

Exhibit 1

Bankruptcy Court Transcript of February 21, 2024 Hearing

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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3 IN RE: . Chapter 11
 4 BURGESS BIOPOWER, LLC, . Case No. 24-10235 (LSS)
et al., . (Jointly Administered)
 5 .
 6 . Courtroom No. 6
 7 . 824 North Market Street
 8 . Wilmington, Delaware 19801
 Debtors. . Wednesday, February 21, 2024
 9:30 a.m.

TRANSCRIPT OF CONTINUED FIRST DAY HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

12 For the Debtors: Chantelle McClamb, Esquire
 13 Katharine Earle, Esquire
 GIBBONS P.C.
 14 300 Delaware Avenue
 Suite 1015
 Wilmington, Delaware 19801

15
 16 Kenneth Leonetti, Esquire
 FOLEY HOAG LLP
 17 155 Seaport Boulevard
 Boston, Massachusetts 02210

(APPEARANCES CONTINUED)

20 Audio Operator: Brandon J. McCarthy, ECRO

21 Transcription Company: Reliable
 The Nemours Building
 22 1007 N. Orange Street, Suite 110
 Wilmington, Delaware 19801
 23 Telephone: (302)654-8080
 Email: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

1 APPEARANCES (CONTINUED):2 For Public Service
3 Company of New

4 Hampshire:

5 Russell Johnson, III, Esquire
6 LAW FIRM OF RUSSELL R.7 JOHNSON III, PLC
8 2258 Wheatlands Drive
9 Manakin-Sabot, Virginia 23103

10 Tyler Brown, Esquire

11 HUNTON & WILLIAMS

12 951 E Byrd Street

13 Suite 200

14 Richmond, Virginia 23219

15 For the Noteholders:

16 Julia Frost-Davies, Esquire

17 GREENBERG TRAURIG LLP

18 One International Place

19 Suite 2000

20 Boston, Massachusetts 02110

21 For the State of
22 New Hampshire:

23 Mark Dell'Orfano, Esquire

24 NEW HAMPSHIRE DEPARTMENT OF JUSTICE

25 28 State Street

22nd Floor

Boston, Massachusetts 02109

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1 (Proceedings commenced at 9:33 a.m.)

2 THE COURT: Please be seated.

3 MC. MCCLAMB: Good morning, Your Honor. For the
4 record, Chantel McClamb, Gibbons PC, proposed counsel to the
5 debtors. Again, first and foremost, we would like to thank
6 Your Honor and your chambers for accommodating us and hearing
7 us this morning. I believe the third amended agenda was
8 delivered to your chambers this morning.

9 THE COURT: I have that.

10 MC. MCCLAMB: Okay, so, if it pleases the Court,
11 I'll do some brief introductions, and then I'll cede the
12 podium to Mr. Leonetti, who will give a brief status update
13 of where the case stands today and the order of the agenda
14 that we propose.

15 THE COURT: Okay.

16 MS. MCCLAMB: Okay, so again, I am joined by Mr.
17 Kenneth Leonetti.

18 MR. LEONETTI: Good morning, Your Honor.

19 MS. MCCLAMB: Alison Bauer.

20 MS. BAUER: Good morning, Your Honor.

21 MS. MCCLAMB: Benjamin Weissman and Jiun-When Bob
22 Teoh from Foley Hoag.

23 MR. TEOH: Good morning, Your Honor.

24 MS. MCCLAMB: My colleague Robert Malone from
25 Gibbons PC.

1 MR. MALONE: Good morning, Your Honor.

2 MS. MCCLAMB: And then we also have Dean Vomero,
3 the chief restructuring officer for the debtors, and our
4 first day declarant, as well as Mr. Neil Gupta from SSG
5 Advisors, who is the declarant for our DIP motion.

6 So, with that, I will cede the podium to Mr.
7 Leonetti for the update and the agenda.

8 THE COURT: Mr. Leonetti.

9 MR. LEONETTI: Thank you, Your Honor. Just give
10 the Court a brief update on where we are, and then I have a
11 suggested order of motions to take up.

12 Unfortunately, Your Honor's probably assumed from
13 the volume of pleadings you got yesterday that the parties
14 don't -- there is no deal yet. The debtor has been operating
15 over the past week, albeit at a reduced rate, trying to keep
16 expenses as low as possible to bridge us from last week's
17 hearing to today.

18 There were discussions last week between the
19 lenders and Eversource. We were not party to those
20 negotiations, but we were kept apprised of them by the
21 lenders. Eversource wanted to negotiate directly with the
22 lenders who hold the (inaudible) security here and have the
23 major economic interest.

24 It's my understanding that a few proposals were
25 exchanged. The last one was from the lenders on Saturday.

1 Eversource declined to send a further proposal to the
2 lenders. And then that's why we're here today, because we
3 knew there'd be no deal. So everyone I know worked furiously
4 over the weekend, and I do recognize there was a lot of
5 volume of material for Your Honor to have to go through in
6 the last very short time period. And we do appreciate that.

7 This is all important, though, in terms of the
8 timing and where we are today, because, frankly, Eversource
9 has all the time in the world. Whether or not the plant
10 survives or not seems, frankly, to be immaterial to them.
11 But again, they have all the time in the world, and they just
12 need to wait us out, as I'll explain a little bit later, as
13 we get into the meat of the motions.

14 On the other hand, for the debtors, this is
15 existential today. I'm not exaggerating that if the debtors
16 cannot sell power into the market and be paid for that power
17 in the very near future, the debtors will be forced to shut
18 down, with the attendant loss of jobs, loss of tax revenue to
19 taxing authorities in the City of Berlin, loss of economic
20 development in the community surrounding the plant, and also
21 loss of a customer for many small vendors, including a wood
22 supplier who relies very heavily on us.

23 So that's kind of where we are today. And I know
24 we've got a packed agenda. I would suggest that we do the
25 lead market participant and rejection motions first, of

1 course, subject to Your Honor's view on the matter. And if
2 there's another order, we're absolutely happy to take it up
3 in a different order. But I think those are kind of the
4 gating items from which everything else flows.

5 Then to take up the venue motion, then the DIP,
6 and if we get through all of those, I think at that point,
7 hopefully the first day motions, take those up at the end.
8 Those, I think, fall into place pretty neatly. If we get
9 through the preceding three motions.

10 I'll pause there, Your Honor. And I don't know if
11 anyone else has any preliminary remarks they'd like to.

12 MR. BROWN: Your Honor, (inaudible).

13 THE COURT: Yes.

14 MR. BROWN: Thank you. Again, Tyler Brown of
15 Hunton, Andrews & Kurth. Your Honor, on behalf of what I'll
16 refer to as PSNH for Public Service Company New Hampshire.
17 The point I wanted to raise is this. Like during the
18 hearings last time, we found motions that were being
19 requested for approval that involve financial commitments.
20 The first one on the agenda today, the LMP requires, I
21 believe, under the DIP, an \$850,000 financial commitment.

22 It's a little bit of the cart before the horse
23 when they're asking for approval to enter into an LMP
24 agreement that requires a commitment of money unless we have
25 a committed facility.

1 I've been to Mr. Leonetti's position before, and I
2 certainly respect his desire to present the case how he
3 wants. But I wanted to remind the Court we had some stops
4 and starts on relief last week, and perhaps the Court would
5 consider provisional approval until we get through the actual
6 DIP to see if we have funding. So I just wanted to alert the
7 Court to that concern.

8 THE COURT: Okay. Thank you.

9 MR. BROWN: Yes, ma'am.

10 MS. FROST-DAVIES: Good morning, Your Honor.

11 Julia Frost-Davies of Greenberg Traurig. I'm here with my
12 partners, Brian Greer, Dennis Meloro. I represent the pre-
13 petition note holders and the potential DIP lenders.

14 Your Honor, I was really happy to be back before
15 you last week. It was a pleasure. It was my first time back
16 in Delaware since COVID, and I am really sad that we're here
17 today. This is a case that should have settled. I don't put
18 that on Mr. Brown. Like, I think this is maybe just a
19 function of me getting older.

20 I've known Mr. Brown as long as I've known Mr.
21 Leonetti, and he's usually my co-counsel. So it's not for
22 lack of trying and professionalism, but if they win
23 everything they want, they still get nothing, and the cases
24 die. And I just needed to put that on the record because I
25 don't think we should be here. Thank you.

1 THE COURT: Thank you. Is there anyone else who
2 wants to say anything preliminarily?

3 MR. DELL'ORFANO: Your Honor, Mark Dell'Orfano
4 from the New Hampshire Department of Justice representing the
5 State of New Hampshire.

6 THE COURT: Yes

7 MR. DELL'ORFANO: Your Honor, we would ask that
8 the venue motion be taken up sooner in the hearing, primarily
9 because that motion has significant interest to the State.
10 And unfortunately, I was just assigned this case yesterday
11 afternoon, and I'm not sure how long the other motions by the
12 debtors are intending to go. But we do have some things to
13 say about the venue motion, and we want to make sure that
14 we're available to provide that comment.

15 THE COURT: Thank you. Anyone else? Okay, well,
16 I appreciate that the State would like the venue motion moved
17 up, but I think we need to see where these cases stand
18 operationally. And I also think it's a chicken and egg
19 thing, almost. Which goes first, the DIP or the lead market
20 participant in the rejection agreement? So we'll go with the
21 lead market participant agreement and the rejection agreement
22 first.

23 MR. LEONETTI: Thank you. I may proceed?

24 THE COURT: You may.

25 MR. LEONETTI: Thank you. So I'll address the

1 lead market participant agreement first, and I'm going to
2 address, after that, the rejection motion. But they are very
3 much conjoined when you really think about them analytically
4 and practically.

5 Again, subject to the Court's preference, what I
6 would propose is make a proffer on behalf of our witness in
7 support of both those motions, and that's Mr. Vomero, and
8 then to allow him to be available to be cross examined if
9 Eversource or anyone else wishes, and then to finish argument
10 on the motions.

11 THE COURT: Let me ask is there are any objection
12 to that process.

13 MALE VOICE: No, Your Honor.

14 THE COURT: Okay, that's fine.

15 MR. LEONETTI: So this is the proffer of Mr. Dean
16 Vomero, the debtor's chief restructuring officer related to
17 the need for interim and final relief on the lead market
18 participant motion and for final relief on the rejection
19 motion.

20 If called, Mr. Vomero would testify as follows:
21 First, Mr. Vomero has served as the debtor's chief
22 restructuring officer since October 2023. His
23 responsibilities include forecasting and managing the
24 debtor's cash flow and overseeing management of the debtor's
25 operations.

1 In the months before the petition date, the
2 debtor's cash flow was reasonable but not sustainable.
3 Before these Chapter 11 cases commenced, Mr. Vomero created
4 revenue models under which the debtor's business could
5 continue operating through bankruptcy proceedings, collecting
6 revenue for the energy they produced for the benefit of the
7 debtor's estate and their creditors, and ultimately achieving
8 a successful reorganization.

9 These economic models were the underpinning for
10 the DIP financing that the debtors were able to negotiate
11 with their senior lenders. Without that DIP, the debtors are
12 out of business.

13 Those models were also based on the debtors
14 anticipated receipt of approximately \$5 million as payment
15 for renewable energy certificates, or RECs, and \$300,000 for
16 capacity, all of which were to be paid in January of 2024.

17 The debtor's primary source of revenue is selling
18 its energy into ISO New England's wholesale market --

19 THE COURT: Can you read a little slower? Thank
20 you.

21 MR. LEONETTI: Occupational hazard, so I
22 appreciate that, Your Honor, I will.

23 THE COURT: The RECs were 5 million and the
24 capacity, 300,000.

25 MR. LEONETTI: And 300,000 in capacity in January

1 2024. The debtor's primary source of revenue is selling
2 energy into ISO New England's wholesale market and providing
3 capacity and selling RECs. Historically, it was paid monthly
4 for energy and capacity and quarterly for RECs.

5 All of the debtor's energy is currently delivered
6 to Eversource, as are most of the RECs, though some is sold
7 in the open market. Eversource also receives the entirety of
8 the debtor's capacity payments from ISO New England.

9 Since the petition date, the debtors have been
10 producing power and transmitting it onto the grid. At full
11 capacity, the debtors produce approximately \$75 to \$100,000
12 in energy per day. The debtors have not been paid for any of
13 the power they've produced post-petition yet.

14 ISO New England requires that energy producers,
15 like the debtors, have a lead market participant to transact
16 and collect revenues on their behalf in the energy and
17 capacity markets. Without an active and cooperative lead
18 market participant, the debtors cannot sell their energy into
19 ISO New England's market and also receive payment for it.

20 Again, without an active and cooperative lead
21 market participant, the debtors still can deliver output to
22 ISO New England's market, but the only way they get paid for
23 it is if the lead market participant forwards that payment.

24 As part of the PPA, Eversource was designated as
25 the debtor's lead market participant for both the sale of

1 energy and the receipt of capacity payments. Because the
2 debtors are seeking to reject the PPA and shift to market
3 sales, or to enter into a PPA with another third party, they
4 need a new LMP, which is what I refer to as a lead market
5 participant, unless Eversource is willing to perform that
6 function.

7 The debtor's affiliate, CS Berlin Ops, which
8 already provides services to the plant, is already qualified
9 by ISO New England to be a lead market participant. They've
10 had that designation for a while, well before the petition
11 date. The debtors have entered into an agreement with CS
12 Berlin Ops, subject to this court's approval for CS Berlin
13 Ops to act as the LMP.

14 CS Berlin Ops would not charge the debtor for this
15 service. Thus, the payment for energy and capacity would be
16 a direct passthrough to the debtors in a way the same way in
17 which Eversource is historically passing through capacity
18 payments to the debtors and should be doing so now.

19 There are several ministerial acts that must be
20 taken in the ISO New England CAM system for the debtor to be
21 able to designate a new lead market participant. Basically,
22 it entails the completion of an online form submitted to ISO
23 New England, but the existing lead market participant, i.e.,
24 Eversource, must initiate those changes.

25 On January 22nd, 2004 (sic), Eversource materially

1 breached the PPA by withholding required payments from the
2 debtors, specifically by withholding the capacity and part of
3 the REC payments due in January. The unexpected withholding
4 of these funds, which the debtors were relying on receiving,
5 created a huge hole in the debtors budget and caused a
6 liquidity crisis. The debtors currently lack funds to
7 finance operations for any lengthy period of time.

8 The DIP budget negotiated with the lenders assumed
9 that the debtors could sell capacity and energy into the day
10 ahead markets shortly after the petition date. The improper
11 setoff of the RECs and capacity payments is contrary to every
12 representation Eversource has made prior to the time that
13 they actually did the set off. This includes on December
14 8th, 2023, Eversource told the debtors it would apply the
15 credit for the excess CRF, cumulative reduction factor,
16 against payments due to the debtors for energy only, and
17 that's in Exhibit D to the exhibits that we're going to be
18 moving into evidence at the end of the proffer.

19 On January 8th, 2004 (sic), Eversource submitted
20 its invoice for energy and capacity, showing, again, that the
21 excess CRF credit would be applied only against payments due
22 for energy, not against payments due for capacity. And
23 that's the letter that's at Exhibit E to the exhibit binder.

24 On January 10, 2024, Eversource submitted an
25 invoice for RECs that showed that, separate from the amount

1 due for energy and capacity, it would pay the entire REC
2 payment on January 22, 2024. That's Exhibit F in the exhibit
3 binder.

4 On January 11, 2024, Eversource representatives,
5 including an attorney for Eversource, represented to the New
6 Hampshire Public Utilities Commission that it was not
7 entitled to set off payments for capacity or RECs against the
8 excess CRF credit. And that's Exhibit T.

9 Relying on these statements and the plain language
10 of the PPA, the debtors started to initiate the transfer of
11 the RECs to Eversource on January 15th, 2024. On January
12 16th, Eversource told the New Hampshire Public Utilities
13 Commission that the PPA allowed it to credit the excess CRF
14 against payments due for energy only and not against payments
15 due for capacity or for RECs. The REC payments were due on
16 January 22nd, 2024. They were not made that day.

17 Rather, on January 23rd, 2024, Eversource posted a
18 new invoice, indicating that it was withholding capacity and
19 a portion of the RECs to apply to the excess CRF credit.
20 That invoice posting is at Exhibit H to the exhibit binder.

21 Eversource never sent this directly to the
22 debtors. Rather, the invoices were posted on a system that
23 the debtors could access, and it was uncovered by CS
24 operations personnel -- they're the ones who provide the back
25 office services for the plant -- when the REC payments didn't

1 arrive as they were supposed to.

2 On January 23, 2024, the debtors gave notice to
3 Eversource that it had breached the PPA by withholding the
4 RECs and capacity payments. That's at Exhibit I to the
5 exhibit binder.

6 The PPA contains a seven-business-day period from
7 notice to cure any material fault and depending on whether
8 notice was received by email on the 23rd or by Federal
9 Express on the 24th, that seven day period expired on
10 February 2, 2024, at the latest.

11 On February 8th, 2024, the debtors terminated the
12 PPA as a result of Eversource's failure to cure its material
13 breach. That's Exhibit L in the exhibit binder.

14 The debtor's ability to use a new lead market
15 participant is constrained, even though the PPA is terminated
16 or if it's rejected nunc pro tunc to the petition date. And
17 again, as I explained a few moments ago in Mr. Vomero's
18 proffer, that's because it's Eversource that needs to go into
19 the system and first initiate the change.

20 The result is that the debtors are currently at
21 the mercy of Eversource. Eversource has made clear that it
22 does not intend to remit to the debtors any payments to which
23 the debtors are entitled until the CRF is paid down. It has
24 also refused to initiate any transfer in the CAM system. It
25 is made clear that it will continue to take the debtor's

1 energy and capacity post-petition and will set those off
2 against the CRF excess credits.

3 Left in this limbo and with a breaching and
4 noncooperative counterparty as its current lead market
5 participant, the debtors, at this moment, do not know whether
6 they will get paid for the energy they produce and the
7 capacity payments they are entitled to for providing that
8 energy on the grid.

9 The debtors are looking to sell their energy
10 products as a merchant generator or to another long term
11 buyer for their energy products, but it is Mr. Vomero's
12 opinion that no prospective buyer would consider entering
13 into any agreement with the debtors while their former
14 counterparty, Eversource, remains in control of market access
15 and revenue as a result of its status as the current lead
16 market participant.

17 The debtors have entered into an agreement for DIP
18 financing, but that financing does not alleviate the extreme
19 financial distress that Eversource created by withholding the
20 payments due to the debtors in January. The DIP financing is
21 subject to various milestones that the DIP lenders required
22 and to which the debtors agree, one of which is that the
23 debtors engage a new lead market participant. And in the
24 earlier version of the DIP financing, that agreement was no
25 later than three business days after the petition date,

1 although the lenders have indicated that they will move that
2 date to the date, hopefully that we get the lead market
3 participant order entered hopefully today.

4 No responsible business would take the risk of
5 putting the debtor's ability to generate and collect revenue
6 at the mercy of Eversource. This jeopardizes the business
7 and prevents a successful reorganization. The PPA is an
8 uneconomic contract, and if the debtors are forced to perform
9 under it, they will begin planning a wind down of their
10 business subject to the senior lender's consent. The only
11 source of revenue for the debtors is the production and
12 transmission of power, which translates to energy capacity
13 and RECs.

14 At the current contract price of \$67 plus fuel
15 adjustment costs, on average, over the past two contract
16 years, the debtors produced and delivered approximately \$3.6
17 million in energy each month, or \$42 million annually. Over
18 the same time period, the debtors generated and minted about
19 31 million in RECs annually. Of this, about 25 million was
20 sold to Eversource.

21 Also, on average, over the past two years, the
22 debtors received approximately \$3.9 million for capacity. So
23 if you take the energy, the capacity and the RECs, the
24 debtors have about \$77 million in annual revenue, rough
25 average, over the last two years, and again as an average

1 about 72 million, which comes from Eversource.

2 It costs the debtor four and a half to \$5 million
3 per month to operate, which translates to \$55 to \$60 million
4 a year. This includes payments for fuel, payments to their
5 service providers, which also includes employee wages and
6 benefits, taxes, and other operating costs. The cost of fuel
7 biomass products, woody biomass alone approximated \$2.4
8 million a month in 2023, or almost \$30 million. These
9 expense numbers do not include interest payments or capital
10 expenditures.

11 The CRF credit was approximately \$172 million at
12 the end of the last operating year, which ended on November
13 30th, 2023.

14 THE COURT: I'm sorry, say that again.

15 MR. LEONETTI: The CRF credit was approximately
16 \$172 million at the end of the last operating year, and that
17 operating year ended November 30th of 2023.

18 That means that Eversource would have been
19 entitled to credit energy payments due in 2024 against that
20 \$7 million. And because it's calculated on a one-twelfth
21 basis, that's \$6 million per month, roughly.

22 So, based on the monthly energy average production
23 and delivery of three and a half million dollars, that means
24 that the debtors will not receive any money, any payments
25 from Eversource for energy this year. That's \$42 million

1 annually in revenue that the debtors will not receive.

2 In other words, if the PPA is not rejected, even
3 if all Eversource can continue to withhold its payments for
4 energy, there's insufficient money to operate the debtors.
5 The debtors would have an operating deficit of \$20 million
6 again, just alone. If it's just energy, that's payments that
7 are withheld. And if Eversource does not pay the RECs or
8 capacity payments, but instead withholds them too, the
9 debtors would have an operating deficit of over \$50 million.

10 As a result of all this, the debtors are in an
11 untenable position. Eversource has refused to pay them for
12 post-petition energy or capacity, while at the same time it
13 has refused to transfer LMP status to another party so the
14 debtors can sell it directly while at the same time it is
15 opposed rejection of the PPA.

16 Mr. Vomero would testify that if this situation
17 continues beyond the next few days, the debtors will be
18 forced to cease operations in the very near future. The
19 debtors cannot responsibly operate the facility on a daily
20 basis for an extended period of time absent the relief sought
21 today.

22 It also has capacity and supply obligations it
23 will then breach. The debtors can't just turn off the plant
24 and then turn it back on without risking damage to the
25 machinery and equipment. It needs to be much more of a slow

1 and controlled shutdown, and if the plant is shut down, this
2 could easily become a permanent situation. If the debtors
3 shut down the plant in the middle of winter, pipes could
4 freeze, which would damage the plant severely and make
5 starting up operations very difficult.

6 The employees at CS Berlin Ops, who provide the
7 day to day operations and maintenance on the plant, will be
8 unemployed if the plant is forced to close. They will be
9 forced to move or may have to seek alternative employment.
10 These are highly skilled and experienced individuals, and
11 replacing them will be extremely difficult, if not
12 impossible.

13 If the debtors shut down and cease operations,
14 there will be significant loss of tax revenue to taxing
15 authorities. If the debtors are forced to shut down and
16 cease operations, they will be in breach of their obligations
17 to their fuel supplier, and as it is, given the weather and
18 other changes in the market, it's become increasingly
19 difficult to get sufficient fuel to ensure that the debtors
20 can operate at full capacity. It requires frozen ground to
21 conduct logging operations during the winter, meaning the
22 debtors need the winter months to build up inventory. So in
23 the spring when the ground thaws, they'll have sufficient
24 inventory.

25 On information and belief, the debtors are the

1 largest purchaser of woody biomass from their fuel supplier.
2 If the debtors cease operations for even a short period of
3 time, it could permanently impair their ability to get fuel
4 reliably in the future. And even if they could, it would
5 likely require them to obtain wood at elevated prices.

6 This is Mr. Vomero's proffered testimony in
7 support of the LMP and rejection motions, and I'd also like
8 at this time to move before making him available for cross
9 examination to move admission of Exhibits A through DD. It's
10 30 exhibits in our binder. It's my understanding that
11 Eversource has stipulated to authenticity and admissibility.

12 MR. BROWN: Just point of clarification is Exhibit
13 DD, which was in our list, is that the exhibit E requested
14 yesterday?

15 MR. LEONETTI: Yes.

16 MR. BROWN: Thank you.

17 THE COURT: Okay, I have Exhibits A-1 through 10
18 and B-11 through 14. That's what I'm looking at in the plan
19 exhibit. Is there -- oh wait.

20 MR. JOHNSON: Your Honor, Russell Johnson for
21 Public Service New Hampshire. That's our exhibits.

22 THE COURT: That's yours.

23 MR. JOHNSON: Yes, Your Honor.

24 THE COURT: Okay. My fault. Okay. Yeah.

25 MR. JOHNSON: And, Your Honor, just for

1 clarification, Mr. Brown will be handling the LMP motion.

2 And I'll be handling the motion to (inaudible).

3 THE COURT: Hold on a second.

4 MR. LEONETTI: It's a two-volume set, Your Honor.

5 If you don't have it, we have an extra copy.

6 MALE VOICE: Your Honor, may I approach?

7 THE COURT: Give me a second.

8 MR. LEONETTI: Entitled on the sleeve, it's
9 entitled exhibit binder, and it's volume one of two and
10 volume two of two.

11 THE COURT: I see that. But on the inside, I have
12 a letter from Hunton Andrews Kurth.

13 MR. LEONETTI: That's Exhibit DD.

14 (Overlapping voices)

15 MR. LEONETTI: You have the right binder, Your
16 Honor, that exhibit with a letter from Hunton is Exhibit DD,
17 which I think, as we were scrambling yesterday to get these
18 chambers, we ran out of exhibit tabs.

19 THE COURT: Okay, I'm with you.

20 MR. LEONETTI: Thank you.

21 MR. BROWN: Yes, Your Honor. We have no
22 objections to those exhibits.

23 THE COURT: Okay, any other objection? Any other
24 one? Anybody else? Okay, I hear no objections. Exhibits AA
25 through DD, Debtor's exhibits, are admitted.

1 MR. BROWN: Your Honor, I would like the
2 opportunity to cross-examine.

3 THE COURT: Yes. Mr. Vomero?

4 MALE VOICE: Judge, do you want the audio people
5 from Zoom --

6 THE COURT: Oh, yeah. Thank you.

7 MR. LEONETTI: And, Your Honor, one housekeeping.
8 It's Exhibit A through DD.

9 THE COURT: What did I say?

10 MR. LEONETTI: I think you said AA.

11 THE COURT: You're right. I did. A. It's
12 admitted. A through DD.

13 MR. LEONETTI: Thank you. Tender Mr. Vomero for
14 cross-examination.

15 THE COURT: Mr. Vomero. Good morning.

16 THE BAILIFF: Raise your right hand, sir. Do you
17 affirm to tell the truth, the whole truth, and nothing but
18 the truth, to the best of your knowledge and ability?

19 THE WITNESS: Yes.

20 THE BAILIFF: State your full name (inaudible).

21 THE WITNESS: Dean Vomero, V-O-M-E-R-O.

22 THE BAILIFF: Thank you.

23 MR. BROWN: Your Honor, again, Tyler Brown, on
24 behalf of PSNH. Good morning, Mr. Vomero.

25 THE WITNESS: Good morning.

CROSS-EXAMINATION

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BY MR. BROWN:

Q. I know you are the CRO of the company, Correct?

A. Yes, I am.

Q. And you signed the first day declaration that was your testimony, correct?

A. That is correct.

Q. All right. And you understand, at least generally, what a lead market participant in the ISO New England system does, don't you?

A. Yes.

Q. Okay. And an LMP, as I'll call it, actually, in two capacities, isn't that right? With respect to energy as well as capacity, they're the interface with the ISO, correct?

A. Generally speaking.

Q. Okay. And relating to energy, the LMP is the one who places orders or submits orders for the sale of energy through ISO, correct? Is that a fair statement?

A. My understanding is you can't clear transactions without an LMP. As much insofar as my understanding is we couldn't get cash unless we were the LMP. We don't control any of the cash, generally. My understanding.

Q. But the debtors, in this case, Burgess or Berlin, they don't communicate with ISO about the sale of energy,

1 correct.

2 A. So Berlin is a market participant, which is
3 different than a lead market participant.

4 Q. Right. So when Mr. Leonetti said earlier that,
5 for example, CS Berlin Ops had qualified as a lead market
6 participant, do you understand that to be the market
7 participant as opposed to a lead?

8 A. No. So Berlin is the generator, right? My
9 understanding. Right. And then CS Berlin operations is an
10 affiliated entity and they would serve as our lead market
11 participants.

12 Q. My question really is, have they already qualified
13 as a lead market participant?

14 A. They haven't. But we can't -- my understanding
15 within the CAM system is we can't unless Eversource initiates
16 us or allows us to go through that process. We have had
17 discussions with ISO New England and we don't anticipate an
18 issue in obtaining that. But there's a mechanical mechanism
19 that prevents it.

20 Q. And it's more than just mechanical, isn't it?
21 Isn't there also a credit qualification required for ISO to
22 accept someone as a lead market participant?

23 A. Yeah, that's true. And they have templates where
24 you can assess the credit enhancement. And we've actually
25 gone through those templates and assessed the credit

1 situation as well.

2 Q. Right. So you, for example, concluded that
3 perhaps an \$850,000 cash collateral deposit is required for
4 CS Berlin ops to qualify, correct?

5 A. Right. That's our estimate. It should be
6 sufficient.

7 Q. And that's a line item in your proposed DIP
8 budget, is that right?

9 A. That's correct.

10 Q. Okay. And do you also understand that when an LMP
11 acts on behalf of a power producer in selling energy that the
12 money that comes back from ISO passes through the LMP?

13 A. That's my understanding. Right. With an account
14 that's maintained by ISO New England is my understanding.
15 But yes.

16 Q. And you also understand there may be payments that
17 have to go back to ISO from the LMP?

18 A. Perhaps for collateral, if collateral changes
19 periodically.

20 Q. Reconciliations, for example.

21 A. Perhaps. But again, our third party would be the
22 expert in that area. We would engage them to manage and
23 optimize that process for us.

24 Q. Is it your understanding that the credit
25 worthiness requirement for ISO to recognize someone as an LMP

1 is because money passes through the LMP's hands in connection
2 with dealing with ISO?

3 A. Sure. The trades have to clear. We understand
4 that. And I would say that the DIP is sized appropriately to
5 handle the collateral requirements insofar as I can see.

6 Q. Mr. Vomero, question wasn't before you. Please
7 just stick with questions that I ask you.

8 A. I was trying to clarify the clearing of the
9 transactions.

10 Q. Thank you. And you understand that when payments
11 are made for energy to the LMP that's been sold to ISO, that
12 there are preliminary load reads on the meters. Do you
13 understand how that works?

14 A. Not specifically, but it's certainly tied to, it's
15 tied to production, tied to day ahead pricing generally. But
16 in terms of the very specifics, again, that's why we're
17 engaging -- well, one of the reasons we have to engage with
18 third parties, to rely on their expertise in managing the
19 transactional data.

20 Q. But I asked you a little earlier about the
21 possibility of reconciliations. You're familiar with that
22 concept, are you not? When energy is supplied and perhaps
23 there's a reconciliation for the actual delivery.

24 A. I don't have firsthand knowledge of that.

25 Q. Okay. All right. Well, let's move on then. The

1 payments that go through the LMP from ISO for energy sold
2 into the grid, those payments come a month later than the
3 supplies, isn't that right?

4 A. That's generally -- for ISO New England?

5 Q. Yes. So let me ask it differently. So if energy
6 is produced in January, when do the payments come in for the
7 energy?

8 A. So a 30-day lag time on the initial payment.

9 Q. So in February?

10 A. Perhaps. I would have to just verify that.

11 Q. Okay.

12 A. For some reason I had thought it was every other -
13 - every two weeks, but I can certainly clarify that.

14 Q. Is there anybody else in the courtroom today that
15 can provide certainty as to when the payments come to the
16 LMP?

17 A. I would have to ask our regulatory counsel.
18 Again, it's just going by memory, but it wouldn't exceed 30
19 days (inaudible).

20 Q. All right. And moving forward then, power
21 production has continued into February, pre-petition,
22 correct?

23 A. Correct.

24 Q. And the payments from the ISO for that money going
25 to the LMP hasn't arrived yet, has it?

1 A. No, it has not.

2 Q. And with --

3 A. Well, it's -- that's not -- it's arrived in your
4 account, or --

5 Q. Do you know that for a fact?

6 A. Well, I see what you're saying. No. No. The
7 energy that's produced in February, correct. I don't believe
8 the trades have cleared, but I don't know that for certain
9 because of the lag in payment.

10 Q. All right, how about with respect to the post-
11 petition period? The debtors filed on February 9th. Energy
12 has continued to be produced according to the proffer.

13 A. That's correct.

14 Q. That energy payment hasn't come in from ISO yet,
15 has it?

16 A. I wouldn't know that.

17 Q. Okay. And you're familiar with the role the LMP
18 plays on the capacity side, are you not?

19 A. Generally.

20 Q. All right. And one of the roles that the LMP
21 plays is they participate in the forward capacity markets
22 that are run by ISO, correct?

23 A. Correct.

24 Q. Those are auctions of the capacity of the plant
25 committing to capacity for three years down the road; isn't

1 that right?

2 A. Correct.

3 Q. And the last one of those auctions occurred in
4 early February, right?

5 A. Yes, it did.

6 Q. And my client, PSNH, acted as LMP in connection
7 with those forward commitments for the power plant, correct?

8 A. Correct.

9 Q. And it hasn't been paid currently for capacity for
10 the month of February from ISO with respect to capacity, was
11 committed three years ago, has it?

12 A. I wouldn't know the answer to that, but --

13 Q. Do you understand that there's also a lag in
14 payment of capacity payments by up to a month?

15 A. It wouldn't surprise me.

16 Q. Okay. Now, your counsel proffered that the
17 Burgess facility was producing electricity during the post-
18 petition period, correct?

19 A. Correct.

20 Q. And the operations, while they may be -- I think
21 the representation was they're operating less capacity,
22 they're putting out a little less power now than they were
23 pre-petition; is that right?

24 A. Correct.

25 Q. But the plant is still running the way it was,

1 correct? It's --

2 A. Other than dialing back the amount of output that
3 we've had to do, it's producing power.

4 Q. Right. And so the Court understands --

5 A. Right now. Right.

6 Q. Sorry, I didn't mean to interrupt you. So the way
7 it acted or operated pre-petition, it produced power. Those
8 went through interconnection lines that are owned by PSNH,
9 and the power goes to the grid, correct?

10 A. Correct.

11 Q. And as the lead market participant, PSNH reads the
12 meter, right?

13 A. Correct.

14 Q. Interfaces with the debtor on how much capacity or
15 production they're expecting to deliver; isn't that right?

16 A. That's --

17 Q. That still happens, correct?

18 A. Correct.

19 Q. And then they interface with ISO regarding the
20 expectations of the delivery, and they read the meter with
21 respect to that, right?

22 A. Correct.

23 Q. And then billing happens based on the expected
24 delivery and maybe reconciled by the actual delivery. Is
25 that fair to say.

1 A. Perhaps General --

2 Q. Operating the way it did before?

3 A. Yeah.

4 Q. Okay. And my understanding of one of the reasons
5 that the debtors had filed the LMP motion is they want to
6 capture the payments that would come from ISO through the LMP
7 for its own benefit; is that correct?

8 A. We want to be compensated for the energy we're
9 producing.

10 Q. Okay. Are you familiar with how the PPA between
11 the debtors and PSNH worked in terms of payments going to the
12 debtor?

13 A. Historically?

14 Q. Yes.

15 A. I understand, yes.

16 Q. All right. And back in October, when you were
17 hired as CRO, was it your understanding that PSNH under the
18 contract would be netting, recouping, whatever word you want
19 to use, the excess cumulative reduction against energy
20 payments?

21 A. That was my understanding. Beginning in January
22 for December's production.

23 Q. Right. So you knew that in October, but it was
24 going to start in January at the end of the last operating
25 year. Correct?

1 A. Correct.

2 Q. All right. In fact, the debtors sought some
3 relief from that netting from the legislature. Correct?

4 A. They made an effort, yes.

5 Q. Yes. And the legislature in New Hampshire passed
6 a bill to continue a moratorium against PSNH, setting off or
7 netting that excess cumulative reduction, correct?

8 A. Correct.

9 Q. And the governor vetoed it. Correct?

10 A. Correct.

11 Q. Are you familiar with why the governor decided to
12 veto it? Did he announce his reasons?

13 A. I didn't explore the reasons, and I'm sure I've
14 heard them during the time.

15 Q. One of the reasons you heard that the governor
16 decided that the debtors had received over nearly \$200
17 million over market in payments for the energy? And that was
18 the reason it was being vetoed?

19 A. Yeah. I don't recall seeing 200 million. I'm not
20 sure the governor understood the consequences of the
21 inability to pay and to honor the CRF and the effect it would
22 have on the plant and the taxpayers in New Hampshire.

23 Q. Fair enough.

24 A. But that's a --

25 Q. Fair enough on that end.

1 A. Politics is not my strong suit, so.

2 Q. Fair enough. I'm not asking you to --

3 A. Yeah. Yeah.

4 Q. -- testify about what the governor knew or didn't
5 know.

6 A. Yeah, I don't know what he was thinking.

7 Q. But you know that in the proffer there was
8 representation that as of the end of the last operating year,
9 there was \$171 million paid to the debtors above market for
10 just energy. Isn't that right?

11 A. That's right. But my understanding as well as I
12 think Eversource has been reimbursed for that. So the
13 damages on your client, I think, are (inaudible).

14 Q. The number's come down --

15 A. My understanding.

16 Q. -- since December to 164 million. Is that
17 accurate?

18 A. I haven't done that analysis.

19 Q. Roughly.

20 A. Back of the envelope, so if you were to assume
21 January and February's application of the CRF gets you in the
22 ballpark, I suppose.

23 Q. Well, the February. I thought we came to the same
24 conclusion. Probably hasn't come in yet --

25 A. I'm sorry. December and January. Sorry, sir.

1 Q. All right, so as the LMP, currently, PSNH is in a
2 position potentially to reduce the energy payments, you would
3 agree, by the excess cumulative reduction. Correct?

4 A. Post-petition.

5 Q. I'm talking about February. Let's talk about pre-
6 petition first.

7 A. So you're talking -- give me dates, energy
8 produced, and --

9 Q. Sure. Energy has been produced from February 1st
10 until the 8th, right?

11 A. That's as much a question of law. I've kind of
12 had that question. Whether you have the right to offset.

13 Q. I'm not asking --

14 A. It's always been a question for me.

15 Q. And I'm not asking --

16 A. Because using a pre-petition obligation to offset
17 a post-petition, it's --

18 Q. I'm sorry, I'm not asking --

19 A. No, and I meant you, your client. I just can't
20 answer that question.

21 Q. Apologize for interrupting.

22 A. No worries.

23 Q. I'm not trying to ask a legal question. My
24 question to you is, were you expecting as a CRO of the
25 company that until and unless the PPA was terminated or

1 rejected, or rejected retroactively, that the energy payments
2 were going to be subject to the excess cumulative reduction
3 being netted against them?

4 A. Pre-petition, they were certainly in our plans,
5 yeah.

6 Q. Okay. At present, the debtors --

7 A. And I'll clarify that, if I may. So pre-petition
8 in that when we did our forecast, depending on the time of
9 the filing, at one point, we assumed -- in fact, I think in
10 our plans, we had assumed that December's, if we had filed at
11 the end of January, December's production would be offset
12 against energy only from January's payment.

13 So if we had missed the 23rd, which was our expectation
14 of payment would be, that would have occurred. That's the
15 best way I can answer your question.

16 Q. Sure. That was your expectation.

17 A. Yeah.

18 Q. So you knew that PSNH, as the LMP, was in a
19 position to carry out what you thought was the pricing
20 mechanism for the energy, which is to reduce the energy
21 payments by the excess cumulative production. That was
22 expected?

23 A. Yeah, that's what the contract says.

24 THE COURT: Hold on, please.

25 MR. LEONETTI: I'm going to object to that, Your

1 Honor. First of all, it does seem like -- I know Mr. Brown
2 says he's not asking for a legal conclusion, but some of
3 these questions are very legal in nature, what people are
4 entitled to do or not entitled to do. And so that's my first
5 objection. My second objection is that this witness is not
6 qualified to talk about or testify as to what Eversource knew
7 or was planning to do.

8 MR. BROWN: And my response to that, Your Honor,
9 is, as the CRO, he's testified and proper that he made cash
10 flow projections. And what's relevant to the cash flow is
11 whether or not there's going to be a reduction for ECR when
12 the energy payments are made.

13 THE COURT: You can ask him about his cash flows,
14 and you can't ask him about what Eversource was going to do,
15 and I'm not going to accept his testimony for the legal
16 conclusions. So with those constraints, you can ask him.

17 MR. BROWN: Appreciate that. Thank you, Judge.
18 BY MR. BROWN:

19 Q. So, Mr. Vomero, let's restate. So, in your cash
20 flow projections for January, were you anticipating that
21 there would be a reduction in the energy payments for the
22 excess cumulative reduction?

23 A. So depended on the timing of the projections. So
24 we updated them continuously, weekly, at least, and it was
25 hinged on whether or not we were going to file. So at some

1 points, we were expecting the payment. If we had made the
2 deadline, if we were able to file or decided to file prior to
3 the 23rd. At one point, those payment of December's
4 production may have been in a forecast, but as time passed
5 and we got through December and weren't going to make the
6 23rd, we knew that we would be offset. So it varied over
7 time.

8 Q. So --

9 A. Is the --

10 Q. -- by the end of January, it was in your cash flow
11 forecast --

12 A. At the end of January?

13 Q. -- that it would be reduced?

14 A. Excuse me?

15 Q. By the end of January 2024 -- let's pick January
16 15. By January 15, was it in your forecast that the ECR, the
17 excess cumulative reduction, would be offset or netted
18 against the energy payment?

19 THE COURT: For what time period?

20 MR. BROWN: So this goes -- Your Honor, I'll
21 clarify that. Okay.

22 BY MR. BROWN:

23 Q. So in January, the energy produced in December
24 gets invoiced, correct?

25 A. The January invoice? Yeah. Around that time.

1 Q. Around January 23 --

2 A. It gets invoiced.

3 Q. -- an invoice is created --

4 A. But that would be paid versus invoice date. I
5 believe the invoice was in early January. I'm just trying to
6 remember the --

7 Q. Yeah, and I'm not trying to hold you to particular
8 dates, but the concept is energy produced in December gets
9 invoiced in January and paid in January. So there's a month
10 lag, correct?

11 A. That's correct.

12 Q. And going back to my question earlier, so energy
13 produced, at least pre-petition in February, same thing.
14 It'll be March before an invoice is produced. And
15 potentially ECR applies to that energy payment, correct?

16 A. I mean, February is a little different. Well,
17 it's a little different just because of the filing. So I'm
18 not sure I can answer that question. I mean, an argument can
19 be made that pre-petition energy. Again, I don't know how --
20 whether or not the CRF legally would be applied to the energy
21 produced in February.

22 Q. Now, you're morphing this into a legal question.
23 Not my question --

24 A. It goes hand in hand because you have to make
25 judgments in your forecast. Right? So you really -- so you

1 have to manage to a worst case in many ways or a best case,
2 you really don't want to when you're sizing up a credit
3 facility. So I'm really not trying to be difficult. It's a
4 question I've had since, and I've asked our legal team since
5 I've walked in the door. I just don't know the answer. And
6 our forecast has changed on a weekly basis, so I'm not sure
7 we're entitled or should be -- should receive the pre-
8 petition energy paid, because, again, it's a legal question
9 that I've asked our team.

10 Q. Well, then let's step back to -- I'm sorry.

11 A. I'm not trying to be difficult. That was our
12 thought process. And as we looked at the forecast, we ran
13 many different scenarios with the (inaudible).

14 Q. Okay, harken back to January. You said you didn't
15 file as early, perhaps, as you would have liked to. Is that
16 fair? File for bankruptcy?

17 A. Personally speaking? Correct. I would have
18 preferred to file earlier. But that's my opinion.

19 Q. Is one of the reasons because if you didn't file
20 earlier, there'd be the opportunity for PSNH as the LMP to
21 net the excess cumulative reduction against the energy
22 payment?

23 MR. LEONETTI: I'm going to check to the extent,
24 and I know this is not Mr. Brown's intent, but to the extent
25 any of this touches on attorney client privilege, and the

1 (inaudible) we discuss. So mostly caution the witness not to
2 do that and just to make sure that -- I'm sure your intent is
3 not (inaudible).

4 MR. BROWN: That's correct, Your Honor. But the
5 witness did open the door on this discussion about the timing
6 and what they were trying to accomplish.

7 THE COURT: Well, I think you're not asking the
8 obvious questions because you don't want to get the obvious
9 answers to them. Okay. So you can continue down this road.
10 But he's given you the same answer now for the last five
11 minutes.

12 MR. BROWN: I'll move on.

13 THE COURT: So -- and you haven't asked him the
14 questions that would ask him what he's doing post-bankruptcy
15 in the forecast. Okay, but why don't you move on? I think
16 he's answered your questions.

17 MR. BROWN: I will. Thank you, Judge. In fact,
18 if I have just a minute, perhaps I can make it quicker.

19 THE COURT: Of course. Of course.

20 MR. BROWN: Thank you, Judge.

21 MR. JOHNSON: While Mr. Brown is checking his
22 notes, are we -- are you hearing the LMP (inaudible) because
23 I have several questions (inaudible).

24 THE COURT: Really?

25 MR. LEONETTI: I certainly have no objection, Your

1 Honor. I know it's usually one lawyer, one witness, but I
2 did ask (inaudible).

3 THE COURT: Okay. Now you'll get to question
4 afterwards then.

5 MR. BROWN: Your Honor, why don't I cede it to Mr.
6 Johnson, and he can ask his questions?

7 THE COURT: Okay.

8 MR. BROWN: Thank you, Judge.

9 THE COURT: Thank you. Mr. Johnson.

10 MR. JOHNSON: Your Honor, Russell Johnson for
11 Public Service Company in New Hampshire. Thank you, Your
12 Honor.

13 CROSS-EXAMINATION

14 BY MR. JOHNSON:

15 Q. So, good morning. Good morning.

16 A. Good morning, Russell.

17 Q. In your proffer, to make sure I understand this
18 correctly, your counsel said that the income from the
19 facility over the last two years was approximately \$77
20 million. Is that --

21 A. Two-year average.

22 Q. Two-year average is 77 million?

23 A. Yeah.

24 Q. And as I understood the testimony, as well,
25 approximately 72 million of that came from Public Service New

1 Hampshire?

2 A. Correct.

3 Q. And the breakdown of those amounts, just want to
4 make sure we're all on the same page here, 42 million for
5 energy, approximately?

6 A. If that's what Ken said, that would be correct.

7 Q. Okay. 31 million from RECs, renewable energy
8 credits?

9 A. Correct.

10 Q. And 3.9 million in capacity.

11 A. Correct.

12 Q. Okay. Those amounts that were paid, the 72
13 million by Public Service New Hampshire, is it your
14 understanding that those were above market rates?

15 A. It depends at what point in time. So if you're
16 looking at a two-year average, I don't know exactly what the
17 magnitude is, but I think the CRF was designed to capture
18 that. But it depends on what point in time because the
19 market changes at various points.

20 Q. All right, so let's just do on a line item by line
21 item.

22 A. Sure.

23 Q. So for energy, the 42 million, would that -- the
24 price paid by Public Service New Hampshire, would that have
25 been above the market rate for the energy?

1 A. The 42 million? So the average over two years.

2 Q. Well, I'm talking -- it's 42 million a year,

3 right? It's 42 million a year is the average?

4 A. 42 million over two years, it was 42 million per
5 year.

6 Q. Right.

7 A. It's a two-year average. That's right. Right.

8 Q. But the question I have, and maybe I'm asking it
9 incorrectly, that 42 million, is that based at the contract
10 rate? Was Public Service New Hampshire paying that 42
11 million at the price set forth in the contract?

12 A. That's my understanding.

13 Q. And is it your understanding, or do you know if
14 that contract price is above or below market?

15 A. So with respect to the figures I provided, I
16 didn't do that analysis for that two-year average.

17 Q. Okay. You are aware, though, that the excess
18 cumulative reduction, and Your Honor, as you may have
19 noticed, we call it the ECR. They're calling it the CRF.
20 It's the same thing. Just want to make sure we're all on the
21 same page. But you are aware that the excess cumulative
22 reduction for 2022 and 2023 increased, right, over that time
23 period?

24 A. I didn't historically look at the figure or the
25 calculation, but I understand over time we are where we are,

1 and our team felt comfortable with the 72 million. But at
2 discrete points in time, I can't answer your question. I
3 didn't look at the accumulation.

4 Q. Okay. With respect to the RECs, the price paid by
5 Public Service New Hampshire, is it your understanding that
6 was the contract price that they paid for those RECs?

7 A. That's my understanding.

8 Q. And do you have any idea whether or not that was
9 above or below market?

10 A. Over time, I didn't do that analysis. I don't
11 know.

12 Q. 2023, was the price paid by Public Service New
13 Hampshire for the 31 million in RECs that you've proffered
14 were purchased, were they above market or below?

15 A. For the entirety of 2023? I don't know.

16 Q. Same answer for 2022?

17 A. Yeah. I didn't historically look at market prices
18 for RECs.

19 Q. Okay. Same set of questions --

20 A. For the entirety of 2023 and 2022, I did not.

21 Q. And just to close the loop here, same question.
22 I'm sure the answer is going to be the same, but I do want to
23 ask it. The price paid by Public Service New Hampshire
24 Company of New Hampshire -- Public Service Company of New
25 Hampshire, for capacity in 2023, was that the contract rate

1 that they paid for that capacity? And I'm talking about the
2 PPA.

3 A. Yes.

4 Q. Okay. And I'll ask the same question. Do you
5 know whether or not that price paid was above or below
6 market?

7 A. My recollection is there was a slight -- I don't --
8 -- I don't know if that was above or below market because it's
9 an open auction for capacity, and I can't -- again, not
10 having the contract in front of me, I'm probably not because
11 I'm under oath. But I do believe there's a little
12 adjustment, somewhat of an adjustment to that figure.

13 But also, when you talk about market prices, the
14 contract provided for fuel price pass-throughs, so when you
15 look at the analysis, it becomes one of what is the contract?
16 How are you defining market as well? I just wanted to point
17 that out. But again, it doesn't change the answer to the
18 entirety of 2023 and the entirety of 2022. I just didn't
19 know what the market was (inaudible).

20 Q. You don't know? That's fair. I just -- do you
21 know if anybody in the room for the debtors would know the
22 answer to this question?

23 A. I don't know the answer to that.

24 MR. JOHNSON: All right, I'm done with that. No
25 other questioning, Your Honor. One more, Your Honor -- not

1 Your Honor, Mr. Vomero.

2 THE WITNESS: No, that's fine. (Inaudible).

3 MR. JOHNSON: Sorry about that.

4 THE COURT: Objection.

5 MR. JOHNSON: You probably would object.

6 BY MR. JOHNSON:

7 Q. Mr. Vomero, the proffer from your testimony is
8 that if the plant was shut down, there would be dire
9 consequences. Is that correct?

10 A. That's correct. And you are aware that the plant
11 did shut down in December 2023. Correct?

12 A. Correct.

13 Q. Okay. And that was for maintenance?

14 A. For an eight-day, fully staffed maintenance
15 shutdown, which is different than keeping a plant operating
16 at minimal capacity. They're completely different. So
17 mothballing a plant is different than bringing a facility
18 down for major maintenance. They're incomparable.

19 Q. Please explain.

20 A. So when you're -- first off, it takes about a week
21 for the furnaces to -- for the boiler to get down to a
22 reasonable temperature. So you're just going to have the
23 cool down, number one. Number two, is the plant's manned
24 temperatures being maintained, the ambient conditions are
25 being somewhat controlled, and you have your skilled

1 personnel there who are attending to the facility. So it's
2 much different bringing any manufacturing facility down for
3 major maintenance versus a hard stop. We're done.
4 Completely different.

5 Q. And you have utility providers, excuse me, that
6 provide utility service, electric, gas, telephone, cable to
7 the plant. Correct? The facility?

8 A. I don't know if they have cable up there, but
9 water would be one? Yes. We do have utilities.

10 Q. Water -- sorry. And electricity and gas?

11 A. Correct.

12 Q. And is any of that used for heating, the
13 electricity or gas provided to the plant? Is that used to
14 heat the plant at all?

15 A. No. My understanding --

16 Q. If you know.

17 A. -- my understanding is that the heat from --
18 that's generated through the boilers is used -- will heat the
19 actual manufacturing and critical equipment. And you would
20 not have heaters there blowing on the equipment. It's
21 unlikely, because you can't get to the piping. And the
22 facility is -- if you've been in the facility, it's a
23 structured -- it's really, there's no insulation. It's tin.
24 It's really a tin structure around it. And so you're not
25 going to be able to get to all the pipes and all of the

1 critical equipment by conventional heating or even putting
2 boilers in. Even if you were to put heaters in, I'm not sure
3 you could do that effectively. I wouldn't take the risk of
4 doing it.

5 Q. All right. One last question, Your Honor. And
6 then I don't know if you have -- with respect to CS Berlin
7 Ops, they are the ones that -- they provide the maintenance
8 to the facility under that agreement, or what is it that CS
9 Berlin Ops provides to the facility at this point?

10 A. So all the employees?

11 Q. The employees.

12 A. At the facility. Right. And other services as
13 well.

14 Q. So the proffer was that if the facility shut down,
15 you would lose all those employees from CS Berlin Ops. Is
16 that what your proffer was?

17 A. Over time, yes. We would have no money to pay
18 them.

19 Q. All right. And in the first day hearing, your
20 counsel, I know it wasn't testimony, but I want to ask this
21 question. He referred to CS Berlin Ops as a captive, non-
22 debtor affiliate. What does that mean in your understanding?

23 A. So, within -- that's a good question. So, within
24 some structure -- so CS, in essence, is a management company.
25 Its an outsource management. As a (indiscernible) seen this

1 before. There is some affiliation, some connection with the
2 ownership of certain of the CS entities and certain of the
3 debtors. What that is I am not a hundred percent certain.

4 Q. So, you wouldn't --

5 A. Those relationships amongst CS and the debtors.

6 Q. -- know whether CS Berlin Ops has any other
7 customers other than the debtors.

8 A. I don't believe CS Berlin Ops does. I don't know
9 the answer to that. I haven't specifically looked at the
10 payroll of CS Berlin.

11 Q. One last -- I promise this is my last question.
12 Is CS Berlin Ops the entity that has the LMP or is going to
13 try to qualify to get the LMP?

14 A. Yes.

15 MR. JOHNSON: One moment, Your Honor.

16 THE COURT: Yes.

17 MR. JOHNSON: Just two questions.

18 BY MR. JOHNSON:

19 Q. At this time, and this goes to the LMP, how much
20 unrestricted cash to the debtors currently have on hold?

21 A. Less than \$100,000.

22 Q. Back to your cashflow, and this is just going to
23 be one question, does your cashflow model that you did
24 contemplate paying Public Service Company of New Hampshire
25

1 the monthly ECR amount out of collections for energy produced
2 in February?

3 A. I can't answer that question.

4 MR. JOHNSON: That's all, Your Honor. Thank you
5 for your patience.

6 THE COURT: Thank you. Any other cross?

7 (No verbal response)

8 THE COURT: Redirect?

9 MR. LEONETTI: No, Your Honor.

10 THE COURT: Thank you. Mr. Vomero, you may step
11 down.

12 (Witness excused)

13 MR. LEONETTI: That is the only witness that we
14 have in support of those -- the rejection and LMP motions.

15 THE COURT: Okay. Let me ask Eversource if they
16 have any witnesses or evidence to put in.

17 MR. BROWN: Your Honor, we would rely on the same
18 evidence that is in from the debtors.

19 THE COURT: Okay. Thank you. Let's hear
20 argument.

21 MR. LEONETTI: Thank you, Your Honor. With
22 respect to the LMP motion, the purpose of the LMP motion and
23 the reason it's a matter of such urgency, as you just heard
24 from Mr. Vomero, is that the debtors are out of free cash.

25

1 They have \$100,000 and they're unable to generate revenues
2 under the current lead market participant arrangement.

3 Without a lead market participant that will pay
4 for energy that the debtor produces and the capacity that the
5 debtor provides, the debtor has no prospects for post-
6 petition revenue. Selling energy into the market and
7 collecting on it through an LMP is not just the ordinary
8 course of the debtor's business, it's the only course of our
9 business because we need an LMP to enable us to participate
10 in the ISO New England wholesale electricity market.

11 Debtors are operating their business every day.
12 We are still acquiring raw materials. We are incurring
13 payroll expenses. We're operating the facility and paying
14 for administration of the case. As Mr. Vomero testified, we
15 don't have the liquid assets at hand to do it much longer.
16 The one \$1 million carveout that Your Honor ordered and that
17 the lenders agreed to last week bridged us to today, but we
18 are getting to the end.

19 The \$5 million that we should have received
20 prepetition would have provided enough liquidity to get us to
21 a hearing, maybe longer in the future, to the extent that
22 Eversource's position is that this all needs more time. That
23 money was withheld improperly by Eversource. Your Honor, you
24 don't need to decide that today.

25

1 The subject of the LMP motion is how do the
2 debtors fill this budgetary hole and maintain a viable
3 business to get us to either a sale or a consensual plan of
4 reorganization. Whether the PPA was breached or whether it
5 was terminated can be litigated another day. But as Mr.
6 Vomero's testimony makes clear, the entire course of dealing
7 by Eversource, its representations to us, its representations
8 to the PUC establishes clearly that Eversource knew that the
9 PPA only allows offsets against energy; at least they knew
10 that up until the day before that payment was supposed to be
11 made. That makes sense because the only accrual into the CRF
12 is energy.

13 Any -- you heard some questions about whether
14 capacity, or the rec's are overmarket or under market, it
15 doesn't matter. The only thing that fills up the CRF bucket
16 is the production of energy and even then, we don't know if
17 its over market or under market. There is a reference price
18 and that is not necessarily the price that PSNH is collecting
19 from its customers. Its not necessarily the price that PSNH
20 is acquiring energy from other places.

21 So, it makes sense, when you think about the
22 structure, that the only thing Eversource can offset against
23 the CRF is the very thing that fills up the CRF. And as I
24 noted in Mr. Vomero's proffer, Eversource even made that

25

1 representation, its counsel even made that representation, to
2 the Public Utilities Commission before they withheld it.

3 Now the debtors have secured DIP financing from
4 our lenders, but that financing is conditional. The DIP has
5 many milestones. Chief among them is the requirement that we
6 engage a new MLP promptly. That is not an unreasonable
7 request by the lenders. Its not fair to ask them to fund into
8 a black hole not knowing if the debtors are going to have
9 revenue. Financing also comes at a cost, interest, and every
10 dollar the debtors cannot get from contemporaneous market
11 sales is a dollar that they might have to borrow.

12 So, by improperly withholding the rec payments
13 Eversource has set up a situation where we need to be here
14 and have the LMP heard on such a shortened basis.
15 Fortunately, there is another entity, CS Berlin Ops, that can
16 step in and fill that role. The DIP budget provides an
17 estimate to fill any collateral requirement that might be
18 required and so the only thing that is blocking the debtors'
19 ability to start selling energy onto the market and getting
20 paid for that energy is the transfer of the LMP role in the
21 CAM system.

22 Now, Your Honor, Eversource doesn't need to
23 actually win its arguments for its to win its goal here.
24 They --

25

1 THE COURT: Well, let me ask: Let's say the debtor
2 hadn't filed bankruptcy and you were in this situation, and
3 there was more money so that you had time to let everything
4 play out, what would the debtor do, outside of bankruptcy, to
5 change their lead market participant?

6 MR. LEONETTI: We would have to contact Eversource
7 and ask them to do that.

8 THE COURT: Okay. And when they refused then what
9 would you do? What would the debtors do?

10 MR. LEONETTI: I think we would have to put up the
11 white flag of surrender because we're not -- I mean or just
12 burn money.

13 THE COURT: So, there is no non-bankruptcy legal
14 authority to be able to change a lead market participant is
15 what you are telling me?

16 MR. LEONETTI: That is my understanding, Your
17 Honor. We explored that. We had conversations with ISO New
18 England as to whether there was some sort of administrative
19 proceeding that you have to do and we did not get anything
20 anywhere near satisfaction as to what that was. They asked
21 the questions of ISO New England and we did it on a
22 confidential basis without disclosing parties. ISO New
23 England as this ability because, obviously, we didn't want it
24 to leak out of what we were considering. My understanding is
25

1 that there is no -- like you can't start an administrative
2 regulatory hearing in front of ISO New England.

3 THE COURT: Don't have any relief in the Court
4 system?

5 MR. LEONETTI: Not that we are aware of.

6 THE COURT: Okay. So, if there is no ability
7 outside of bankruptcy to change a lead market participant,
8 what inside of bankruptcy gives me the power to do that?

9 MR. LEONETTI: We are not asking you to change it.
10 We are not asking you to change the LMP, Your Honor. We are
11 asking you to order that Eversource undertake the actions in
12 CAM's to permit us to designate a -- and the reason why I
13 think this Court has authority to do that is because its
14 conjoined with the concept of rejection.

15 With the entire concept of pre- versus post-
16 petition obligations which is that the debtor -- and that is
17 one of the reasons we filed the rejection motion on day one
18 with a *nunc pro tunc* request which is once the contract is
19 rejected then there is -- you know, a necessary flowing of
20 that is the debtor being permitted to go find a new lead
21 market participant.

22 THE COURT: I have no problems with the debtor
23 finding a new lead market participant. My question is what
24 authority is there for me to order a non-debtor party to take
25 an action? Where does that come from in the code?

1 MR. LEONETTI: Sure. So, where that comes from in
2 the code, in our view, is because our energy is property of
3 the estate. The energy that we produce, when we spin the
4 turbines and when we provide capacity and electricity to the
5 grid, is the debtors property. Eversource is standing in the
6 way of the debtors' ability to sell its -- its almost as if,
7 you know, they had a piece of machinery that, you know, the
8 debtor owned and we need that piece of machinery back to
9 continue operations. And we loaned it to them and we loaned
10 it to them prepetition, let's say, even under the terms of
11 the lease and now we are rejecting the lease. This is no
12 different. Just because its electrons that are spinning and
13 going out on power lines and you can't grab them tangibly --

14 THE COURT: Well, let's take that scenario. What
15 if that was happening? What motion would you file in front
16 of me to compel them to give you piece of equipment?

17 MR. LEONETTI: We would file a turnover motion.

18 THE COURT: A turnover motion, violation of the
19 stay, none of that is in front of me. And I don't know that
20 its either of those things. I am just saying what is the
21 authority. What I found lacking in the motion is the
22 authority, not whether it should and not whether Eversource
23 is breaching its obligations under the agreement, or not if
24 they're going to violate the stay in terms of the rejection,
25 and not if the debtor is going to have a huge damage claim

1 if, in fact, Eversource refuses to do this administerial
2 task. Those are questions, I think significant questions.

3 My question is if you couldn't -- my real question
4 when I read this is, okay, what would happen outside of
5 bankruptcy because its not a bankruptcy question. Now maybe
6 it becomes one, but you haven't framed it that way so I don't
7 know.

8 MR. LEONETTI: Sure. Well, I guess if it was
9 outside of bankruptcy, Your Honor, let's say they're in
10 breach and we terminated, right, that is outside of
11 bankruptcy because that is the situation in which we would
12 need to change the LMP.

13 THE COURT: Yes.

14 MR. LEONETTI: They refused, sue them and ask for
15 an injunction.

16 THE COURT: What would be the basis of that
17 lawsuit?

18 MR. LEONETTI: Again, the basis of that lawsuit
19 would be that they are no longer contractually permitted to
20 be our lead market participant.

21 THE COURT: Okay. And I don't have that suit in
22 front of me.

23 MR. LEONETTI: So, Your Honor, we did debate long
24 and hard how best to bring this because it's a little bit of
25 a different concept then, you know, the code anticipates.

1 You know, the code, I believe, is flexible enough because we
2 are asking for an order of the Court under 363 to allow us to
3 enter into this agreement. This --

4 THE COURT: No problem, you can do that.

5 MR. LEONETTI: -- Court --

6 THE COURT: I'll hear argument, but I am not
7 seeing the issue right now.

8 MR. LEONETTI: -- then has the authority to enter
9 all orders that are necessary and appropriate to fulfill our
10 ability to enter into that agreement and to fulfill that
11 agreement. Whether we named 542 or 362 in our papers or not,
12 I think it's the concept that it's the only way we can get to
13 actually fulfill that post-petition contact which is to have
14 Eversource be forced to flip that switch or enter those
15 digits in the CAM system so that we can now fulfill our
16 commitment to use this other entity as a lead market
17 participant.

18 THE COURT: Is there any case law out there that
19 is close to this scenario of how you want to use 105?

20 MR. LEONETTI: Not that we have uncovered, Your
21 Honor. Look, we recognize that that is the problem and that
22 is why, I think, its conjoined with the rejection motion.

23 THE COURT: Okay. We can talk about that then.

24 MR. LEONETTI: So, the rejection motion, whether
25 you want to apply just the business judgment standard or you

1 want to apply the heightened standard, if there is rejection
2 the Court also has authority to enter all orders necessary
3 and appropriate to allow us to use the property of the estate
4 which is the energy that we produce.

5 Now on the rejection I think it's almost beyond
6 dispute that the debtors are locked into an uneconomic
7 contract and its difficult to conceive of a business
8 rationale for staying in the PPA. I think as Mr. Vomero's
9 testimony made clear the amount of the setoff, even without
10 the recs and capacity would make it extremely difficult if
11 not impossible for us to operate for very long. You add
12 setoff for recs and capacity and it gets even worse.

13 There is two other big problems with the CRF and
14 the PPA and why we need to get out of it. One is that to the
15 extent there is not a paydown in a particular month of
16 sufficient to fulfill that \$6 million per month. So, to the
17 extent we don't produce enough energy to fill that \$6 million
18 the delta rolls over to the next month.

19 THE COURT: Yes.

20 MR. LEONETTI: So, \$6 million let's say this month
21 in February, let's say we produce \$3.5 million in energy in
22 January that's \$2 and a half million that rolls to the next
23 month. So, now the next month there is \$8.5 million and,
24 again, if we setoff -- if they setoff that \$3.5 million now

25

1 its \$5 million that rolls to the next month. So, now its \$11
2 million that is owing to the next month.

3 This is why I note in their papers Eversource
4 argued that, oh, in January, we paid them \$1.8 million. So,
5 they got a little bit of money in January. Maybe when the
6 next rec comes due, they will get a little bit of money,
7 which is in April, out of that. That is actually a falsity
8 and the reason why is because if they continue to offset this
9 roll-forward just keeps getting bigger. So, by the time we
10 get to April it will be like an \$11, \$12 million hole and so
11 you add recs, and capacity, and energy which they are all
12 going to withhold that is not going to get you to the \$11,
13 \$12 million. So, then the money is going to roll to the next
14 month and it's just going to keep accumulating until we get
15 to the end of the year.

16 This isn't a hypothetical situation where we even
17 found money to operate. So, there is no money, under their
18 interpretation of the CRF and of the PPA, ever coming in
19 again or maybe some point in 2026, 2027 when all of this runs
20 its course. But maybe not because the second problem, big
21 problem, with the CRF is that the energy that we are
22 delivering to them now for which Eversource was paying, and I
23 use that euphemistically because they're not actually paying
24 it to us, so that \$3 and a half million, that to gets
25 calculated in calculation of the CRF.

1 So, in other words, if we produce energy in
2 January, let's say its again \$3 and a half million, and
3 Eversource applies that \$3 and a half million to the February
4 money to the extent that that \$3 and a half million of energy
5 is also overmarket that gets rolled into next year's CRF.
6 So, it just keeps adding in a lot of different ways. So,
7 again, that's why its hard to even imagine 2026, 2027 we
8 would dig out of that hole.

9 THE COURT: So, I'm buying that this was an
10 economic contract that the debtor needs to get out of. I
11 will hear about the public interest, but let's assume that is
12 met, that burden higher standard to the extent its applicable
13 is met. We still have the issue of how do we implement the -
14 - what is the legal basis for compelling Eversource to take
15 the ministerial steps needed by ISO New England to start the
16 transition to a new lead market participant.

17 MR. LEONETTI: I think it's a combination of 105,
18 542 and 362. It's our -- because what they are doing is --
19 and because they also control -- its not like we can run a
20 wire to the factory and send the power elsewhere. I mean that
21 would be great, but they also control the substation where
22 the electricity goes to.

23 I mean certainly, you know, if the contract is
24 rejected or terminated and they still refuse to do that there
25 is no opportunity to now say, okay, we are going to attach a

1 new electrical wire. So, that is the pickle that Eversource
2 has put us in and that is the reason why we are here today.
3 Again, I think the code is flexible enough. Certainly, you
4 know, if its rejected it's a necessary and logical flowing of
5 rejection that under those provisions of the code we now
6 control our property and we need to be able to deliver it.

7 THE COURT: Rejection is breach and the debtor
8 doesn't have to perform in the future.

9 MR. LEONETTI: Right.

10 THE COURT: That is what we know from Mission
11 Product, but that is different then -- why is it not -- why,
12 under Mission Product, can I compel the counter contract
13 party to the rejected contract to take a specific action?

14 MR. LEONETTI: Because its property of the estate
15 that they are interfering with.

16 THE COURT: That might be and that is not what you
17 said in your papers.

18 MR. LEONETTI: Well, it's certainly what I'm
19 saying now. I understand that. Again, Your Honor, we have
20 been wrestling with this because we haven't been able to find
21 any precedent and, you know, I can't point to a specific
22 provision of the code, but certainly it's not different then
23 if, you know, again, to my lease example let's say I lease a
24 piece of equipment and I reject the lease and they are in the

25

1 possession of the piece of equipment, that piece of equipment
2 belongs to me and I certainly can go get it.

3 You know, even maybe closer to home let's say they
4 control the only road that goes to the debtors' facility
5 under the terms of some long-term lease, you know, and that
6 road connects to the interstate and it's the only way I can
7 get off the property. There is also case law that a party --
8 state law goes back years, decades that you have to be able
9 to give someone access, you know, to a public highway. You
10 can't just block them in. It's the same thing here.

11 THE COURT: Okay. That is what I am struggling
12 with.

13 MR. LEONETTI: Your Honor, we have struggled with
14 this as well, but I think if you can take, again, 105, and
15 362, and 363, which we have asked for authority for the new
16 LMP agreement, and also 542 there is enough -- its property
17 of the estate that we need to now be able to deliver. Again,
18 it's just a ministerial act. We are not asking them to pay
19 any money. We are not asking you to compel them to pay any
20 money or to do anything. Its literally just going into CAMs
21 and entering a few little details.

22 I am happy to address the public interest test as
23 well.

24 THE COURT: Sure.

25

1 MR. LEONETTI: Okay. So, certainly our position
2 is that its not applicable. I certainly acknowledge, though,
3 that the case law is unsettled. There is no Third Circuit
4 precedent. There is contrary Fifth Circuit precedent. I
5 think the best place to start is with the Supreme Court's
6 decision in Beldisco that the only equities the Court can
7 consider is how they relate to the success of the
8 reorganization except to the extent there are specific
9 provisions of the code that address it.

10 We know that in connection with rejection of
11 collective bargaining agreements, for example, or airport
12 leases there are specific heightened standards, but there is
13 no such heightened standard with respect to power purchase
14 agreements. For that reason, I think exactly what the Court
15 did in Extraction Oil & Gas, which as Your Honor knows is a
16 case from this district bankruptcy court, that the public
17 interest test does not apply; although, I know that Judge
18 Sontchi went onto go through the standards anyway.

19 In any event, turning the public interest test,
20 Mirant, which is cited by Eversource, I think if you look at
21 that case, which they contend should be applied, the standard
22 that Mirant puts out there is exactly why the public interest
23 would weigh in favor of rejection here. Basically, the Court
24 there says that the public interest is met if rejection would
25 further the Chapter 11 goal of permitting successful

1 rehabilitation of the debtor and, secondly, the rejection
2 does not cause any disruption in the supply of electricity.

3 Number one, rejection would certainly further the
4 goal of rehabilitation. The lenders have committed to
5 finance us for a DIP through Chapter 11. They are committed
6 to support a process for either a sale or a debt for equity
7 conversion that would keep the debtors in business. And the
8 contrary is also true, failure to achieve rejection would
9 impair if not utterly destroy the goal of rehabilitation.

10 As to the second prong, which is disruption in the
11 energy markets, it's the same result which is not only would
12 rejection not cause any disruption in the supply of
13 electricity, but denying rejection would result in the
14 opposite. The 75 megawatts produced by the debtor would not
15 be available to the public. What Eversource posits is that
16 the public interest standard requires the debtor to keep the
17 power purchase agreement in place. Basically, they are
18 saying that the Court should deny rejection so that
19 Eversource can recover energy and refund it to the rate
20 payers who have already paid for this excess energy costs.

21 This argument is a chimera, Your Honor, frankly.
22 If there is no rejection there is no debtor to produce energy
23 because we are shut down. So, the public interest is served
24 by rejection because that then enables the debtor, it

25

1 releases us from burdensome obligations and allows jobs to be
2 preserved and energy to be produced and put on the grid.

3 I did want to respond as well, Your Honor, to
4 Eversource's 365(j) argument in their papers yesterday. And
5 its our position that 365(j) does not apply. 365(j) only
6 provides a lien on the interests of the debtor in such
7 property for the recovery of any portion of the purchase
8 price that such purchaser or party is paid.

9 The option agreement is not a contract to purchase
10 real property, it's an option agreement that is exercisable,
11 if at all, at some date ten years in the future. It may be
12 exercised, it may not be exercised, but it's not actually a
13 contract to purchase real property and that is what 365(j)
14 was designed to protect which is I show up to buy a piece of
15 property from my neighbor, I put down a deposit or maybe I
16 pay them in full, and two days later he declares bankruptcy.
17 That is what 365(j) was meant to protect.

18 If you look at the way the option agreement is
19 structured actually it defines purchase price and the
20 purchase price is the fair market value of the property minus
21 the value of the cumulative reduction and that is Section
22 4(a) of the option agreement. If you continue on and you
23 also look at Sections 2(a) combined with Section 4(a) you see
24 that the purchase price is not measured until the option
25

1 exercise period which is in 2033. So, again, there has been
2 no deposit made for the purchase of property.

3 There is some limited case law, one case that we
4 found overnight was In Re Waldron, which is at 36 B.R. 633,
5 its out of the Southern District of Florida Bankruptcy Court
6 in 1984. In that situation, it also involves an option. The
7 Court held that 365(j) is inapplicable since the sale of any
8 real property had not yet taken place.

9 There were two factors that were very similar to
10 that here which is that a contract for the sale of real
11 property will only occur at the moment that the party
12 exercises the option. There has been no exercise of the
13 option on the property and its not even exercisable, as the
14 option agreement makes clear, until 2033 if at all. And also
15 the Court there says that 365(j) was intended only to create
16 a lien on real property in favor of a non-possessory
17 purchaser to secure the amount of the purchase price already
18 paid.

19 Nor does Eversource have any other security
20 interests claims in the debtors' assets. There has been no
21 grant of security interest to them. Yes, there's a
22 subordination agreement with the senior lenders, but the
23 lenders are only subordinated in Eversource's right to
24 exercise a purchase option ten years again into the future.

25

1 If there is termination then they certainly won't have that
2 right.

3 Eversource doesn't have a lien on the energy
4 payments, or the recs, or the capacity payments. There is no
5 UCC that has been filed. There was a hearing in front of the
6 PUC, Your Honor, last week and that is Exhibit AA in our
7 exhibit binder. At page 37 of that transcript, you will see
8 that Eversource itself concedes that its not a secured
9 creditor.

10 THE COURT: I read that.

11 MR. LEONETTI: The last thing I would say, Your
12 Honor, and I do appreciate the Court's indulgence on these
13 points, is that all outcomes ultimately lead to the end of
14 the PPA. Its just a question of how we get there. The
15 motion to reject is granted, that is how we get there one
16 way. The PPA is deemed properly terminated by either this
17 Court or an arbitrator, at that point there is no more PPA,
18 or there is delay which is what Eversource wants. If there is
19 delay there is shutdown, if there is shutdown there is the
20 potential of Chapter 7. Then under 365(d)(3)(a) you will
21 have rejection by operation of law of the PPA. All roads
22 lead to the rejection of the PPA, Your Honor.

23 We are asking for the ability to have that
24 rejected now and to enable us to sell our electricity to

25

1 enable the debtors to survive to reorganize, which is the
2 fundamental purpose of the code.

3 THE COURT: Can you talk about *nunc pro tunc*?

4 MR. LEONETTI: Yes. So, one of the reasons -- so,
5 we filed it on day one. We understand that -- we felt, after
6 consulting with the U.S. Trustee that getting the rejection
7 heard on what would have been a legitimate first day was a
8 tall order, you know, to ask. We felt the parties definitely
9 needed to have the opportunity. I think its 14 days is what
10 you would typically have, but, you know, certainly *nunc pro*
11 *tunc* is allowed in rejection of executory contracts.

12 Frankly, if Eversource, when we spoke to them the
13 Monday before the last Tuesday hearing, had said, you know,
14 we need time for rejection but you guys can go sell LMP we
15 would have been fine with that. The fact that they haven't
16 been and they haven't allowing us to sell on the open market
17 is exactly why we need *nunc pro tunc* relief.

18 Now, I think one of the things the Court can
19 reserve is -- I read Eversource's argument that, well, its
20 not fair to require us to pay the debtors for energy between
21 the petition date and the date of the eventual rejection --
22 you know, that the Court ultimately enters an order
23 rejecting. Its almost like the use and occupancy in reverse,
24 which is the debtor is sitting there, its rejecting *nunc pro*
25 *tunc*, but its sitting in the landlord's property and its

1 using and occupying. It's the exact reverse here which is
2 they are using our energy.

3 I think one of the things the Court could do is it
4 could reserve for a later date what is the right payment that
5 Eversource should make for that energy between the petition
6 date and the date the order enters. Maybe there is a
7 different measuring stick, maybe it is not the contract
8 price, maybe it's a market price. But there certainly is an
9 ability for the Court to have a claims -- a process where the
10 parties can either negotiate or bring to the Court for
11 resolution what is the right amount. That is occasion, but
12 it doesn't counsel against *nunc pro tunc*.

13 THE COURT: So, I am just trying to understand
14 from the debtors' perspective what the *nunc pro tunc* does and
15 you are telling me it -- I am not sure what you are telling
16 me.

17 MR. LEONETTI: What I am telling you is that what
18 the *nunc pro tunc* does is, I think, it frees from any
19 argument that there is any kind of post-petition actions that
20 might give rise to an administrative claim by Eversource as a
21 result of whatever we have been doing for the past eight or
22 now, I guess, twelve days.

23 So, *nunc pro tunc* enables us to have a discussion
24 with Eversource. Again, this gets to the problem of energy,
25 right, which is its constantly going out. What *nunc pro tunc*

1 does is it gives us the ability to then say, okay, you know,
2 we are freed of this obligation effective as of the petition
3 date and so anything that arose between the parties arose
4 prepetition, any claims for rejection.

5 THE COURT: If that's what that does that they
6 could not possibly have a claim for an administrative --

7 MR. LEONETTI: And, again, I'm not asking the
8 Court to -- and maybe it does and maybe it doesn't, but we
9 are trying to get the entry of the order. That is why we
10 filed it on day one. I think it was filed even before the DIP
11 is my belief because we wanted to get it to make it clear
12 that we want to be freed of -- have this contract rejected,
13 if it hasn't been terminated, you know, effective as of the
14 petition date.

15 THE COURT: I am not sure I understand the
16 advantage and its just maybe me, but --

17 MR. LEONETTI: If its --

18 THE COURT: Go ahead.

19 MR. LEONETTI: -- not *nunc pro tunc* then there is
20 an argument that they can offset for the post-petition
21 energy.

22 THE COURT: Well, I don't know about the whole
23 offset thing. That is an interesting question and whether
24 you can offset or not. Why does that have to be decided
25 today? Why can't the *nunc pro tunc* aspect of it -- what is -

1 - why does that matter for today? Can't that be left for
2 determination later?

3 MR. LEONETTI: I think it could be. I think the
4 Court --

5 THE COURT: What does it impact today?

6 MR. LEONETTI: -- can order rejection today and we
7 can have later argument on whether it should be --

8 THE COURT: On when the effective date of that
9 should be because what the benefit to the estate of during
10 that period might be zero, it might be negative. You might
11 have a claim against Eversource, I don't know.

12 MR. LEONETTI: Right.

13 THE COURT: But they may have benefit to the
14 estate, you know, is the measure, right. So, Eversource may
15 have no claim for payment of any amount for that period of
16 time. I don't know, but I guess my question is what I the
17 reason I have to decide the effective date of the rejection
18 today.

19 MR. LEONETTI: You don't, Your Honor. You can --
20 if we get out of the -- if we get rejection and we get LMP
21 this is something that certainly can be saved for late
22 adjudication. Thank you.

23 THE COURT: Thank you.

24 MS. FROST-DAVIES: Your Honor.

25 THE COURT: Yes, Ms. Frost-Davies.

1 MS. FROST-DAVIES: I am happy to come up, Your
2 Honor. You are going to have to give me some grace because I
3 am not exactly sure what exhibits Your Honor has versus what
4 have. So, maybe the debtors can help me.

5 Your Honor, I would like to go to the purchase
6 agreement and I just don't know where that might be in Your
7 Honor's binders.

8 THE COURT: I have got them right here.

9 MS. FROST-DAVIES: This is going to be a heck of a
10 lot easier for us. So, Your Honor asked, as usual, the hard
11 but right question which is what would happen outside of
12 bankruptcy with us. So, my view is that you would first go
13 to Section 12.3 because I am going to start with termination
14 knowing that they dispute that. I am going to say that if
15 this -- you are going to go from termination that if this is
16 terminated then, Your Honor, the contract is terminated.

17 The LMP is pursuant to the contract so I am going
18 to start there and say its terminated. They had no ability to
19 be the LMP after that. And if what they do is stand in the
20 way outside bankruptcy you sue the heck out of them for
21 damages and inside bankruptcy, I say that is a violation of
22 the automatic stay. It is an intentional violation of the
23 automatic stay.

24 So, if the position for Eversource is that they
25 need notice beyond what they have been given and beyond

1 sitting here today to stand in the way of the debtors' LMP
2 rights, which are a pure asset of the estate, then, Your
3 Honor, I fully expect that the debtors will be moving on
4 expedited notice for a violation of the stay.

5 I also would bring Your Honor's attention to 9.7,
6 we will just flip there together. Its only for purposes,
7 Your Honor, of this PPA that Eversource is considered the
8 lien market participant. If they are not joined together,
9 even by rejection, this doesn't exist. So, all they are
10 doing now is just literally getting in the way and violating
11 the stay.

12 Your Honor, 11.3 --

13 THE COURT: Okay. 9.7, so you are saying 9.7 says
14 that that establishes that they are the lead participant, but
15 its for purposes only of the PPA and for no other purpose.

16 MS. FROST-DAVIES: That is my understanding. I am
17 getting a nod. All they have here, Your Honor, is a blocking
18 right and its not even a right; they are just blocking.

19 THE COURT: You wanted to go to 11 something.

20 MS. FROST-DAVIES: Yes, 11.3. If Eversource,
21 although it says here PSNH -- and, Your Honor, I have never
22 had a case where the Shakespearean rose was so important, but
23 if PSNH, I will go with the contract, doesn't fulfill its
24 obligations, and it does say purchase obligations, but they
25 are not fulfilling them, they are not paying those, they are

1 just taking, then the seller is free to sell any and all the
2 products to one or more third parties.

3 Now, Your Honor, I don't know that the debtor
4 would object to Eversource continuing to serve as LMP as long
5 as they pass the debtors' profits onto the debtors. By
6 profits I don't mean net or offset, that's another one. So,
7 you go to the PUC transcript the attorney for Eversource says
8 all my bankruptcy lawyers will be really mad if I use the
9 word "offset" they want me to use "netting." So, its another
10 of the choosing the word category.

11 Your Honor, I think that the contract clearly
12 allows the debtors to sell their energy and if not, I would
13 ask the debtors to have an intentional stay violation motion
14 heard on as short as notice as Your Honor would grant.

15 THE COURT: Thank you.

16 MR. BROWN: I didn't know if there were any other
17 proponents, but I'm happy to go.

18 THE COURT: I think we are ready for you, Mr.
19 Brown.

20 MR. BROWN: Thank you, Your Honor. Again, Tyler
21 Brown on behalf of PSNH.

22 Your Honor, I would like to start with where the
23 Court headed on its questions because I think it goes to the
24 heart of our objection to the motion, the LMP motion, which
25 is not only procedurally but substantively a problem. The

1 debtors would not, emphatically, have a right to seek to oust
2 PSNH under the PPA. Out of the exclusive LMP position it is
3 a contractual right that has vested property in our client.

4 So, what have they done in bankruptcy? Well, --

5 THE COURT: Explain that to me.

6 MR. BROWN: Sure.

7 THE COURT: Under this agreement they don't have
8 the right even if its terminated?

9 MR. BROWN: Well, we don't have a definitive
10 termination decision. They have taken the position it's been
11 terminated. We took the position there was a dispute about
12 the breach and the termination that had to go through the
13 dispute resolution process under the contract.

14 THE COURT: I understand that; although, I think
15 you have brought it right into my courtroom. So, I think
16 that Eversource has brought it right into my courtroom when
17 they didn't need to, but they have. So, I don't know about
18 the right to arbitration in those circumstances, but let's
19 assume for the moment this was terminated --

20 MR. BROWN: Okay.

21 THE COURT: -- are you saying that in that event
22 that Eversource could not be ousted from the lead market
23 participant position?

24 MR. BROWN: No. If the contract was terminated
25 there is no continuing contract right.

1 THE COURT: Okay. And what if its rejected.

2 MR. BROWN: Then there are continuing contract
3 rights because, as the Court noted, Mission Product provides
4 that rejection is breach, not termination. What the debtors
5 are asking you to do is take away a property interest from
6 PSNH. What is the property interest that we are talking
7 about? Its not a ministerial thing to serve as LMP. It is
8 the effect of being in that position to allow the contract to
9 play out the way its described, which is the energy price
10 paid is less then the excess cumulative reduction. That is
11 what they are entitled to be paid for the energy sold.

12 THE COURT: What difference does it make whether
13 they are the lead market participant or not in that
14 circumstance if somebody else is a lead market participant
15 and, in fact, Eversource was still entitled to that they are.

16 MR. BROWN: Okay. Well, we have a netting
17 mechanism versus a debtor that has apparently \$100,000 of
18 unrestricted cash, a real risk. So, what the contact
19 provides is our client is in a position to protect the
20 financial risk by being in that spot. Post-termination,
21 again, we lose that right. Post-rejection, however, we have
22 a property right that can't get displaced by merely
23 rejection. There may come a time, Your Honor, where all of
24 the money that we are entitled to flows through the contact
25 through the LMP.

1 THE COURT: Nothing is going to flow through it if
2 its rejected.

3 MR. BROWN: And the Court hasn't decided yet the
4 effective date of the rejection, but I --

5 THE COURT: Lets say its effective today --

6 MR. BROWN: Okay.

7 THE COURT: -- nothing is going to flow through it
8 after today.

9 MR. BROWN: We have --

10 THE COURT: How are you going to get your money
11 back?

12 MR. BROWN: Well, the money would, at least, be --
13 would come in there and be subject to being held until the
14 Court determines who is entitled to it, right.

15 THE COURT: Explain that to me. They are going to
16 stop production. The rejection, and let's say they stop
17 production and there's no energy sold.

18 MR. BROWN: Correct. Then there wouldn't be any
19 more energy sold. Remember, there is an income stream from
20 January that hasn't come in yet. There is February
21 prepetition that hasn't come in yet. There is February 9th
22 through today that hasn't come in yet. There is an income
23 stream that will come in and being in the position of LMP
24 does give us property interests that are important to protect
25 the ability to net those amounts.

1 Whether or not the Court will decide we can net
2 them post-petition is an issue, as you have said, that is not
3 up for today. There are prepetition rights that are still in
4 play and they are protected in favor of PSNH by being in that
5 LMP position.

6 Your Honor, let me come back, though, to how they
7 get there because we laid that out really clear in our
8 papers. Your Honor, they are seeking three things today. We
9 don't contest that they can enter into a contract with an
10 affiliate if they think that they are going to get the LMP
11 position they want to line that party up. That is not what
12 we are objecting to. What we are objecting to is the second
13 and third relief they are seeking which is compelling, i.e. a
14 mandatory injunction compelling us to take action we are not
15 obligated to take under the contract and then compelling us
16 to hold funds.

17 Your Honor, as we pointed out in our papers those
18 are 7001(a)(7) for injunction, 7001(a)(9) for declaratory
19 relief; those are adversary proceedings. And I --

20 THE COURT: Let's say they are, what process do
21 you think you would be getting that you're not getting today?

22 MR. BROWN: We would get substantive protections
23 under Rule 7065 to argue the standards for TRO.

24 THE COURT: You could argue them today. Why
25 didn't you argue them today?

1 MR. BROWN: We would like to present evidence with
2 respect to that.

3 THE COURT: We had a hearing.

4 MR. BROWN: We have a hearing on a first day
5 motion, not a complaint, not a motion for an injunction, Your
6 Honor.

7 THE COURT: And what process do you think you
8 wouldn't have gotten? Do you think I wouldn't have permitted
9 a witness to testify?

10 MR. BROWN: Your Honor, we are here, again,
11 without discovery, without an opportunity to brief those
12 issues.

13 THE COURT: Did you have discovery you needed for
14 today that you didn't get or that you asked me and they
15 didn't let you have?

16 MR. BROWN: Because, Your Honor -- we didn't ask
17 you because they are not here procedurally correctly and
18 they're looking to get substantive relief on an interim
19 motion. Its not merely a ministerial issue, its not really a
20 363, 105 issue. It's a taking away of property rights.

21 THE COURT: Well, you can see I'm troubled by
22 that, but I am also troubled by the positions that Eversource
23 is taking, quite frankly. I think you had a really bad day
24 in front of the commission last week, okay. I wish you
25 wouldn't be having a bad day here.

1 MR. BROWN: I agree with you, Your Honor. I
2 wouldn't want to have -- I don't want to have a bad day here
3 either, but what I think we are missing -- we are still
4 talking about, first, when they filed their LMP motion they
5 had not rejected the agreement, its still not rejected. We
6 have -- and in our view its still not terminated. You are
7 aware of the process that is required for termination in the
8 contract. It couldn't be clearer in 25.1 and 25.3 that any
9 dispute between the parties has to go through that process.

10 THE COURT: Yu brought that dispute here by
11 objecting to the rejection on these grounds.

12 MR. BROWN: And, Your Honor, we're happy to do it
13 by an adversary proceeding here, but it's not by a motion on
14 a first day hearing.

15 THE COURT: No, no, the rejection is by motion.
16 You could have stood back from the rejection and just said,
17 Whatever consequences flow from it flow, but you didn't. You
18 engaged on the rejection motion and you brought in front of
19 me issues that you say are subject to arbitration, but you
20 brought them here.

21 MR. BROWN: Again, Your Honor, if this Court is
22 going to be decide those issues, we don't think it's
23 appropriate to decide those issues today on an interim
24 motion.

25 THE COURT: Okay. So let's say they tee up on

1 adversary proceeding --

2 MR. BROWN: Yes, Your Honor.

3 THE COURT: -- which maybe they should have, and I
4 would have given them an expedited proceeding and we would
5 have had the hearing today and I would have made it co-
6 extensive, because we do that in Bankruptcy Court when it's
7 necessary, and I think it is here.

8 So maybe we have to do that. I'm -- what's your
9 reason that I shouldn't approve rejection? What's your
10 reason?

11 I guess I'm hearing nothing that it's okay to
12 permit entry into the lead market participant agreement as
13 long as there's no -- nothing compelling Eversource to take
14 any action.

15 MR. BROWN: Well, again, I think you're right,
16 Your Honor. Let me just respond to that as succinctly as I
17 can.

18 They can enter into an agreement. We're not
19 standing in the way of them entering into an agreement with
20 an affiliate, but them taking, actually taking the LMP
21 position is the loss of a property interest.

22 THE COURT: If there's a way that that can be
23 done, if the ISO, for example, were to permit it, well, then,
24 they do. So that would not be this Court.

25 MR. BROWN: Right, Your Honor.

1 But by virtue of compelling us to take action --

2 THE COURT: I'm not saying that I'm going to
3 compel Eversource to take any action.

4 I'm saying that if I'm entering an order
5 permitting the debtors to enter into a lead market
6 participation agreement, so they can start taking whatever
7 actions they think are appropriate to take with the ISO
8 and/or in court, here or elsewhere, then you don't have any
9 problem with that?

10 MR. BROWN: Well, the problem will be that ISO has
11 a problem with that; again, I'm not an ISO lawyer, Your
12 Honor.

13 THE COURT: You're not ISO.

14 So I don't know what ISO will or will not do when
15 faced with an actual order permitting them to enter into an
16 agreement with another entity.

17 MR. BROWN: Understood, Your Honor.

18 I guess that'll play out however that plays out.
19 But our objection to this is the compulsory mandatory
20 injunction that essentially they're asking you to decide.
21 And they said to you today, you don't need to reach the issue
22 whether it was properly terminated, and I certainly agree
23 with that.

24 So at this point, we'd have a right under contract
25 that we're being asked or stripped away from us by their

1 request and that's what Mission Products says doesn't happen.
2 It's under the contract. It's a right under the contract.

3 And it was put in place -- I hope it's become
4 clear to the Court why it was put in place -- it was put in
5 place to be sure during the course of the term, the excess of
6 a hundred million dollars that ratepayers have paid above the
7 market, would be captured. And then the purchase option was
8 meant as the secondary mechanism to cover the balance,
9 whether it's a hundred million or still above a hundred
10 million at the end of the term. That mechanism was there to
11 say, If you want to take the plant at the end of the term,
12 that's the way you recover the rest of the above market.

13 So these were critical pieces to the agreement
14 approved by the New Hampshire Public Utility Commission.
15 They didn't approve a contract that just simply says, You
16 sell above market and you'll never recover it. These were --
17 the LMP was the position that we were put in so that we could
18 best protect ourselves, so that we're not subject to the
19 credit risk of the debtors.

20 In the papers they filed yesterday, Your Honor,
21 they said, just give PSNH a claim. Well, a claim isn't very
22 valuable when their plan attached to their RSA says unsecured
23 creditors in Berlin get zero, nothing. So that's not
24 satisfactory.

25 And, again, going back to the whole reason why

1 that ECR provision and the netting provision is in there is
2 to give our client and, ultimately, the ratepayers, the
3 protection against that.

4 Your Honor, there have been suggestions that PSNH
5 isn't pay for power because they were able to offset or net
6 against the monies that were due. That's what the contract
7 says the price would be for the power; it would be reduced by
8 the ECR. It also contains a recoupment provision, as well,
9 Your Honor, in 10.3.

10 And, again, there was an opportunity to talk about
11 all of this. There was an opportunity to try to mediate all
12 this and, utility, whether it's arbitration or a decision,
13 they just blew past all of that.

14 Our exhibit -- Exhibit DD in your book is the
15 letter from one of my partners where we invoked the
16 resolution procedure. So, you know, rather than come running
17 to the Court and asking the Court to do something I don't
18 think the Court has the power to do under their present
19 papers, they had the opportunity to explore a resolution and
20 they didn't.

21 THE COURT: Well, how long is that resolution and
22 arbitration going to take? Let's be realistic. If the
23 company doesn't have the money --

24 MR. BROWN: Yes.

25 THE COURT: -- because ever -- I'll put it in the

1 way that Eversource would say it -- Eversource is exercising
2 its rights and exercising them, I will say, in a way
3 different than it represented to the Commission as to how
4 those rights would be exercised, and, therefore, there's no
5 time for a lengthy arbitration proceeding or to go through
6 mediation and then arbitration.

7 MR. BROWN: And I understand that, Judge. I
8 understand the realities of where we are, which is why we did
9 lead in our papers with, an adversary proceeding is the right
10 mechanism for this, but today is not the right mechanism.

11 So, you know, I realize the reality is they may
12 not be able to pay the costs and have the time for an
13 arbitration, so an adversary proceeding is an okay mechanism.
14 And their papers, their first day declaration, in the last
15 section of their first day declaration described the
16 adversary proceeding they intended to bring. They just chose
17 to bypass that process and come here on a first day motion
18 and that's, in large part, you know, what we object to, is
19 taking those property rights away in that context.

20 I do want to -- before Mr. Johnson was planning to
21 address the rejection issues and the heightened standard and
22 the retroactive, and I'll let him address that, Your Honor,
23 but there are, again, issues relating to the LMP in the
24 rejection. And maybe I've already made --

25 THE COURT: No, I'll hear that and then I'll hear

1 from Mr. Johnson.

2 MR. BROWN: Thank you.

3 Again, maybe I've already made the point, Your
4 Honor, but Mission Products, of course, says we don't lose
5 that right. So even if you reject, that still doesn't solve
6 the issue of we have not just a right to perform
7 prospectively, but we have financial rights in the stream of
8 income that's still coming in.

9 And then I want to mention, just very quickly,
10 the 365(j) issue we raised. Again, we're not asking you to
11 determine today whether or not a rejection damages claim,
12 which hasn't been filed, is a lien claim, a secured lien
13 claim and whether it has priority. We just wanted to alert
14 the Court that this isn't a panacea. The rejection doesn't
15 solve all their issues. We have other issues that are
16 important issues that need to get resolved.

17 It is clear in the contract in 4.1.6(c), it is
18 clear in the contract in the last sentence that that is a
19 claim. The cumulative reduction that is not paid by the end
20 of the term is a claim and it is a claim for money that
21 actually has been paid. It has been paid to the debtors.
22 It's calculated by the payments that were paid above market
23 and it is the purchase price, under the purchase option, is
24 stated to be the fair market value, less the cumulative
25 reduction that has not been repaid. So it is, in fact, a

1 payment toward the purchase price.

2 I find it hard to believe --

3 THE COURT: It may not exist in 10 years.

4 MR. BROWN: It may not, Your Honor.

5 THE COURT: So how is it a current payment today
6 if it doesn't exist in 10 years?

7 MR. BROWN: I didn't say it was an allowed --
8 well, let me back up.

9 It is a payment that has been made that is for a
10 prospective exercise of a purchase option. But it is an
11 executory contract by their assertion. It is a contract for
12 the sale of real estate. It just hasn't occurred yet. I
13 totally agree with that.

14 And we may be arguing later, what's the value of a
15 purchase option that's breached and the value of the payments
16 towards the purchase price that have, in fact, been paid when
17 it's not exercisable until the twentieth year? That's not
18 before the Court. I just simply wanted to alert the issue,
19 that issue was --

20 THE COURT: It may never be exercised.

21 MR. BROWN: It might not. It might not, that's
22 right. But if it's not exercised, it is a -- there is a
23 claim in the case for the ECR.

24 THE COURT: Well, that's an interesting question.
25 If it's never exercised, because -- for whatever reason,

1 maybe because Eversource decides not to exercise that option,
2 is it recoverable under anything other than against the
3 purchase price? Is there a claim for it? I don't know.

4 MR. BROWN: And it's a -- and those are some tough
5 questions and I simply wanted to raise it because I wanted
6 folks to know that rejection doesn't solve all of these
7 issues.

8 THE COURT: It may not, but what does no rejection
9 do?

10 MR. BROWN: You know, I certainly understand why
11 they want to walk away from performing, because it,
12 undoubtedly, is selling energy at a price that allows us to
13 recover what we're entitled to be paid. I get that. It's
14 untenable. I understand that.

15 But we are obligated, in our view, to perform, in
16 accordance with that PPA that was approved by the Commission
17 and that PPA requires us to actually offset the ECR against
18 the payments. That's where we are, and until we're told that
19 it's been terminated, that's what our approved terms are.

20 And so, we are stuck a bit in a position that we
21 have to net -- we have to recoup those funds, because that's
22 what the contract was that was approved by the Commission.

23 Thank you, Your Honor.

24 THE COURT: The Commission may think it -- view it
25 a little differently, or they may not. They just raise

1 questions; like me, I raise lots of questions, too, right,
2 so...

3 MR. BROWN: Yes.

4 Let me turn the podium over to Mr. Johnson. Thank
5 you.

6 THE COURT: Uh-huh. Thank you.

7 MR. JOHNSON: Thank you, Your Honor.

8 Russell Johnson, here on behalf of the Public
9 Service Company of New Hampshire.

10 THE COURT: Mr. Johnson?

11 MR. JOHNSON: Your Honor, I won't spend a lot of
12 time here because a lot of this has already been addressed,
13 but I just want to make clear, the Public Service Company of
14 New Hampshire is a party. They believe they're still a party
15 to a power purchase agreement, the PPA, and, you know, the
16 Court can make its own decision and, obviously, it will, on
17 rejection.

18 But while being a party to that, as Mr. Brown
19 stated -- and I don't want to belabor the point -- but they
20 do have an obligation to try to recover the ECR. They do,
21 under the contract, for the ratepayers, right. They entered
22 into a contract. The Commission -- the New Hampshire Public
23 Utilities Commission put conditions on that contract; said,
24 You have to recover the above market.

25 I know the witness testified he wasn't sure about

1 whether (indiscernible), but the ECR is \$172 million after 10
2 years into the contract. That only gets to that point
3 because the power being purchased was above market.

4 So, we can't, as a utility that's regulated by the
5 Public Services Commission, and a party to a contract, just
6 say, We're not going to enforce our rights, Your Honor.
7 We're just going to walk away from this.

8 So, when you say, Why do we oppose rejection, we
9 have an obligation to our ratepayers who have paid this
10 money. This 172 million was paid, okay, so that's -- if you
11 ask why we're here, that's why we're here, okay, for --

12 THE COURT: What do you think opposing rejection
13 is going to get the ratepayers, your customers?

14 MR. JOHNSON: Your Honor, that's a good question.
15 I guess in the endgame, it just depends on what relief is
16 done in the rejection, right. There was a very broad order
17 proposed with the rejection order.

18 The 64 million that's left, I think we agree that
19 *nunc pro tunc*ing that to another day or the date of rejection
20 makes sense because there are some issues with that, right,
21 regarding the costs. But the 64 million in ECR is probably
22 gone, right. Either way, it's either gone based on rejection
23 or if they ever say in the contract it's gone because they're
24 going to shut down and there's nothing we can do about that.

25 But with respect to the \$100 million, which is

1 obviously not an issue for today, as long as it's not
2 affected by the rejection order, we'll deal with that later,
3 right. So, it really depends on what the rejection order
4 provides, I think, is the best way to answer your question on
5 that.

6 Yes, the net result if it's rejected, the 64
7 million is gone. But we can't just say, Go ahead and reject
8 the contract. We're not going to oppose it.

9 What does that look like to our ratepayers, that
10 we just sat on our contractual rights? I don't think it's --
11 it's what we can do as a public -- we're a regulated public
12 utility company and we've taken a position on that.

13 So with respect to --

14 THE COURT: So are you abandoning your argument
15 that there's a higher standard or that the higher standard
16 hasn't been met?

17 MR. JOHNSON: No, I'm not abandoning that
18 argument. I'm just simply, in response to your question,
19 addressing the reality of it. I do think -- and the other
20 reason for asserting this is the ratepayers aren't here,
21 right. There is the State of New Hampshire on the phone, or
22 somewhere, but the ratepayers aren't being represented, so we
23 filed an objection to say, Look, that should be considered in
24 the rejection.

25 But, ultimately, the result of that is they lose

1 anyway.

2 THE COURT: Are Eversource's customers co-
3 extensive with the ratepayers of New Hampshire or the
4 interests of New Hampshire?

5 MR. JOHNSON: There's -- the Public Services of
6 New Hampshire is, I think, the largest utility, by far, in
7 New Hampshire. But only the ratepayers of the Public
8 Services of New Hampshire are on the hook for this 170, or
9 now, 164 million. Ratepayers of Colonial Gas and other New
10 Hampshire utilities, no, they're not going to take a hit for
11 this. It's just the ratepayers of the Public Services of New
12 Hampshire.

13 THE COURT: Well, didn't the -- and I just want to
14 understand your public interest argument, then, because
15 Eversource has raised this heightened standard for the public
16 interest. What's the argument that it's not in the public
17 interest to this contract to be rejected -- the two
18 contracts, I guess, to be rejected?

19 MR. JOHNSON: Right. I guess the answer to that
20 is understand that if the contract is not rejected, the
21 statement is, Oh, they're going to shut down. But that
22 doesn't mean the contract is rejected, right.

23 This case would presumably go to a Chapter 7
24 Trustee if converted and there would still be a PPA in place
25 that that trustee could possibly market now. Whether there's

1 any value to that or not, I don't know.

2 THE COURT: How could it be marketed if Eversource
3 is still the lead market participant and capturing all of the
4 income and the revenue generated by it?

5 MR. JOHNSON: Once again, it would be a discussion
6 between the Public Services and the Chapter 7 Trustee as to
7 whether there was some way to reach a deal, such as what we
8 tried to do with the lenders over the weekend.

9 To answer your question, that would be all that's
10 left, right. If it's rejected then this goes to a Chapter 7
11 Trustee. If other things go differently or eventually
12 because the plant is, you know, may not operate or
13 (indiscernible) to a sale or whatever, that issue is gone,
14 right. I mean, if you reject it now --

15 THE COURT: Right. And you think the Chapter 7
16 Trustee is going to operate a power plant?

17 MR. JOHNSON: It doesn't have to operate the power
18 plant.

19 I know that the limited testimony we have today is
20 that it will go, and that's all that's before Your Honor -- I
21 get that. I'm not sure I completely agree with that, but
22 that's the evidence --

23 THE COURT: That's the testimony.

24 MR. JOHNSON: I know, that's the evidence before
25 the Court, Your Honor. So, yeah, I don't know. I don't know

1 the answer to that.

2 THE COURT: Yeah, if this case converts --

3 MR. JOHNSON: And the other --

4 THE COURT: -- the trustee would have to ask for
5 permission to operate. It would shut down. Where would the
6 money come from? It's -- there's a whole host of issues that
7 I just don't see.

8 MR. JOHNSON: Right.

9 And, Your Honor, I know you've already -- we've
10 already passed this, but one of the arguments in our papers
11 is about why the heightened standard should apply -- I
12 understand we're past that now -- is the contract actually
13 says that. I mean, Section 24.3 talks about a FERC review
14 being required for disputes, material disputes in the
15 contract. So they agreed to that. I mean, that's in
16 Section 24.3 of the contract.

17 THE COURT: Well, they agreed to the standard.
18 They didn't agree that, perhaps, it's not met.

19 MR. JOHNSON: Right.

20 THE COURT: So even if I say, okay, that's the
21 standard, at least the couple of cases I read would suggest
22 the standard has been met --

23 MR. JOHNSON: Right.

24 THE COURT: -- it's met here.

25 You know, I'm just looking at the objection. In

1 the rejection objection, you're saying the disputes are
2 subject to binding arbitration.

3 The PPA has not been terminated, I guess, as a
4 basis for the -- that it shouldn't be rejected?

5 MR. JOHNSON: Rejection is different than
6 terminated. So, I don't -- I don't believe that -- no, the
7 Bankruptcy Code allows them. This isn't a situation where we
8 say the FERC has exclusive jurisdiction. I don't think
9 the -- you know, that's what we're arguing here today. But,
10 no, Your Honor has the ability to reject, even though I don't
11 think it's been terminated.

12 THE COURT: Okay. Thank you.

13 MR. JOHNSON: Thank you, Your Honor.

14 MS. FROST-DAVIES: Your Honor, Julia Frost-Davies.

15 If Your Honor will indulge me, I will be brief,
16 but I want to answer one of Your Honor's questions and, also,
17 I have an answer to one of mine. I'm with Your Honor, when
18 you have rejection, it is not a termination; it's a breach.

19 And so where does that send us? Mission Products
20 sends us to the contract and that sends us to state law, and
21 that's what we look at.

22 With Your Honor's permission, because I do not
23 have it printed, but we will get it to Your Honor, I did ask
24 regulatory counsel, what is an LMP?

25 Is it -- because you know where I'm going -- is it

1 a property right? Because Mission Products, as we all know,
2 derives from saying, if you transferred, you know, trademark,
3 copyrights, anything that's not a 365(n) protected, can you
4 then rip that out of the counterparty's hands?

5 So that made me ask the question. So, I'd be
6 interested to hear the answer, because the -- may I read from
7 the ISO definition, Your Honor?

8 THE COURT: Certainly.

9 MS. FROST-DAVIES: Okay. And we'll provide this
10 to Your Honor.

11 "Lead market participant, for purposes other than
12 the forward-capacity market," which is the energy market, "is
13 the entity authorized to submit, supply offers, demand bids,
14 demand reduction offers, baseline" -- I'll give you the other
15 things they can submit -- "the lead market participant is the
16 entity designated to participate in that market on behalf of
17 existing capacity resource or a new capacity resource."

18 So, regulatory counsel, you know, has provided me
19 with a definition that says this is an authorization. This
20 is really a facilitation for how these things --

21 THE COURT: It sounds sort of like an agent.

22 MS. FROST-DAVIES: Correct, Your Honor.

23 Which, last time I checked, is not a property
24 interest. So, I'd just like to share that as we think about
25 what might happen next. So that was the question that I had

1 when Your Honor asked about Mission Products.

2 Your Honor also asked what does rejection do and
3 what does it do to the ratepayers? And Your Honor is crystal
4 clear on this, but I just want my view out there, loud and
5 clear. What it does is -- I'm sorry, you said if there's no
6 rejection -- what happens if there's no rejection?

7 No rejection kills the case and it kills it today.
8 There's no ability to fund one more day into this. So if
9 it's not rejected -- and what does it do for the ratepayers?

10 Nothing, Your Honor. It doesn't do anything.
11 They won't be generating the power that this side of the
12 house feels they're entitled to set off against.

13 Your Honor, the other point I wanted to make is
14 with process. And I am a student of process. I appreciate
15 process and due process. If Your Honor tells us we have to
16 do an adversary proceeding, I don't know if we can. I don't
17 know if we have any more money to go past today.

18 And if you're hearing a bit of frustration in my
19 voice it's because the settlement discussions, we sent a
20 counter over on Saturday and that was the end of it. And,
21 instead, what did we do? We spent all the money that could
22 have been used to reach a resolution on every lawyer in this
23 courtroom.

24 And setting an adversary proceeding, if that's
25 where they want to go, I don't think we're going to get a

1 resolution in between. There'll be discovery. There'll be
2 documents.

3 No one asked us for discovery. No one asked
4 Mr. Leonetti for discovery. There is not a witness from
5 Eversource in this courtroom. And so, I'm really not sure
6 what insisting on an adversary proceeding gets them, except a
7 backdoor way to kill the company.

8 I want to spend one minute not talking about
9 Eversource. I want to talk about everybody else. You can
10 see by virtue of the fact that I'm sitting with debtors'
11 counsel that we are aligned on a path forward. That was not
12 always the case. And Mr. Vomero, I think, probably doesn't
13 always appreciate my views, although, I think sometimes he
14 does -- and we've had some very hard and tough
15 conversations -- but we're here and we're here on a very
16 fragile resolution to save a distressed asset in a city that
17 really has no other alternatives.

18 This involved getting together our lenders, who
19 are the fulcrum and who are -- I'm not even going to say what
20 kind of hit they'll be taking on their claim, Your Honor. I
21 told you before and I'm straight with you. It's razor-thin
22 as to whether we go forward at this point. It just is.

23 It saves jobs. It saves vendors. We have a plan
24 that pays GUCs in full, except for the party that's trying to
25 get in our way.

1 So when I said this morning I was sad walking in
2 here, this is what's making me sad, and I hope to leave here
3 not so sad. Thank you, Your Honor.

4 THE COURT: Thank you.

5 MR. LEONETTI: I have nothing to add. Ms. Frost-
6 Davies addressed the two issues that I was going to raise in
7 terms of, (A), it's not a property right, and, what's the
8 consequences of that?

9 THE COURT: Yeah, I'm not sure that it's a
10 property right either, but I don't know, okay. I just don't
11 know that it is or is not a property right.

12 Okay. I'm going to take 15 minutes.

13 One of the reasons that I had objections due
14 yesterday at noon, rather than sometime before, was because I
15 hoped the parties would be spending their time and money on
16 the resolution of this and not focused on filing objections,
17 and also, because people become more solidified when they
18 start working on objections and filing objections.

19 But I'm going to take a few minutes and see where
20 I end up. So, thank you.

21 We're in recess.

22 COUNSEL: Thank you, Your Honor.

23 (Recess taken at 11:49 a.m.)

24 (Proceedings resumed at 12:20 p.m.)

25 THE CLERK: Please rise.

1 THE COURT: Thank you. Please be seated.

2 Okay. What's in front of me are two, at the
3 moment, are two motions: the motion to reject the power
4 purchase agreement and the motion to enter into a new lead
5 market participant agreement to reject the power purchase
6 agreement and the option agreement. I think the facts are
7 pretty much not in dispute and what it's boiled down to is
8 legal argument on the standards and on process.

9 Starting with the motion to reject, there are
10 three pieces to the motion to reject. There's the request to
11 reject the two agreements. There is the request that that be
12 made on a *nunc pro tunc* basis. And there's a request that I
13 order Eversource, yes, to cooperate with the debtors to
14 effectuate the rejection of the contract by taking what the
15 debtor calls are "ministerial steps" through the ISO New
16 England system to permit a different lead market participant
17 to act on behalf of the debtors before the ISO.

18 In terms of the standard for rejection, whether
19 it's the business judgment standard or the higher, public
20 interest standard, I find that the evidence is clear and
21 undisputed that the debtors have met both of those standards.
22 The debtors' business judgment is clear. The testimony of
23 Dean -- of Mr. Vomero is unrebutted, that this is an
24 uneconomic contract, that the debtors will not be able to be
25 operating cash flow positive in the circumstances where

1 Eversource set offs, nets, recoups -- whatever -- proceeds of
2 energy sales against the CRF. And, again, that's unrefuted.
3 The testimony is also unrefuted that the debtor has less than
4 \$100,000 in unrestricted funds, that the debtor will have to
5 shut down the facility if the contract is not rejected and if
6 they are unable to enter into new arrangements. So the
7 debtors' business judgment is unrefuted.

8 In terms of the higher standard, looking at the
9 FirstEnergy Solutions Corp. case, 945 F.3d 431 (6th Cir.
10 2019) at page 445, they discuss the Mobile-Sierra standard
11 and the Court says:

12 "Even Sierra, which held that a contract may not
13 be said to be either unjust or unreasonable, simply because
14 it is unprofitable to the public utility also recognized a
15 different outcome when the rate is so low as to impair the
16 financial ability of the public utility to continue in its
17 service."

18 And in the dissent in Sierra, Justice Stevens
19 says, even while dissenting:

20 "Only if the rate was so low that the seller might
21 be unable to stay in business, thereby impairing the public
22 interest, could the seller be excused from performing its
23 contract."

24 When I look at the standard and the testimony that
25 we've received today, it's unrebutted that the debtor will be

1 going out of business. The plant will be shut down. This is
2 not an eight-day maintenance, scheduled maintenance type of
3 shutdown; it's a permanent shutdown. And that is more than a
4 very real likelihood and a very real possibility if the
5 debtor is not permitted to reject this contract and, quite
6 frankly, take other actions, as well, that it would need to
7 take. So I find that even the higher standard is met if it's
8 applicable.

9 So if the request were simply an order permitting
10 rejection, that would be easy, and I would permit the
11 rejection and I would enter such an order. The *nunc pro*
12 *tunc*, I think both parties have already said, that could be
13 held for another day, so I won't address that issue.

14 The real issue is, can I compel on this motion to
15 reject Eversource to cooperate with the debtors to effectuate
16 the rejection of the contract and I see no basis in the Code
17 for me to grant that relief. I find it unfortunate that I
18 can't do it on this motion, but I don't think I can.

19 And the debtors provided me with no authority.
20 105, I do not think, can be stretched to that extent,
21 especially in light of Mission Products and what that case
22 teaches us, that rejection is merely a breach.

23 I think what I can do is, in paragraph 8, the
24 current paragraph 8, I can authorize ISO New England and
25 other governmental authorities to take whatever actions they

1 think are necessary to effectuate the relief here. I'm not
2 ordering them to do anything, but I can authorize them to
3 take whatever actions they feel would be appropriate, in
4 light of the rejection.

5 So the order on the rejection cannot be entered in
6 the form that it's been submitted, but I will authorize
7 rejection of the contract based on the unrebutted evidence.
8 We save *nunc pro tunc* for another day and we form the order
9 to the ruling I just made.

10 Similarly, on the new lead market participant
11 agreement, I think the debtor has met its burden to show that
12 it would be in its best interests to obtain a new lead market
13 participant. And that testimony is very clear that
14 Eversource is standing in the way of the debtors being able
15 to positively monetize their energy sales.

16 The proceeds from the sales are not winding up in
17 the hands of the debtors, so it is in the debtors' best
18 interests to get a new lead market participant and to, if
19 necessary, post security with the ISO that makes the new lead
20 market participant creditworthy in the eyes of the ISO. And,
21 again, the testimony is unrebutted on that front.

22 But once again, I cannot order the Public Service
23 Company of New Hampshire or Eversource to cooperate
24 immediately with the debtors to effectuate the transfer of
25 the lead market participant agreement. I don't see anything,

1 again, that's been cited to me as a basis in the Code that I
2 can provide that relief on this motion.

3 So, I can provide half a loaf, which may be no
4 loaf, and I recognize that, and, again, I think that's
5 unfortunate because I think the prospect of the plant
6 shutting down does not only harm Eversource's customers, who
7 will not have a source to recoup the overpayments that
8 they've made over the last 10 years, but the current
9 employees may very well be out of jobs. The town may suffer
10 a tax loss. And to the extent, though I didn't have
11 testimony on this, that the energy generated by this facility
12 is necessary, it won't be there.

13 So I don't see the benefit to the public interest.
14 I don't see the benefit to Eversource's customers by a
15 shutdown.

16 So, what can I do? I can entertain an emergency
17 motion for violation of the stay, enforcement of the stay,
18 some other emergency motion that shall tailored to what the
19 Court can do. An adversary could be filed. An emergency
20 request for an injunction. It could be here. It could be in
21 the State Courts of New Hampshire.

22 And I would caution parties to think long and hard
23 about actions that they're taking because the damage to the
24 debtors could be their enterprise value. And while I'm not
25 making a ruling on whether there is currently a violation of

1 the automatic stay, and I want to see the briefing on that if
2 parties are going to put it in front of me, setoff requires
3 relief from the stay. Exercising control over property of
4 the estate is a violation of the stay. And I'm making no
5 ruling, but I think it would be appropriate for me or some
6 other court to entertain emergency relief, given the
7 circumstances, the dire circumstances here.

8 I don't know that the lenders would be willing to
9 fund it and I understand that. And I don't know that it will
10 be successful, because I don't have the briefing in front of
11 me, but I think people should pause.

12 So that's what I can do on these two motions. So,
13 do you want a break to think about what you want to do next
14 or are we ready to go into the next? I do have a hearing at
15 2:00 and we're going to take a break for that and I'm hoping
16 that one is resolving.

17 MR. LEONETTI: Subject to Eversource's view, we
18 think a break would be productive.

19 Thank you, Your Honor, for a ruling and your
20 guidance. I think that, hopefully, will be helpful here.

21 I just wanted to add for the record, because,
22 again, I just don't want there to be any misconceptions on
23 Eversource's part, in addition to the items you noted, you
24 know, as Mr. Vomero's testimony, we're producing, at full
25 capacity, seventy-five to \$100,000 a day in energy, and to

1 the extent there's a stay violation, that would be -- or some
2 other -- that would be included in our panoply of damages.

3 THE COURT: It could be.

4 And, again, whether there's any benefit to the
5 estate, so that Eversource would have a claim, I don't know
6 that there would be. Again, I'm not ruling on it, but what's
7 the benefit to the estate of producing energy for which it
8 does not see dollars in cash? And a reduction of a future
9 credit, I don't see how that benefits the estate, especially
10 if this company goes out of business? It's worth zero, so
11 what's the benefit to the estate?

12 MR. LEONETTI: Exactly, Your Honor.

13 THE COURT: Okay. So how much time would you
14 like?

15 MR. LEONETTI: Twenty minutes or so, until
16 1:00 p.m.

17 THE COURT: Certainly.

18 We'll take a break until 1:00.

19 MR. LEONETTI: Okay. Great. Thank you.

20 THE COURT: We're in recess.

21 (Recess taken at 12:36 p.m.)

22 (Proceedings resume at 4:31 p.m.)

23 THE CLERK: Please rise.

24 THE COURT: Please be seated.

25 MR. LEONETTI: For the record -- yes, thank you,

1 Your Honor -- Kenneth Leonetti for the -- proposed counsel
2 for the debtors.

3 Thank you, Your Honor, for the time. We have used
4 it productively. Unfortunately, time being what it is, we
5 have not used it completely yet.

6 So there is a joint proposal that the parties have
7 been working on. Eversource has taken it back to their --
8 Eversource's attorneys, I should say, has taken it back to
9 their client for approval, but, we've, unfortunately, run out
10 of daylight today on it. And so our suggestion -- but we
11 don't want to delay much. This is, as I said before, I mean,
12 this is costing us seventy-five to \$100,000 a day, as I know
13 Your Honor appreciates.

14 So here's where our suggestion is, which is we've
15 told them that, you know, if we hear from them by noon
16 tomorrow, we have a deal. If we don't have a deal, the
17 debtors intend soon thereafter, probably Friday,
18 realistically, because I'm mindful of spending legal fees
19 unnecessarily, it will probably file a variety of papers, an
20 adversary proceeding with a request for a TRO, a motion for
21 violation of the stay, a motion for turnover, and there may
22 be others, all with a request for hearing on shortened
23 notice.

24 We've imposed on Your Honor's schedules a lot over
25 the last two weeks and believe me, it is very much

1 appreciated on behalf of my client, and I know on behalf of
2 everyone's clients.

3 And then, a hearing, hopefully, next -- well,
4 hopefully not a hearing next week -- but if necessary, a
5 hearing, subject, of course, to the Court's schedule, a
6 hearing next week on both, whatever we file with the request
7 for shortened notice, as well as a continuation of all
8 motions that haven't been yet heard today.

9 THE COURT: Well, I was going to ask about that.

10 So I take it whatever the discussions are -- and I
11 don't need to know the details -- would resolve everything
12 that's pending?

13 MR. LEONETTI: Yes. The goal is for peace in the
14 valley, as I like to call it.

15 THE COURT: Okay.

16 MR. LEONETTI: And then the lenders have agreed to
17 a carve-out -- (indiscernible) carve-out?

18 MS. FROST-DAVIES: May I, Your Honor?

19 THE COURT: Please.

20 MS. FROST-DAVIES: I was trying to stand up, but I
21 wanted to give you accurate information.

22 Ken, may I take the podium for one moment?

23 MR. LEONETTI: Yes.

24 MS. FROST-DAVIES: Your Honor, Julia Frost-Davies,
25 counsel to prepetition noteholders, proposed DIP lenders.

1 I do have a representative for one of the
2 noteholders here who's been working with us on the proposal.
3 We would recommend to our client an additional carve-out from
4 the restricted cash of half a million dollars to bring us to
5 next week.

6 For the sake of good order, I need to obtain the
7 approval of our other two noteholders, which I do not believe
8 will be withheld, but I do need to tie that up. So we will
9 reach out immediately after this hearing, assuming that the
10 schedule Mr. Leonetti proposed is acceptable to Your Honor.

11 THE COURT: Okay. Thank you.

12 MS. FROST-DAVIES: Thank you.

13 THE COURT: Yes, client approval is important.

14 (Laughter)

15 MR. LEONETTI: And then the last thing is, we
16 would request, at the Court's convenience, a status
17 conference at some point tomorrow afternoon. We can either
18 report, hopefully, if there's a deal, or if not, a plan for
19 what we need to do and when we plan to file it.

20 THE COURT: Okay. And that's all we're talking
21 about is a status report tomorrow?

22 MR. LEONETTI: Correct. No argument on anything.

23 And if we could have that -- schedule --
24 scheduling, right; obviously, we would want to talk to if we
25 had to go forward.

1 And, if possible, we would request that it be
2 telephonic?

3 THE COURT: Yes.

4 MR. LEONETTI: Great, thank you.

5 THE COURT: Yes, okay.

6 So what time do you propose?

7 MR. LEONETTI: 2:00? 3:00?

8 Oh, I think Your Honor has a 3:00 p.m. hearing, I
9 heard.

10 THE COURT: I have a 3:00 p.m. meeting commitment.

11 MR. LEONETTI: Understood. Of course, yes.

12 THE COURT: But --

13 MR. JOHNSON: 2:00?

14 MR. LEONETTI: 2:00?

15 THE COURT: 2:00? 2:30?

16 I want to make sure you all have enough time to
17 speak with your clients.

18 MR. JOHNSON: 2:00 or 2:30 works for us, Your
19 Honor.

20 THE COURT: Okay. Why don't we say 2:00 and if it
21 needs to be pushed back for some reason, you all will let me
22 know.

23 MR. LEONETTI: Okay.

24 THE COURT: We'll do 2:00.

25 Please get a notice out immediately of a status

1 conference by Zoom.

2 MR. LEONETTI: Okay.

3 THE COURT: And people will have -- can sign up
4 for that, I guess, by let's say 10:00 in the morning. Get
5 that notice out. They can sign up by later than that, by
6 noon --

7 MR. LEONETTI: Okay.

8 THE COURT: -- okay, for the 2 o'clock hearing.
9 It's last-minute. Just make sure you get on the list for the
10 registration.

11 MR. LEONETTI: And then we spent the break also
12 drafting, but we need to -- I know we need to share it with
13 people -- we have a draft of revised orders on the rejection
14 motion and on the LMP motion, which, once we -- if it's
15 deemed acceptable to everyone, we would do it -- we would
16 submit it on a certification of counsel basis.

17 THE COURT: Okay. Let me ask you, I know earlier
18 I had an attorney -- I have forgotten his name, I
19 apologize -- from this state.

20 Okay. Is Mister -- I'm sorry, give me the name
21 again --

22 MR. LEONETTI: Dell'Orfano.

23 THE COURT: -- Dell'Orfano in the loop or not in
24 the loop?

25 MR. LEONETTI: Not in the loop.

1 THE COURT: Not in the loop, okay.

2 Because he did join into the venue motion --

3 MR. LEONETTI: Right.

4 THE COURT: -- so please -- I don't know how much
5 of a loop he wants to be, but please, if it's necessary and
6 he wants to be, get him in the loop, as well. Obviously, you
7 need to have client's approval first. I understand.

8 MR. LEONETTI: Understood. Okay.

9 Thank you, Your Honor. We will.

10 THE COURT: Okay. Thank you.

11 MR. LEONETTI: Ms. McClamb reminded me, your
12 ruling on the LMP motion, was that on an interim basis or a
13 final basis?

14 THE COURT: I'm not sure that I know the effective
15 difference between an interim and a final --

16 MR. LEONETTI: Right.

17 THE COURT: -- in that circumstance.

18 MR. LEONETTI: Nor do I, so...

19 THE COURT: I guess I would -- did it get noticed
20 out on an interim basis?

21 MR. LEONETTI: Yes.

22 THE COURT: Well, then I think it should be
23 interim, but again, sort of once it's done, I'm not sure what
24 happens. But it was noticed on an interim, let's make it an
25 interim.

1 MR. LEONETTI: Okay. The horse is kind of out of
2 the barn.

3 THE COURT: Kind of.

4 MR. LEONETTI: Yes, okay.

5 And that's all there is.

6 THE COURT: Anything else?

7 MR. LEONETTI: Thank you.

8 THE COURT: Okay. Thank you, then.

9 We are adjourned and I will see you virtually
10 tomorrow at 2:00.

11 COUNSEL: Thank you, Your Honor.

12 THE COURT: Thank you.

13 (Proceedings concluded at 4:39 p.m.)

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CERTIFICATION

1
2 We certify that the foregoing is a correct
3 transcript from the electronic sound recording of the
4 proceedings in the above-entitled matter to the best of our
5 knowledge and ability.

6
7 /s/ William J. Garling

February 22, 2024

8 William J. Garling, CET-543
9 Certified Court Transcriptionist
10 For Reliable

11
12 /s/ Mary Zajaczkowski

February 22, 2024

13 Mary Zajaczkowski, CET-531
14 Certified Court Transcriptionist
15 For Reliable

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