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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

September 7, 2010 - 9:08 a.m.
Concord, New Hampshire

RE: DE 09-174
PUBLIC SERVICE CO. OF NEW HAMPSHIRE:
Petition for Declaratory Ruling
regarding Penacook Lower Falls.

PRESENT: Commissioner Clifton C. Below, Presiding
Commissioner Amy L. Ignatius

Sandy Deno, Clerk

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

Reptg. Briar Hydro Associates:
Howard M. Moffett, Esq. (Orr & Reno)
Susan Geiger, Esq. (Orr & Reno)

Reptg. PUC Staff:
Matthew J. Fossum, Esq.
Steven E. Mullen, Asst. Dir./Electric Div.

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

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1 P R O C E E D I N G

2 CMSR. BELOW: Good morning. I'll open
3 this hearing in DE 09-174. On September 18th, 2009,
4 Public Service Company of New Hampshire filed a petition
5 seeking a declaratory order with respect to its 1982 Power
6 Sale Contract with Briar Hydro Associates, which is the
7 successor in interest to New Hampshire Hydro Associates,
8 in a 30 year contract for the purchase and sale of output
9 from the Penacook Lower Falls Hydro Project. Back on
10 July 16th, the parties, Public Service Company of New
11 Hampshire, Briar Hydro Associates, and Commission Staff
12 recommended a procedural schedule that was approved on
13 July 19th, and later modified on July 26th. On
14 August 3rd, Chairman Tom Getz recused himself or sent a
15 letter indicating that he would not participate in the
16 hearings or deliberations on the issue raised by the
17 Petition for a Declaratory Ruling. And, so, the
18 procedural schedule set today as a hearing.

19 And, we'll start by taking appearances.

20 MR. EATON: For Public Service Company
21 of New Hampshire, my name is Gerald M. Eaton.

22 CMSR. BELOW: Good morning.

23 MR. MOFFETT: Good morning,
24 Commissioners. I'm Howard Moffett, from Orr & Reno,

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1 representing Briar Hydro Associates. With me from our
2 office is Susan Geiger, and, from Briar Hydro Associates,
3 Richard Norman, Harry Wolf, and Steve Hickey.

4 CMSR. BELOW: Good morning.

5 MR. FOSSUM: And, good morning. Matthew
6 Fossum, from the Staff of the Public Utilities Commission.
7 And, with me today is Steven Mullen, from Commission
8 Staff.

9 CMSR. BELOW: Good morning. And, do the
10 parties have a plan on how to proceed?

11 MR. EATON: I hadn't discussed this with
12 Attorney Moffett, but I'm going to put on our witness,
13 Richard Labrecque. Have him summarize his -- first of
14 all, have him identify some exhibits, summarize his direct
15 testimony, and summarize his rebuttal testimony, so that
16 we won't be jumping -- putting him on after Mr. Moffett
17 puts on his witness, Mr. Norman. However, we'd like to
18 reserve the right, after Mr. Norman testifies, if
19 something new comes up that wasn't addressed, that we
20 could do some redirect or some additional rebuttal of
21 Mr. Labrecque.

22 CMSR. BELOW: Very good. So, you can
23 proceed to call your witness.

24 MR. EATON: I'd like to call Richard C.

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[WITNESS: Labrecque]

1 Labrecque to the stand please.

2 (Whereupon Richard C. Labrecque was duly
3 sworn and cautioned by the Court
4 Reporter.)

5 RICHARD C. LABRECQUE, SWORN

6 DIRECT EXAMINATION

7 BY MR. EATON:

8 Q. Mr. Labrecque, would you please state your name for the
9 record.

10 A. My name is Richard C. Labrecque.

11 Q. For whom are you employed?

12 A. Public Service of New Hampshire.

13 Q. What is your position and what are your duties?

14 A. I'm the Manager of Supplemental Energy Sources. My
15 duties primarily relate to the administration of
16 interconnection agreements and purchase power contracts
17 with independent power producers.

18 Q. Have you previously testified before this Commission?

19 A. Yes.

20 Q. Do you have in front of you a document, with a cover
21 letter under my signature, dated "September 18th,
22 2009"?

23 A. Yes.

24 Q. Could you please describe that document.

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[WITNESS: Labrecque]

1 A. Actually, why don't you give me a copy of it please.

2 (Atty. Eaton handing document to the

3 Witness.)

4 BY THE WITNESS:

5 A. This is a Petition for Declaratory Ruling that PSNH

6 filed related to the contract dispute at issue here in

7 this docket.

8 BY MR. EATON:

9 Q. Is your affidavit attached to that?

10 A. Yes.

11 Q. And, what other attachments, if any, are attached to

12 that document?

13 A. There's a copy of the contract between PSNH and New

14 Hampshire Hydro Associates.

15 MR. EATON: Your Honor, could we have

16 that marked for identification as "Exhibit 1"?

17 CMSR. BELOW: Be so marked.

18 (The document, as described, was

19 herewith marked as Exhibit 1 for

20 identification.)

21 MR. EATON: My copy seems to be missing

22 the first page of the contract, but I believe that it's

23 also contained as an attachment to the next exhibit.

24 BY MR. EATON:

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[WITNESS: Labrecque]

1 Q. Mr. Labrecque, do you have in front of you a document
2 with a date of "January 25th, 2010"?

3 A. Yes.

4 (Atty. Eaton handing document to the
5 Witness.)

6 BY MR. EATON:

7 Q. And, could you please describe that document.

8 A. This is a Stipulation of Facts, the result of both
9 parties coming to agreement on some facts that could be
10 presented to the Commission.

11 Q. And, could you describe the two attachments to that
12 document.

13 A. A copy of the contract is attached, and a copy of a
14 spreadsheet that includes some details on the
15 administration of the contract from its conception in
16 October of 1983. Continuing on through, including some
17 forecasted production from the hydro facility, through
18 the end of the contract in September of 2013.

19 MR. EATON: Could we please have this
20 marked as "Exhibit 2" for identification?

21 CMSR. BELOW: It will be so marked.

22 (The document, as described, was
23 herewith marked as Exhibit 2 for
24 identification.)

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[WITNESS: Labrecque]

1 CMSR. BELOW: And, I might add, our
2 Exhibit 1, the copies that we have, do have the first page
3 of the contract as well.

4 BY MR. EATON:

5 Q. Mr. Labrecque, do you have a copy of your prefiled
6 testimony in front of you?

7 A. Yes.

8 Q. And, that's attached to a cover letter dated "May 14th,
9 2010"?

10 A. Yes, it is.

11 Q. Did you prepare this testimony?

12 A. Yes.

13 Q. Is it true and accurate to the best of your knowledge
14 and belief?

15 A. Yes.

16 Q. Do you have any changes to make to it?

17 A. No.

18 Q. And, if you were asked those questions today, you would
19 answer them the same way?

20 A. Yes.

21 MR. EATON: May the prefiled testimony
22 of Mr. Labrecque be marked as "Exhibit 3" for
23 identification?

24 CMSR. BELOW: It will be so marked.

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[WITNESS: Labrecque]

1 (The document, as described, was
2 herewith marked as Exhibit 3 for
3 identification.)

4 BY MR. EATON:

5 Q. And, do you have your rebuttal testimony in front of
6 you, Mr. Labrecque?

7 A. Yes, I do.

8 Q. And, when is that dated?

9 A. August 25th, 2010.

10 Q. Did you prepare this testimony or was it prepared under
11 your supervision?

12 A. Yes, I prepared it.

13 Q. Do you have any corrections to make to that testimony?

14 A. No.

15 Q. Is that testimony true and accurate to the best of your
16 knowledge and belief?

17 A. Yes.

18 Q. And, if you were asked those questions today, you would
19 answer the same way?

20 A. Yes.

21 MR. EATON: Could we have that
22 identified as "Exhibit 4"?

23 CMSR. BELOW: So marked.

24 (The document, as described, was
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[WITNESS: Labrecque]

1 herewith marked as Exhibit 4 for
2 identification.)

3 CMSR. IGNATIUS: Commissioner Below, can
4 I just clarify one item on exhibits, I may have missed it.
5 The Stipulation of Facts that was filed on January 25th --

6 CMSR. BELOW: Yes.

7 CMSR. IGNATIUS: -- is just the
8 Stipulation. Some exhibits that I think Mr. Labrecque was
9 discussing that go to it, we had filed separately and
10 received separately on January 26th. Are they a combined
11 Exhibit Number 2 or is that a separate exhibit?

12 MR. EATON: I copied them together. We
13 have extra copies, if you would like that.

14 CMSR. IGNATIUS: I have them. I just
15 want to make sure I know when we're referencing, are they
16 -- should we combine the January 25th and 26th submittals?

17 MR. EATON: Yes, that was -- I had an
18 oversight on my part to file exhibits on the 25th, so I
19 filed the exhibits on the 26th. But they should all be
20 considered to be "Exhibit 2".

21 CMSR. IGNATIUS: Thank you.

22 CMSR. BELOW: That's what we'll do.

23 BY MR. EATON:

24 Q. Mr. Labrecque, could you please summarize your direct

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[WITNESS: Labrecque]

1 testimony in Exhibit 3?

2 A. Yes. The issue being disputed here is whether or not
3 an adjustment to the recovery mechanism that was built
4 into the Contract terminates at a certain date
5 following the recovery of some excess payments. My
6 prefiled testimony presents our interpretation of what
7 we consider to be simple administrative terms contained
8 within the document that was executed by the parties in
9 1982. The dispute really centers on two sentences in
10 the Contract, in Article 3.D.1. The first sentence is
11 a clear, concise description of how the Contract should
12 be administered, and I'll read it: "Beginning with the
13 ninth Contract year, and continuing for the term of the
14 Contract, a recovery amount equal to 5.47 cents per kWh
15 shall be deducted from the Contract rate."

16 In our discussions with Briar Hydro
17 Associates that led to our filing of the Petition, we
18 understood their interpretation to be that the second
19 sentence in that section is somehow to be interpreted
20 as a term of Contract administration. We don't feel
21 that it is. The second sentence reads: "This
22 deduction allows Public Service to recover the payments
23 made under Section A, Article 3, which exceeded the
24 index price." While that statement may be explanatory

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[WITNESS: Labrecque]

1 or somehow provide some color to the first sentence,
2 it's not a -- it's not a Contract term that could be
3 administered.

4 One of the problems we have with Briar
5 Hydro's interpretation of that Article D.1 is the fact
6 that the Contract does not include a discount rate with
7 which either party would administer an end date to the
8 recovery mechanism, the 5.47 cents. Without a discount
9 rate noted in the Contract, there would be no way to
10 perform that calculation, even if that calculation were
11 considered to be a term of the agreement, which PSNH
12 feels it is not. So, and a lot of the record of this
13 case, there's discussion about when the full recovery
14 would have been made and how one would do that
15 calculation and which calculation is more appropriate,
16 which party has presented the proper calculation. And,
17 PSNH's argument is that no such calculation is
18 required. That its -- Article D.1 is simple in its
19 statement that this recovery shall "continue for the
20 term of the Contract."

21 There's another article in the Contract
22 that I think is important to note: Article 10, titled
23 "Prior Agreements Superseded". I'll read it: "This
24 Contract with Attachment A represents the entire

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[WITNESS: Labrecque]

1 agreement between the parties hereto relating to the
2 subject matter hereof, and all previous agreements,
3 discussion, communications, and correspondence with
4 respect to the said subject matter are superseded by
5 the execution of this Contract." PSNH's interpretation
6 of this article is simple: That the nine-page document
7 that both parties executed in 1982, from that date
8 forward, represents, in its entirety, the agreement
9 reached between the parties. Again, there is a lot of
10 further evidence in the record in which the parties --
11 that the parties exchanged related to the intent of the
12 negotiating parties back in 1981 or 1982. It's our
13 position that none of that is relevant, given Article
14 10, and given the fact that we have a nine-page
15 Contract that represents the full agreement between the
16 parties.

17 That notwithstanding, we did exchange
18 discovery related to the intent of the parties. And,
19 there was no evidence that the parties intended for
20 this recovery to end at a certain date, evidenced by
21 the fact that they didn't discuss that in the Contract.
22 The Contract, other than the lack of a discount rate
23 with which to administer such a provision, the Contract
24 doesn't address a situation in which full recovery of

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[WITNESS: Labrecque]

1 the excess payments had not occurred as of the
2 termination of the 30 year Contract. For example, if,
3 in the final 10 or 15 or 20 years of the Contract's
4 term, the hydro facility had minimal production, maybe
5 had had some extended outages, to the extent where full
6 recovery of excess payments during the initial eight
7 years had not occurred, there are no terms in the
8 Contract that would address how PSNH's customers would
9 be made whole in that situation. So, it's
10 inconceivable that, without terms to address that
11 condition, explicit terms, we should be inferring terms
12 that would require an early termination of the
13 adjustment.

14 My prefiled testimony also touched on
15 the topic of why Briar Hydro might have executed this
16 Contract in 1982. And, I included an exhibit to my
17 testimony that showed how these various terms of the
18 Contract worked, the various adjustments, but also
19 included in that exhibit was our then current forecast
20 of PSNH's incremental energy costs, which at the time
21 were forecasted to escalate significantly. There were
22 -- there is an article in the Contract that, to the
23 extent PSNH's incremental energy costs ever exceeded 9
24 cents, future pricing under the Contract would be

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[WITNESS: Labrecque]

1 indexed to that incremental energy cost. And, under
2 the forecast that we had back in 1982, that article of
3 the Contract would have kicked in somewhere around year
4 nine. And, by the year 30 of the Contract, payment
5 rates to Briar Hydro would have been over 40 cents per
6 kWh. And, it is PSNH's belief that this -- this
7 forecast was in the minds of the parties at the time
8 that this Contract was executed. And, it may have been
9 -- may have been given significant weight by New
10 Hampshire Hydro Association in their election to
11 execute this Contract, even though it had in it terms
12 and conditions that could provide for the situation in
13 which we find ourselves right now. Whereby, for the
14 final few years of the Contract, they're receiving a
15 rate of 3.53 cents per kWh.

16 PSNH is here protecting the interests of
17 our customers. We have a Contract that goes through
18 September of 2013, at a rate of 3.53 cents, under our
19 interpretation of the Contract. That has material
20 value to PSNH's customers, and we're here to ensure
21 that Contract terms that aren't explicitly in the
22 Contract won't be inferred and will result in economic
23 harm to our customers.

24 I believe that summarizes my prefiled

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[WITNESS: Labrecque]

1 testimony.

2 Q. As long as we're there, are you looking at the last
3 page of Exhibit 3?

4 A. Yes.

5 Q. And, when was this page presented to New Hampshire
6 Hydro Associates?

7 A. March 19th, 1982.

8 Q. And, was there anything that also went along with this
9 sheet that you can tell from the cover page, the letter
10 from Mr. Lyons?

11 A. There was a statement regarding the 5.47 cent recovery
12 rate on the cover sheet.

13 Q. And, this accompanied the Contract that was to be
14 executed?

15 A. Correct.

16 CMSR. BELOW: Just to clarify that
17 point. The cover letter says "two copies of the subject
18 contract". Is that the transmittal of the actual Contract
19 that was actually executed, to the witness's knowledge?
20 Or, was that an earlier draft?

21 WITNESS LABRECQUE: I can't say either
22 way.

23 CMSR. BELOW: Okay.

24 WITNESS LABRECQUE: This letter was in
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[WITNESS: Labrecque]

1 our files. The Contract itself was executed, I believe,
2 April 28th. I don't know if the actual execution had a
3 different cover letter with it than this March 19th
4 version. I can't say either way.

5 BY MR. EATON:

6 Q. And, could you please summarize your rebuttal
7 testimony.

8 A. Yes. My rebuttal testimony reiterates our belief that
9 Article 10, "Prior Agreement Superseded", should be
10 given significant weight in this proceeding. And, that
11 much of the discovery and the discussions related to
12 the intent of the parties, while interesting, is not
13 relevant to contract interpretation.

14 In my rebuttal of Briar's testimony, I
15 draw attention to the fact that PSNH's belief is that
16 the entire argument, Briar Hydro's entire argument is
17 centered around the second sentence of Section D.1,
18 which states: "This deduction allows PSNH to recover
19 payments made under Section A, Article 3, which
20 exceeded the index price." PSNH interprets this
21 section merely as a descriptive sentence of the intent
22 of the recovery mechanism. Certainly in no way
23 provides for a clear and concise term with which to
24 administer an end date to that recovery mechanism.

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[WITNESS: Labrecque]

1 Again, I point out the lack of a
2 discount rate in the Contract, and the fact that the
3 Contract does not address the situation in which there
4 is a shortfall in recovery of excess payments prior to
5 the normal termination of the Contract.

6 I also provide some rebuttal to the
7 Briar testimony in which Briar is attempting to paint
8 PSNH as the "drafter" of the Contract, we were
9 "inflexible" on terms, we were "unyielding" on certain
10 points. And, these are essentially quotes from the
11 Briar testimony. They also said that "Briar was
12 presented with a "take it or leave it" situation." I
13 don't believe these types of arguments are relevant to
14 the discussion. And, they must be considered in light
15 of the fact that this is a commercial transaction
16 entered freely by both parties, executed by both
17 parties.

18 In the Briar testimony, they also make a
19 number of statements that implies or states explicitly
20 that they did not, at the time, nor did they today
21 understand some of the terms, some of the adjustment
22 mechanisms in the Contract. And, again, I rebut that
23 those are irrelevant arguments. Perhaps an attempt to
24 evoke some kind of sympathy, painting Briar Hydro as a

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[WITNESS: Labrecque]

1 victim. Again, I feel that's irrelevant to
2 interpreting a contract.

3 I rebut some of the Briar Hydro
4 testimony which states that "Section C of the Contract
5 is not relevant." And, as I described previously,
6 Section C provided for a potential escalation in
7 Contract pricing, that, given the forecast that was
8 being used at the time, would have led to some extreme
9 pricing that would reach higher than 40 cents per
10 kilowatt-hour in the final Contract year. I believe
11 that that potential for upside, in conjunction with all
12 the other terms and conditions of the Contract, was
13 what led to execution of the Contract.

14 I rebut a statement made in the Briar
15 testimony that states that "The intent of the recovery
16 adjustment was to recover front-end excess payments,
17 not to enrich PSNH in the bargain." So, I'd like to
18 point out that PSNH is here protecting the economic
19 interest of its customers. It would be Briar Hydro
20 that would be enriched if Contract terms were to be
21 inferred that do not exist within the nine-page
22 Contract.

23 The Briar testimony gives a considerable
24 amount of discussion on the history or the derivation

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[WITNESS: Labrecque]

1 of the 5.47 cent per kWh adjustment. Even to the point
2 of stating "I can find no evidence that contains
3 mathematical calculations to support the adjustment of
4 5.47 cents per kWh." I'll point out that, regardless
5 of the existence of any evidence or mathematical
6 calculations, it's the Contract term that must be
7 administered; 5.47 cents is the adjustment as contained
8 in the executed Contract.

9 Also, during discovery, PSNH provided to
10 Briar Hydro a copy of a mathematical calculation, in
11 which the 5.47 cent per kWh figure was derived. And,
12 it was a simple present value calculation, with an
13 assumed interest rate of a 2 cent payment for eight
14 years, followed by a 5.47 cent deduction in the
15 remaining 22 years. And, that calculation, of course,
16 assumed uniform annual hydro production. And, both
17 parties were at risk if that turned out to not be the
18 case. If hydro production in the first eight years was
19 significantly higher than in the final 22 years,
20 obviously, the mathematics that derive the 5.47 cent
21 deduction would no longer be correct. But, both
22 parties executed the deal, knowing that there was risk
23 on either side of that calculation.

24 I also rebut in the Briar testimony

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[WITNESS: Labrecque]

1 discussion related to what I would call the "second
2 phase" of this argument. The first phase being whether
3 or not any form of calculation is required; and it's
4 PSNH's testimony that it is not. But, even if that
5 calculation were of interest, how would it -- how would
6 it be done? And, Briar's belief that -- Briar believes
7 that the "excess payments" referred to in the Contract
8 are 1 cent per kilowatt-hour during the first eight
9 years, not 2 cents per kilowatt-hour. And, my rebuttal
10 attempts to prove that the Contract includes two
11 distinct and separate adjustment mechanisms that Briar
12 Hydro is attempting to condense into one, for the
13 purposes of determining when the 5.47 cent deduction
14 should be terminated.

15 The first deduction involves Section A,
16 which increases the Contract rate by 2 cents for eight
17 years, and Section D.1, which reduces the rate by 5.47
18 cents "beginning in the ninth Contract year and
19 continuing for the term of the Contract." The second
20 adjustment mechanism is entirely contained in Section
21 D.2 of the Contract, which provides for a 1 cent per
22 kWh rate decrease in the first eight years, and a 0.67
23 cent rate increase in the 9th through 20th Contract
24 years. These are two separate adjustment mechanisms

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[WITNESS: Labrecque]

1 that were included in the Contract. The 2 cents and
2 the 5.47 cents are matched, they go together. The 5.47
3 cents and the 2 cents was the present value calculation
4 assuming uniform hydro production. The 1 cent and the
5 0.67 cent adjustment, I can't speculate as to the
6 intent or the history of that adjustment, except to say
7 that it is a separate adjustment. It was -- it was
8 administered in its entirety for the first eight years
9 and the subsequent 12 years. And, in PSNH's belief,
10 it's not a subject of dispute in this Contract
11 discussion.

12 The Briar testimony feels otherwise.
13 The basis for that argument is that Section A includes
14 a sentence "This rate is subject to the adjustment
15 provided for under Section D.2." And, apparently, it's
16 the phrase "is subject to" that Briar Hydro interprets
17 as "incorporating the adjustment of Section D.2 into
18 Section A." And, my rebuttal is that "is subject to"
19 serves only to clarify that both adjustments act in a
20 cumulative manner, they're additive, and that neither
21 one supersedes the other.

22 In addition, Section D.2 is a
23 stand-alone section. If the drafters had intended for
24 them to work as one, they would have drafted the

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[WITNESS: Labrecque]

1 Contract as such; they did not.

2 My rebuttal ends with a summary of our
3 position, that Briar is attempting to convince the
4 Commission to infer Contract language that does not
5 exist, in order to provide for an economic windfall to
6 the project owners. To do so, you'd have to infer a
7 discount rate in order to effect the calculation. A
8 discount rate does not appear in the Contract. The
9 Contract also doesn't include terms and conditions
10 related to a condition by which a full recovery of
11 excess payments had not occurred by the end of the
12 term. That's my rebuttal.

13 Q. Mr. Labrecque, is there a discount rate associated with
14 the 1 cent adjustment and the 0.67 cent repayment?

15 A. No, there is not.

16 Q. How did that work?

17 A. For the first eight years of the Contract, 1 cent per
18 kWh was subtracted from the Contract price. Then, for
19 the subsequent 12 years of the Contract, 0.67 cents was
20 added to the Contract price, with a contingent clause
21 that, in any one year of the 12 years, no more than
22 one-twelfth of a economic value of the 1 cent during
23 the first eight years will be provided for. And, in a
24 number of years, that meant that the 0.67 cents

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1 terminated one or two or three months prior to the end
2 of the calendar year. And, in other years, it was in
3 effect for the entire calendar year. But it was
4 administered on a nominal basis, under clear terms of
5 administration that were contained within that article
6 in the Contract.

7 Q. Do you have anything to add to your testimony?

8 A. No, I do not.

9 MR. EATON: The witness is available for
10 cross-examination.

11 CMSR. BELOW: Okay. Mr. Moffett.

12 MR. MOFFETT: Thank you. Good morning,
13 Mr. Labrecque.

14 WITNESS LABRECQUE: Good morning.

15 CROSS-EXAMINATION

16 BY MR. MOFFETT:

17 Q. I would like to ask you just a couple of questions
18 about your qualifications. The one-page Attachment 1
19 to your prefiled testimony. And, I have copies of it
20 here, if that makes it easier for you to follow.

21 MR. MOFFETT: This is already a part of
22 an exhibit that's been marked, so I don't think we need to
23 mark it separately.

24 BY MR. MOFFETT:

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[WITNESS: Labrecque]

- 1 Q. I would just like to be sure I have some of the dates
2 approximately right, Mr. Labrecque. When did you
3 actually begin working for PSNH?
- 4 A. April or May of 2009.
- 5 Q. 2009?
- 6 A. Correct.
- 7 Q. And, prior to that time, you worked for Northeast
8 Utilities from 1992 to 2009, is that correct?
- 9 A. Correct.
- 10 Q. And, during the first approximately seven years of that
11 period, from 1992 to 1999, you were doing Nuclear
12 Safety Analysis for Northeast Utilities?
- 13 A. Correct.
- 14 Q. And, then, in 1999, you switched over to doing
15 Wholesale Power Contracts?
- 16 A. Correct.
- 17 Q. From 1999 to 2009?
- 18 A. Yes.
- 19 Q. Right. As part of your Wholesale Power Contracting,
20 were you doing power contracting with PURPA qualifying
21 facilities, what we might call "QFs"?
- 22 A. In part, yes.
- 23 Q. In part. Okay. And, was that true from the beginning,
24 in 1999, or did you take that on gradually during that

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[WITNESS: Labrecque]

1 1999 to 2009 period, the QF Contract?

2 A. Gradually.

3 Q. Okay. So, your familiarity with the QF power market
4 would date from sometime during the period between 1999
5 and 2009? Is that correct?

6 A. Yes.

7 Q. But, in any event, you weren't working for PSNH in
8 1982, when this particular contract was signed, is that
9 right?

10 A. That's correct.

11 Q. And, you weren't -- you weren't dealing with QF power
12 contracts in any other job in 1982, when this Contract
13 was signed?

14 A. Correct.

15 Q. So, is it fair to say that, whatever you have to say
16 about market conditions for QF power purchase
17 agreements in 1982 is not based on your own direct,
18 personal knowledge?

19 A. Correct.

20 Q. Okay. I would like to ask you to turn back now to your
21 rebuttal testimony, which I believe has been filed as
22 -- or, excuse me, has been marked as "Exhibit 4".

23 MR. MOFFETT: And, just as a
24 clarification, Commissioner Below, and for the reporter,

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1 would you prefer us to mark Briar Hydro exhibits
2 separately, in numbered sequence, or do you want them put
3 together, so that both the PSNH exhibits and the Briar
4 exhibits are numbered sequentially?

5 CMSR. BELOW: We can just maintain the
6 sequence we've started.

7 MR. MOFFETT: Okay. So, that's fine.

8 BY MR. MOFFETT:

9 Q. If you would, Mr. Labrecque, turn to Page 2 of your
10 testimony, your rebuttal testimony of August 25th.
11 And, you've talked a little bit about this in your
12 direct testimony in response to Mr. Eaton. But you
13 focus, in Lines 9 through approximately 16, on Article
14 10, which is the merger clause in the Agreement. And,
15 if I understand your argument, you're arguing that
16 Article 10 of the Contract makes any testimony about
17 the intention of the parties back in 1982 irrelevant
18 and inadmissible? Is that the gist of your testimony?

19 A. Yes.

20 Q. Okay. Now, I'd like to refer you to the Stipulation
21 that the parties filed on January 25th and 26th of this
22 year. And, I believe that's been marked as "Exhibit
23 2".

24 MR. MOFFETT: And, I have extra copies

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1 of that, if anyone needs them. Okay.

2 BY MR. MOFFETT:

3 Q. I'd like to have you turn to Page 2, and just read the
4 -- not the entire Paragraph 7, but just the first
5 sentence of Paragraph 7 of the Stipulation?

6 A. Paragraph 7 begins --

7 Q. In the Stipulation.

8 A. Correct.

9 Q. On Page 2 of the Stipulation, would you please read the
10 first sentence of Paragraph 7.

11 A. "The parties disagree on the interpretation of
12 Paragraph 3.D.1. PSNH" --

13 Q. Yes, that's far enough.

14 A. Is that --

15 Q. Yes. And, then, would you turn to the next page, and
16 just read Paragraph 10?

17 A. Ten?

18 Q. Paragraph 10.

19 A. "The parties disagree about the interpretation and
20 effect of the pricing adjustments [contained] in
21 Article 3.A and Article 3.D.2 during the first eight
22 Contract years."

23 Q. Fine. Now, Mr. Labrecque, as you know, this is -- this
24 is not the first case that the Commission has heard

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[WITNESS: Labrecque]

1 recently involving this 1982 Contract. There was an
2 earlier case, which grew out of DE 07-045. And, I want
3 to show you some language from an order of the
4 Commission in that case.

5 MR. MOFFETT: And, I do not intend to
6 mark this as an exhibit, Commissioners, because it's in
7 the record of the previous case, but I have copies for you
8 here.

9 BY MR. MOFFETT:

10 Q. Mr. Labrecque, would you turn to Page 12 of this order,
11 which is the order following briefs in DE 07-045. And,
12 it is Order Number 24,804, dated November 21, 2007. At
13 the bottom of Page 12, the Commission is talking about
14 terms of the Contract that are disputed between the
15 parties. Each of the parties contends that specific
16 language in the Contract means different things. And,
17 the burden, the gist, of the paragraph at the bottom of
18 Page 12, and continuing onto the top of Page 13, is
19 that, when you cannot tell "within the four corners of
20 a document" -- "within the four corners of a contract"
21 what the clear meaning is, it's appropriate to refer to
22 what we call "extrinsic evidence"," and the Commission
23 called it "the documents associated with, and the
24 circumstances underlying, the contract." That's at the

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1 end of that paragraph at the top of Page 13. Have I
2 got the gist of that approximately right?

3 A. I can't comment on whether you do or you don't.

4 Q. All right. In any event, you would agree, I take it,
5 that this whole issue of whether or not Article 10, the
6 merger clause, essentially renders irrelevant and
7 inadmissible extrinsic evidence or testimony about the
8 intention of the parties? Would you agree that that's
9 a legal issue for the Commission?

10 A. Yes.

11 Q. Yes. Okay. That's fine. Now, Mr. Labrecque, if you
12 would, let's go back to your rebuttal testimony. At
13 Pages 10 and 11, you focus on what you indicate is a
14 key -- a key dispute between the parties in this case.
15 The Q&A on Page 10 and 11 concerns whether or not the
16 excess payments in the first eight Contract years
17 amounted to 1 cents a kilowatt-hour or 2 cents a
18 kilowatt-hour.

19 MR. MOFFETT: And, I'd like now to look
20 with you at some exhibits that we've prepared that deal
21 with the Article 3 Contract language. And, I've got
22 blowups of these three exhibits that I want to -- that I
23 want to put up for the Commission to see. We also have
24 smaller pages that we can put. But this first one I'd

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1 like to have marked as -- I think it would be "Exhibit 5",
2 am I correct?

3 CMSR. BELOW: Yes. Do you have copies
4 for the clerk and the court reporter?

5 MR. MOFFETT: I do. Let me get you
6 those copies.

7 CMSR. BELOW: Okay. So, we'll mark this
8 page as "Exhibit 5".

9 (The document, as described, was
10 herewith marked as Exhibit 5 for
11 identification.)

12 BY MR. MOFFETT:

13 Q. Now, Mr. Labrecque, I want you to take your time, if
14 you need to, and satisfy yourself about this. But I
15 will represent that this is a direct quote, these are
16 excerpts that are direct quotes from Article 3 of the
17 Contract. And, they track exactly the language of the
18 Contract that the parties agreed in the Stipulation
19 were relevant to the dispute between the parties. And,
20 just that we refer to it, these are the Contract terms
21 that are set out in Paragraph 6 of the Stipulation of
22 Facts between the parties. If you'll follow me just
23 briefly, the first paragraph way out at the left-hand
24 margin is the initial paragraph of Article 3. That's

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1 followed by the complete quote of Article 3.A. Okay.
2 Hang on, I'll get this. Yes, here we have Article 3.A.
3 That's followed then by Article 3.B. That's the
4 complete Paragraph 3.B in the Contract. There's an
5 ellipse to indicate that Paragraph C is not included
6 here. And, the reason it's not included is that
7 Article C -- excuse me, Paragraph C, Article 3.C, dealt
8 only with the situation in which PSNH's incremental
9 energy costs would exceed -- 96 percent of PSNH's
10 incremental energy costs would exceed the index price.
11 That never happened. Am I right about that?

12 A. Correct.

13 Q. Okay. That then takes us to Paragraph D, and we have
14 Paragraph D, with D.1 and D.2. Now, there's some
15 additional language at the end of D.2, but that, again,
16 is not relevant, because that dealt with a situation
17 that did not occur under the Contract.

18 So, in sum, or in summary, this exhibit
19 represents the provisions in the Contract "Pricing"
20 article, Article 3, that the parties agreed in the
21 Stipulation were relevant to the dispute between the
22 parties. Are you with me on that?

23 A. Yes.

24 MR. MOFFETT: Okay. Now, the second

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1 exhibit that I have here is a chart. And, we may get
2 caught for space here. I want to make sure that the
3 witness and the Commissioners can see this, but -- and,
4 I'm going to put up one more exhibit. And, if it blocks
5 anybody's view, we can look at it. But let me put up both
6 exhibits now, so that we can just go back and forth
7 between them. And, I have copies of both of these for
8 everybody.

9 And, if I may, Mr. Chairman, I'd like to
10 have the middle exhibit, which is the colored chart,
11 marked as "Exhibit Number 6".

12 CMSR. BELOW: Yes. That can be so
13 marked.

14 (The chart, as described, was herewith
15 marked as Exhibit 6 for identification.)

16 MR. MOFFETT: And, the third exhibit,
17 which is titled "Summary of Article 3 Price and Payment
18 Terms", we could get that marked as "Exhibit 7".

19 CMSR. BELOW: We can, if you provide
20 copies to the clerk and the court reporter.

21 MR. MOFFETT: I'm sorry, did I not do
22 that? Yes. Just a second, I've got copies, small copies
23 of that somewhere here, but I'm not sure what I've done
24 with them. Okay. Thanks.

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1 CMSR. BELOW: So, the one-page document
2 "Summary of Article 3 Price and Payment Terms" will be
3 marked as "Exhibit 7".

4 (The document, as described, was
5 herewith marked as Exhibit 7 for
6 identification.)

7 MR. MOFFETT: Thank you.

8 BY MR. MOFFETT:

9 Q. Okay. Mr. Labrecque, you haven't seen this. We talked
10 about Exhibit 5 before, and we've established that
11 that's the actual language of the Contract. You have
12 not seen Exhibit 6, the colored chart. I want to spend
13 a little bit of time talking about that. And, first,
14 I'd like to note something about the chart here. It's
15 broken into three periods, "1", "2", and "3". Period 1
16 covers the first eight Contract years. And, that
17 relates to language in the Contract that talks about
18 the first eight Contract years. We have it in Article
19 3.A, we have it in Article 3.B. In Article D.1 we
20 switch to beginning with the ninth Contract year. And,
21 then, in D.2, we're back to for the first eight
22 Contract years. So, when I refer to "Period 1" of the
23 pricing provisions in the Contract, Article 3, I'm
24 referring to the first eight years of the Contract.

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1 There's a second period in the Contract --

2 CMSR. IGNATIUS: Before you go on,
3 Mr. Moffett, just a clarification. You keep saying that
4 it refers to the "first eight years of the Contract", but
5 it seems to me the bar you're looking at refers to the
6 first -- no, I'm sorry. I'm misreading this. I
7 apologize. I'm getting my years and my cents per
8 kilowatt-hour confused.

9 MR. MOFFETT: Yes.

10 BY MR. MOFFETT:

11 Q. So, the first period is the first eight years of the
12 Contract. The second period, which is longer than the
13 first period, is years 9 through 20 of the Contract.
14 It's a 12-year period, or exactly one and a half times
15 the length of the first period, is that correct?

16 A. (No verbal response).

17 Q. And, the reason with have a distinct Period 2, is that,
18 beginning with the ninth Contract year, there's a
19 deduction of 5.47 cents taken, for the -- the language
20 is for the term of the Contract. And, then, in
21 Paragraph D.2, right down here, it says "For the ninth
22 through the twentieth Contract years, the Contract rate
23 shall be adjusted by adding 0.67 cents to the kilowatt
24 rate." So, that establishes that there's a second

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1 discrete period of 12 years here, which we've called
2 "Period 2". And, this is the 0.67 cent adjustment that
3 is made in years 9 through 20, this diagonally hatched
4 gray area right here (indicating). Then, at the end of
5 the 20th year, that adjustment goes away, so we have a
6 different Contract price in Period 3, which is the
7 final ten years of the Contract. Is that correct?

8 A. Yes.

9 Q. Okay. Now, I'd like to go back and just walk through
10 the way this Contract pricing provision actually works.
11 Okay. It says in Article 3.A, first of all -- strike
12 that. Let me go back to the very first paragraph --
13 the very first paragraph of Article 3, right here at
14 the top. Says "The price charged by Seller to Public
15 Service...under [the] Contract shall be based on an
16 index price of 9.00 cents per kilowatt-hour." Okay?
17 And, we're showing the 9 cents per kilowatt-hour as
18 this line right here (indicating), that starts at the
19 top of the gray area in Period 1, and continues across
20 the top of the green area in Period 2, and flat through
21 Period 3. That's the 9 cent per kilowatt-hour index
22 price. Is that clear? And, is that a fair
23 representation of what the index price is?

24 A. 9 cents.

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1 Q. Okay. Then, Article 3.A says "For the first eight
2 years of the Contract, the Contract rate shall be 11.00
3 cents per kilowatt-hour." And, we've shown that here,
4 walking up the left-hand side of the chart, through the
5 index price, through 10 cents, to 11 cents a
6 kilowatt-hour. That's the top of the red diagonal
7 hatched block in Period 1. And, it says "This rate",
8 namely 11 cents, "exceeds the index price by 2.00 cents
9 per kilowatt-hour." Do you agree that that 2 cent --
10 that those two blocks together constitute 2 cents on
11 top of the 9 cent index price?

12 A. Yes.

13 Q. Okay. And, then, it says "all payments made" -- "all
14 payments made by Public Service to Seller which exceed
15 the index price must be recovered by Public Service,
16 during later Contract years." Meaning, presumably,
17 Period 2 and Period 3, if necessary, because those
18 payments are not being recovered in Period 1, right?

19 A. (No verbal response).

20 Q. The payments that exceed the index price are going to
21 be recovered in Period 2 and Period 3, if necessary,
22 right, because they're not being recovered in Period 1?

23 A. That's true.

24 Q. Okay. Then, it says, still in Paragraph 3.A, "This

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1 rate is subject to the adjustment provided for under
2 Section D.2, Article 3." Okay? Now, so let's go down
3 to Section D.2 of Article 3. And, I want to focus just
4 on the first eight Contract years, Period 1. What the
5 Contract language says, here in D.2, is that, "For the
6 first eight Contract years, the Contract rate shall be
7 adjusted by subtracting 1.0 cent per kilowatt-hour from
8 the rate." So, we've got a 2 cent adder here, if you
9 will, under Paragraph 3.A. But, under Paragraph 3.D.2,
10 we're subtracting 1 cent per kilowatt-hour from the
11 Contract rate. Are you with me so far? Is that -- Is
12 that what the Contract language says?

13 A. Yes.

14 Q. Okay. So, during Period 1, the first eight Contract
15 years, the adjusted Contract rate, meaning the payments
16 that were actually made to the Seller by PSNH, were 10
17 cents a kilowatt-hour. Am I right about that?

18 A. Correct.

19 Q. And, that's incidentally, essentially, what we're
20 saying here, for Period 1, years 1 to 8, in Exhibit 7,
21 the "Summary of the Article 3 Price and Payment Terms",
22 Section 3.A establishes a Contract rate of 11 cents,
23 which is 2 cents above the index price, subject to the
24 adjustment provided under 3.D.2. And, then, Section

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1 3.D.2 provides that 1 cent per kilowatt-hour is to be
2 subtracted from the Contract rate, resulting in a net
3 or adjusted Period 1 Contract rate of 10 cents a
4 kilowatt-hour. Okay?

5 Now, then we go to Period 2. And, in
6 Period 2, we are now dealing with Section 3.D.1
7 initially. It says "Beginning with the ninth Contract
8 year, and continuing for the term of the Contract, a
9 recovery amount equal to 5.47 cents...shall be deducted
10 from the Contract rate." And, that's this green area
11 right here (indicating), plus the diagonally hatched
12 gray block below it, together they add up to 5.47
13 cents. But, not all of that is going to be deducted,
14 because we have another adjustment in Period 2. The
15 Period 2 adjustment is that, for the 9th through the
16 20th Contract years, the Contract rate shall be
17 adjusted by adding 0.67 cents per kilowatt-hour to the
18 rate. And, that's shown here by the diagonally hatched
19 gray bar immediately below the green block in Period 2.
20 Am I correct so far, in terms of the way I'm
21 summarizing the Contract language?

22 A. Yes.

23 Q. Okay. Then, we go to Period 3. And, let's remember,
24 this first period is eight years, the second period is

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1 twelve years. Now, we go to Period 3, which is a ten
2 year period. Okay? In Period 3, what happens is that
3 the 0.67 cents per kilowatt-hour, which has been added
4 back into the rate in Period 2, drops off. So, whereas
5 the Period 2 Contract rate is 4.2 cents per
6 kilowatt-hour, the Period 3 Contract rate becomes 3.53
7 cents per kilowatt-hour. Is that a fair summary?

8 A. Yes.

9 Q. Okay. And, that's essentially what we're saying here
10 in this exhibit, which is marked as Exhibit 7, the
11 "Summary of Article 3 Price and Payment Terms". Now,
12 Mr. Labrecque, you've agreed that the index price
13 across the entire term of the Contract was 9 cents,
14 right? Just to --

15 A. Yes.

16 Q. Just to go back and summarize, that comes from the top
17 paragraph here, in Article 3, the beginning
18 introductory paragraph of Article 3?

19 A. Yes.

20 Q. That index price is 9 cents throughout the whole term
21 of the Contract, am I right?

22 A. Yes.

23 Q. Okay. And, what price per kilowatt-hour did PSNH
24 actually pay to the Seller during Period 1, the first

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1 eight years of the Contract?

2 A. The 9 cent index price was adjusted twice. First, a 2
3 cent adder, and then a 1 cent deduction, for a net
4 Contract price of 10 cents for the first eight years.

5 Q. Okay. That's fine. And, we actually have that in the
6 Stipulation, do we not? Let's look at the Stipulation,
7 which is PSNH's Exhibit 2, I believe. Yes, Exhibit 2.
8 Paragraph 8 of the Stipulation, the last partial
9 sentence at the bottom of Page 2, and continuing onto
10 Page 3, says "During the first eight Contract years, a
11 period that consists of 96 months...the Contract rate"
12 I'm now reading from the top of Page 3, "the Contract
13 rate was 10 cents per kilowatt-hour. [That] was based
14 on a 9 cent index price, increased by 2 cent per
15 kilowatt-hour positive adjustment...in Article 3.A and
16 [then] decreased by the 1 cent per kilowatt-hour
17 negative adjustment described in Article 3.D.2."

18 Okay. Now, Mr. Labrecque, you may not
19 have this figure in your head, it's in the Stipulation,
20 I want to ask you about the total amount of energy that
21 was generated in Period 1 here. And, just to save
22 everybody some time, if you'll look at Page 3 of the
23 Stipulation, Paragraph 9, would you agree with me that
24 Paragraph 9 of the Stipulation states that "the total

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1 energy delivered during the first eight Contract years
2 was 148,869 megawatt-hours, for which PSNH made total
3 payments of \$14,886,900." Is that accurate?

4 A. Yes.

5 Q. And, would that be your testimony today, that that's
6 the amount of energy that PSNH generated during Period
7 1?

8 A. Yes.

9 Q. Okay. And, it's, I assume, no accident that the amount
10 of -- well, yes. That the total amount of payments
11 made to the Seller during Period 1 was \$14,886,900,
12 because that's just ten times the 10 cent per
13 kilowatt-hour adjusted Contract rate, right?

14 A. Yes.

15 Q. Okay. And, incidentally, Mr. Labrecque, if you turn to
16 Exhibit 2 in the Stipulation, it's the spreadsheet at
17 the back of the Stipulation. Got that? That 10 cent
18 per kilowatt-hour adjusted Contract rate is the figure
19 that appears in the far right column as the adjusted
20 Contract rate received by New Hampshire Hydro
21 Associates, and then Briar, is that correct?

22 A. Yes.

23 Q. Okay. And, then, finally, Mr. Labrecque, we have -- we
24 have an exhibit that has been prefiled. This is

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1 Exhibit 5 to Mr. Norman's prefiled testimony. I'd just
2 like to draw your attention, Mr. Labrecque, to the
3 first page of this exhibit.

4 A. Can you -- excuse me.

5 Q. And, I suppose I should -- I'm sorry?

6 A. Can you describe this exhibit to me one more time?

7 Q. Yes, I will.

8 A. Where did this appear?

9 Q. This appears as Exhibit Number 5 to the prefiled
10 testimony of Mr. Norman, which was prefiled in this
11 docket on June 14, 2010. We haven't seen it yet this
12 morning, you're seeing it for the first time this
13 morning. But it's attached to Mr. Norman's testimony,
14 prefiled testimony.

15 A. I'm just struggling to find the place in his testimony
16 where he said, you know, notes it.

17 Q. Okay. Let me help you with that, if I can. Let me
18 just see if I can point you directly to it. If you
19 turn to Page 11 of Mr. Norman's prefiled testimony of
20 June 14.

21 A. Okay.

22 Q. Actually, starting at the bottom of Page 10, in his
23 testimony, in his prefiled testimony, is in the last
24 couple of lines on Page 10. "As evidence that both

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1 Briar and PSNH used the 10 cents per kilowatt-hour
2 adjusted Contract Rate as a basis for their business
3 dealings, I have attached a representative invoice
4 dated July 31, 1990, prepared by New Hampshire Hydro
5 Associates which shows that the adjusted Contract Rate
6 upon which PSNH payments were based was 10 cents per
7 kilowatt-hour." Okay. That's "Exhibit 5" to his
8 testimony?

9 A. I see it now. Thank you.

10 Q. And, I'd just like to draw your attention to the line
11 that indicates "rate". It's down in this indented
12 block. It's the second line from the bottom in the
13 indented block in the middle of the page. And, it says
14 "Rate .10", is that right?

15 A. Yes.

16 Q. Okay. So, New Hampshire Hydro Associates was invoicing
17 PSNH at 10 cents per kilowatt-hour during Period 1, and
18 PSNH was paying 10 cents per kilowatt-hour during
19 Period 1. Am I right?

20 A. Correct.

21 Q. Okay. Now, Mr. Labrecque, I'd like to go back and look
22 again at some language in Section 3.A. Starting with
23 the third, the third line -- well, let's read from the
24 beginning of the sentence. "This rate", referring to

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1 an 11 cent Contract rate, "exceeds the index price by
2 2.00 cents per kilowatt-hour", then there's a
3 semicolon, then it says "and all payments", "all
4 payments made by Public Service to Seller which exceed
5 the index price must be recovered by Public Service,
6 during later Contract years, in accordance with Section
7 D.1., Article 3." Okay? And, then, let's go down to
8 Section 3.D.1. And, it says that "Beginning with the
9 ninth Contract year", that's here at the beginning of
10 Period 2, "and continuing for the term of the Contract,
11 a recovery amount equal to 5.47 cents per KWH shall be
12 deducted from the Contract rate." And, then, it says
13 "This deduction allows PSNH to recover the payments
14 made under Section A, Article 3, which exceeded the
15 index price."

16 Now, Mr. Labrecque, we've established
17 that what -- what PSNH actually paid to Briar Hydro,
18 first New Hampshire Hydro, then Briar Hydro, from
19 Period 1, was 10 cents per kilowatt-hour, is that
20 correct?

21 A. Yes.

22 Q. And, we've established that the index price was 9 cents
23 a kilowatt-hour, am I right?

24 A. Correct.

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[WITNESS: Labrecque]

- 1 Q. So, tell me -- tell me what the excess payments were
2 per kilowatt-hour above the index price in Period 1?
- 3 A. The payment rate was 10 cents, the index rate was 9
4 cents. The payment rate of 10 cents was the result of
5 two separate and distinct adjustments.
- 6 Q. Yes. But I'm asking you -- I'm asking you a slightly
7 different question. I'm asking you what rate per
8 kilowatt-hour did PSNH actually pay to the Seller under
9 this Contract, in excess of the index price, the 9 cent
10 index price, in Period 1? Was it 1 cent or 2 cent?
- 11 A. To the extent 10 cents is 1 cent greater than 9 cents,
12 I would agree that the value you're asking me to say is
13 "1 cent".
- 14 Q. Thank you. Now, let's, Mr. Labrecque, let's look again
15 at this colored graph, which is Exhibit 5 [6?]. And, I
16 want to come back to something that you talked about
17 briefly with Mr. Eaton in your direct examination. I
18 would like -- I would like you to compare the sum of
19 this top 1 cent per kilowatt-hour over a period of
20 eight years, with the sum of the 0.67 cent adder in
21 Period 2, years 12 -- excuse me, years 8 through 20,
22 that 12 year period. If you were to multiply 1 cent
23 per kilowatt-hour, times eight years, and then compare
24 that, the product of that, to the product of 0.67 cents

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[WITNESS: Labrecque]

- 1 over 12 years, would the numbers be the same? Would
2 the product be the same?
- 3 A. I'd have to do that math. I don't know. Have we done
4 that math? Is it --
- 5 Q. I have done that math. And, I'm happy to let you take
6 a calculator and do it, if you want. But I will
7 represent to you that 0.67 cents is two-thirds of 1
8 cent per kilowatt-hour. You with me on that?
- 9 A. I am.
- 10 Q. And, the eight year period, in Period 1, is two-thirds
11 of the 12 year period, in Period 2. Give me that?
- 12 A. Correct.
- 13 Q. Okay. And, I think it follows from that that the --
14 that the total value, what you call the "total economic
15 value" of the adjustment here in Period 2, the 0.67
16 cents per kilowatt-hour, times 12 years, is the exact
17 mathematical equivalent of the 1 cent per kilowatt-hour
18 times eight years in Period 1. Do you agree with that
19 or do you want to think about it or do you want to
20 check it?
- 21 A. Well, I'll only -- we're talking about a particular
22 adjustment in the Contract.
- 23 Q. Uh-huh.
- 24 A. And, you know, we've got the language, the exact

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[WITNESS: Labrecque]

1 language in front of us.

2 Q. Uh-huh.

3 A. And, yes, I agree that the 0.67 is simply eight divided
4 by 12. That adjustment was meant to be done on a
5 nominal basis, assuming uniform annual hydro
6 production, the math would work out on a nominal basis.
7 That the 1 cent payment, the 1 cent subtraction during
8 the first eight years would be equivalent to the 0.67
9 cent addition in the subsequent 12 years.

10 Q. Uh-huh.

11 A. That was a separate adjustment, and that's how it was
12 administered.

13 Q. Uh-huh. Yes. Okay. And, that's really all I'm --
14 that's really all I'm asking here. Now, Mr. Labrecque,
15 you called this a "nominal" payback, if you will, of
16 this figure up here (indicating). But, if the figures
17 -- if the product of the 0.67 cents times 12 years in
18 Period 2 is the exact same number as the product at 1
19 cent per kilowatt-hour times eight years in Period 1, I
20 think you'll agree that PSNH wasn't making any attempt
21 to recover interest on this 1 cent here in Period 2, am
22 I right? You called that a "nominal" -- a "nominal"
23 adjustment?

24 A. Yes. Clarifying that the Contract doesn't include any

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[WITNESS: Labrecque]

- 1 provision for --
- 2 Q. Yes.
- 3 A. -- a discount rate or interest or accrual on any
- 4 balance. It was a very simple article to interpret.
- 5 Q. Okay. So, PSNH wasn't making any attempt in the
- 6 Contract to recover interest on this 1 cent final upper
- 7 -- upper block here (indicating), this red diagonal
- 8 hatched block. There was no attempt to recover
- 9 interest in Paragraph 2 on that, am I correct?
- 10 A. That neither party -- the Contract that was executed by
- 11 both parties included an adjustment mechanism for which
- 12 there was no discount rate.
- 13 Q. So, no interest on this -- no interest repaid here on
- 14 this amount up here (indicating)?
- 15 A. Correct.
- 16 Q. Okay. And, I'm scratching my head to understand why
- 17 there would have been no interest paid on this, if
- 18 there had really been a payment made here to represent
- 19 the second cent per kilowatt-hour above the index price
- 20 in Period 1? Wouldn't you agree that the reason
- 21 there's no interest paid here in Period 2, or
- 22 continuing into Period 3, on that -- on that second
- 23 cent per kilowatt-hour here, is because this money was
- 24 never paid by PSNH, am I right? The second cent per

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[WITNESS: Labrecque]

1 kilowatt-hour in Period 1 was never paid to the Seller
2 by PSNH, am I right?

3 A. No. And, the reason you're scratching your head is
4 because you're attempting to combine the two
5 adjustments, and that's where you're losing your focus.
6 There's two separate and distinct adjustments here.
7 The 1 cent, 0.67 cents is matched, and it works, as I
8 said, very simply. You read the article, it's very
9 simple. That's how it was administered. The other
10 adjustment at play here is the 2 cents and the 5.47.
11 When you attempt to combine the two is where you're
12 starting to scratch your head.

13 Q. Uh-huh. And, I understand that that's PSNH's position,
14 okay? And, you argue that we're trying to co-mingle or
15 condense the two sets of adjustments into one thing.
16 But I want to ask who's losing focus here,
17 Mr. Labrecque? Because we've walked through the actual
18 payments that were made in Period 1, and we've
19 established that there was only 1 cent per
20 kilowatt-hour paid in Period 1 in excess of the 9 cent
21 index price during the first eight Contract years. So,
22 I think -- I think you'd have to agree that PSNH only
23 paid 1 cent per kilowatt-hour above the index price
24 here. And, this second cent per kilowatt-hour, that's

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[WITNESS: Labrecque]

- 1 shown here at the top in the red hatch, was never paid.
- 2 Was it actually paid to the Seller, that 1 cent?
- 3 A. The Seller was paid 10 cents for the first eight years.
- 4 Q. Yes. And, that's 1 cent above the index price, right?
- 5 A. Yes.
- 6 Q. So, the Seller never got, in Period 1, this second cent
- 7 per kilowatt-hour, am I right? The one at the top
- 8 here?
- 9 A. The way the Contract was invoiced was a net 10 cents.
- 10 You know, are you suggesting that we should have paid
- 11 11 cents and then asked for a rebate check of 1 cent?
- 12 Q. I'm not suggesting anything.
- 13 A. Well, I'm just saying, I've stated a number of times,
- 14 "yes, the Seller was paid 10 cents."
- 15 Q. Got it.
- 16 A. And "yes, that's 1 cent greater than 9."
- 17 Q. Uh-huh. Okay. And, all I'm suggesting is that the
- 18 reason the reason this gray hatched 0.67 cent bar in
- 19 Period 2 is the exact equivalent of the 1 cent per
- 20 kilowatt-hour times eight years in Period 1, without
- 21 any interest shown on it, is because, in fact, this 1
- 22 cent per kilowatt-hour was never paid. It was, if you
- 23 will, it was a phantom loan. I mean, what we're
- 24 talking about here is amounts that were paid to the

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[WITNESS: Labrecque]

1 seller in excess of the index price in Period 1, okay?

2 And, that wasn't 2 cents a kilowatt-hour, that was 1

3 cent per kilowatt-hour. Correct?

4 A. The Contract, the Seller was paid 10 cents for the
5 first eight years, and that was 1 cent greater than the
6 index.

7 Q. Yes. Okay. In fact -- in fact, Mr. Labrecque, isn't
8 the case that what purports to be shown here, as a
9 payment in excess of the index price in Period 1,
10 wasn't really paid by PSNH until Period 2. It's this
11 0.67 cents per kilowatt-hour adjustment, times 12
12 years, in Period 2, where Briar or NHHA, the Seller
13 gets that final 2 cents, that looked like it was being
14 paid in Period 1. Isn't that correct?

15 A. That's your interpretation.

16 Q. Okay. So, and what I'm suggesting to you, and if you
17 disagree, I'm happy to hear why, what I'm suggesting to
18 you is, that second cent per kilowatt-hour in Period 1
19 was never paid in Period 1, it was paid in Period 2.
20 And, it was paid as a reduction in the 5.47 cents
21 deduction that is found in Section 3.D.1. And, the
22 reason I'm saying that is because you keep talking
23 about the way the Contract was administered. The
24 Contract was administered over time, based on three

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[WITNESS: Labrecque]

1 distinct Contract periods. And, the relevant inquiry
2 here is how much the Seller, Briar, was paid in excess
3 of the index price in Period 1. That starts to be
4 repaid in Period 2. But that amount was 1 cent, not 2
5 cents. You've agreed with that several times. And,
6 so, I just think it's important for us all to
7 understand and focus on the fact that this Contract is
8 being administered over time, in three separate -- in
9 three separate time periods.

10 CMSR. BELOW: Is there a question there,
11 Mr. Moffett?

12 MR. MOFFETT: Excuse me, sir?

13 CMSR. BELOW: Is there a question there?

14 MR. MOFFETT: Sorry. No, your Honor.

15 BY MR. MOFFETT:

16 Q. Okay. Switching gears, Mr. Labrecque. If you'd like
17 at your rebuttal testimony, on Page 5.

18 MR. EATON: I'm sorry, where are you?

19 Page 5 of what?

20 MR. MOFFETT: Page 5 of Mr. Labrecque's
21 rebuttal testimony. In the first paragraph, Mr. Labrecque
22 is talking about some of his issues or problems or
23 questions about Mr. Norman's testimony. In Line 4, he
24 characterizes one of them as the lack of a discount rate.

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[WITNESS: Labrecque]

1 BY MR. MOFFETT:

2 Q. And, am I right, that essentially your testimony is
3 that there was no discount rate established
4 specifically in the Contract? Is that your testimony?

5 A. Yes.

6 Q. Yes. But would you agree that both PSNH and New
7 Hampshire Hydro or Briar understood that there was, in
8 fact, a discount rate that purported to make sense out
9 of the 5.47 cent deduction?

10 A. I will agree that, in 1981 or 1982, when the parties
11 involved were drafting the Contract, that an interest
12 rate was used, assuming uniform annual hydro
13 production, and a 2 cent adder for the first eight
14 years, in order to determine that the 5.47 cents was an
15 equivalent present value calculation of the 2 cent
16 adder. I will not agree that the two parties assumed
17 that that interest rate would -- was an inferred part
18 of the Contract administration.

19 Q. Thank you. And, that, in fact, is essentially what is
20 said in Attachment 2 to your prefiled testimony, I
21 believe. Yes. This is Attachment 2 to your prefiled
22 testimony.

23 MR. MOFFETT: And, I have copies of it
24 here for everybody, just to make this easier.

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[WITNESS: Labrecque]

1 BY MR. MOFFETT:

2 Q. Mr. Labrecque, you've introduced this into the record
3 through your prefiled testimony of May 14th. And,
4 since it's already been marked, I'm not going to assume
5 that we will mark this separately. But I would like to
6 refer to it. And, in particular, I'd like to ask you
7 what this document is?

8 A. I'll describe this as a "cover letter", sent to
9 Mr. Richard A. Norman of New Hampshire Hydro
10 Association -- Associates, from the then Manager of
11 PSNH Supplemental Energy Sources, John Lyons.

12 Q. Okay. And, would you read for us, would you read into
13 the record the second paragraph of that letter from Mr.
14 Lyons to Mr. Norman.

15 A. "Also enclosed is a revised schedule of estimated
16 Contract payments. The recovery amount was
17 recalculated to be 5.47 cents per kWh, based on an
18 interest rate of 17.61 percent.

19 Q. Thank you. And, am I right that the net result of all
20 of that was that the Seller, which is New Hampshire
21 Hydro Associates, or Briar Hydro in the later years,
22 was going to be repaying the amount that was borrowed
23 in Period 1 at the rate of 5.47 cents, which is
24 deducted from the index price in Periods 2 and,

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[WITNESS: Labrecque]

1 presumably, if necessary, Period 3. Is that basically
2 the way that works? Let me restate it. The interest
3 rate of 17.61 cents [sic] was used to determine the
4 5.47 cents deduction from the index price that appears
5 first in Period 2, beginning with the ninth Contract
6 year, and continues, as necessary, through Period 3.

7 It's this green, it's this green area. The
8 17.61 percent interest rate or discount rate was used
9 to establish that 5.47 cent deduction, is that right?

10 A. I agree that the 17.61 percent interest rate was used
11 to calculate the 5.47 cent adjustment.

12 Q. And, am I right that that deduction of 5.47 cents,
13 using the 17.61 percent discount rate, was based on an
14 initial payment of 2 cents a kilowatt-hour, rather than
15 1 cent a kilowatt-hour?

16 A. That's correct.

17 Q. Mr. Labrecque, why should anyone believe that PSNH
18 should have been repaid for 2 cents a kilowatt-hour, in
19 Periods 2 and 3, when it only advanced 1 cent per
20 kilowatt-hour in Period 1?

21 A. Again, it's the attempt to force two adjustments into
22 one, and to look at this from a net basis that's
23 causing the difficulties. When you have a Contract
24 that you need to administer month-by-month,

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[WITNESS: Labrecque]

1 year-after-year, you follow the express terms of the
2 Contract. That's what at play here. We need to follow
3 the express terms of the Contract.

4 Q. And, I think -- I would submit to you that that's what
5 we're doing. Because we're taking it period-by-period.
6 We're talking about the exact payments that were made
7 in Period 1. And, we're following that by the exact
8 payments that were made in Period 2, when the recovery
9 started. And, I think your testimony is that this 5.47
10 cent deduction that begins in Period 2 was based on 2
11 cents. But, am I correct that you've agreed that what
12 was actually borrowed, if you will, or what was loaned,
13 what was advanced in Period 1 was 1 cent per
14 kilowatt-hour above the index price?

15 A. What you're putting forth is irrelevant relative to the
16 terms that need to be administered in this Contract.
17 What you're stating is correct, but that's not the way
18 the Contract is written.

19 Q. Okay. Mr. Labrecque, in your rebuttal testimony, you
20 have attached an "Exhibit RCL-1".

21 MR. MOFFETT: And, I have copies for
22 everybody. Again, this has been marked already, so I'm
23 not going to plan on marking it separately.

24 BY MR. MOFFETT:

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[WITNESS: Labrecque]

- 1 Q. Mr. Labrecque, would you tell us what you understand
2 this document to be?
- 3 A. Well, this was a document that we first saw when Briar
4 Hydro responded to some PSNH data requests. I refer to
5 it and attach it as an exhibit to my rebuttal. And, I
6 state therein that "it appears to be a memo from Essex
7 Hydro to potential or committed investors in one or
8 more of their proposed hydro [facilities]." I state
9 that it "has no addressee, [it's] not signed, and [it]
10 is not dated." It appears to be a status memo
11 regarding "ongoing contract discussions with PSNH." It
12 "also includes attachments showing estimated payments
13 under the Contract, based on estimates of PSNH's
14 avoided fuel costs."
- 15 Q. It's not a PSNH document, am I right?
- 16 A. In reading it, it appears to me that, no, it is not a
17 PSNH document.
- 18 Q. Can you tell us what the -- what the handwritten legend
19 in the upper right-hand corner of the first page of the
20 memo refers to? It says "Coal Park". Can you tell us
21 what the "Coal Park" was or is?
- 22 A. I have no idea what that refers to.
- 23 Q. And, can you -- the document refers to "Moore's Falls".
24 Can you tell us what "Moore's Falls" is or was?

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[WITNESS: Labrecque]

- 1 A. No.
- 2 Q. And, is it your testimony that this memo was circulated
3 to investors by New Hampshire Hydro Associates?
- 4 A. Based on my read of it, that was my interpretation of
5 it. I think -- I hope I was clear that I am not
6 stating that as a fact.
- 7 Q. Okay. And, to your knowledge, was it -- was this memo
8 or anything like it used in the negotiations with PSNH?
9 For -- over the 1982 Contract?
- 10 A. Are you saying -- are you asking if this document
11 changed hands? If both parties were looking at it? I
12 don't know.
- 13 Q. And, just to clear up something that doesn't quite
14 follow, as far as I can see here. Would you turn to
15 the last page of your Exhibit RCL-1, which is a
16 spreadsheet entitled "Contract Pricing Provisions
17 Penacook Lower Falls Hydro". Is it your testimony that
18 this was attached to the "Market for Power" memo?
- 19 A. It was included in the Briar Hydro data response as a
20 combined document.
- 21 Q. Okay. I'll note that it was dated at the bottom, looks
22 like "March 10th, 1982 R.V.P." This would appear to be
23 a PSNH document, am I right? The last page?
- 24 A. That page appears to be a PSNH document. That

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[WITNESS: Labrecque]

1 notwithstanding, it may or may not have been included
2 as an attachment, you know, to some other part of this
3 document.

4 Q. And, I will simply represent to you that if that was,
5 in fact, attached to the "Market for Power" memo that
6 represents the bulk of your Exhibit RCL-1, we think
7 that was a mistake, and it should not have been -- it
8 should not have been attached to your memo, because it
9 really has nothing to do with the "Market for Power"
10 memo. I just want to clarify that for the record. If
11 you have knowledge otherwise and want to try to clarify
12 it, fine. But I just don't want the Commission or
13 anybody else to be confused about that.

14 A. Yes, I can't resolve that particular issue myself.

15 CMSR. IGNATIUS: Mr. Moffett, I got lost
16 there. Are you saying that when Briar made a discovery
17 response, putting all of those together, that final sheet,
18 "Contract Pricing Provisions", shouldn't have been part of
19 that packet?

20 MR. MOFFETT: That's what I'm saying,
21 your Honor. Yes. I think that was a mistake on our part.
22 And, it never should have been included as part of the
23 document, which is the memo for -- on the "Market for
24 Power" that is Mr. Labrecque's RCL-1.

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[WITNESS: Labrecque]

1 CMSR. IGNATIUS: Thank you.

2 MR. MOFFETT: All right.

3 BY MR. MOFFETT:

4 Q. Okay. Mr. Labrecque, let's go back to your rebuttal
5 testimony. If you would look at Page 5 of your
6 rebuttal testimony, Lines 25 to 26, at the bottom, and
7 continuing to the top of Page 6. You're saying --
8 you're testifying there, starting on Line 25, on Page
9 5, second line from the bottom of the page, "Mr.
10 Norman's response overlooks the potential situation in
11 which the Penacook Lower Falls Hydro Project could have
12 experienced poor performance or even catastrophic
13 failure during the latter years of the Contract term,
14 relative to performance during the initial years."
15 And, you testified a little bit in response to Mr.
16 Eaton about this issue.

17 What I want to ask you, Mr. Labrecque,
18 is essentially why PSNH wasn't concerned about that
19 problem in the Contract? And, let me ask it this way.
20 Would you agree that there's no provision in the
21 Contract for a security lien in favor of PSNH on the
22 project that would allow PSNH to take over the project,
23 if the Seller got into financial trouble?

24 A. That's correct.

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[WITNESS: Labrecque]

1 Q. And, would you agree that Article 7 of the Contract
2 contains -- I'll give you a minute to find the
3 Contract.

4 A. Got it.

5 Q. Got it? If you turn to Article 7 of the Contract, my
6 question is, would you agree that there's no provision
7 there, no requirement that the Seller carry property
8 insurance on the project?

9 A. I would agree.

10 Q. Can you tell me why PSNH would not have been concerned
11 to protect itself in those fairly fundamental ways in a
12 Contract like this?

13 A. No, I cannot. I was not a party to that Contract.

14 Q. Okay. Mr. Labrecque, let's just revisit one piece of
15 your direct testimony from this morning. You and Mr.
16 Eaton were talking about -- you were talking about what
17 might have been in the mind of the Seller when they
18 entered into this Contract, and you were talking about
19 the provision in Article C, it's the provision that is
20 not included here, because we never got there during
21 the administration of the Contract. Right? And, I
22 believe your testimony was that the Seller might have
23 been looking at what might happen if the incremental
24 energy cost to Public Service rose significantly above

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[WITNESS: Labrecque]

1 the index price of 9 cents. My question is this. What
2 would have happened if we had gotten to Article C --
3 excuse me, Paragraph C, Article 3, Section C, and the
4 index price had risen above -- excuse me, PSNH's
5 incremental energy cost had risen above the index price
6 of 9 cents? In that event, in theory, the Seller could
7 have earned more money from subsequent sales under the
8 Contract, right?

9 A. Yes.

10 Q. Okay. What would have happened, if the incremental
11 energy cost of PSNH had risen significantly above the 9
12 cent index price, so that Article C would have come
13 into play, and then PSNH's incremental energy cost had
14 decreased back below the index price? In that event,
15 would the Seller have owed PSNH money?

16 A. I don't follow you.

17 Q. Okay. Paragraph C provided, and we understand that
18 this never happened during the 30 years of the
19 Contract, but Paragraph C provided that, if PSNH's --
20 if 96 percent of PSNH's incremental energy cost
21 exceeded the index price of 9 cents, then PSNH would
22 begin to pay the Seller a declining percentage of
23 PSNH's incremental energy cost, am I right?

24 A. Yes.

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[WITNESS: Labrecque]

1 Q. And, as long as that incremental energy cost was going
2 up dramatically, then the Seller would have stood to be
3 paid at a higher rate for the out years in the
4 Contract. But what if -- what if the incremental
5 energy cost of PSNH had gone up above the index price
6 here, the 9 cents, so as to trigger these higher
7 payments, and then it had declined below the 9 cent
8 index price, say, suddenly power became cheap, or for
9 some -- for one reason or another, prices did not
10 continue to rise, but actually fell. In that event,
11 would you say that, under the Contract, the seller
12 would have owed money to PSNH, rather than being paid a
13 percentage of PSNH's incremental energy cost?

14 A. I didn't say that.

15 Q. I'm not saying that you did. I'm asking you if that --

16 A. Okay. My response is the Contract would be
17 administered in accordance with Article C. I mean,
18 it's a page and a quarter. We'd dissect it
19 line-by-line and follow the terms of the Contract.

20 Q. So, what would happen then if the incremental energy
21 cost went up, and the Seller was paid a declining
22 percentage of PSNH's incremental cost, and then the
23 incremental energy cost took a nose dive, and went back
24 below the 9 cent per kilowatt-hour index price. Which

[WITNESS: Labrecque]

1 way would payments go under the Contract at that point?

2 A. You want to give me some time to read it and respond?

3 I'm not --

4 Q. Yes, that's fine.

5 A. I'm not as thoroughly versed in Article 3 as you would

6 like at this point.

7 Q. Take your time.

8 CMSR. BELOW: Off the record for the

9 moment.

10 (Brief off-the-record discussion

11 ensued.)

12 CMSR. BELOW: Back on the record.

13 BY THE WITNESS:

14 A. Yes. This isn't -- this isn't the time or the place

15 for me to fully comprehend Article C. There's

16 provisions in here for various adjustments, depending

17 on where the rate goes in relation to PSNH's

18 incremental energy costs. And, I can't give you a

19 concrete answer to your question.

20 BY MR. MOFFETT:

21 Q. It would take you a little more time to figure that

22 out?

23 A. Yes.

24 Q. Okay. Just one quick question about what we were

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[WITNESS: Labrecque]

1 talking about a moment ago, which relates to security
2 provisions in the Contract, or the fact that the
3 Contract did not include a security lien for PSNH. Are
4 you aware that Briar Hydro, in fact, proposed a
5 security lien in writing to PSNH during the
6 negotiations for this Contract?

7 A. I may have seen something in the file. I guess I
8 didn't pay particular attention to it, given that it
9 wasn't incorporated into the Contract.

10 Q. Subject to check, it was Rider K, in one of the
11 versions of the Contract that New Hampshire Hydro
12 Associates sent to PSNH. But you're not -- you're not
13 aware of that?

14 A. I've seen something that says "Rider K"; never read it.

15 MR. MOFFETT: Okay. Mr. Chairman, I
16 have no further questions at this point.

17 CMSR. BELOW: Okay. Thank you.

18 Mr. Fossum.

19 MR. FOSSUM: Thank you. Just a couple
20 very short questions, I hope.

21 BY MR. FOSSUM:

22 Q. Now, Mr. Labrecque, you testified here and in both, in
23 your prefiled rebuttal, that there's essentially an
24 integration clause, Article 10, of this Contract. And,

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[WITNESS: Labrecque]

1 it's your opinion that, because of that, I see you're
2 agreeing with me, whether it's your opinion that,
3 because of that article, there's no need to look beyond
4 the terms of the Contract, it's just the Contract is
5 what it is and says what it says, and that there's no
6 need for extrinsic evidence to aid in its
7 interpretation?

8 A. Correct. That's my interpretation.

9 Q. Now, when was the Contract signed? When did it become
10 effective?

11 A. It bears the date "April 28th, 1982." I have no
12 evidence to the contrary that that's not the date that
13 it was actually signed.

14 Q. And, in your direct testimony, your initial direct
15 testimony, Exhibit 3, on Page, the pages aren't
16 numbered, but it's the fifth page, you reference the
17 attached documents, the cover letter and calculation
18 sheet that we've spoken about previously?

19 A. Correct.

20 Q. And, that cover letter bears a date of "March 10th,
21 1982", preceding the signing of the Contract, is that
22 correct?

23 A. Well, on my copy, I see a stamp of "March 10th", but
24 the letter is dated "March 19th".

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[WITNESS: Labrecque]

1 Q. But, in either event, prior to the Contract?

2 A. Correct.

3 Q. So, I guess then that evokes the question, for what
4 purpose are we reviewing the letter and this analysis,
5 if there's no need for that analysis?

6 A. Are you asking for what purpose did I attach this to my
7 testimony?

8 Q. Yes.

9 A. This was an exhibit to draw attention to the fact that,
10 during negotiation of this Contract, which includes
11 Article C, with an indexing provision to PSNH's
12 incremental energy cost, that there was a forecast
13 exchanged between the two parties that showed a
14 escalating payment rate. It also -- it also maps out
15 the various adjustment mechanisms. So, I thought it
16 was useful on both of those points.

17 Q. So, I guess, in aiding the Commission with
18 understanding what evidence is relevant to the
19 understanding of this Contract, is that evidence
20 relevant to the understanding of this Contract?

21 A. I believe that the nine pages of the Contract itself
22 are adequate to interpret this dispute. A lot of the
23 other evidence in the record is -- goes beyond the
24 document itself.

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[WITNESS: Labrecque]

1 Q. So, even for understanding the derivation of the 5.47
2 cent adjustment, you would say that there's no need to
3 resort to any evidence outside of the Contract?

4 A. It's useful for -- to broaden your depth of information
5 regarding the topic, but I don't believe it's necessary
6 to go beyond the Contract itself in this case.

7 MR. FOSSUM: I have nothing further.

8 Thank you.

9 CMSR. BELOW: Okay. Any redirect? I
10 mean --

11 BY MR. EATON:

12 Q. Mr. Labrecque, --

13 CMSR. BELOW: Oh, wait a second.

14 Commissioner Ignatius has some questions.

15 CMSR. IGNATIUS: Well, I do have some
16 questions. I don't know if we should take a break first
17 or do they now, I can do it either way.

18 CMSR. BELOW: I think that we can try to
19 finish with this witness.

20 CMSR. IGNATIUS: I'd be happy to do so.

21 Good morning, Mr. Labrecque.

22 WITNESS LABRECQUE: Good morning.

23 BY CMSR. IGNATIUS:

24 Q. Is it your view that the Contract terms laid out the

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[WITNESS: Labrecque]

1 amount to be paid, and what the totals end up being
2 over the course of the 30 years isn't important, it's
3 that you follow the terms of the Contract?

4 A. That's correct.

5 Q. So, whether PSNH ends up collecting more or less than
6 the 2 percent -- the 2 cents adder isn't significant in
7 your view?

8 A. No.

9 Q. And, do you have any way in which you would even know,
10 I think you said "there would be no way to calculate
11 whether it's above or below", whether you've recovered
12 the full amount or less than or more than the full
13 amount of the 2 cents?

14 A. Not under the terms and conditions of the Contract.
15 You know, for interest, you could perform the
16 calculation to monitor the extent to which the original
17 deal that equated a 2 cent adder and a 5.47 cent
18 adjustment, assuming a uniform annual hydro production.
19 You could do the math. Given that, you -- you, me, or
20 any analyst found the memo that quoted a 17.61 percent
21 interest rate, that does not appear in the Contract,
22 you could then set up a spreadsheet to do that
23 mathematics. But the results of such a calculation,
24 while interesting, do not alter the way the Contract is

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[WITNESS: Labrecque]

1 administered.

2 Q. Have you done that calculation out of the -- you said
3 "out of interest", meaning --

4 A. Curiosity.

5 Q. -- curiosity, not an interest rate?

6 A. Yes.

7 Q. And, where does that come, if you have made that
8 calculation?

9 A. Based on our calculation, the full recovery of the 2
10 cent payment occurred October or November of 2009.

11 Q. October or November of 2000 --

12 A. Nine.

13 Q. Okay. Thank you. And, if, in fact, the amount to be
14 recovered was 1 cent, as Briar asserts, do you know
15 when that kind of breakeven point would have occurred?

16 A. I believe we put it in the Stipulation a fact, or maybe
17 not, but, regardless, July of '96 pops into my mind.

18 Q. July of 1996?

19 A. Yes, based on some analysis that the Briar staff
20 performed. No, I don't believe it appeared in the
21 Stipulation of Facts.

22 MR. EATON: Madam Commissioner?

23 CMSR. IGNATIUS: Yes, Mr. Eaton.

24 MR. EATON: Those two calculations are

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[WITNESS: Labrecque]

1 contained in Exhibit 3 to Mr. Norman's testimony. Exhibit
2 3 is Briar Hydro's calculation and Exhibit 4 is PSNH's
3 calculation.

4 CMSR. IGNATIUS: Thank you.

5 MR. EATON: They were not included with
6 the Stipulation, because PSNH wouldn't stipulate that they
7 are relevant.

8 MR. MOFFETT: Madam Commissioner, I
9 might also point out that, on the colored chart there,
10 which is Exhibit Number 6, I believe, we have attempted to
11 show the approximate points at which Briar would have
12 calculated the recovery.

13 CMSR. IGNATIUS: We'll have plenty of
14 chance, Mr. Moffett, for your witness to testify to that.

15 MR. MOFFETT: Thank you.

16 BY CMSR. IGNATIUS:

17 Q. Mr. Labrecque, you've stated you weren't part of the
18 negotiating team, in fact, you weren't a part of PSNH
19 anywhere close to the time that this Contract was
20 entered into. Do you know who did negotiate it?

21 A. I believe it was John Lyons. His name keeps popping
22 up.

23 Q. Is he still with the Company?

24 A. No.

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[WITNESS: Labrecque]

1 Q. Do you know if any of the names that appear, "H.J.
2 Ellis", "D.R. Sklar", who were cc'd on this memo, and
3 maybe other names, whether people who participated in
4 this Contract might still be with the Company?

5 A. I don't believe either, I'll say "Mr.", but I don't
6 know, Mr. Ellis or Mr. Sklar are members -- are
7 employees of PSNH at this time.

8 MR. EATON: It's "Ms. Sklar", was --

9 WITNESS LABRECQUE: Sorry.

10 MR. EATON: -- was an attorney with
11 Public Service Company. She's no longer with the Company.
12 Mr. Perron has retired, as Mr. Ellis and Mr. Lyons have
13 retired. Mr. McKenney retired and passed away last year.

14 CMSR. IGNATIUS: Thank you.

15 BY CMSR. IGNATIUS:

16 Q. Mr. Labrecque, has PSNH made any effort to locate the
17 people who did participate in the negotiations to get
18 their understanding of what occurred and what was
19 intended?

20 A. No.

21 Q. One of the interesting provisions in your testimony,
22 you say you don't know why it might be there, is the 1
23 cent reduction that you say is an independent
24 calculation separate from the 2 cent adder. Do you

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[WITNESS: Labrecque]

1 have any, and this may be speculation on your part, any
2 guess on what the purpose of that 1 cent reduction was
3 during the first eight years?

4 A. I do not.

5 Q. Do you have any understanding of what the 0.67 cent
6 adders in years 9 through 20 would have been for?

7 A. Well, they go together. Why both of them are in there
8 as a package, I don't know.

9 Q. You said that the 2 cent adder was for the purpose of
10 satisfying the lenders, who wanted to see presumably a
11 higher Contract rate?

12 A. Yes. I'm not sure exactly what I say in my testimony
13 to that, in that regard. But my assumption is, yes,
14 that 9 cents wasn't adequate to obtain financing, and
15 they needed something higher in the early years.

16 Q. Do you know if other contracts negotiated with QFs by
17 PSNH include similar kinds of adders and deductions?

18 A. They do. I don't know of any that are similar or
19 identical to this one.

20 Q. You understand that Mr. Norman alleges that a PSNH
21 employee told him that "the recovery period was about
22 to be done, and PSNH would be repaid in full, so that
23 the rate would change." You're familiar with that?

24 A. Yes.

[WITNESS: Labrecque]

1 Q. What do you make of that testimony? And, "testimony"
2 is the wrong word, but that information?

3 A. Sure, about that information. It's ultimately
4 irrelevant. And, I believe, subsequent to that
5 informal discussion, there was another informal
6 discussion where the statement was retracted, in a
7 sense, "I got it wrong on further review." So, to me,
8 it's not particularly relevant to looking at the
9 Contract terms.

10 CMSR. IGNATIUS: Let me ask,
11 Mr. Moffett, is that something that your witness, Mr.
12 Norman, will be able to address, the statement that maybe
13 that representation has been retracted?

14 MR. MOFFETT: Yes, madam Chairman -- or,
15 Madam Commissioner, Mr. Norman will be --

16 CMSR. BELOW: That's fine. If that's
17 the case, I won't ask further of Mr. Labrecque about that.

18 BY CMSR. IGNATIUS:

19 Q. I think the final thing I want to ask you is a question
20 of the purpose of continuing the rate. As you
21 interpret under the Contract, through 2013, if, by your
22 calculations, that full recovery amount was reached in
23 October or November of 2009, why, in your view, is it
24 appropriate that that rate continue even beyond the

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[WITNESS: Labrecque]

1 point that you've recovered the adder put on at the
2 beginning of the Contract?

3 A. Because we're interpreting the Contract as it's
4 written, it was an agreement reached by both parties.
5 It had risks for both parties that they both accepted,
6 PSNH, on behalf of procuring power for their customers,
7 and Briar Hydro, on behalf of investors in their
8 project. So, our obligation is to administer the
9 Contract terms as we see them through the end of the
10 Contract. And, at this point, it's to the benefit of
11 our customers, because it's a cent or two or whatnot,
12 you know, lower than the current market. So, it
13 represents a value to our customers that we don't want
14 to give up, based on Contract language we don't see in
15 the Contract.

16 CMSR. IGNATIUS: All right. Thank you
17 very much.

18 CMSR. BELOW: Okay. Mr. Eaton.

19 REDIRECT EXAMINATION

20 BY MR. EATON:

21 Q. Could you look at Exhibit 5 for identification. This
22 is the one-page document that Mr. Moffett entered.
23 And, it's -- and, I want to read a couple sentences in
24 there. Starting with the third line of Article 3,

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[WITNESS: Labrecque]

1 Section A. "And all payments made by Public Service to
2 Seller which exceed the index price must be recovered
3 by Public Service, during [the] later Contract years,
4 in accordance with Section D.1., Article 3." Did I
5 read that correctly?

6 A. Yes.

7 Q. And, then, in Section D.1., Article 3, the second
8 sentence says: "This deduction allows Public Service
9 to recover the payments made under Section A, Article
10 3, which exceeded the index price." Did I read that
11 correctly?

12 A. Yes.

13 Q. Now, the word "payments" is found in both Article A and
14 -- Article 3, Section A and Article 3, Section D.1,
15 correct?

16 A. Correct.

17 Q. And, that's not modified by any -- any adjective,
18 correct?

19 A. Correct.

20 Q. Now, if you look at Article 3, Section D.2, the last
21 sentence says: "The total of said Additional payments,
22 for any given year, shall not exceed one-twelfth of the
23 money subtracted during the first eight Contract
24 years." Do you think, by adding the word "Additional",

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[WITNESS: Labrecque]

1 that that's been -- that those payments aren't the same
2 payments as the Article 3, Section A payments?

3 A. Yes. It continues to be my interpretation that those
4 adjustments are separate.

5 Q. And, if the parties wanted to combine these sections,
6 they could have done that, right?

7 A. Correct.

8 Q. And, if you look at -- if you look at Exhibit 7, which
9 is -- which is over here, Section 3.D.1, and it reads:
10 "This deduction continues past Period 2 (i.e." and it
11 quotes, -- he quotes -- or, at least Exhibit 7 quotes
12 the language from the agreement, "(i.e. "for the term
13 of the Contract")", and then they add the words "if
14 necessary". Are the words "if necessary" in the
15 Contract?

16 A. No.

17 Q. Would it have been easy to put the words "if necessary"
18 into the Contract?

19 A. There would have been any number of very simple ways to
20 reflect the intent that Briar Hydro is attempting to
21 state.

22 Q. And, over in Period 3, that second bullet, is there any
23 language in the Contract that says "Once the excess
24 payments have been recovered, the Contract rate will be

[WITNESS: Labrecque]

1 the index price of 9 cents"?

2 A. No.

3 MR. EATON: Thank you. I have no
4 further questions.

5 CMSR. BELOW: Okay. If there are no
6 further questions for this witness, then the witness is
7 excused. And, we'll take a break until 11:45. We're in
8 recess.

9 (Whereupon a recess was taken at 11:45
10 a.m. and the hearing resumed at 11:50
11 a.m.)

12 CMSR. BELOW: Okay. Thank you.

13 MS. GEIGER: Thank you, Commissioner
14 Below. I'll be doing the direct examination of Richard
15 Norman.

16 CMSR. BELOW: Okay.

17 MS. GEIGER: I'm calling him on behalf
18 of New Hampshire Hydro Associates to the stand.

19 (Whereupon Richard A. Norman was duly
20 sworn and cautioned by the Court
21 Reporter.)

22 RICHARD A. NORMAN, SWORN

23 DIRECT EXAMINATION

24 BY MS. GEIGER:

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[WITNESS: Norman]

- 1 Q. Could you please state your name for the record.
- 2 A. Richard A. Norman.
- 3 Q. And, Mr. Norman, where are you employed and what
4 position do you hold?
- 5 A. I'm the President of Essex Hydro Associates. Essex
6 Hydro Associates is the general partner of Briar Hydro
7 Associates, and was the general partner of New
8 Hampshire Hydro Associates.
- 9 Q. And, could you please explain the role of Essex Hydro
10 Associates with respect to the Contract that's the
11 subject of today's hearing?
- 12 A. Yes. As the general partner for New Hampshire Hydro
13 Associates, it has the responsibility for conducting
14 the negotiations on behalf of the then owner of the
15 project.
- 16 Q. And, Mr. Norman, have you previously testified before
17 this Commission?
- 18 A. I have.
- 19 Q. And, did you submit prefiled testimony in this docket?
- 20 A. I did.
- 21 Q. And, do you have before you a document entitled
22 "Prefiled Testimony of Richard A. Norman on Behalf of
23 Briar Hydro Associates"?
- 24 A. I do.

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[WITNESS: Norman]

1 Q. And, is this the prefiled testimony that you just
2 referred to?

3 A. It is.

4 Q. And, do you have any corrections or modifications to
5 that prefiled testimony?

6 A. I have two minor corrections. On Page 20, Line 14, I
7 would like to add the words -- the Line 14 reads
8 presently, as submitted, "excess payments, not enrich
9 PSNH in the bargain." And, I'd like to insert the
10 words "customers of", after the words "not enrich". So
11 that it would then read "excess payments, not enrich
12 customers of PSNH in the bargain."

13 The second correction that I'd like to
14 make is found on Page 24, Line 8. The line did read
15 "The bargain that was struck has more than been
16 fulfilled. Long ago PSNH and its ratepayers". And,
17 I'd like to add the words "long ago", new words, "the
18 Public Service", and delete the words "and its". So,
19 it would then read: "Long ago the PSNH ratepayers
20 recovered payments made in excess of the index price."

21 Q. Mr. Norman, do you have any other corrections and
22 modifications to your prefiled testimony?

23 A. I don't.

24 Q. Okay. With the changes that you just described, if you

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[WITNESS: Norman]

1 were asked the same questions today under oath as those
2 that are contained in your prefiled testimony, would
3 your answers be the same?

4 A. Yes.

5 MS. GEIGER: Commissioner Below, we'd
6 like to have Mr. Norman's prefiled testimony and the
7 exhibits that were attached to it marked as the next
8 exhibit in this docket for identification. I've put
9 before the Bench or on the Bench another copy of that
10 submission, which has all of the appendices indexed by
11 number, just for ease of reference. My understanding is
12 that the originals that were filed with the Commission did
13 not have the numbered tabs on the side of them. So, for
14 ease of reference, I thought it would be helpful for the
15 Bench to follow along in the testimony. And, I have
16 provided another copy of the tabbed exhibits to the Clerk.

17 CMSR. BELOW: Okay. We'll mark that as
18 "Exhibit 8". Though, I'm a bit confused at how the tabbed
19 document could be so much larger than what we have
20 already. So, I just want to understand that.

21 MS. GEIGER: I'm just wondering if the
22 Bench has copies of the attachments that were submitted?

23 CMSR. IGNATIUS: Commissioner, Attorney
24 Geiger, we have your submission here, our own set. Now,

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[WITNESS: Norman]

1 what had been distributed was a shortened version that the
2 cover letter I think noted that some of the hard copies of
3 the full exhibits weren't circulated to all. So, this is
4 helpful.

5 MS. GEIGER: Okay.

6 CMSR. BELOW: So, we'll mark the long
7 version, with all of the tabs, as "Exhibit 7".

8 CMSR. IGNATIUS: Eight.

9 CMSR. BELOW: Eight, I'm sorry.
10 "Exhibit 8".

11 (The document, as described, was
12 herewith marked as Exhibit 8 for
13 identification.)

14 MS. GEIGER: And, if Staff and PSNH
15 don't have that large package, I do have extra copies. It
16 looks like Mr. Mullen has it. And, does Attorney Eaton --

17 MR. EATON: I have copies of Exhibits 2,
18 3, 4, and 5.

19 MS. GEIGER: Okay. Thank you. And,
20 Exhibit 2, my understanding, has a lot of sub-exhibits
21 marked in the convention 2-1, 2-2, 2-3. I don't mean to
22 confuse the record, but I think you'll be able to follow
23 along as we move through the documents that are attached.
24 And, if there are any questions, just let me know.

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[WITNESS: Norman]

1 BY MS. GEIGER:

2 Q. And, Mr. Norman, did you sign the Contract that is the
3 subject of this docket?

4 A. I did.

5 Q. And, were you personally involved in the negotiation of
6 that Contract?

7 A. I was.

8 Q. Okay. And, could you please describe the circumstances
9 of your company at the time that Contract was
10 negotiated?

11 A. Yes. I would like to respond to some of the comments
12 that Mr. Labrecque made concerning our -- the status of
13 our program at that time. It was at a very early stage
14 in the development of our hydro programs. We had gone
15 out and significantly extended ourselves with regard to
16 commitments, even up to the point of including the
17 commencement of construction, and were confronted with
18 the need to obtain a construction loan in order to
19 develop the project. Had we not been able to develop
20 the project, we essentially were confronted with
21 bankruptcy. So, there was a need for us to find an
22 acceptable power contract that would meet the
23 requirements of our lender. And, it was under those
24 circumstances that we began to negotiate with Public

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[WITNESS: Norman]

1 Service.

2 What I would say is that, and in my
3 direct testimony I indicated this, that Public Service
4 was supportive at that point in time of the development
5 of IPP projects, to the point of being willing to offer
6 certain contract provisions and whatever. And, that's
7 really where we stood at the time that the negotiations
8 began in mid 1981.

9 Q. Mr. Norman, I think I just heard you say that you were
10 "negotiating a Contract to satisfy your lenders", is
11 that correct?

12 A. That is correct, and to satisfy ourselves.

13 Q. And, could you please explain what a contract that
14 would be satisfactory to your lenders at that time
15 would entail?

16 A. Yes. What they were focusing on was a source of
17 sufficiently certain revenue that we would be able to
18 repay the loan which we were proposing to take on the
19 project. The loan was made up of a construction loan,
20 which then phased into a term loan for eight years.
21 And, so, as with the evidence that we've submitted,
22 there was a significant focus with regard to the early
23 years of the Contract. If we did not have sufficient
24 assurance for revenues that met our lenders'

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[WITNESS: Norman]

1 requirements. We couldn't get the construction -- we
2 couldn't get the construction loan, and, therefore, we
3 couldn't do the project. So, it was in that context
4 that we undertook the negotiations that ensued over the
5 next several months.

6 Q. Do you have a recollection of what rate your lenders
7 were requiring of you at that time?

8 A. Well, it wasn't necessarily a specific rate as we
9 started off, but, rather, it was a cash flow
10 projection, which ultimately translated into a
11 requirement that 10 cents per kilowatt-hour met their
12 requirement.

13 Q. And, do you have a recollection of the parties' intent,
14 the parties to the Contract's intent regarding the
15 pricing provisions of the Contract?

16 A. Yes. It would have been very easy for us, at the time
17 that we began to talk with Public Service, they had a
18 policy in place which provided for three different
19 options. Option 2 provided for a level index rate of 9
20 cents per kilowatt-hour. That's been discussed fairly
21 extensively by Mr. Labrecque. But, basically, if our
22 lenders had been satisfied with a 9 cent per
23 kilowatt-hour rate, we could have taken what was then
24 called an "Option 2 Contract". We would have been paid

[WITNESS: Norman]

1 10 cents -- correct myself, 9 cents per kilowatt-hour
2 level for a 30 year period. That didn't meet our
3 requirements. And, therefore, in accordance with the
4 policy provisions that Public Service had published at
5 that time, we elected to develop our project under
6 Option 3. I believe the PSNH policy statement is
7 incorporated into my earlier testimony, and that's the
8 basis upon which we began our negotiations.

9 We fully understood that we were asking
10 for something more than a common index rate of 9 cents,
11 and that the bargain to be struck was that we would
12 have to -- we would have to provide for recovery
13 payments for payments that we received in excess of 9
14 cents per kilowatt-hour. There then ensued a number of
15 exchanges of correspondence and calculations. The
16 index or the discount rate or the interest rate varied
17 moderately during that period of time. At one time it
18 was 17.75 percent. I think we ended up at 17.61 or
19 17.62 percent. The rate being determined by Public
20 Service's average cost of capital at that time.

21 Q. And, Mr. Norman, do you recall a question from
22 Commissioner Below of Mr. Labrecque regarding a letter
23 dated March 19th, 1982, that was attached to what's
24 been marked as Exhibit 3, Mr. Labrecque's prefiled

[WITNESS: Norman]

1 testimony?

2 A. I do.

3 Q. And, I'm going to show you a copy of that. And, I
4 think the question from Commissioner Below was whether
5 or not the reference in the letter to an attachment
6 relating to a copy of the Contract, whether or not a
7 final draft of the Contract was actually appended to
8 that letter? Do you recall that?

9 A. It's my belief that it isn't. And, the basis of that
10 statement are some additional exhibits that were
11 included in my testimony. I make reference to a letter
12 from New Hampshire Hydro to Mr. Henry Ellis, dated
13 April 1, '82, in which we basically transmitted some
14 further requests or requirements from our lenders,
15 which led to further modifications of the draft that
16 was transmitted in March of '82. In this, we asked for
17 certain clarification language, which ultimately was
18 added to Section 3.A of the paragraph. And, that was a
19 clarifying sentence, the last sentence of Paragraph
20 3.A, which states: "The provisions of Section C,
21 Article 3, shall not override the provisions of this
22 paragraph." The concerns from our lenders being that,
23 if, during the initial eight years, the incremental
24 energy price was to exceed 10 cents and triggered

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[WITNESS: Norman]

1 Section C of the paragraph, that the actual price that
2 we would be receiving would be less than 10 cents.

3 And, so, that was one provision that was added.

4 There was a second letter dated
5 April 16th of 1982. And, I should say that the earlier
6 letter was marked as "Exhibit 2-25".

7 Q. Of your prefiled testimony?

8 A. Of my prefiled testimony.

9 Q. Okay.

10 A. And, the subsequent letter dated April 16th of 1982,
11 this is "Exhibit 2-29", led to a further modification
12 of the power contract, which provided for an additional
13 potential two years of payments at a rate of 10 cents,
14 in the event that we experienced operating difficulties
15 during the first eight years of the Contract. So, the
16 final -- the final form of the Contract is as reflected
17 as of April 28th, not as of March of '82.

18 Q. Okay. Thank you. Now, Mr. Norman, could you please
19 briefly describe for the Commissioners the
20 circumstances that led to the dispute that brings us
21 here today?

22 A. With some embarrassment, I will. This Contract was
23 signed a long time ago. It had been administered, the
24 project had operated, and I think operated well for a

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[WITNESS: Norman]

1 number of years. And, in early -- in January of '09, I
2 had requested a meeting with a PSNH representative to
3 seek a meeting with regard to the earlier Contract
4 dispute dealing with capacity payments. It was an
5 informal meeting. It was held outside of Public
6 Service's offices. It was a very short meeting. And,
7 during that meeting, the Public Service representative
8 made the statement that, according to his calculations,
9 it was expected that we would have achieved full
10 recovery payment two to three years before the end of
11 the Contract term.

12 As an outgrowth of that meeting, I went
13 back and talked with my associates. And, it caused us
14 to go back and parse the language of the Contract which
15 is in dispute, to see how we interpreted the Contract,
16 and whether or not we would be entitled to a payment
17 other than the 3.53 cents per kilowatt-hour that we
18 were currently reading. We also asked our lawyers to
19 take a look at it. And, the conclusion that we came
20 to, as we will explain today, is that the plain meaning
21 of the Contract was intended to provide PSNH and its
22 ratepayers with recovery payments that were equivalent
23 to the 1 cent per kilowatt-hour premium or the excess
24 above the index rate that we received during the eight

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[WITNESS: Norman]

1 Contract years, with an allowance for the time value of
2 money. We concluded that we were not obligated to
3 continue to pay the 5.4 cent per kilowatt-hour
4 adjustment for the full term of the Contract.

5 Q. Now, Mr. Norman, you indicated that you went back,
6 after having this conversation with a representative of
7 PSNH, and to make a determination of how the Contract
8 operated, is that correct?

9 A. That's correct.

10 Q. And, is it fair to say that the chart that's been
11 marked for identification as "Exhibit 6" is a graphical
12 representation of how Briar Hydro believes the pricing
13 provisions of the Contract work?

14 A. Well, with one exception. And, that being, and my
15 eyesight is still almost okay, in Period 3, it is shown
16 that there's a 5.47 cent per kilowatt-hour adjustment,
17 which runs through the full 30 years of the Contract.
18 We don't believe that should be the case. We believe
19 the Contract provides that, at such time as full
20 recovery with time value of money has been realized by
21 PSNH and its ratepayers, that from that point forward
22 we should be paid at the index rate.

23 Q. Is another way to look at what's depicted on -- I'm
24 going to take this down for a moment. Another way to

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[WITNESS: Norman]

1 look at what's been depicted on -- on this chart, is
2 that Briar Hydro believes it's only responsible for
3 paying the amount that's shown on this chart that's
4 depicted in the solid red, is that correct?

5 A. Yes. That's correct.

6 Q. And, has Briar Hydro made a calculation as to when it
7 believes it has repaid that amount?

8 A. It has made that calculation. And, I think, and I'll
9 try not to repeat a lot of what's been done, but the
10 solid red area represents eight years of a 1 cent per
11 kilowatt-hour payment in excess of the index rate.
12 And, we then performed our calculation, which indicated
13 that, by July of 1996, taking into account a discount
14 rate, I believe, of 17.61 percent, that we would have
15 fully repaid the 1 cent per kilowatt-hour -- 1 cent
16 per kilowatt-hour rate that had applied during the
17 first eight years. And, one way to express it, and
18 it's shown down in the small boxes here that have not
19 been mentioned, is that the dollar value of the 1 cent
20 premium in the first eight years, as is shown on the
21 chart that's here, equaled \$1,488,685, which was the
22 production during that period times 1 cent per
23 kilowatt-hour. If you then looked at the rate that was
24 applied, we were actually receiving 9 cents, less 5.47

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[WITNESS: Norman]

1 cents, plus 0.67 cents per kilowatt-hour, for a payment
2 rate of 4.2 cents. That the box that's shown here,
3 between the end of Contract year 8 and July of 1996,
4 would have resulted in excess payments -- would have
5 resulted in repaying the \$1,488,000 with recognition
6 for time value of money and the total of those payments
7 would have been \$4,378,127.

8 If you used Public Service's
9 interpretation of the Contract, which is to take the
10 solid red box, and then the hatched red box, the sort
11 of phantom two cents per kilowatt-hour payment, because
12 we only got 1 cent, not two cents. But, if we took
13 their calculations, and assumed that we would receive a
14 payment of 4.2 cents per kilowatt-hour from Contract
15 years 9 to 20, and then 3.53 cents per kilowatt-hour
16 thereafter, by, I believe, September of 2009, under
17 their calculations, we would have fully repaid the
18 \$1,480,000 that we received in the first eight years,
19 plus the time value of money. And, the total of that
20 payment would have been \$18,850,000, and I'm rounding
21 off here.

22 Q. Mr. Norman, I believe you just indicated that you think
23 that, as a result of PSNH's calculation of the amounts
24 that it has been repaid, the amount of excess above

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[WITNESS: Norman]

- 1 index price that it's been paid, occurred in September
2 of '09. Subject to review of the chart, do you want to
3 change that testimony? And, I think, if you look --
- 4 A. What I want to reference are the calculations that were
5 -- I have them here.
- 6 Q. Well, if you just look at the bottom of the chart
7 that's been marked as "Exhibit 6", PSNH says that it
8 has recalculated recovery as a result of "November of
9 '09". Do you agree with that? That that's their
10 recalculation date or that repayment date? I believe
11 you said "September".
- 12 A. Actually, I'm referring to I believe the calculation
13 that was provided by Public Service, and this may have
14 been subsequently adjusted. But the calculation that I
15 have shows that we actually went positive or fully
16 repaid, Public Service recovered the full amounts
17 sometime in September and October of '09.
- 18 Q. Okay. So, irrespective of which month in 2009 PSNH or
19 you believe that, according to PSNH's calculation,
20 recovery has been made, fully made, it's true, is it
21 not, based on the chart and based on those calculations
22 that Briar Hydro has fully repaid PSNH the above index
23 Contract price?
- 24 A. Yes.

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[WITNESS: Norman]

1 Q. Now, we've heard from Mr. Labrecque extensively on
2 direct, as well as through cross-examination by
3 Attorney Moffett, what PSNH's interpretation of the
4 Contract provisions mean. Could you please provide a
5 brief summary of Briar Hydro's interpretation of the
6 pricing provisions of the Contract. And, I would ask
7 you to direct your attention and focus on the chart
8 that contains the blown up provisions of Article 3.

9 A. I'm struggling to find -- yes. I think it centers, as
10 I listened to Mr. Labrecque, frankly, he's been in
11 business a long time, I've been in business a long
12 time. And, what I struggle with is his
13 characterization that "Public Service has been strictly
14 administering the Contract according to its language."
15 And, it's my belief that a plain reading of Section 3.A
16 is the way the Contract has to be interpreted. And, if
17 you read Section 3.A, and bear with me, if you will, it
18 says: "For the first eight years of the Contract, the
19 Contract rate", this is the only place that the
20 Contract rate is established, essentially, as a defined
21 term "shall be 11.00 cents per kilowatt-hour. This
22 rate exceeds the index price by 2.00 cents per
23 kilowatt-hour; and all payments", again, underscoring
24 "payments", "made by Public Service to Seller which

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[WITNESS: Norman]

1 exceed the index price must be recovered by Public
2 Service, during later Contract years, in accordance
3 with Section D.1., Article 3." Section D.1., Article 3
4 which provides for the 5.47 cent recovery beginning in
5 year nine, is incorporated by reference into Paragraph
6 -- into Section 3.A. It isn't free-standing. It's a
7 part of 3.A.

8 Similarly, it says: "This rate is
9 subject to adjustment provided for under Section D.2.,
10 Article 3." Here again, what Section D.2., Article 3
11 does is to modify the Contract rate. It doesn't stand
12 by itself. And, therefore, when you look at the chart,
13 what the chart is saying is that we start off with a 9
14 cent index price, we increase it to 11 cents, and then
15 we decrease it to 10 cents. And, that's all part of an
16 adjustment to the Contract rate. It doesn't say
17 "Section D.2 stands by itself."

18 We're -- and this, to us, is the focal
19 point of our disagreement with Public Service. They
20 contend that Sections D.1 and D.2 stand by themselves.
21 You read the language of Section 3.A, seems to me it's
22 a part of 3.A.

23 The other area in which we strongly
24 disagree with Public Service is the wording in Section

[WITNESS: Norman]

1 D.1. And, what Section -- and, what Public Service has
2 done is to focus solely on one sentence, "Beginning
3 with the ninth Contract [term], and continuing for the
4 term of the Contract, a recovery amount equal to 5.47
5 cents per kilowatt-hour shall be deducted from the
6 Contract rate." They focus for the "term of the
7 Contract" and "shall be deducted from the Contract
8 rate". They ignore both the language in Section A,
9 which talks about the intent of the recovery, and they
10 also ignore the qualifying sentence in Section D.1,
11 that states "This deduction allows Public Service to
12 recover the amounts made under Section A, Article 3,
13 which exceeded the index price."

14 Q. Mr. Norman, do you believe there are any Contract terms
15 to support the PSNH assertion that Briar Hydro's
16 repayment obligation should be based on 2 cents per
17 kilowatt-hour, instead of 1 cent per kilowatt-hour?

18 A. I don't. As I say, I sort of refer to it as the
19 "phantom 1 cent payment", because we didn't get paid
20 one cent. And, the record clearly indicates, both from
21 evidence that we've submitted and from Public Service's
22 own calculations, that we only received 10 cents per
23 kilowatt-hour, or 1 cent in excess of the index rate
24 for the first eight years.

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[WITNESS: Norman]

1 Q. Has PSNH provided you with any, other than the
2 repayment calculation that is the basis for the second
3 vertical line appearing in the third period on the
4 chart that's been blown up, has PSNH provided you with
5 any other calculations to support its version of the
6 Contract?

7 A. To the best of my knowledge, in recent times, no.

8 Q. Now, assuming that PSNH has recovered all amounts in
9 excess of the index price that were paid to Briar
10 Hydro, what rate should be paid by PSNH for the
11 remaining term of the Contract? What's Briar's
12 position on the payment for the duration after Briar
13 has fully -- after Briar has fully repaid PSNH for the
14 above index price?

15 A. Well, I -- if you refer to Article 3.B, it states that
16 "If, during the first eight Contract years, 96 percent
17 of Public Service's incremental energy costs has not
18 exceeded the index price, the Contract rate beginning
19 with the ninth contract year shall be the index rate of
20 9 cents. This rate shall remain in effect until
21 superseded by the provisions of Section C, Article 3."
22 And, Section C, Article 3, deals with Public Service's
23 incremental energy costs, the one and a quarter pages
24 that Mr. Labrecque referred to. And, it's our belief

[WITNESS: Norman]

1 that that event has not been triggered. And,
2 therefore, the index rate of 9 cents per kilowatt-hour
3 would apply, from the point of recovery through the end
4 of the 30 year term of the Contract.

5 Q. And, I think I just heard you say that, under the
6 Contract or during the Contract term, has PSNH's
7 incremental energy rate ever exceeded the index rate
8 such that Section C of the Contract would be triggered?

9 A. No.

10 Q. But I believe you heard Mr. Labrecque testify this
11 morning during his examination, and I think he may have
12 used the words "speculate" about the parties' intent on
13 how Section C of the Contract was to operate. Were you
14 here for that testimony?

15 A. I do.

16 Q. Do you agree with what Mr. Labrecque indicated in his
17 speculation?

18 A. Not in the least. I would say that he did concede that
19 it was speculation, and that's what it was. Because,
20 as I've just testified before, we were confronted with
21 an extreme situation. And, our focus was on finding a
22 sufficient source of revenue to support the term loan
23 that we needed for the project. And, in looking at
24 that projection, Mr. Lyons, in correspondence with us

[WITNESS: Norman]

1 emphasized that this was nothing more than a
2 projection. And, from our perspective, we were looking
3 not just at what we might earn if the incremental
4 energy rate went up, but, as Mr. Moffett, in his
5 cross-examination from Mr. Labrecque indicated, we were
6 equally concerned with what would happen if the
7 incremental energy price spiked at something to trigger
8 Section C. And, we were then confronted with the
9 remaining term of the Contract being paid at
10 incremental energy prices, which had a declining
11 percentage, going down all the way to 50 percent of the
12 incremental energy prices. And, I would just site as a
13 specific example that, if it had gone over 9 cents, and
14 using, as an example, it went back then down to 8 cents
15 per kilowatt-hour. And, we were being paid only
16 50 percent of the incremental energy price, 4 cents per
17 kilowatt-hour. Four cents per kilowatt-hour would not
18 have supported the operation of the project.

19 And, I could get into something more
20 extreme. The market price today, as I think people
21 know, is more like about 4 or 5 cents. So, to say that
22 we were focused in a greedy way, upon looking at all
23 the money we would make in the future, which is the
24 implication of Mr. Labrecque's testimony, just isn't

[WITNESS: Norman]

1 correct. It would have been very, very nice, frankly,
2 if it had gone up that high; we might not even be here
3 today. But, in fact, that isn't the way it turned out.
4 And, as prudent business people, we were just as
5 concerned about what would happen with a decrease in
6 price, as we were with an increase in price.

7 But, again, our primary focus, as is
8 evidenced in the record, was getting the 10 cents per
9 kilowatt-hour, so we could get our construction and
10 term loan.

11 Q. In addition to that portion of Mr. Labrecque's
12 testimony with which you disagree, and are there any
13 other areas in either his prefiled testimony, direct
14 testimony or prefiled rebuttal testimony, that you have
15 disagreement with?

16 A. Well, as I mentioned, and I may be repeating myself, we
17 don't agree with the obligation to continue to make the
18 5.47 cent repayment.

19 Q. Well, if you take a look at Mr. Labrecque's rebuttal
20 testimony, on Page 8, Lines 21 through 25, you see in
21 that prefiled testimony Mr. Labrecque makes reference
22 to a letter titled "Market for Power"?

23 A. Yes.

24 Q. Could you please describe what that document is.

[WITNESS: Norman]

1 A. That document -- in 1981, I also held positions in
2 other companies that were involved in energy
3 development. And, the information contained therein
4 was initially compiled in an effort to develop a
5 coal-fired plant in Massachusetts. Subsequently, we
6 made an attempt to develop and construct a new
7 hydroelectric plant, referred to as the "Moore's Falls
8 Project", located in the Merrimack River, in
9 Litchfield, New Hampshire, and had some preliminary
10 discussions with Public Service relating to that. But
11 this was an internal memo. It was not served as a
12 direct linkage to the Penacook Project. And, there are
13 some statements that are contained in that which I
14 disagree with. And, basically, I think Mr. Labrecque
15 has indicated in his testimony that, among other
16 things, we were placing reliance on some wording, in
17 which it stated that, "if we didn't" -- "If
18 negotiations with Public Service [didn't] proceed
19 smoothly, other New Hampshire utilities [would] be
20 approached. These included Connecticut Valley, Granite
21 State Electric, and Concord Electric (an
22 all-requirements customer), and the New Hampshire
23 Electric Co-op." I point out, first of all, as a point
24 of clarification, that at that point in time the Co-op

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[WITNESS: Norman]

1 was also an all-requirements customer of Public
2 Service. And, to create the impression that we had a
3 lot of alternatives with regard to selling our power is
4 just not correct. Due to both the geographical
5 location of our project, given the state of developing
6 the IPP industry, we, practically speaking, were
7 limited to Public Service as our purchaser of power,
8 notwithstanding the theoretical wording that may have
9 been in PURPA at that time.

10 And, as I mentioned, although I
11 characterized our discussions and do characterize them
12 as a "take it or leave it", with regard to specific
13 Contract wording, I don't mean to imply that Public
14 Service was a hostile company with which to deal with
15 with regard to supporting our efforts to do this
16 project. Their pricing policy made it possible for us
17 to do this project. But, during the course of the
18 negotiations, as we I think have pointed out in my
19 prefiled testimony, we were dealing with an individual
20 that frankly was not a lawyer, and he refused to make
21 some common sense adjustments to language. And, we
22 were confronted with either accepting that language,
23 putting it in the Contract and attempting to live with
24 it, or, alternatively, not having a Contract. And, so,

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[WITNESS: Norman]

1 I disagree with the characterization with regard to
2 what our alternatives were with the power market, and
3 am clarifying what I think our experience was with
4 regard to dealing with Public Service. Taking, as a
5 case in point, Article D. At numerous times, we would
6 sit there and say to John Lyons "This doesn't make any
7 sense. Put it into and incorporate it into the
8 Contract rate." And, the answer we got back was "It's
9 a standard contract, and that's the way it has to be."

10 Q. Now, Mr. Norman, are you asking the Commission to order
11 PSNH to pay Briar Hydro the amount that Briar Hydro has
12 paid back to PSNH above the index price?

13 A. We're not. And, again, I have to differentiate between
14 our calculation, which said that the excess payments
15 were recovered in 1996, and Public Service's
16 calculation, which says that they were recovered late
17 in 2009. From a practical and a political perspective,
18 if we were to seek that recovery, it would be tens of
19 millions of dollars based upon the methodology, and
20 that just isn't something that's logical.

21 What we have asked is one of two things:
22 Either determine, that as of the date of the filing in
23 this docket, that we're entitled to an index rate of 9
24 cents per kilowatt-hour for the remaining term of the

[WITNESS: Norman]

1 Contract or, alternatively, terminate the Contract.

2 And, if you do terminate the Contract, we would like

3 recognition for the fact that these proceedings take a

4 long period of time, we have no idea when a decision

5 would be reached, and we would like to have the

6 difference between the 3.53 cents that we're currently

7 being paid and the index price for the period of time

8 from when this Contract -- when this filing was made by

9 Public Service, until the termination date of the

10 Contract.

11 Q. Mr. Norman, do you have anything further to add to your

12 testimony?

13 A. No.

14 MS. GEIGER: Thank you. I have no

15 further questions.

16 CMSR. BELOW: Thank you, Ms. Geiger.

17 Mr. Eaton.

18 MR. EATON: Thank you.

19 CROSS-EXAMINATION

20 BY MR. EATON:

21 Q. At Page 4 of your testimony, you talk about "an

22 informal meeting between a representative of PSNH and

23 me." How informal was that?

24 A. I'll be very specific. We met at Fratello's. We met

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[WITNESS: Norman]

1 on the 9th of January, at 1700. And, the meeting
2 lasted for probably 30 minutes. I had one glass of
3 white wine. The Public Service representative had one
4 beer.

5 Q. Did that representative later retract what was said
6 about the recovery of payments?

7 A. I -- to the best of my knowledge, Mr. Eaton, there was
8 never a formal retraction by that individual, but,
9 rather, the position that Public Service took. And, we
10 sought to arrange a meeting to try and address this
11 issue in an informal way, as I indicated in my
12 testimony. That meeting did not -- was not a positive
13 result. And, in that meeting, the position that was
14 taken by the Company, not by the individual
15 representative, was as reflected here; that Public
16 Service was entitled to 5.47 cents for the term of the
17 Contract.

18 Q. Did that employee make an informal retraction of what
19 he had said?

20 A. To the best of my knowledge, no. Although, in recent
21 times, my understanding is that that employee was
22 informed that the position of the Company was that the
23 5.47 cents would apply for the 30 years of the
24 Contract.

[WITNESS: Norman]

1 Q. Mr. Norman, you're asking the Commission to change the
2 Contract, aren't you?

3 A. No, I'm not.

4 Q. Won't the 5.47 cents not continue for the term of the
5 Contract?

6 A. Under our reading of the Contract, as I've indicated,
7 in Section 3.A, the 5.47 cent adjustment would stop at
8 the point when Public Service and its ratepayers had
9 fully recovered the excess, the payments in excess of
10 the index rate, with recognition for the time value of
11 money.

12 Q. Where does it say that in the Contract? That the --
13 the exact words you just said? Not what you think they
14 mean. Where does it say that "the 5.47 cents stops and
15 doesn't continue for the term of the Contract"?

16 A. What I can point to, Mr. Labrecque, is what I've
17 indicated in Section 3.A. And, that is that the
18 recovery amounts would be tied to the payments, and I
19 underscore payments, 10 cents, not 11 cents, that would
20 be made. And, that would be the intent of the
21 paragraph, and that's the way I read it.

22 Q. Does the Contract state that the -- the Contract, does
23 that state that the 1 cent adjustment of Article 3,
24 Section D.2, offsets the 2 cents adder to the index

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[WITNESS: Norman]

1 price?

2 A. If you're asking me "does Section D.2 state that?"

3 Q. Yes.

4 A. My answer is that it's a qualified answer. Section D.2
5 doesn't say that. But Section 3.A does say that by
6 incorporating D.2 into Section A and modifying the
7 Contract rate.

8 Q. Then, why in the world would we pay 0.67 cents back to
9 you, from year 9 to year 20, if that has -- that has
10 absolutely no relevance? If the 1 cent was merely a
11 reduction to the 11 cent price, why in the world would
12 we pay you back 0.67 cents for the 12 years?

13 A. I'm going to give you two answers. One is, I wish
14 Mr. Lyons was here to answer that question, because
15 that's a question we asked of him and couldn't get an
16 answer back in 1982. But, with respect to a direct
17 response, as Mr. Moffett has indicated, the shaded
18 green -- red area is illusory, in the sense that it
19 was never paid. And, the hatched area, the 0.67 cents
20 that you applied to actually reduce -- actually what it
21 did was to reduce the 5.47 cent negative adjustment
22 that began in year 9. So, when we talk about this,
23 there was no payment, there was no dollar value with
24 regard to Section -- with regard to Period 1, Contract

[WITNESS: Norman]

1 years 1 to 8. And, what the effect of the 0.67 cents
2 was was basically to somewhat reduce our recovery
3 payment obligation from years 9 to years 20.

4 Q. Where in the Contract does it state that Section D.2
5 reduces Section D.1 payments?

6 A. If you read Section 3.A in its entirety, you have
7 adjustments, which are provided in both Section D.1 and
8 D.2, and they're incorporated by reference into Article
9 3.A. And, that's the only way that they apply
10 together. And, what that ends up doing is establishing
11 a net payment rate that is applicable during Periods 1,
12 2, and 3. And, it's -- I'm not a lawyer, but I've read
13 a lot of contracts. And, I look at Section 3.A, and I
14 don't understand why you don't incorporate by reference
15 D.1 and D.2, because that's just what the words say.

16 Q. Have you ever read a liquidated damages clause in a
17 Contract?

18 A. In other contracts, certainly.

19 Q. And, what's a "liquidated damages clause" supposed to
20 do?

21 A. Well, it depends upon the circumstances of the
22 contract. It could be a construction contract, it
23 could be an operating contract. And, it's a point of
24 negotiation. And, it can provide for many, many

[WITNESS: Norman]

1 different things.

2 Q. So, in 1981, you didn't know how the plant was going to
3 operate for the first eight years, for the next twelve
4 years, and for the full thirty years, right?

5 A. I don't -- no, I disagree with you. The project itself
6 was very well-defined. We were dealing with the
7 leading turbine manufacturer in the U.S., Allis
8 Chalmers. The turbines that we were putting in were
9 the exact turbines that Public Service was buying and
10 installing at the same time. We were dealing with an
11 established contractor, Perini Corporation. And, as
12 indicated in previous testimony with Mr. Labrecque, the
13 issue came up, when you talk about "liquidated
14 damages", what happens if the project doesn't operate
15 as advertised? And, during the course of negotiations,
16 there were issues and correspondence exchanged, with
17 regard to a put, with regard to property insurance and
18 whatever, as referenced by Rider K, among other things.
19 The final Contract, as accepted and determined by
20 Public Service, didn't incorporate any of those
21 provisions. It apparently concluded that liquidated
22 damages was not an appropriate task, it was not an
23 appropriate thing to be included. I can't answer for
24 Public Service. What I can show you in the record is

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[WITNESS: Norman]

1 that we offered and were willing to give a put, we were
2 willing and had to have property insurance in our term
3 loan and whatever, but none of those provisions were
4 ever incorporated into the Contract.

5 Q. But there was a provision that said that "the index
6 price would be increased by 2 cents, and those monies
7 would be paid back by a deduction from the index price
8 of 5.47 cents for the remainder of the Contract term"?

9 A. I'm sorry to continue to disagree, but that's not what
10 the words say. The words say "the index price is
11 increased by 2 cents." But, then read on in the
12 paragraph, and the 2 cents is then reduced by Article
13 D.2. The payment rate is 10 cents, not 11 cents.

14 Q. In our Stipulation, do you have that in front of you?

15 A. Somewhere.

16 Q. It's attached to Exhibit 2 -- or, it's part of
17 Exhibit 2.

18 A. I have it, Mr. Eaton.

19 Q. Could you look at Paragraph 13.

20 A. Yes.

21 Q. You agreed to this language, correct, in the
22 Stipulation? I mean, your attorney signed the
23 Stipulation?

24 A. Yes. No, I'm just reading it. Yes.

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[WITNESS: Norman]

1 Q. And, it says a total of "\$1,488,685" was subtracted
2 during the first eight Contract years. You agreed to
3 that language, correct?

4 A. Yes.

5 Q. And, PSNH then paid "one-twelfth of the money", or
6 "\$124,057", over the remaining 12 Contract years. Over
7 the next 12 Contract years, correct?

8 A. I think -- I think the intent of this language was to
9 focus on the level of production during each of
10 Contract years 9 to 20, when we would only be paid 3.53
11 cents, instead of 4.2 cents. And, that operated as a
12 trigger, because -- because of the language in Section
13 D.2. And, that's what this says here, at least as I
14 read the sense of it, is that you had 12 Contract
15 years. There were five years in which we didn't reach
16 the cap, and, therefore, we continued to be paid at 4.2
17 cents. And, for the other seven years, our production
18 was over the average of the first eight years. And, in
19 those years, we reverted to a 3.53 cent payment for any
20 production in excess of the average rate of production
21 that we had achieved in the first eight years. I think
22 that's what -- I think that's what Paragraph 13 deals
23 with.

24 Q. What does Paragraph 13 say?

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[WITNESS: Norman]

- 1 A. Shall I read it?
- 2 Q. Yes. Because your -- what you think the intent of
3 Paragraph 13 may not be the same as what it actually
4 says?
- 5 A. Well, in my mind, it's establishing the production rate
6 beyond which we don't get paid 4 cents. That's the
7 operative effect of this paragraph. Because, if we had
8 -- if we had operated our projects and produced more
9 than the average rate in the first eight years, that
10 would then have caused us to continue to be paid at a
11 rate of 4.2 cents, instead of 3.53 cents.
- 12 Q. Was this repayment provision explicit in the Contract?
- 13 A. I believe it was as explicit as to the read the
14 operation of Section A, D.1 and D.2. And, each one of
15 those component adjustments were incorporated into an
16 adjusted Contract rate. And, the adjusted Contract
17 rate in Period 1 was 10 cents. The adjusted Contract
18 rate in Period 2, subject to production limits, was 4.2
19 cents. And, in Period 3, it was 3.53 cents.
- 20 Q. Does Paragraph D.2 of the Contract have a beginning
21 date and an ending date for the 0.67 cents?
- 22 A. Yes.
- 23 Q. Does Paragraph D.1 of the Contract explicitly have a
24 beginning date and an end date for the 5.47 cents?

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[WITNESS: Norman]

- 1 A. Subject to the qualification of the second sentence,
2 yes.
- 3 Q. When is the end date that is written into Paragraph
4 D.1? When does it occur as you read Paragraph D.1?
- 5 A. As I indicated, and I'm not trying to be difficult, if
6 you want to read -- if you want to look for language in
7 Paragraph D.1, it isn't there. But we don't read it
8 that way. We read it that Paragraph D.1 must be read
9 in the context of Paragraph 3.A.
- 10 Q. And, the language that is in there is the words
11 "continuing for the term of the Contract", correct?
- 12 A. That's in D.1. But it doesn't -- it doesn't take into
13 account the fact that the intent of Paragraph 4 -- the
14 intent of Paragraph D.1, and the recovery of 5.47
15 cents, is intended, as it's stated in 3.A, that all the
16 payments made by Public Service to Seller which exceed
17 the index price must be recovered by Public Service.
18 And, that's the point of our disagreement.
- 19 Q. Is it to be recovered on a present value basis or a
20 nominal basis, like Paragraph D.2?
- 21 A. Well, the recovery provided for in 3.A, which includes
22 the adjustments, must recognize the time value of
23 money, based upon the extrinsic evidence that's in the
24 record that led up to this Contract being signed. And,

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[WITNESS: Norman]

1 as Mr. Moffett, I think, indicated in his discussion
2 with Mr. Labrecque, you can't get to a 5.47 cents or
3 any of those other calculations without recognizing the
4 time value of money.

5 Q. But it doesn't appear in the --

6 A. In the specific Contract, it doesn't. In the letter
7 from Mr. Lyons that was introduced earlier today, there
8 was a specific reference tying in the 17.61 percent
9 interest rate.

10 Q. And, under Article 10 of the Agreement, "all
11 correspondence with respect to the subject matter are
12 superseded by the execution of the Contract", correct?

13 A. No.

14 Q. No?

15 A. Not always. No.

16 Q. So, you don't -- you don't abide by Article 10 of the
17 Agreement?

18 A. No. What I do is look to the earlier decision of this
19 Commission in this Contract. And, I can take the words
20 out. But, basically, if the Contract is not clear,
21 then, under New Hampshire law, and I'm not a lawyer,
22 but, under New Hampshire law, reading the words, one
23 must look to the extrinsic evidence. In fact, Public
24 Service made exactly the opposite argument in the prior

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1 case. Public Service argued "you need to look at
2 extrinsic evidence, if, in fact, you have confusion
3 within the four corners of the Contract." And, that's
4 really all we're talking about here. There's two
5 different ways to look at the Contract, and, therefore,
6 you must look outside of the Contract.

7 Q. Unless the Commission finds that the Contract is clear
8 on its face?

9 A. Absolutely. Yes, sir.

10 Q. And, in the previous decision, it did not find the
11 Contract --

12 A. In the previous decision, it found the contract
13 confusing, or words to that effect.

14 MR. EATON: Thank you. That's all I
15 have.

16 CMSR. BELOW: Okay. Mr. Fossum.

17 MR. FOSSUM: Thank you. Just a few very
18 brief questions.

19 BY MR. FOSSUM:

20 Q. Looking at Exhibit 6, the colored chart that you
21 presented, by your calculations -- well, your
22 understanding of the Contract is that the recovery
23 period for the front-end loading was to end upon
24 repayment, is that accurate?

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[WITNESS: Norman]

1 A. With time -- recognition for time value of money, yes.

2 Q. And, by your calculations, that recovery period ended
3 in July 1996?

4 A. That's correct.

5 Q. I don't know that it's ever been made clear to me, so
6 I'll ask. Why did nothing happen sometime around July
7 of 1996, when the payment amount didn't change as you
8 had anticipated?

9 A. I'm embarrassed to say, but because I didn't do my job.
10 And, it wasn't, as I testified, until we met with --
11 when I met with a Public Service representative in an
12 informal meeting that this issue was raised, and it was
13 related to me that this individual, who was in a
14 position of responsibility, was interpreting the
15 Contract to provide for recovery, and then an
16 adjustment of the energy price.

17 Q. So, I guess it's safe to say that, had you not met with
18 that individual, this Contract would have continued for
19 the remainder of its term exactly as it had been going
20 along?

21 A. Probably.

22 Q. Now, in your prefiled testimony, which is Exhibit 8, on
23 Page 24 you said that you "believe an equitable
24 resolution of this Contract dispute is called for."

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[WITNESS: Norman]

1 That's reading at Lines 11 and 12. Is that correct?

2 A. Yes.

3 Q. Now, why is "an equitable solution called for"?

4 A. Well, because I believe that the Contract language is
5 confusing. I believe that the Contract language, if
6 interpreted by us, would have provided that we more
7 than met our bargain. The policy -- Public Service
8 policy that was in force or in effect said "you can
9 have 9 cents or you can have something more, but,
10 essentially, you have to -- you're basically taking a
11 loan from the ratepayers, and they must be fully
12 repaid." And, we've met that bargain, and more than
13 met it, under either our interpretation of 1 cent, or,
14 interestingly, Public Service's recommendation, if you
15 take all their arguments about the 2 cents, excluding
16 the one sentence which says "5.47 cents runs for 30
17 years regardless", the ratepayer has derived a very,
18 very good bargain. And, we think that there is --
19 there is a need for fairness and an equitable
20 resolution, based upon the fact that we have more than
21 met the intent of the bargain, as set forth by the
22 initial policy of Public Service.

23 Q. And, I guess, why would it not be equitable to continue
24 the Contract as it had been going along, given that

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[WITNESS: Norman]

1 PSNH didn't make payments as you had anticipated
2 beginning as far back as 1996?

3 A. I think it's just continuing an inequity. And that,
4 basically, at this point in time, we think the Contract
5 should be read as I've indicated, and that we should
6 either get the 9 cents per kWh index rate, and if you
7 think that that's an inequitable resolution, because
8 it's higher than the market rate, then terminate the
9 Contract.

10 Q. No, well, what I feel is, I guess, irrelevant.

11 A. Yes.

12 Q. But, and just one last question that I have.

13 MR. FOSSUM: No, I guess I've forgotten
14 my last question. So, I guess I'll just let it go. Thank
15 you.

16 CMSR. BELOW: Okay.

17 CMSR. IGNATIUS: Thank you. Good
18 afternoon, Mr. Norman.

19 BY CMSR. IGNATIUS:

20 Q. I'd like to ask you about the chart that's been
21 attached to various different exhibits here, but you'll
22 find it in the testimony of Mr. Labrecque, the direct,
23 Exhibit 3, and you may have it in other places as well,
24 it's the "Contract Pricing Provisions" chart.

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[WITNESS: Norman]

1 A. I'm sorry. Was that in his initial testimony or --

2 Q. It was. And, it's also attached to --

3 A. Oh. Okay.

4 (Atty. Geiger handing document to the
5 witness.)

6 BY CMSR. IGNATIUS:

7 Q. Have you got a copy?

8 A. Yes, I have it.

9 Q. Great. Was this something that you had seen at the
10 time that the Contract was being negotiated in 1982?

11 A. Yes.

12 Q. And, we don't -- I guess we think this is a PSNH
13 document, is that accurate?

14 A. My belief is, in fact, if you look at the stamp at the
15 bottom, it's noted "March 10th, '82 R.V.P", and I
16 believe that's Mr. Perron, his initials.

17 Q. Thank you.

18 CMSR. BELOW: Though, if you look
19 carefully, what's been suggested as saying "March 10th" on
20 that document, I think, if you look at that --

21 WITNESS NORMAN: Oh, maybe 19th.

22 CMSR. BELOW: -- it might be the 19th.

23 WITNESS NORMAN: Yes. Yes.

24 BY CMSR. IGNATIUS:

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[WITNESS: Norman]

1 Q. What was your understanding of the "adjustment" line to
2 reduce 1 cent per kilowatt-hour during the first eight
3 years? What was that 1 cent adjustment for?

4 A. Well, it's incorporated into Paragraph D.2. But, as I
5 indicated in my testimony, we really never understood
6 what that adjustment was for. And, again, in dealing
7 with Mr. Lyons, where we would say "John, you know,
8 this thing doesn't make any sense. Let's put it in."
9 And, he said "no, it's got to be in this paragraph."
10 And, the way that we looked at it is just the way that
11 the schedule puts out, and that is we were looking at
12 the right-hand column, in terms of what it was that we
13 would receive for an actual payment. And, it was the
14 end result that we were focusing on, in terms of
15 getting the project pulled together.

16 Q. And, what was your understanding of the recovery line,
17 the next one over to the right, that begins in year 12
18 of the reduction of 5.47, and I'm not asking you to
19 look back at the contract, I'm asking you to look at
20 this document, that runs to the end of the term 2013?

21 A. This was the number that resulted from the present
22 value calculations that were made by Public Service,
23 with respect to the amount of recovery that would be
24 necessary in order to recover the front-end, the

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[WITNESS: Norman]

1 payments that were received in excess of the index
2 rate.

3 Q. So, did that mean to you that you would have your rate
4 reduced by 5.47 cents, from years 12 through 30, unless
5 the Section C were triggered?

6 A. Well, that's the open question, in terms of whether or
7 not the provisions of the Contract are intended to
8 essentially assure a 5.47 cent per kWh reduction for
9 the full term, or whether the purpose of that recovery
10 was to take into account the payments that we actually
11 received up front.

12 Q. I understand that's your position on interpreting the
13 contract.

14 A. Yes.

15 Q. I'm asking you about this document.

16 A. This document --

17 Q. What did you make, at the time you were negotiating the
18 Contract, what did you make of that line going, a
19 reduction of 5.4 cents from year 12 through year 30?

20 A. We would have looked at it as applying for the Contract
21 term, the 5.47 cents.

22 Q. And, in fact, you lived with that until this
23 conversation in 2009, correct?

24 A. Yes, we did. Now, we hadn't focused, I mean, it's a 30

[WITNESS: Norman]

1 year agreement, and we've gone off and done a number of
2 other projects. And, this is a contract that,
3 basically, when we came to the end of Contract year 8
4 and Contract year 20, and I could bring another witness
5 up here, and we would scratch our heads in terms of
6 "what is it that we're going to be paid in accordance
7 with this Contract?" And, actually, we're putting
8 together different -- different figures to try and
9 figure out exactly what it was that we were going to be
10 paid.

11 So, it really went into the files, and
12 we hadn't focused on the out years of the Contract.
13 And, as I say, I'm embarrassed that this wasn't brought
14 up in 1996 or 1997. We basically were just operating
15 under the Contract.

16 And, it was only when Public Service --
17 or, an employee of Public Service looked at it in the
18 way that it was being administered, that it raised the
19 question as to whether or not there was an entitlement
20 on our part to terminate the 5.47.

21 Q. You also described in your testimony that you were
22 somewhat under the gun, that was my phrase, but it was
23 a difficult period --

24 A. Very definitely.

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[WITNESS: Norman]

1 Q. -- when you were negotiating. All right. Are you
2 making an assertion that you were under duress, in the
3 legal sense, in signing that agreement?

4 A. No. And, that's, in terms of -- and I've tried to
5 distinguish, because, as the record will show, and as I
6 would testify, during the course of negotiations,
7 Mr. Ellis, who I think was at that time a Senior Vice
8 President, personally participated in those
9 negotiations. And, so, Public Service, on the one
10 hand, was giving us a document that permitted us to do
11 the project, because they were looking to try and
12 reduce their reliance on oil. But, on the other hand,
13 we were dealing on a day-to-day basis in the Contract
14 negotiations with an individual that was very
15 inflexible, in terms of specific contract language.
16 So, it was a yin and yang type of thing.

17 But, no. I couldn't sit here and tell
18 you that we signed this Contract under duress. We
19 didn't.

20 Q. And, I think there was testimony that some
21 clarifications you were looking for did make it into
22 the language?

23 A. Yes. And, those were ones where we were -- we went
24 back to Public Service, and we said "It doesn't work.

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[WITNESS: Norman]

1 If we can't get this language, we can't get our loan."
2 And, there were two, two adjustments made at the very
3 end of the negotiations, which were points of
4 clarification. There was one point of clarification
5 regarding the certainty of the 10 cents, which they
6 wouldn't change the language on, but the bank accepted
7 it.

8 Q. There's something, I confess, seems inconsistent here.
9 That you describe having terms that were -- is
10 "onerous" too strong, I don't want to put words in your
11 mouth, terms you didn't necessarily like, because of
12 your circumstances, that, as you look now in the
13 Contract, find them favorable to you, as to the point
14 of repayment of the up-front cost?

15 A. Well, as -- with respect to the repayment, there was
16 never a feeling on our part that we were being asked to
17 do something unreasonable, with respect to a recovery
18 or repayment objective. I mean, we needed to get
19 something, and, in return, we were willing to give
20 something. And, as evidenced by the interest rate of
21 17.61 percent, this was when we were in a really bad --
22 when the country was in a really bad financial
23 situation. Interest rates, I can't cite exactly where
24 it was, but around 20 percent. And, Public Service's

[WITNESS: Norman]

1 cost of capital was 17.75 percent or 17.61 percent, as
2 a regulated public utility, before the bankruptcy.
3 And, so, we've got some evidence.

4 We saw two things that I would
5 characterize as "onerous". One was the subject of our
6 earlier proceeding here, where we felt that there
7 should be future recognition for capacity. That case
8 is gone; we lost. The other is that, in correspondence
9 with Public Service, we believed that the 17.61 percent
10 was an unrealistically high cost of capital, and we
11 sought to have an adjustment made, to the extent that
12 the cost of capital went down. And, Public Service
13 would not agree to that. And, so, we've never argued
14 that the 17.61 percent was either onerous or unfair. I
15 mean, that's where the world was at that time, and
16 we're willing to live by it.

17 The proposal that we've put forward, as
18 to what we characterize as an equitable resolution,
19 whether you accept our calculation at 1 cent or you
20 accept Public Service's calculation at 2 cents, in
21 either case, the ratepayer has fully recovered the
22 up-front payment, with recognition of time value of
23 money.

24 Q. You made something of an offer to resolve this a few

[WITNESS: Norman]

1 moments ago on the stand. And, I'd ask you to explain
2 in a little more detail different ways that going
3 forward we could end the debate.

4 A. No. No, I would turn to our lawyers. And, I'm not
5 sure whether those were confidential discussions or
6 not.

7 Q. Well, I'm not asking you anything outside of this
8 hearing room.

9 A. Okay.

10 Q. And, maybe I said that inartfully. You had said, at
11 this point, rather than asking for repayment, a refund
12 of monies that you feel you've continued to pay when
13 you should not have, under your reading of the
14 Contract, that you said you were asking for some --
15 either change of rate at a certain date going forward
16 or termination of the Contract, with some recognition
17 of the value of the time in working through the docket.
18 So, can you quantify any of that, work through any of
19 those ideas of yours some more?

20 A. Well, in round numbers, either the 9 cents, if you go
21 back to the filing date, which was -- which was
22 September of '09, our annual production, in round
23 numbers, is -- it's a little bit high, but 20
24 gigawatt-hours per year. We've averaged a little bit

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[WITNESS: Norman]

1 less than that. And, if we were to take 20
2 gigawatt-hours a year, and the difference between the 9
3 cent index rate and the 3.53 cents, and, again, I'm
4 going to round up, a 5 cent difference, you're talking
5 about, hopefully my decimal points are correct, I think
6 you're talking about potentially, let me -- it's a
7 million dollars, roughly speaking, a little bit less
8 than a million, for the one year run.

9 Assuming that the repayment began in
10 September of '09, and became effective in September of
11 2010, be subject to the actual production. But, in
12 round numbers, it would be somewhere, I think, between
13 800,000 and a million dollars for that one year payment
14 or for that one year period. And, at that point of the
15 Contract being terminated, we then would take the
16 responsibility to find another market for our power.

17 Q. And, when you said the date of the filing in September,
18 that was a filing that PSNH made, correct?

19 A. Yes, it was.

20 Q. Why didn't Briar Hydro come in and make a filing?

21 A. Well, we sought -- we met with Public Service and
22 sought to address this issue in a nonlegal way, and we
23 were unable to come to an agreement. And, one of the
24 questions was whether the venue for this dispute be in

[WITNESS: Norman]

1 court or be in the PUC. And, I -- this is speculation
2 on my part, to be confirmed by Mr. Eaton, but my belief
3 is that Public Service preferred to have this issue
4 heard before the PUC. And, therefore, in a rush to the
5 filing position, they chose the PUC, rather than the
6 courthouse.

7 MR. EATON: Madam Commissioner,
8 Paragraph 3 of Mr. Labrecque's affidavit confirms what Mr.
9 Norman just said.

10 CMSR. IGNATIUS: Thank you. Those are
11 all my questions. Thank you very much.

12 CMSR. BELOW: Okay.

13 BY CMSR. BELOW:

14 Q. Mr. Norman, on Page 6 of your testimony, at Lines 4 and
15 5, you state that "the recovery methodology was set
16 forth in very specific detail and followed the
17 methodology established by PSNH in Exhibit 2-8." And,
18 if we turn to that exhibit, that is now part of the
19 Exhibit 8, what's been identified as "Exhibit 8", the
20 first page of that there's a photocopy of a business
21 card, "Richard V. Perron, P.E," for "PSNH". And, the
22 second page, does that show the methodology that you're
23 referring to?

24 A. I'm sorry, I don't -- I haven't found it as of yet.

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[WITNESS: Norman]

1 (Atty. Geiger handing document to the
2 witness.)

3 BY THE WITNESS:

4 A. Yes.

5 BY CMSR. BELOW:

6 Q. And, at that time, it showed -- it appears to show an
7 index rate of 9 cents, a front-end loading rate of 10
8 cents for a period of eight years, and it shows a
9 discount rate, or sometimes it's referred to as the
10 "interest rate" or a "cost of capital", of
11 17.75 percent. And, that ended up computing a recovery
12 rate of 2.7 cents per kilowatt-hour, from years 9
13 through 30, is that correct?

14 A. Yes.

15 Q. Okay.

16 A. It's 2.77 cents, but, yes.

17 Q. Right, 2.77. And, so, it's your testimony that you
18 thought that the Contract was being negotiated based on
19 that kind of recovery formula?

20 A. Yes.

21 Q. And, then, when we turn forward to your Exhibit 18 --
22 or, 2-18, there's a sheet that's something like what's
23 been referred to as part of Mr. Labrecque's prefiled
24 testimony, Exhibit 3, the attachment to that, that

[WITNESS: Norman]

1 shows a table that shows some calculations. And, it
2 shows a "front-end rate" of "11 cents", an "incentive
3 adjustment" of "minus 1 cent" for the first eight
4 years, and then "plus 0.67 cents" for the next 12
5 years. And, it shows a "recovery" of "minus 5.54", is
6 that correct?

7 A. Yes. "5.479", yes.

8 Q. Well, no, I'm looking at your Exhibit 2-18.

9 A. I've got -- hold on one second please. And, am I
10 looking -- is this what you're looking at?

11 Q. Yes.

12 A. Yes.

13 Q. It appears to be. It appears to be -- what is your
14 understanding of what this document is?

15 A. This document is one of a series of documents that were
16 put in place that were showing the pricing effect of
17 the methodology that was being used and incorporating
18 into the form of the Contract Public Service's
19 projection of their incremental -- of their projection
20 of the future incremental energy cost.

21 Q. So, you're understanding, this is a calculation that
22 was done by PSNH in the process of the negotiations and
23 what they were proposing for --

24 A. My belief is that it is. I'm not certain.

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[WITNESS: Norman]

- 1 Q. Okay.
- 2 A. I don't believe that this is something -- well,
3 actually, it is a Public Service document, as
4 indicated, in the upper right-hand corner, "RVP" is
5 Mr. Perron.
- 6 Q. Okay. And, then, if we turn to your Exhibit 2-21,
7 that's the letter from Mr. Lyons dated March 19th, '82,
8 1982, --
- 9 A. Yes.
- 10 Q. -- in which he states "The recovery amount was
11 recalculated to be 5.47 cents per kWh, based on an
12 interest rate of 17.61 percent." Is that correct?
- 13 A. Yes.
- 14 Q. And, this is something that you -- it's a letter
15 addressed to you and was received by you at the time?
- 16 A. Yes.
- 17 Q. Is that correct? And, attached to that, and referenced
18 in the letter, is the "revised schedule of estimated
19 contract payments", is that correct?
- 20 A. Yes.
- 21 Q. And, that shows a front-end rate of "11 cents" in the
22 fifth column over. It says "front-end rate 11 cents".
23 And, it shows that in effect for 8 years, is that
24 correct?

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[WITNESS: Norman]

- 1 A. Yes.
- 2 Q. And, then, it shows an adjustment of minus 1 cent for
3 those same eight years, is that correct?
- 4 A. Yes.
- 5 Q. So, it shows an estimated payment of 10 cents for the
6 first eight years in the far right column, is that
7 correct?
- 8 A. (Witness nodding in the affirmative).
- 9 Q. And, it then shows the adjustment of, in the
10 "adjustment" column, from the ninth through the twelfth
11 year of "plus 0.67 cents", correct?
- 12 A. Yes.
- 13 Q. And, then, it shows the "recovery" of "minus 5.47" from
14 I guess what's 1992, which is the ninth year of the
15 Contract, through 2013, is that correct?
- 16 A. Yes.
- 17 Q. Okay. And, the Contract that was attached to that
18 transmittal letter, is that your Exhibit 2-22, that, in
19 the upper right corner is dated -- has a -- somebody
20 handwrote in "3/19/82"?
- 21 A. This is 3/19/82. What I'm looking at is to -- there
22 were two changes that were made, which are not in this
23 draft. So, this was the draft that existed as of the
24 19th of March.

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[WITNESS: Norman]

1 Q. Okay. And, in that draft, if we turn to that version
2 of -- that draft version of Article 3 on "Price", 3.A,
3 --

4 A. Yes.

5 Q. -- does that differ materially from the final version
6 of the Contract?

7 A. It differs materially, no. The only thing that is
8 added is, I believe, the last sentence, which is "the
9 provisions of Section C shall not adjust the
10 provisions", and that sentence is not in this draft.

11 Q. "The provisions of Section C, Article 3, shall not
12 override the provisions of this paragraph."

13 A. Right.

14 Q. So, that was what was added?

15 A. That was added.

16 Q. But the rest of that is the same?

17 A. The rest of it is as shown on the chart.

18 Q. Okay. Which has both the nominal, I mean, the
19 introductory paragraph starts with an index of 9 cents,
20 then it refers to 11 cents. But it also says that
21 "subject to adjustment provided for under Section D.2,
22 Article 3." Is that correct?

23 A. Yes.

24 Q. And, the Article D.2 is -- how does that compare in

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[WITNESS: Norman]

1 this version of the draft with the final version of the
2 Contract?

3 A. I believe that the operation of the Contract is as
4 indicated on the paste boards. And, that is D.1 and
5 D.2 are brought back into 3.A to give you a net payment
6 rate.

7 Q. I guess my question is, if you look at your Exhibit 22
8 and if you want to take a minute to look at Paragraph
9 D.2 of that 3/19/82 draft of the Contract, could you
10 just indicate to me how that, that draft, in Article
11 3.D.2 is either the same or different from the final
12 version that was executed, which is shown as Exhibit 5?

13 A. I think they're the same.

14 Q. Okay. Although somebody, maybe your handwriting, or
15 your lawyers at the time, had some mark-ups, which were
16 maybe issues of concern, but nothing was changed to
17 reflect those?

18 A. That's right.

19 Q. Okay. And, then, turning to your Exhibit 2-31, that
20 appears to be an internal memo from Mr. Perron of PSNH
21 to others at PSNH, that was dated after the date of the
22 execution of the Contract, is that --

23 A. Yes.

24 Q. And, attached to that memo appears to be, the last page

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[WITNESS: Norman]

1 of this attachment to your testimony, the last page of
2 that appears to be a calculation of the 5.4 cents per
3 kilowatt-hour recovery rate, according to the formula
4 that had been used sort of throughout the negotiations,
5 is that correct?

6 A. I'm not sure. Are you referring to the last page of
7 Exhibit 4, which is the recovery amount, 5.47?

8 Q. Yes. It has -- it has a -- it's marked probably at the
9 time as "Exhibit 4" to that --

10 A. Yes.

11 Q. -- attached to that memo. And, it appears to be dated
12 "17 March 82 RVP", Mr. Perron, presumably, at PSNH.

13 A. Yes.

14 Q. So, this appears to be -- I mean, would you say that
15 this was the application of the formula that derived
16 the 5.47 cents that ended up in the Contract? Is that
17 what this appears to be?

18 A. Yes. And, I would point out that, in this calculation,
19 where we differ is that he's used a Contract rate of 11
20 cents, which he equates to a payment rate of 11 cents.
21 Whereas, in fact, it was 10 cents. But this
22 calculation basically assumes a 2 cent in excess of
23 index price payment.

24 CMSR. BELOW: Okay. That's all the

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[WITNESS: Norman]

1 questions I have. Ms. Geiger, do you have redirect?

2 MS. GEIGER: No thank you.

3 CMSR. BELOW: Okay. So, if there are no
4 further questions for this witness, the witness is
5 excused.

6 WITNESS NORMAN: Thank you.

7 CMSR. BELOW: Yes, Mr. Moffett?

8 MR. MOFFETT: Mr. Chairman, we'd like to
9 request one thing. And, that is the opportunity to submit
10 a post hearing brief. We think that there are several
11 legal issues that need to be considered by the Commission
12 that bear on the factual testimony that's been given here.
13 They include the effect of Article 10, the merger clause.
14 They include the standard for determining how you would --
15 how you would apply extrinsic evidence, in the event that
16 the Contract itself is not clear or it's confusing or it's
17 not -- it's ambiguous on its face. We think -- we think
18 it would be helpful if we could provide a post hearing
19 brief to the Commission. And, we don't need a lot of time
20 for that. Two or three weeks I think would be plenty.

21 CMSR. BELOW: Mr. Eaton, you have a
22 response?

23 MR. EATON: I was ready to make our
24 final arguments today, orally, and I think that would --

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1 that would suffice. So, I don't think briefs are
2 necessary. I think the Commission can look at the record
3 and determine whether the Contract is clear and whether it
4 ought to be enforced according to its terms.

5 CMSR. BELOW: Mr. Fossum, do you have a
6 view on this question?

7 MR. FOSSUM: Not really, no. Staff, as
8 I would have explained, I guess, doesn't really have a
9 position on this. So, Staff -- I think it would be very
10 unlikely that Staff would be submitting a brief, should
11 one be allowed. So, to the extent that the Commission
12 desires to have them, I would defer to the parties'
13 arguments.

14 CMSR. BELOW: Okay. And, just to check
15 and be clear, Mr. Eaton, you're not planning to recall
16 your witness for any further rebuttal, are you?

17 MR. EATON: No.

18 CMSR. BELOW: Okay.

19 (Cmsr. Below and Cmsr. Ignatius
20 conferring.)

21 CMSR. BELOW: I think we're inclined to
22 take a lunch break, maybe till 2:30, and then proceed to
23 the oral closing arguments. And, at that time, you know,
24 perhaps you would have some time to prepare what you want

1 to touch on on those critical points. I'm just not -- I
2 mean, we are certainly familiar with the law, both with
3 regard to when contracts are ambiguous or what the role of
4 extrinsic evidence is.

5 So, if that's not too problematic, I
6 think that's the way we would like to proceed. Okay? So,
7 we will break till 2:30, and then hear closing arguments
8 at that time. Thank you.

9 (Whereupon a recess was taken at 1:28
10 p.m. and the hearing resumed at 2:34
11 p.m.)

12 CMSR. BELOW: Before we proceed to
13 closing arguments, is there any objection to striking the
14 identification and entering the exhibits into evidence?

15 MR. EATON: No.

16 MR. MOFFETT: No.

17 CMSR. BELOW: Hearing no objection, all
18 the exhibits will be entered into evidence. And,
19 Mr. Fossum, why don't you begin, if you have anything to
20 say.

21 MR. FOSSUM: I do, but very briefly. As
22 you have heard extensively, this is, at bottom, a simple
23 contract dispute between PSNH and Briar Hydro. Each has
24 advocated for its interpretation of the Contract as they

1 read it. In that interpretations from both sides have
2 been presented to the Commission, and Staff does not have
3 its own interpretation of this Contract to advocate for,
4 Staff takes no position on the dispute. The Commission
5 has before it the Contract, evidence of the parties'
6 conduct, both before and after its execution, if it's
7 deemed relevant. And, it has -- the Commission has before
8 it Briar Hydro's claim for relief, which is essentially
9 prospective only. Meaning that the Commission need not
10 look back to do some complicated calculations necessarily
11 to determine recovery, if that is deemed needed.

12 As such, Staff believes the Commission
13 has before it all information that's necessary to make a
14 decision. And, Staff has no further position on the
15 interpretation of the Contract.

16 CMSR. BELOW: Okay. Thank you.
17 Mr. Moffett.

18 MR. MOFFETT: Thank you, Mr. Chairman.
19 I'd like to make five points by way of a closing summary.
20 First, we believe, Briar believes, that the most important
21 Article 3 price terms are clearly in dispute between the
22 parties. PSNH is asking you to focus on the first
23 sentence in Section 3.D.1, which purports to allow the
24 5.47 cent deduction for the remaining term of the

1 Contract. That ignores the second sentence in Section
2 3.D.1, and comparable language in Section 3.A, which make
3 it very clear that the only purpose of that 5.47 cent
4 deduction is to allow PSNH to recover the payments that it
5 made in Period 1 in excess of the index price. The
6 parties simply disagree about that. And, we think that
7 the Commission is going to have to sort out which
8 interpretation comports more with the total language of
9 Article 3, the pricing terms. A.

10 And, we think, frankly, that, given the
11 inconsistency between the relevant terms relating to these
12 most important pricing provisions, you have to look at
13 extrinsic evidence as to what the parties intended at the
14 time. And, that would include such things as the intent
15 of the parties, it would include the PSNH policy
16 statement, which was used in Option 3 as the basis for the
17 contract. And, it would include the exchange of documents
18 that took place during the negotiation of the contract, in
19 which both parties essentially asked for changes in
20 contract language, set out their understanding of what the
21 relevant provisions meant, and essentially tried to get to
22 a meeting of the minds. So, that's Point Number 1.
23 There's a clear disagreement over the fundamental Contract
24 terms and how they should be interpreted.

1 Point Number 2 is we think it's very
2 clear, from the testimony this morning, that, in terms of
3 what PSNH should have been permitted to recover under the
4 Contract language in Article 3, PSNH made excess payments
5 above the index price or loaned, if you will, to the
6 Seller 1 cent per kilowatt-hour, not 2 cents per
7 kilowatt-hour. And, that the 5.47 cent deduction in
8 Section 3.D.1, contrary to that statement, was actually
9 based on an assumption that 2 cents per kilowatt-hour had
10 been loaned, rather than the 1 cent. So, Briar's position
11 is that you have a fundamental mistake at the heart of the
12 Article 3 price terms on which this Contract has been
13 administered. Because, although it's very clear from
14 Mr. Labrecque's testimony, that the 5.47 cents deduction
15 in 3.D.1 was intended to recoup 2 cents per kilowatt-hour,
16 based on an interest rate or a discount rate of
17 17.61 percent. It's very clear that that's not what PSNH
18 loaned to the Seller. What PSNH loaned to the Seller was
19 1 cent, not 2 cents.

20 The third point I want to make has to do
21 with the Article 10 merger clause. And, I'm not going to
22 belabor this, because I understand that the Commission is
23 familiar with that legal issue. It's already ruled on
24 that issue under this same Contract. But, suffice it to

1 say, that we believe that the confusion in the Article 3
2 language not just allows, but actually demands that you
3 look beyond the four corners of the Contract, to determine
4 the correct meaning of the Contract terms that are in
5 dispute.

6 Point Number 4: If, as we think you
7 should, you look at extrinsic evidence, evidence of the
8 parties' intentions, documents that were exchanged during
9 the negotiations, the circumstances of the parties at the
10 time, if you look at that extrinsic evidence, we think
11 that you run the risk of making a gross mistake by
12 focusing on one particular piece of extrinsic evidence,
13 namely, the spreadsheet that was attached to the March 19,
14 1982 letter, from John Lyons at PSNH, to Mr. Norman at New
15 Hampshire Hydro Associates. And, this is the spreadsheet
16 that there were a series of questions about just before
17 Mr. Norman finished his testimony. There are four reasons
18 why we think it would be a huge mistake to focus on this
19 particular piece of evidence as a way of trying to see
20 what's going on in the Contract terms.

21 Number one, this spreadsheet was
22 developed by PSNH and sent to New Hampshire Hydro
23 Associates a month and a half before the Contract was
24 signed. It was not contemporaneous with the signing of

1 the Contract. There were several additional versions of
2 the Contract that passed back and forth in the meantime.

3 Secondly, and more important, I would
4 even say "most important", on its face, this spreadsheet
5 cannot be used to fairly interpret the meaning of the
6 price terms, because its whole premise is that Article C
7 -- excuse me, Section C of Article 3 would have been
8 reached. If you look at that spreadsheet carefully,
9 you'll see that Columns 2, 3, and 4, after the first
10 column which is the year, Paragraphs 2, 3, and 4, the
11 whole almost first half of the spreadsheet is premised on
12 a series of what Mr. Lyons refers to as "estimates" of
13 PSNH's incremental energy costs. And, the resulting
14 adjustments that would be made if you get into Paragraph C
15 of Article 3, which would trigger the declining percentage
16 of the incremental energy costs. We never got there.
17 Article C was never triggered, it was never invoked. So,
18 to hold this up and to say that, in some way, this sort of
19 captures the meaning of Article 3, to the exclusion of all
20 of the other extrinsic evidence about what Article 3 --
21 what the Article 3 terms might mean, we think would be
22 gross error.

23 The third reason why we think that would
24 be a mistake is that, as we said earlier, the 5.47 cents,

1 in the "recovery" column, over toward the right-hand side
2 of this, the second column from the right, is itself based
3 on a mistake. The 5.47 is not the right number that
4 should have been recovered in that deduction in order to
5 make PSNH whole for the excess of payments it made over
6 the index price in Period 1. That number was 1 cent, not
7 2 cents. Whereas, the testimony has been very clear that
8 the 5.47 cents is based on an assumption that 2 cents was
9 advanced to the Seller during the first eight years, 2
10 cents a kilowatt-hour.

11 And, number four, a reason why this
12 would be a mistake to rely on this document, is that, if
13 you interpret -- if you interpret this document to support
14 PSNH's position in this case, it's going to run directly
15 counter to what PSNH itself said in its policy statement
16 in November of 1981, which is a document which is in the
17 record, we talked about it before in the earlier case, and
18 again this morning, but that document set up options under
19 which PSNH would recover in the out years the amounts that
20 it had advanced in excess of the index price. And, as
21 we've said, the evidence I think is clear that that was 1
22 cent, not 2 cents. And, to interpret this document as
23 some sort of filter through which the whole Contract terms
24 can be interpreted is just a huge mistake.

1 The last point I want to make has to do
2 with what Briar is asking from the Commission. We believe
3 that the Commission has the authority, under Section
4 362-A:6 of the Revised Statutes Annotated, that's the
5 chapter on limited electrical energy producers, we believe
6 that the Commission has the authority to resolve disputes
7 arising between limited electrical energy producers and
8 PSNH, or any other electric utility that purchases the
9 output of a limited electrical energy producer. And, so,
10 we think that this Commission stands in the same position
11 that a court would stand in, in terms of fashioning an
12 appropriate remedy for a dispute between the parties.

13 We believe, on the basis of the evidence
14 that went in this morning, that there's a serious question
15 in this case about whether the parties ever had an actual
16 meeting of the minds with respect to the pricing terms in
17 Article 3. And, if, in fact, the parties did not
18 understand the same things, by what they signed in the
19 Contract, then we think the appropriate remedy is probably
20 to consider the Contract void and terminate it. And, the
21 only question is "when you would do that?" We think that
22 the most appropriate and reasonable and fair place to
23 terminate the Contract would be at the point where PSNH
24 has fully recovered, under whatever measure the Commission

1 chooses to use, the payments that it made to Briar, in
2 excess of the index price, during the first eight years of
3 the Contract.

4 Now, there's a dispute between the
5 parties over that issue, too. Briar believes that that
6 was done, that PSNH was fully made whole, and its
7 ratepayers were fully made whole as of July of 1996. But
8 that's not what we're asking you to find here. What we're
9 saying is that, regardless of whether you think PSNH
10 loaned the Seller 1 cent or 2 cents per kilowatt-hour in
11 the first eight Contract years, it's still been repaid
12 fully, as of sometime at about the point last fall that
13 PSNH filed its petition for a declaratory judgment. Maybe
14 October, maybe November, but certainly by some time last
15 fall, even by PSNH's calculation. All right?

16 So, we believe that there really is only
17 one remedy here that would treat all of the parties to
18 this case in a way that is reasonable and fair. And, that
19 is to simply declare the Contract void as of the point at
20 which PSNH brought its petition, last September, or walk
21 it out to November, if you like, because that's what
22 PSNH's recovery calculation considers. We're prepared to
23 waive any argument that the recovery -- that Briar should
24 be entitled to recover anything based on the earlier

1 recovery date of July 1996. We're prepared to waive that.
2 So, just stick with PSNH's calculation on the recovery,
3 and consider whether the most reasonable and the most fair
4 resolution of this dispute, to PSNH, to its ratepayers,
5 and to Briar, wouldn't be simply to void the Contract as
6 of November, let's say, November 2009, and let the parties
7 go their way. PSNH has been made whole. Its ratepayers
8 have been made whole, several times over in our view, but
9 at least once. And, Briar would at least not be faced
10 with continuing to pay or continuing to take a deduction
11 in the Contract rate, that was based on a mistake, that
12 doesn't comport with the Contract language, and that is --
13 and that results in PSNH being -- PSNH being -- recovering
14 several times over the amounts that it's entitled to
15 recover under the Contract.

16 So, that's our closing statement.

17 CMSR. BELOW: Thank you. Mr. Eaton.

18 MR. EATON: Thank you. I did a bit of
19 research on some of the Supreme Court cases concerning
20 interpretation of contracts. And, one which is
21 particularly helpful is Lasonde versus Stanton. It's a
22 2008 case, at 157 New Hampshire 582. And, it states,
23 "When interpreting a written agreement, we give the
24 language used by the parties its reasonable meaning,

1 considering the circumstances and context in which the
2 agreement was negotiated, when reading the document as a
3 whole." "Absent ambiguity, the parties' intent will be
4 determined [by] the plain meaning of the language."
5 "Ambiguity exists only when the parties could reasonably
6 disagree as to a clause's meaning." And, that case was
7 cited in a case decided July 20th, 2010. It was Number
8 2009-316, I'm sorry I don't have the name of the case.
9 But that case says "Nor does any such confusion, or legal
10 impossibility, create ambiguity in the clause itself.
11 Lack of precision in contract clause does not create
12 ambiguity."

13 And, if the parties had made a mistake
14 in 1982, they would have recognized it well before that
15 infamous wine and beer informal exchange between a PSNH
16 employee and Mr. Norman. If you were to believe Mr.
17 Norman and Briar Hydro's complete case, you would say that
18 we are currently in Contract year -- the end of Contract
19 year 27, this is in Exhibit 4 to his testimony. Their
20 calculation, that we have currently made a mistake of
21 54,640,300. And, if we go back to the date when the
22 informal meeting took place, in July of 2009, it was
23 \$43,884,000.

24 Now, we know Mr. Norman is a very

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1 capable businessman. And that, if this truly was a clause
2 in which the 5.47 cents went away as soon as PSNH was
3 completely paid off, he would have been looking at it. He
4 would have had somebody keeping track of it. In fact, we
5 even reported it to the Commission as excess payments,
6 along with the front-end loaded rate orders. But that's
7 not the case. We're looking back to the time when the
8 parties negotiated the Contract and what they understood
9 then, not what they understood in 2009, when they looked
10 back at the Contract for the first instance.

11 Commissioner Below pointed out
12 Exhibit 2-31 of the attachments to Mr. Norman's testimony.
13 And, that was an internal memo, and it was for Mr. Perron,
14 describing the calculation. If the Commission looks at
15 Exhibit 2-20, it will see a similar calculation that was
16 sent to Mr. Warren Mack, who I also believe was involved
17 with negotiations, and that has a calculation done using
18 17.75 percent rate of return. And, what Commissioner
19 Below pointed out, and the witness agreed, was that this
20 is a present value calculation. It says, essentially,
21 what is the value of paying 2 cents over the index rate
22 for eight years, with recovery over the remaining 22
23 Contract years. So, Mr. Mack and Mr. Norman were aware of
24 what this calculation was, and what the basis of the 5.47

1 cents was. It was a present value calculation of what
2 that overpayment would be.

3 Now, there's a controversy over whether
4 -- what was paid over the index rate for the first eight
5 years was. We know what was actually billed. We know
6 that was 10 cents. And, Mr. Labrecque continually said
7 how that 10 cents was arrived at. It was arrived at by
8 adding 2 cents to the index price under Section 3.A, and
9 by deducting 1 cent under Section 3.D.2. And, if you look
10 carefully at Section 3.D.2, you will see that it is
11 self-contained. In the first eight Contract years, 1 cent
12 is deducted. In the next twelve years, 0.67 cents is
13 added to the rate. And, in any year, no more than
14 one-twelfth of the money subtracted during the first eight
15 years is paid back.

16 This is self-executing. There's no
17 disagreement, the fact that PSNH did this correctly, and
18 that the money was paid back at the end of year 20. And,
19 it has nothing to do with the 5.47 cent deduction. If the
20 parties truly wanted the 5.47 cent deduction to end, they
21 could have added the words "if necessary". They could
22 have made Section D.1 as explicit as in Section D.2. If
23 Section D.2 weren't in here, you'd have a hard time
24 wondering "why didn't the parties do something more

1 specific?" But you have a specific item in the Contract,
2 which is clear that 1 cent gets deducted. They know how
3 much, it was \$143,000 by the end of the first eight years,
4 and \$143,000 got paid back. There was no interest
5 calculation. And, the distinction that the parties have
6 in -- when they think the repayment period ends, whether
7 it's July of 1996 or November of 2009, that shows that
8 there should have been much more explicit directions in
9 the Contract as to how to calculate the end date of the
10 5.47. But there's nothing in there to say that it
11 happens. There's nothing in there to say how it's
12 calculated. That's Mr. Labrecque's testimony of "where is
13 the discount rate in the Contract to know when we're
14 supposed to end that repayment period?"

15 What you have in the 2 cent and 5.47
16 cent figure is what the parties agreed might happen. I
17 brought up the point in cross-examination about a
18 liquidated damages clause. In 1982 and '81 as this
19 Contract was getting negotiated, they're trying to figure
20 out "how do you pay back Public Service?" Well, we could
21 keep track of all the monies, but that wasn't in the
22 Contract. They simply agreed that 5.47 cents was a
23 reasonable term to deduct from the index rate after the
24 first eight years was over. As it happened, PSNH will

1 recover more than what we paid in. If the force majeure
2 clause had come into effect, and the plant was disabled,
3 then, before PSNH returned its money, then PSNH would have
4 to -- would have to suffer that loss, and the money would
5 not -- there was no provision for paying PSNH for any of
6 the overpayments, should the plant not perform in the
7 final Contract years.

8 So, there's no balance there. There's
9 no provision for PSNH customers to get back the money it
10 paid. It was simply what we're going to agree to, what
11 the value of this 2 cents is over eight years, and how do
12 we pay it back? They did a present value calculation to
13 do that, and that was well known to Mr. Lyons and Mr. Mack
14 and Mr. Norman. And, the fact that Mr. Norman is now
15 embarrassed that he doesn't pick this up, doesn't bring
16 this to the level of a mistake from the very beginning or
17 that the Contract goes away.

18 I don't believe you can refashion the
19 Contract in an equitable manner. You have to enforce it
20 for its clear language, which is the 5.47 cents remains in
21 effect for the remainder of the Contract term. There's
22 nothing that clearly changes that and clearly negates
23 that, and the language that's concerning about PSNH
24 recovering all its amounts is the same as a liquidated

1 damages clause. This is what we think will happen, and
2 this is our calculation, and we'll see what happens, based
3 upon how much rain falls, in the first eight years, and
4 how much rain falls in the Contoocook Rivershed during the
5 last 22 years of the Contract. It's very clear that
6 that's what the parties intended. Extrinsic evidence
7 shows that as well. There's no qualifying of any of these
8 spreadsheets by Briar Hydro or New Hampshire Hydro
9 Associates to say "Oh, look. Wait, wait. That 5.47
10 cents, let's put an asterisk in that spreadsheet and say
11 "until PSNH recovers all of its overpayments"." That's
12 not in there. And, you really can't write it in there.
13 It's just too clear, and it's not ambiguous. The fact
14 that there's some confusion about it, I'm not confused, I
15 know what the Contract says, and how it's been operated up
16 until now. And, if it wasn't for that, and Mr. Norman
17 admitted it, if it wasn't for that wine and that beer, we
18 wouldn't even be here, and the whole contract would have
19 gone to 2013 the way it's being operated now.

20 Thank you. That's the end of my closing
21 statement.

22 CMSR. BELOW: Mr. Moffett.

23 MR. MOFFETT: Just one quick point, Mr.
24 Chairman. Mr. Eaton, at the beginning of his remarks,

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1 cited cases. I'd like to renew our request to be
2 permitted to submit a post hearing brief.

3 CMSR. BELOW: On what topic? On the
4 whole range of closing arguments or on something specific?

5 MR. MOFFETT: He's cited cases having to
6 do with a question of how you interpret contract language,
7 when there's an ambiguity or when there's a question about
8 it. We think that that's one thing that ought to be
9 briefed. I'm not insisting that we brief Article 10, if
10 the Commission feels it doesn't need law on that, although
11 we would like to. We think that it's worth having the
12 Commission consider law on the question of what's a proper
13 remedy in this case. It doesn't need to be long. We'd be
14 happy to do it in 10, 12, 15 pages.

15 But we think that there are legal issues
16 in this case that are going to bear on the ultimate
17 resolution, one way or another. And, we think it would be
18 to the Commission's advantage to have those -- to have the
19 benefit of those cases before you decide the issue.

20 MR. EATON: Could I respond?

21 CMSR. BELOW: Yes, Mr. Eaton.

22 MR. EATON: The procedural schedule has
23 been out there for months. If briefs were going to be
24 requested, I learned about this the same time you did.

1 Mr. Moffett doesn't practice in front of the Commission as
2 much as I do, but I can't remember the last time that
3 briefs were filed. And, it's customary for the parties to
4 make a closing argument. I cited a couple of cases that
5 it doesn't rise to the level of brief. Frankly, I think
6 this case is so clear that it's been a waste of time for
7 PSNH, it's been a waste of time for the Staff. I think
8 the more -- the more they throw against the wall, they
9 hope something will stick.

10 I don't think a brief is necessary. I
11 think they should have been ready to argue these issues
12 today in front of the Commission. So, I object to the
13 renewed request for a brief.

14 (Cmsr. Below and Cmsr. Ignatius
15 conferring.)

16 CMSR. BELOW: Well, we're going to grant
17 the request for a brief in the form of a memo of law,
18 regarding just those three issues; the question of
19 ambiguity in contracts, Article 10, and proper remedy. We
20 don't really want to rehash all the evidentiary arguments.
21 And, we'd like to have that limited to 12 pages, and due
22 in two weeks. I mean, normally, it's not part of the
23 procedural schedule, but the Bench does, from time to
24 time, allow briefs when there's -- when it might be of

1 value, in terms of just citing the relevant case law that
2 goes to these issues.

3 MR. MOFFETT: Thank you, Commissioner.

4 CMSR. BELOW: So, we'll allow that. Are
5 there any other matters? Oh, well, let me ask that. Off
6 the record for a moment.

7 (Brief off-the-record discussion ensued
8 with the court reporter regarding timing
9 of receipt of transcript.)

10 CMSR. BELOW: Go back on the record. It
11 sounds like transcripts are likely to be available in
12 about a week's time, next Monday would be six days. So, I
13 think we'll stick with the two weeks from today for briefs
14 on the matter, which would give about a week with the
15 transcript in all likelihood.

16 So, if there's no other matters, we'll
17 close the hearing, await the briefs, and take the matter
18 under advisement.

19 (Whereupon the hearing ended at 3:12
20 p.m.)

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