5 kind of pilot program that doesn't have all these  
6 problems for the Joint Utilities, whether they be  
7 related to the jurisdictional problems or related  
8 to a fair, just, and reasonable cost allocation,  
9 so that there is indifference.

10 And I think, as my colleague pointed  
11 out, you know, the key there is indifference.  
12 Yes, sometimes different classes of customers are  
13 treated better than others. But we do need, you  
14 know, if we were going to have a system, and will  
15 people get the benefit of load reduction, that  
16 there can't be so much benefit to one party that  
17 it starts to hurt and causes the other parties to  
18 no longer be indifferent, because it results in  
19 their rates going up.

20 So, you know, we do look forward to  
21 continuing the work on the idea -- on this idea.  
22 But, unfortunately, we view the job of the  
23 Commission right now is to, you know, the  
24 Legislature asked it some questions, and it has

1 to rule on them. But, again, we do think that  
2 there can be a pilot program, but it just can't  
3 be the pilot program suggested under this  
4 statute, because the statute causes too many  
5 preemption and jurisdictional issues.

6 CHAIRMAN GOLDNER: Thank you. Let's  
7 move to the Office of the Consumer Advocate.

8 MR. CROUSE: Thank you.

9 As noted in our opening statement, this  
10 docket was open in response to the General Court  
11 directing you to determine definitively the  
12 answer to two legal questions. As identified in  
13 the lively discussion today, New Hampshire  
14 Supreme Court precedent states that the  
15 Constitutional Avoidance Doctrine is applied when  
16 there is a potential constitutional violation,  
17 and states "Whenever possible, the statute should  
18 be interpreted in a way that avoids placing its  
19 constitutionality in doubt, and that the court  
20 may adopt an alternative interpretation which  
21 avoids constitutional conflict."

22 Addressed throughout the conversation  
23 in our Brief, the OCA has presented a possible  
24 interpretation that seems congruent with the

1 relief sought by the Community Coalition, and, at  
2 least in some respect, recognized as logical or  
3 even possible by the Joint Utilities on narrow  
4 grounds.

5 Therefore, in the view of the OCA, an  
6 alternative that is permissible by New Hampshire  
7 Supreme Court precedent has at least been  
8 presented, and that could at least be entertained  
9 by all parties. And, in that way, there would be  
10 no TOA or OATT violation, the Transmission  
11 Operating Agreement or the Open Access  
12 Transmission Tariff, because they continue to  
13 work as intended.

14 Therefore, the OCA respectfully asks  
15 for there to be a determination that there is no  
16 federal presumption issue, that there's no  
17 violation of the TOA or OATT recalculation  
18 required, because they work as intended, and any  
19 equitable relief the Commission determines  
20 necessary.

21 Thank you.

22 CHAIRMAN GOLDNER: Thank you, Attorney  
23 Crouse.

24 Attorney Young, I don't know if you

1 would like to comment or not, but I will give you  
2 the opportunity.

3 MR. YOUNG: Thank you, Mr. Chairman.

4 The Department has nothing to add at  
5 this time. But we would like to thank everybody  
6 for their extensive input today, as well as their  
7 input in the briefs filed over the past several  
8 months.

9 Thank you.

10 CHAIRMAN GOLDNER: Okay. Thank you.  
11 And, Attorney Young, it's a bit separate, but  
12 I'll make a quick diversion here.

13 It would be, I think, helpful, we've  
14 received over the last couple of years, a few  
15 times, when the Department hasn't taken a  
16 position. And, as a mandatory party, it's sort  
17 of hard to understand the juxtaposition of not  
18 taking a position and being a mandatory party.

19 If that's something the Department  
20 could weigh in on with the Commission, that would  
21 be very helpful. Because we go into the hearings  
22 with the understanding and the expectation that  
23 the Department takes a position as a mandatory  
24 party. And, if the Department has a different

1 position on that, that would be helpful for us to  
2 understand the Department's position on that.

3 And, if you don't -- if you can't  
4 respond live, that's okay, maybe put something in  
5 the file. Or, if you'd like to comment now, that  
6 would be fine as well.

7 MR. YOUNG: I think I'd like to take  
8 that back and discuss internally.

9 CHAIRMAN GOLDNER: Okay. Thank you  
10 very much. Thank you, Attorney Young. That  
11 would be helpful. Okay. Very good.

12 And, finally, we'll rack up with --  
13 wrap up, rather, with the Community Power  
14 Coalition.

15 MR. POSTAR: Mr. Chairman and  
16 Commissioner, thank you very much for today's  
17 discussion. This has been a very productive day.  
18 We really appreciate the give-and-take and the  
19 serious inquiry into the difficult questions that  
20 you've had to face.

21 In coming in today, we came with the --  
22 excuse me -- the perspective that a pilot program  
23 is certainly possible, it should be implemented,  
24 and it should be implemented as soon as possible,

1       because it's good for consumers in the state and  
2       it's good for the environment of the state.

3               The question is "How do we do this?"  
4       And I believe counsel for OCA has several times  
5       focused on the avoidance principle, which we  
6       recommend highly be implemented here, that there  
7       are revisions that need to be made in the  
8       implementation of a pilot, where you need to take  
9       into account the proper term, how something is to  
10      be implemented.

11             Community Power Coalition is absolutely  
12      willing and looks forward to engaging with the  
13      Utilities in coming up with pilots, because the  
14      purpose of the pilot is to learn something, there  
15      is a mandatory report back on "how did it go?"  
16      And, unless we can get the pilot going, we're not  
17      going to learn what needs to be learned.

18             In terms of the constitutional inquiry,  
19      the preemption inquiry, we think those arguments  
20      have been laid out fairly full in front of you.  
21      We return to the -- it's a comment that we've  
22      made, that you've made, this is a fact-specific  
23      inquiry. And we think that the determination can  
24      be made that a state wholesale program can go



1 forward, you have options beyond that as well, to  
2 ensure that there is a pilot program. And we  
3 would urge that all options be considered.

4 So, there are three things that we'd  
5 really like to come to at the end here. We would  
6 like to take just a minute or two and highlight  
7 the guideposts we think you can follow in  
8 developing a constitutionally non-preempted  
9 program. And we want to go back to review some  
10 pretty important guidance that we focused on from  
11 the Supreme Court on how such a program, what the  
12 contours of the legal landscape are today. And,  
13 then, finally, how would this be implemented?  
14 What's the benefit to consumers? Where are we  
15 going with this whole program?

16 So, we're going to kind of jump down  
17 the line on this. And, again, thank you very  
18 much.

19 Let me turn to Ms. Diamond for the  
20 second piece.

21 MS. DIAMOND: Thank you.

22 To get to the guideposts that CPCNH  
23 identified in its September 7th letter, the  
24 intent behind that letter, and the case law that

1 we outlined, and the five guideposts, was to  
2 provide guidance to the Commission on what we've  
3 seen in the case law and what the Commission can  
4 and cannot do in implementing the limited  
5 producer's pilot program, so as to not create a  
6 jurisdictional and to not infringe on FERC's  
7 jurisdiction.

8 So, I'll just briefly list those  
9 guideposts.

10 The first is that to not infringe on  
11 FERC's jurisdiction. State programs should be  
12 untethered to the interstate wholesale market  
13 administered by RTOs and ISOs. This was in  
14 *Hughes versus Talen*, the Supreme Court held this.  
15 And we don't see the limited producer's pilot  
16 program being tethered to the ISO-New England  
17 market at all, with the limited producers not  
18 being required to register as generator assets,  
19 and also not participating in the ISO-New England  
20 market.

21 The second guidepost is that to not  
22 infringe on FERC's jurisdiction, intrastate  
23 wholesale sales should not directly alter,  
24 adjust, or affect any interstate wholesale rate

1 set by FERC. We don't see that happening here in  
2 this program.

3 And the third guidepost is that states  
4 should not set, challenge, or seek to redetermine  
5 the reasonableness of any FERC-set interstate  
6 rate.

7 And, then, the last two guideposts that  
8 we identified, they're permissive and actions  
9 that this Commission may take in implementing the  
10 program, and by taking them, or if the Commission  
11 takes them, will not infringe on FERC's  
12 jurisdiction.

13 The fourth being that, in exercising  
14 jurisdiction over the state generation programs,  
15 states may reflect, consider, or incorporate  
16 FERC-set interstate wholesale rates.

17 And, then, the last one, which I think  
18 we got into the most during today's discussion,  
19 was that states may indirectly or incidentally  
20 affect interstate wholesale rates set by FERC.

21 And, again, these are just offered as  
22 guidance to this Commission. Any other issues  
23 would, of course, as we've talked about, be  
24 discussed and resolved in discussions with the

1       Utilities specifically in proposing pilots. But  
2       this is offered to assist the Commission.

3               MR. BELOW: And I would just like to  
4       briefly recap the basic jurisdictional issue, of  
5       whether there is such a thing as a "within-state  
6       wholesale sale" that this Commission can assert  
7       jurisdiction over. And I would just like to read  
8       about eight sentences from *FERC v. EPSA*, which  
9       has become widely cited as sort of an important  
10      foundational touchstone precedent.

11             And they explain, I'm going to skip the  
12      citations, and just go to the ellipses, "...this  
13      Court held in *Public Utilities Commission of*  
14      *Rhode Island versus Attleboro Steam & Electric*,  
15      in 1927, that the Commerce Clause bars the States  
16      from regulating certain interstate electricity  
17      transactions, including wholesale sales, that is  
18      sales for resale, across state lines. The ruling  
19      created what became known as the "Attleboro gap",  
20      a regulatory void, which the pointedly noted,  
21      only Congress could fill."

22             Congress responded -- "...Congress  
23      responded to that invitation by passing the FPA",  
24      the Federal Power Act, "in 1935. The Act charged

1       FERC's predecessor agency with undertaking  
2       effective federal regulation of the expanding  
3       business of transmitting and selling electric  
4       power in interstate commerce. Under the statute,  
5       the Commission has authority to regulate "the  
6       transmission of electric energy in interstate  
7       commerce" and "the sale of electric energy at  
8       wholesale in interstate commerce".

9               "... the Act also limits FERC's  
10       regulatory reach, and thereby maintains a zone of  
11       exclusive state jurisdiction. As pertinent here,  
12       the same provision that gives FERC authority over  
13       wholesale sales, states that this subchapter,  
14       including its delegation to FERC, "shall not  
15       apply to any other sale of electric energy."  
16       Accordingly, the Commission may not regulate  
17       either within-state wholesale sales or, more  
18       pertinent here, retail sales of electricity.  
19       State utility commissions continue to oversee  
20       those transactions."

21               "...as earlier described, FERC's sale  
22       jurisdiction to that at wholesale, reserving  
23       regulatory authority over retail sales, as well  
24       as intrastate wholesale sales, to the states.

1       FERC cannot take an action transgressing that  
2       limit no matter its impact on wholesale rates."

3               "...The Act makes federal and state  
4       powers complementary and comprehensive.

5               Now, the Utilities have repeatedly  
6       posited that, because New Hampshire is part of  
7       the Eastern interconnection, all transactions and  
8       sales of electricity are interstate as a result  
9       of various FERC interpretations.

10              But a higher court, the D.C. Circuit  
11       Court of Appeals, found, fairly recently, made a  
12       finding that directly contradicts that assertion.  
13       In that *Energy Storage Resource, ESR*, case, which  
14       was about buying and selling power, not just  
15       simply the regulation services of storage, states  
16       that states -- stated that "States retain their  
17       authority to prohibit local ESRs from  
18       participating in the interstate and intrastate  
19       markets simultaneously, meaning states can force  
20       local ESRs to choose which market they wish to  
21       participate in."

22              That sentence by the D.C. Court of  
23       Appeals makes no sense, if you think it only  
24       applies to Hawaii, Alaska, and ERCOT, because

1       there is no simultaneous federal and state  
2       markets. And, in fact, in the very next  
3       sentence, they refer to the interstate markets as  
4       federal markets, and refer to local  
5       interconnections on local distribution systems.

6               So, the courts above FERC have  
7       recognized that there can be, in places where  
8       there's a federal market, also a local market.  
9       And that gets back to this fact-specific  
10      determination of what pilots might come forward.  
11      And, if it gave the Utilities comfort, there's no  
12      reason a pilot, even with the statute as it is,  
13      couldn't also go ahead and register for QF status  
14      to make clear that FERC is relinquishing  
15      jurisdiction over that transaction.

16             And just a few words from our CEO.

17             MR. CALLNAN: And I will make it quick,  
18      fairly quick.

19             I wanted to just read a couple of  
20      the -- the two sentences that -- on the purpose  
21      for the Limited Electric Energy Producers Act,  
22      because I think it's helpful on why we're here  
23      today.

24             And they read like this: "It is found

1 to be in the public interest to provide for small  
2 scale and diversified sources of supplemental  
3 electrical power to lessen the state's dependence  
4 upon other sources which may, from time to time,  
5 be uncertain. It is also found to be in the  
6 public interest to encourage and support  
7 diversified electrical production that uses  
8 indigenous and renewable fuels and has beneficial  
9 impacts on the environment and public health."

10 The Coalition obviously agrees with  
11 this statement. We find that these pilots can  
12 help accelerate the adoption of distributed  
13 generation in the state, because we can unlock  
14 that value stack that we've been talking about  
15 today, and competitive forces can act upon that.  
16 Unlocking the competition will help drive  
17 innovation in New Hampshire and further cost  
18 reductions. Without it, we are left to the  
19 distribution utilities to help drive that  
20 innovation.

21 These pilots will help develop a very  
22 strong price signal, attracting investment in  
23 distributed generation and storage projects,  
24 reducing costs for New Hampshire ratepayers.



1                   And there's a great deal of demand,  
2                   from what I can tell. We are now 50 members  
3                   strong. So, I get to talk with a lot of  
4                   different communities. And, when I go there, one  
5                   of the first questions I get is, not on this  
6                   subject, but it's about net metering. Skipping  
7                   to the second question I get, the first question  
8                   is "Why can't we net meter?" The second question  
9                   is, "We've been talking about doing storage  
10                  projects, we've been talking about doing PV  
11                  projects. How can CPCNH help us get these  
12                  built?"

13                  And, with these pilots, we can help  
14                  learn how we can do that in a much more  
15                  cost-effective way. So, we're really engaged to  
16                  try to get these pilots and find a solution for  
17                  them.

18                  Thanks.

19                  CHAIRMAN GOLDNER: Okay. Thank you,  
20                  everyone.

21                  Is there anything else that we need to  
22                  cover today?

23                  *[No verbal response.]*

24                  CHAIRMAN GOLDNER: All right. Well,

1 I'll thank everyone again. And we are adjourned.

2 ***(Whereupon the Hearing to Receive Oral***  
3 ***Arguments was adjourned at 2:03 p.m.)***  
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