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PUBLIC UTILITIES COMMISSION

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Concord, New Hampshire

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DAY 3
MORNING SESSION ONLY

RE:DE 11-250
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE:
Investigation of Scrubber Costs and
Cost Recovery

PRESENT: Commissioner Martin P. Honigberg, Presiding
Special Commissioner Michael J. Iacopino

F. Anne Ross, Esq., General Counsel

Sandy Deno - Clerk

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

2 CMSR. HONIGBERG: All right.
3 Where are we this morning? What's the first
4 order of business? Mr. Sheehan.

5 MR. SHEEHAN: We had a
6 discussion off the record this morning about
7 the Exhibit 31, which was the spreadsheet,
8 and your questions about the columns not
9 adding up. The parties have come to an
10 agreement on resolution, and we will be
11 submitting probably something marked 30-A
12 either tomorrow or Monday that will answer
13 the question from the parties' point of
14 view. At that point, you can look at it and
15 see if it answers your questions. But it's
16 going to require a little more printing, if
17 you will.

18 CMSR. HONIGBERG: Okay. Thank
19 you very much. That's good. Anything else?

20 MR. SHEEHAN: Mr. Bersak
21 submitted the exhibit that they marked, 62,
22 which should be on your desk. Otherwise,
23 we're ready for Mr. Kahal.

24 CMSR. HONIGBERG: All right.

1 Does everybody else agree with that?

2 (No verbal response)

3 CMSR. HONIGBERG: All right.

4 Let's call Mr. Kahal then.

5 MS. CHAMBERLIN: Thank you.

6 I'd like to call Mr. Kahal to the stand.

7 (WHEREUPON, MATTHEW KAHAL was duly sworn
8 and cautioned by the Court Reporter.)

9 MATTHEW KAHAL, SWORN

10 DIRECT EXAMINATION

11 BY MS. CHAMBERLIN:

12 Q. Good morning.

13 A. Good morning, Ms. Chamberlin.

14 Q. Would you please state your name and
15 employer.

16 A. Yes. My name is Matthew Kahal. Last name
17 is spelled K-A-H-A-L. I'm an independent
18 consultant retained in this case by Exeter
19 Associates, Inc., which is a contractor with
20 the Office of Consumer Advocate.

21 Q. Please summarize your credentials.

22 A. I'm a -- my training is as an economist. I
23 have B.A., M.A. degrees in economics from
24 the University of Maryland and have

1 completed all Ph.D. coursework and
2 examination requirements. I left a
3 university teaching position in the late
4 1970s to pursue a consulting career. In
5 1981, along with some associates, I helped
6 to found a consulting firm, Exeter
7 Associates. I was with the firm as a
8 vice-president and president for
9 approximately 20 years. In that capacity, I
10 was in charge of a large economics contract
11 with the Maryland Department of Natural
12 Resources that involved, among other things,
13 the certification of essentially all power
14 plants that were built in the state
15 during -- by utilities during that period,
16 during that 20-year period. In the year
17 2001, I left Exeter as an employee and
18 corporate officer. But I've continued to
19 consult with the firm and with a number of
20 other clients ever since on a number of
21 issues, including: Power plant
22 certification and planning; power supply
23 markets; financial issues, such as rate of
24 return, and a number of other regulatory

1 issues.

2 Q. Have you previously testified before the New
3 Hampshire Public Utilities Commission?

4 A. I have. A number of years ago I testified
5 in a Public Service rate case.

6 Q. Did you file testimony on behalf of the
7 Office of Consumer Advocate on
8 December 23rd, 2013?

9 A. I did.

10 Q. That testimony has been premarked as
11 Exhibit 17.

12 And what is the purpose -- oh, do you
13 have any changes or corrections to make to
14 your testimony?

15 A. I do not.

16 Q. What is the purpose of your testimony?

17 A. My task in this case was to evaluate the
18 Company's management of the Scrubber Project
19 at the Merrimack coal-fired plant, largely
20 from a planning point of view; evaluating
21 the prudence of the actions of company
22 management, using accepted regulatory
23 principles of prudence by this Commission
24 and the regulatory community generally.

1 The scope of my testimony, however,
2 does not include certain prudence issues,
3 including: The choice of technology, the
4 design of the project, the contractor
5 selection, construction cost control. And
6 above all, my testimony does not address any
7 legal issues. I don't opine on any legal
8 issues.

9 Q. Please summarize briefly the main points of
10 your testimony.

11 A. There's several main points in my testimony
12 that I'll highlight here for the
13 Commission's benefit.

14 This case really came about because of
15 an event that took place back in 2008, about
16 mid-2008, and that was the change in the
17 cost estimate for the Scrubber Project,
18 which went from \$250 million to \$457
19 million. And that's about an 80-percent
20 increase. That dramatic change in cost
21 prompted the Company to undertake what I
22 would call an "economic viability study of
23 the project." This study was presented to
24 Company management in July of 2008. That

1 study demonstrated that the Project, despite
2 the cost increase, continued to be
3 economically viable. The study also
4 documented the benefits to shareholders from
5 the Project, and also what the rate impacts
6 on customers would be. Based on that study,
7 the Company management approved proceeding
8 with the Project. The budgets were and the
9 capital spending were authorized. The
10 Company then made an informational filing
11 with this Commission, at the Commission's
12 request, on September 2nd, 2008.

13 Now, my testimony critiques that study.
14 I don't fully agree with it. I characterize
15 it as being an "aggressive study," a study
16 that's very optimistic. But at the end of
17 the day, I don't find it to be imprudent, or
18 the Company's decision-making in the summer
19 of 2008 with regard to proceeding with the
20 project to be imprudent. It's noteworthy,
21 though, that I think that the evidence shows
22 that, despite the fact that there was a
23 demonstration in this study, or a conclusion
24 in this study, that the Project was

1 economically viable, nonetheless, there was
2 also -- it also demonstrated that there was
3 a fairly high degree of risk to consumers
4 associated with the Project.

5 My testimony also makes the point that
6 this is a very, very large project as
7 compared to the size of the Company. This
8 is \$457 million compared to a capitalization
9 at that time of \$1.1 billion. So, this is
10 almost a 50-percent increase in the
11 Company's asset base. That has enormous
12 implications, both for shareholders and for
13 the default service customers that are going
14 to be expected to pay for this very
15 expensive project.

16 There is a "however" associated with my
17 finding, that the Company's decision in the
18 summer of 2008 was not unreasonable; and
19 that is, within a very, very short period of
20 time, within weeks or a couple of months
21 after September 2nd, the world totally
22 changed. The world was different in the
23 fourth quarter of 2008 as compared to the
24 third quarter of 2008. And I think that

1 we're all familiar with what those changes
2 are. There were dramatic changes in
3 commodity markets and dramatic changes in
4 gas markets and in the long-term outlook for
5 the price of gas, which is a critical input
6 in the Company's study.

7 My testimony explains why, even though
8 I could accept what the Company did in the
9 summer of 2008, I believe that the Company
10 should have undertaken updates over the
11 ensuing three months, six months, nine
12 months. And had they done that with the
13 fall in gas prices that was taking place --
14 and I show that the fall in gas places on
15 the order of 40 percent or more, depending
16 upon what measure one uses -- then that
17 would have -- an updated study would have
18 resulted in a finding that, in fact, the
19 Project was uneconomic. And the Company at
20 that point should have made that information
21 available to the decision-makers and made an
22 appropriate recommendation as to how to
23 proceed. That's the imprudence that I find
24 for the Company: The failure to update its

1 analysis and reconsider the merits of the
2 Project.

3 My testimony then goes on to put some
4 meat on the bones by describing an analogous
5 project that I happen to be personally
6 involved with during this exact same time
7 frame involving a major utility that was
8 also conducting or developing a large
9 coal-fired project, that in fact did conduct
10 such an update after finding that their
11 project was highly cost-effective in the
12 summer of 2008, and by early 2009, they
13 decided to cancel the project. And this
14 only came about because they carefully
15 monitored the economics, and they did the
16 requisite updating. Those are the major
17 points that are covered in my testimony.

18 Q. And does that complete your summary?

19 A. It does.

20 Q. Thank you.

21 MS. CHAMBERLIN: The witness
22 is available for cross-examination.

23 CMSR. HONIGBERG: I will
24 compliment the witness. That was almost

1 exactly five minutes.

2 Who's going to be questioning
3 first? Is it going to be Mr. Patch or Ms.
4 Goldwasser?

5 EXAMINATION

6 BY MS. GOLDWASSER:

7 Q. Good morning, Mr. Kahal.

8 A. Good morning.

9 Q. I'm Rachel Goldwasser. I'm an attorney at
10 Orr & Reno, and I represent TransCanada in
11 this matter. I just have a couple questions
12 for you.

13 Did you review the NERA testimony that
14 PSNH submitted on rebuttal?

15 A. I did.

16 Q. Do you have a copy of that available to you
17 up on the witness stand?

18 A. I think that I have their testimony. I
19 don't think that I have all their exhibits.

20 Q. I don't think you're going to need the
21 exhibits for my question.

22 A. Yes. This is the Harrison-Kaufman
23 testimony?

24 Q. That's correct.

1 A. Yeah, I have that in front of me. It's
2 dated July 11, 2014.

3 Q. Could you turn to Pages 10 and 11 of that
4 testimony.

5 A. Yes.

6 Q. And I'll summarize here. But if you want to
7 take a minute and refresh your recollection
8 as to that testimony...

9 From Page 10, Line 8, through Page 11,
10 Line 21, Mr. Harrison and Mr. Kaufman
11 summarize several, quote, "uncertainties"
12 with respect to the economy in mid-2008
13 until early 2009.

14 A. Yes.

15 Q. Are those the types of uncertainties that
16 you are -- you referenced in your summary
17 and in your testimony?

18 (Witness reviews document.)

19 A. They are, although this discussion is pretty
20 general and it doesn't have a lot of
21 specifics in it.

22 These are my concerns: As I said, the
23 world changed between the third quarter of
24 2008 and the fourth quarter of 2008. And

1 those concerns have to do with basically the
2 cratering of financial markets that occurred
3 during that time period, which raised the
4 cost of capital to utilities, at least for a
5 period of time, and the developments in
6 natural gas markets on the supply side, the
7 so-called "fracking revolution" that was
8 taking place, and, you know, also, the very,
9 very sharp downturn in economic activity
10 that took place during that time, which
11 frankly, at that time, none of us knew where
12 that was going to go. It was a very
13 unstable and scary period of time.

14 So, to some extent, I think that this
15 does address the type of concerns I had as
16 we went into the fourth quarter of 2008.

17 Q. But you would add more meat on the bones; is
18 that what you're saying?

19 A. I'd add more detail to it. Sure.

20 MS. GOLDWASSER: For the
21 record, that's Exhibit 24.

22 BY MS. GOLDWASSER:

23 Q. Do you have available to you Exhibit No. 37?

24 And if not, I can come stand with you and

1 show it to you.

2 A. I don't believe -- could you tell me what
3 that is?

4 (Ms. Chamberlin hands document to
5 witness.)

6 Q. I'm showing you Exhibit No. 37, which is a
7 packet of materials that were provided to
8 the Connecticut DPUC by Yankee Gas, which
9 was a -- which is an affiliate of PSNH, and
10 was an affiliate at the time of PSNH.

11 A. Yes. And Ms. Chamberlin has just handed me
12 a copy. I didn't have a copy with me.

13 Q. I'll give you a minute to familiarize
14 yourself with it. I'm not sure if you've
15 seen it before.

16 A. I had a chance to briefly review it
17 yesterday while I was in the hearing room.

18 Q. If you turn to Bates Page 3 of that packet,
19 that's a November 13th letter from Janet
20 Palmer of NUSCO, which I believe is
21 Northeast Utilities, to the Connecticut
22 DPUC, and it concerns an October 1st filing
23 and an update to that filing that was
24 supposed to be provided on December 19th,

1 but the Company is seeking an extension.
2 And they say, "Due to the significant
3 economic and energy price market changes and
4 outlooks since that original filing, Yankee
5 is in the process of evaluating the impact
6 of these market drivers on its most recent
7 sales forecast, with the expectation of
8 developing an additional forecast by the end
9 of 2008." Do you see where it says that?

10 A. No. I think that I may be looking at the
11 wrong page. I see a cover letter dated
12 March 2nd, 2009. That's on Page 5 of the
13 document.

14 Q. Turn back to Page 3.

15 A. Oh, okay. I see that now. It's dated
16 November 13, 2008.

17 Q. Yeah, and I just read you the second full
18 paragraph of the letter.

19 A. Correct. Yes, I see that now. Thank you.

20 Q. Is this the sort of update that you're
21 referencing -- or suggesting would have been
22 appropriate in your testimony?

23 A. Conceptually, yes. I have to say that I
24 think with regard to the Scrubber Project,

1 which is what I was talking about, the
2 stakes were far higher than I think this
3 filing. I don't want to minimize the
4 importance for Yankee Gas. But, you know,
5 if anything, given the fact that we're
6 dealing with an investment that's going to
7 be something like at least a third of the
8 Company's asset base, the need for an
9 update, a timely update, is even more
10 important than here. But this is totally
11 appropriate for Yankee Gas to be updating,
12 based on changing conditions.

13 Q. And in your opinion, that sentence
14 references "significant economic and energy
15 price market changes." Those were the same
16 changes that you highlighted earlier. That
17 would be your reading of the --

18 A. Oh, yes, yes. And this was -- November 13,
19 2008, that was right in the middle of the
20 financial and economic crisis that was
21 taking place.

22 Q. And I'm going to ask you to turn to Page 24
23 of that same document.

24 A. I have that.

1 Q. The second full paragraph, third sentence in
2 reads, "Natural gas prices, as measured by
3 Henry Hub, also saw a plunge in 2008 and are
4 expected to remain below recent history for
5 the next several years for reasons similar
6 to those affecting oil. But, also, and
7 perhaps more importantly, prices are likely
8 to remain depressed because of the newly
9 discovered and exploitable supply response
10 available from the unconventional sources,
11 (shale plays)." Did I read that correctly?

12 A. Yes.

13 Q. Is this the sort of information that you
14 would have expected to see in an update to
15 PSNH's September 2nd, 2008 filing?

16 A. I would hope so. I would hope that, if the
17 Company conducted an update, there would be
18 some thoughtful consideration of the
19 economic forces that were at work, even
20 though those economic forces were not
21 totally understood at the time. What was
22 understood was that there was some major
23 change taking place that was not evident in
24 July of 2008 when it did its original

1 analysis.

2 MS. GOLDWASSER: I have no
3 further questions.

4 CMSR. HONIGBERG: Thank you.
5 Who's going to be going next? Mr. Fabish?
6 Mr. Irwin?

7 Mr. Fabish has no questions,
8 he mouths. Mr. Irwin also has no questions.
9 He agrees. Who's going to be next? The
10 Company, Mr. Bersak?

11 MR. BERSAK: I believe so.
12 Yes, sir.

13 EXAMINATION

14 BY MR. BERSAK:

15 Q. Good morning, Mr. Kahal.

16 A. Good morning, Mr. Bersak. Good to see you
17 again.

18 Q. Yes, it is. You know who I am.

19 MR. BERSAK: Mr. Kahal and I
20 had the opportunity to work together with
21 his former firm, Exeter Associates, many
22 years ago. By "many," I'm not talking
23 years, I'm talking decades. It was about 30
24 years ago that I worked with Exeter

1 Associates on a number of cases, and it's a
2 pleasure to work with Mr. Kahal again here
3 today.

4 A. I stopped counting after 20.

5 BY MR. BERSAK:

6 Q. I'm sorry. I gave your secret away.

7 Earlier this morning you started off
8 your testimony by talking about the scope of
9 your testimony. And you indicated that
10 there were two things that you did not
11 include in your testimony, I believe. One
12 of them was, you were not opining on the
13 actual construction project itself; is that
14 correct?

15 A. Right. The cost controls and how the
16 Company managed the Project from a
17 cost-control standpoint.

18 Q. And I believe that, either in your testimony
19 or in your data request, you said you pretty
20 much deferred to the review that was done by
21 Jacobs Consultancy with respect to those
22 matters.

23 A. That's correct.

24 Q. And the second thing you said was that you

1 were not discussing any of the legal
2 arguments that the Company had with respect
3 to whether the Company was required, as a
4 matter of law, to install this technology at
5 Merrimack Station.

6 A. That's right.

7 Q. And you repeat that several times throughout
8 your testimony. For example: If you take a
9 look at Page 5, Line 16, you say, "I take no
10 position on this or any other legal issue
11 that has been raised in this docket"; and
12 similarly, do you agree, also at Page 7,
13 Line 9, "I do not address the Company's
14 legal arguments." Is that correct?

15 A. That's correct.

16 MR. BERSAK: And I would --
17 for simplicity's sake, I have a number of
18 data request responses marked that I'd like
19 to have entered as the next exhibit.
20 There's 14 of them here. They are Mr.
21 Kahal's responses to PSNH's Data Requests
22 Nos. 3, 4, 5, 9, 13, 30, 37, 48, 57, 59, 61,
23 65, 67, and his data request response to
24 Staff's Request No. 4. It's a package.

1 Rather than going up 16 different times, I
2 think this will be much more efficient. And
3 as soon as --

4 CMSR. HONIGBERG: So this
5 package is going to be 63?

6 MR. BERSAK: Yes, please. So
7 the packet of 14 data requests will be
8 marked for identification as Exhibit No. 63.

9 (The documents, as described, were
10 herewith marked as Exhibit 63 for
11 identification.)

12 BY MR. BERSAK:

13 Q. Did you have an opportunity to take a look
14 at the first three items in this packet, Mr.
15 Kahal, your responses to PSNH Questions 1-3,
16 1-4, and 1-5?

17 (Witness reviews document.)

18 Q. Again, in response to the Company's
19 questions after receiving your testimony,
20 you reply that you're not expressing any
21 legal opinions regarding the Company's
22 obligations concerning the Scrubber;
23 correct?

24 A. That's correct.

1 Q. Would you agree that, notwithstanding the
2 fact that you are not addressing those legal
3 issues, that they are nonetheless very
4 important to the issues in this case?

5 A. I won't dispute that. It's -- I don't think
6 it's relevant to my testimony.

7 Q. Were you here yesterday when Mr. Frantz
8 testified, and part of his testimony
9 indicated that, in his mind, the first
10 hurdle that needed to be addressed by the
11 Commission in this proceeding is whether
12 indeed the law enacted by the State
13 Legislature in 2006 created a mandate for
14 the Company to install this technology at
15 Merrimack Station?

16 A. Yeah, I was here during his testimony.

17 Q. On line -- on Page 4, Line 14 of your
18 testimony, if you can take a look at that,
19 please.

20 (Witness reviews document.)

21 Q. Take a look where you testify that this case
22 involves PSNH's compliance with the statute
23 enacted by the New Hampshire Legislature in
24 2006 that requires the owner of the two-unit

1 Merrimack coal-fired power plant to reduce
2 emissions of mercury by 80 percent. And
3 then you recite 125-0:11 through 18, or the
4 "Scrubber Law." Do you see that?

5 A. I'm sorry. Which page is that? Fourteen
6 did you say?

7 Q. It's Page 4, Line 14.

8 A. Oh, Page 4, Line 14.

9 Q. I think I transposed it earlier. So it's my
10 fault.

11 A. Yes, I see that. Yes.

12 Q. And you would agree, would you not, that
13 compliance with a statutory requirement
14 would be a prudent course of action for a
15 utility?

16 A. I certainly wouldn't advocate not complying
17 with the law.

18 Q. In fact, if you take a look at Exhibit 63
19 and turn to your response to Question No. 30
20 from PSNH, is it correct that your response
21 to whether it's ever prudent for a utility
22 to ignore the law was, "It is not Mr.
23 Kahal's position that it is prudent for a
24 utility to intentionally ignore the law."

1 A. I would agree with that.

2 Q. And in addition, if you could turn, please,
3 to response to Question 57, Subpart C, which
4 is also in Exhibit 63, you again repeat your
5 position that you do not dispute the
6 importance of legal compliance; is that
7 correct?

8 A. That's correct.

9 Q. Now, if you go back to Page 4 of your
10 testimony, Line 17, you testify that
11 compliance is to take place through the
12 installation and operation of a Scrubber
13 system. Do you see that testimony?

14 A. I do.

15 Q. And you certainly agree that that is exactly
16 what PSNH did, install and operate a
17 Scrubber system; correct?

18 A. Yes. It became operational, I believe, in
19 the fall of 2011.

20 Q. Now, certain parties to this proceeding have
21 taken the position that the Scrubber Law did
22 not require PSNH to install the Scrubber,
23 that there were other alternatives that
24 could have been pursued.

1 In fact, in your testimony at Page 7,
2 Line 25 [sic] -- and I'll give you an
3 opportunity to find that -- you claim there
4 were, quote, Three potential alternative
5 actions that could have been pursued if
6 authorized by the lawful authority. Do you
7 see that?

8 A. Yes.

9 Q. Now, you used the qualifier, "if authorized
10 by the lawful authority."

11 Consistent with what we discussed a
12 moment earlier, does that mean that whatever
13 was done had to comply with the law?

14 A. I'm not disputing that.

15 Q. So you agree that --

16 A. Yes. And I think that you quoted that
17 testimony. The clear implication -- and I
18 may have said this in a data response, I
19 don't recall -- was that I was never
20 claiming that these alternatives would be
21 taken unilaterally by PSNH.

22 Q. So, if an alternative required prior
23 authorization, say from a state regulatory
24 authority, that would be a prerequisite to

1 PSNH's use of that alternative?

2 A. Oh, I don't know. I'm simply not asserting
3 that this should have been done
4 unilaterally. I don't know what
5 authorizations would be required to
6 undertake these actions. It's possible that
7 the Company does have the unilateral
8 authority to undertake these actions. I'm
9 certainly not asserting that to be true.

10 Q. I understand. Thank you.

11 Would you take a look, please, at your
12 response to Data Request 1-9 from PSNH.
13 That also is in Exhibit 63. In this data
14 request, the Company asked you about the
15 alternatives available to it in lieu of
16 installation of the Scrubber. As part of
17 your response to that question, didn't you
18 answer by stating, "Mr. Kahal is not
19 expressing a legal opinion on the
20 feasibility of the options. That would be
21 for the Commission and/or New Hampshire
22 Legislature to determine"?

23 A. Yes.

24 Q. So you would agree that it's important for

1 this Commission to decide exactly what Mr.
2 Frantz said, that we need to understand the
3 legal issues that you don't address in your
4 testimony, issues such as whether
5 installation of the Scrubber technology at
6 Merrimack Station was a legislative mandate
7 with a fixed deadline. Do you agree?

8 A. Yes and no. There's a "yes" --

9 Q. I'd like to hear the "yes" part.

10 [Laughter]

11 A. The legal issues have been teed up. They've
12 been discussed by the Staff, as you just
13 mentioned, and certainly discussed on
14 multiple occasions by the Company. And I
15 understand that. And since the legal issues
16 have been teed up, I'm sure the Commission
17 will address them. There's no doubt they're
18 important.

19 I think the "no" part of it -- and I'm
20 sorry I have to get to that. But the "no"
21 part of it is it's really not pertinent to
22 my testimony. My testimony is that the
23 Company absolutely had an obligation, and
24 should have, in light of the dramatically

1 changing and fast-changing economic and
2 market conditions, conducted an update. The
3 update would be an informational filing.
4 There's no legal issue over whether the
5 Company could make an informational filing
6 and recommendation to the Commission.
7 Nowhere do I suggest that the Company should
8 be taking unilateral action. But I believe
9 that the Company is the prime mover in
10 moving forward with the update. That
11 implicates no legal issues. So that would
12 be the complete answer.

13 Q. Thank you. I appreciate that.

14 Would you agree that, if this
15 Commission had held that the Scrubber was
16 indeed a legislative mandate with a fixed
17 deadline, that a prudent utility would be
18 guided by such decision?

19 A. The Company should, of course, take into
20 account the legal conclusions reached by the
21 Commission.

22 Q. And would you also agree that an important
23 preliminary legal matter of importance is
24 who made the choice to install the

1 Scrubber -- that is, whether it was the
2 Legislature and not PSNH that made the
3 choice?

4 MS. CHAMBERLIN: Your Honor,
5 I'm going to object to this line of
6 questioning. He said he's not giving a
7 legal opinion, and this line of questioning
8 goes on and on about what the legal
9 obligations were.

10 CMSR. HONIGBERG: Mr. Bersak.

11 MR. BERSAK: I'm not asking
12 what the legal obligations were. I believe
13 this witness has testified, in his opinion,
14 the Company was imprudent. But he doesn't
15 address some overarching issues with respect
16 to whether any of his testimony is indeed
17 relevant if, in fact, the first hurdle that
18 Mr. Frantz described yesterday -- that is,
19 the existence of a legal mandate -- was
20 there.

21 CMSR. HONIGBERG: I know I've
22 heard him say at least a dozen times now
23 that the Company needs to comply with the
24 law and that legal compliance is outside the

1 scope of his testimony. And I heard what
2 you just said. I saw -- I don't really see
3 that as much different from what he's
4 already done. Am I missing something?

5 MR. BERSAK: No, but I believe
6 that the witness is also an expert in
7 prudence. And I believe, in addition to
8 this case, he discussed with me this morning
9 that he's testifying as a prudence expert
10 down in Louisiana again. And I'm going to
11 ask him about his expertise regarding issues
12 of prudence.

13 (Commissioners conferring)

14 CMSR. HONIGBERG: Commissioner
15 Iacopino points out that the prefiled
16 testimony on Page 16 does contain a
17 discussion of -- a more extended discussion
18 of prudence and the standards that the
19 Company needs to follow. It's not entirely
20 clear to me that Mr. Bersak is exactly
21 there. But given that, I think we're going
22 to let him continue, at least for a little
23 while.

24 But I would certainly

1 encourage you, Mr. Bersak, not to expect the
2 witness to give you a different answer the
3 eighth or ninth time you ask him about the
4 scope of his testimony.

5 MR. BERSAK: I hope he's
6 giving me -- hopefully he'll give me the
7 same answer over and over again.

8 BY MR. BERSAK:

9 Q. I believe that the question that was out
10 there was whether it's an important
11 preliminary legal matter for prudence
12 purposes of who made the choice to install
13 the Scrubber, the Legislature or PSNH.
14 A. Well, the first part of the answer is, no,
15 it's not important for the analysis that I
16 did for my testimony. It's certainly
17 important to the Company as to what its
18 legal requirements are. I do note in my
19 testimony -- in fact, I alluded to it
20 briefly in the summary -- that the Company,
21 in the summer of 2008, made a decision --
22 that is, the management, actually, of
23 Northeast Utilities made the decision to
24 authorize the Project and to proceed.

1 That's clearly stated in the exhibits which
2 are Company documents that are attached to
3 my testimony.

4 Q. Is it your opinion that the Company
5 management had the ability to not move
6 forward with the Project under the law?

7 A. I'm not expressing a legal opinion on that.

8 Q. So if the --

9 A. It's the same answer the tenth time.

10 Q. Sure. If this Commission was to decide that
11 the Scrubber installation at Merrimack
12 Station was not the result of a PSNH
13 management choice from a range of options,
14 would you agree that such a decision would
15 have a significant impact on the
16 determination of the Company's prudence?

17 A. I can't speak to the prudence analyses of
18 other witnesses. It wouldn't affect mine,
19 my testimony.

20 Q. Even if it was this Commission that was to
21 decide that and not other witnesses?

22 A. The Commission, obviously hearing the entire
23 case, hearing all the evidence, considering
24 all the legal arguments, can make the

1 determination that it deems appropriate. I
2 mean, other than that, I don't know how I
3 can respond to your question.

4 Q. And whatever determination the Commission
5 makes, the Company has -- as a reasonable
6 utility should look at it and act
7 accordingly.

8 A. Act appropriately, yes.

9 Q. Thank you. Since you're testifying on
10 behalf of the Office of Consumer Advocate,
11 would it be important for you to know
12 whether your client has admitted that the
13 Scrubber Law requires PSNH to install such
14 technology by July 2013?

15 MS. CHAMBERLIN: I'm going to
16 object to that. That's a
17 mischaracterization of the OCA's position.

18 CMSR. HONIGBERG: Can I hear
19 the question again?

20 MR. BERSAK: Sure. I asked
21 Mr. Kahal that, since he's testifying on
22 behalf of the Office of Consumer Advocate,
23 would it be important for him to know
24 whether his client has admitted that the

1 Scrubber Law requires PSNH to install such
2 technology by July 2013.

3 MS. CHAMBERLIN: The OCA has
4 not been a witness in a proceeding to make
5 admissions. I'm not sure what he's talking
6 about. There are various filings where the
7 OCA and other parties will refer in general
8 to the law and building a scrubber. But it
9 has no relevance to this witness's
10 testimony, and it's a mischaracterization by
11 PSNH saying that the OCA, you know, admits
12 that the legal authority was with PSNH. I
13 mean, that's simply not true.

14 CMSR. HONIGBERG: Mr. Bersak.

15 MR. BERSAK: Well, what I'm
16 referring to is a statement made in a
17 memorandum of law filed with this Commission
18 in Docket 08-103 by the Consumer Advocate's
19 Office, at Page 6, where that pleading
20 states, R.S.A. 125-O requires PSNH to reduce
21 mercury emissions by 80 percent by
22 installing a scrubber technology at
23 Merrimack Station no later than July 1,
24 2013. According to the State Supreme Court,

1 in Kelleher v. Marvin Lumber, a party's
2 pleading may be used as evidence and as
3 admission against them in that proceeding or
4 other proceedings.

5 So we have a pleading before
6 this Commission where, to further their
7 legal argument, the Consumer Advocate stated
8 that the Scrubber Law required us to install
9 the Scrubber. Now, years later, they're
10 saying they never said that.

11 CMSR. HONIGBERG: Yeah, now
12 you're flying at 30,000 feet, because you've
13 got a witness in front of you who's
14 testifying about much more -- a much
15 different time frame. I understand why you
16 might want to ask him, would it be -- a
17 question along the lines of what you asked.
18 And if you want to show him that statement
19 and say, "Is this significant to you in your
20 assessment and your testimony," I think you
21 can ask him that. And I think we may
22 already know what the answer is. But I
23 think your -- you should be entitled to do
24 that. Whether that is characterized, then,

1 as an admission is a completely separate
2 issue, and what legal relevance it might
3 have is going to be decided elsewhere.
4 You've got this witness in front of you, and
5 you should be allowed to ask him if a
6 statement that was made by someone, however
7 it's characterized, is significant to his
8 opinions. So you can proceed along those
9 lines.

10 MR. BERSAK: Thank you.

11 BY MR. BERSAK:

12 Q. As part of the preparation for your
13 testimony, would it be relevant to you to
14 know that in a legal pleading filed with
15 this Commission in a predecessor docket to
16 this, that the Consumer Advocate's Office
17 had stated that the law required PSNH to
18 install Scrubber technology at Merrimack
19 Station?

20 A. No, and for the same reason that the
21 Company's legal position, on which I'm not
22 opining, has no effect on my testimony,
23 which is that the Company was imprudent for
24 failing to do an update.

1 And Mr. Bersak, I think that you know
2 me well enough to know that my testimony
3 would have been the same, regardless of
4 which client I was testifying on behalf of.

5 Q. And I appreciate that, because as you
6 stated, you know, many times now, your
7 testimony is based not upon the existence of
8 a legal mandate, but putting that aside for
9 purposes of your presentation.

10 A. That's correct.

11 Q. I understand.

12 It's my understanding that, in your
13 testimony you identified the 2008 to early
14 2009 time frame as being the critical-time;
15 that "critical time period" where we could
16 have potentially changed course on the
17 Scrubber Project; is that correct?

18 A. Yes.

19 Q. If you take a look at your testimony, on
20 Page 9, Line 15, you'd agree that you point
21 to the end of 2008 and early 2009 period as
22 the "critical time" where reconsideration by
23 either this Commission or the Legislature,
24 whichever had jurisdiction, would have been

1 appropriate.

2 A. Yes.

3 Q. When you prepared your testimony, you were
4 not aware of the fact that during this
5 precise time period, the New Hampshire
6 Legislature had, in fact, reconsidered the
7 Scrubber Law and decided not to enact
8 legislation that would have amended that law
9 or changed it.

10 A. Oh, that was discussed extensively in the
11 Company's rebuttal filing.

12 Q. That wasn't the question, though.

13 The question was: When you prepared
14 your testimony, you were not aware of that,
15 were you?

16 A. That's right.

17 Q. In fact, if you take a look at your response
18 to Data Request 1-65A -- that should be in
19 Exhibit 63 -- where we asked you, Are you
20 aware of the Legislature's actions in the
21 spring of 2009 not to change or amend the
22 Scrubber Law, your answer was "No."

23 A. That's right. And having -- even if I had
24 known that, it wouldn't alter my testimony.

1 Q. So you are not aware that during the precise
2 time period you specified as part of the
3 legislative process to consider two bills
4 that would have amended the Scrubber Law,
5 the Legislature was presented with comments,
6 studies and testimony from a multitude of
7 parties debating the pros and cons of
8 continuing with the Scrubber Project.

9 A. I don't --

10 MS. CHAMBERLIN: I object.
11 He's answered the question already.

12 CMSR. HONIGBERG: I agree.
13 Sustained.

14 BY MR. BERSAK:

15 Q. Would you agree that, as part of its powers,
16 the Legislature had the ability to consider
17 broad public interest considerations that
18 went beyond mere economics of the Project,
19 such as the creation of jobs?

20 A. I'd agree with that.

21 Q. And I believe earlier today you said that
22 during this precise time period that we're
23 talking about, there was a "cratering of the
24 financial markets"?

1 A. Yes.

2 Q. And would you agree that that "cratering of
3 the financial markets" led to significant --
4 a significant recession?

5 A. An extremely serious recession nationwide.

6 Q. Which led to significant unemployment around
7 the country?

8 A. It did.

9 Q. And I believe you said that, at that point
10 in time no one knew where it was going to
11 go; is that correct?

12 A. I think that there was a lot of fear and an
13 enormous amount of uncertainty, even in
14 among professional economists as to how
15 serious it would get.

16 Q. So, at that point in time, would it be
17 unreasonable for a legislature to consider
18 broader public interest benefits, such as
19 the creation of a thousand or more jobs
20 during this recession, as a reason why this
21 Project should go forward, notwithstanding
22 arguments by others that it should be
23 stopped?

24 MS. CHAMBERLIN: Your Honor, I

1 object. This witness is not an expert on
2 legislative policy, and it's going beyond
3 his testimony.

4 CMSR. HONIGBERG: Mr. Bersak.

5 MR. BERSAK: The witness is an
6 expert on prudence. He's said in his
7 testimony that there should have been a
8 reconsideration by the appropriate authority
9 during the 2008-2009 time frame, which is
10 exactly what this Legislature did. He's
11 testifying as to the economics of the
12 Project and why economically it might not
13 want -- might have been reconsidered by the
14 appropriate authority, but did not address
15 public interest considerations such as jobs.

16 CMSR. HONIGBERG: Overruled.
17 Do you remember the question?

18 THE WITNESS: Yes.

19 A. I think there was a reference to a thousand
20 jobs?

21 BY MR. BERSAK:

22 Q. Yes.

23 A. A thousand construction jobs?

24 Q. Yes.

1 A. I don't know whether a thousand is a correct
2 number or not.

3 Q. Well --

4 A. But this is a large construction project.
5 It involved a lot of at least temporary jobs
6 that would be created.

7 I think your question is: Is this
8 something that at least might be appropriate
9 for the Legislature to consider in its broad
10 public interest consideration? And I have
11 no dispute with that. I don't think it has
12 anything to do with the Company's prudence
13 obligation. But the -- but I think what's
14 implicit in your question is that the
15 Legislature may well be interested in things
16 beyond the Company's prudence -- issues
17 beyond the Company's prudence.

18 Q. In your testimony at Page 34, Line 11, is it
19 true that you indicate that by 2010, it was
20 too late to change course for the Clean Air
21 Project?

22 A. That's a judgment on my part. I tend to
23 think that by the time we got to 2010, we
24 were beyond the point of no return with this

1 project because of the spending at that
2 point.

3 Q. So, I take it, your testimony is you were
4 not aware that the Legislature had, in fact,
5 reconsidered the Scrubber Project during
6 2009, are you?

7 CMSR. HONIGBERG: Sustained.

8 MS. CHAMBERLIN: I object.

9 [Laughter]

10 CMSR. HONIGBERG: He's already
11 answered it three times now.

12 MR. BERSAK: Yeah, I
13 understand that.

14 BY MR. BERSAK:

15 Q. What I was going to is, are you aware that
16 the New Hampshire Legislature adjourns its
17 session each spring and does not come back
18 to sit until the beginning of the following
19 year?

20 A. I don't know the Legislature's schedule.

21 Q. So, by the next time the Legislature would
22 have reconvened in 2010, according to your
23 testimony, it was too late to change course.

24 MS. CHAMBERLIN: Your Honor,

1 he has agreed with what he has written in
2 his testimony. And he said he doesn't know
3 what the legislative schedule is, so he
4 can't really answer that question.

5 CMSR. HONIGBERG: I don't know
6 that he can't answer the question. That's
7 overruled.

8 Can you answer the question?

9 THE WITNESS: I think the
10 question is -- I think from an economic
11 feasibility standpoint, say mid-2010 I think
12 would have been too late to cancel this
13 project, as a practical matter, because of
14 the rate of spend that was taking place on
15 it. The more appropriate time frame would
16 have been late 2008, beginning of 2009.

17 MR. BERSAK: Okay. Thank you.

18 BY MR. BERSAK:

19 Q. In September of 2008, this Commission issued
20 an order that held that retirement of
21 Merrimack Station was not an alternative
22 available to PSNH as a means of complying
23 with the Scrubber Law.

24 In light of that ruling from this

1 Commission, isn't it possible that a
2 reasonable person would find that retirement
3 of Merrimack Station was not an option
4 available to comply with the law?

5 MS. CHAMBERLIN: Your Honor, I
6 object. The characterization of the
7 Commission's order is inaccurate, and
8 there's multiple pleadings discussing, you
9 know, the role of retirement and how it
10 could be done. It's a legal analysis. It's
11 already taken place. It's beyond this
12 witness's testimony. The question is
13 inappropriate.

14 CMSR. HONIGBERG: Mr. Bersak.

15 MR. BERSAK: I'm not asking
16 for a legal opinion. I'm asking for his
17 opinion as an expert on prudence, as to if a
18 regulatory agency such as this Commission
19 had ruled on an order that retirement of
20 this station was not a means of complying
21 with the law, would a reasonable utility
22 read that and feel that that alternative was
23 not available to them.

24 CMSR. HONIGBERG: I think one

1 of the bases of Ms. Chamberlin's objections,
2 and it was a good one, is that you didn't
3 ask your question as a hypothetical
4 regarding a possible order by a Commission.
5 I think all of you would agree that there's
6 been orders all over the map regarding
7 retirement, and there may have been orders
8 at other times that said other things about
9 retirement. I think if you want to ask him
10 the hypothetical that you just articulated,
11 that's a question that probably wouldn't
12 draw a valid objection. So, want to try
13 that one?

14 MR. BERSAK: Let me rephrase
15 it.

16 BY MR. BERSAK:

17 Q. If, hypothetically, this Commission, in an
18 order issued September 22nd, 2008, had
19 issued a ruling that retirement of Merrimack
20 Station was not an alternative that would
21 have complied with the Scrubber Law, would a
22 utility such as PSNH be reasonable in
23 reading that and taking that alternative off
24 the table?

1 A. No.

2 Q. No? Why?

3 A. I'm not sure I understand what you mean by
4 "taking it off the table." It's still my
5 contention that the Company should have
6 undertaken an update of its economic
7 viability analysis and customer impact
8 analysis to take into account these
9 dramatically changing economic and market
10 conditions -- the reason being, in your
11 hypothetical you were hypothesizing a
12 statement by the Commission based on current
13 law. The point is that current law can be
14 changed.

15 Q. But we're not aware that the Legislature
16 considered such a change and chose not to --
17 (Court Reporter interrupts.)

18 MR. BERSAK: -- not to make
19 that change that he just testified about.

20 MS. CHAMBERLIN: Objection.

21 CMSR. HONIGBERG: Sustained.

22 BY MR. BERSAK:

23 Q. Your third alternative to installation of
24 the Scrubber Law was to divest the Merrimack

1 Station plant, paren, if possible, and leave
2 the mercury compliance problem to the new
3 buyer. Is that correct?

4 A. Yes.

5 Q. I would refer you to your response to Data
6 Request No. 13 that's in Exhibit No. 65
7 [sic].

8 A. I've got that in front of me.

9 CMSR. HONIGBERG: It's
10 Exhibit 63.

11 MR. BERSAK: I'm sorry. My
12 three looks like a five. I'm sorry. I
13 apologize.

14 BY MR. BERSAK:

15 Q. In this data request, PSNH asked you what
16 you meant when you said "divest the
17 Merrimack plant (if possible)." And you
18 responded that the qualifier, "if possible,"
19 meant if divestiture was both legal and
20 practically feasible and if there was a
21 qualified buyer for the plant; is that
22 correct?

23 A. Yes.

24 Q. So, again, you qualified your answer here

1 with the first obligation, that any
2 alternative pursued by PSNH had to comply
3 with the law.

4 A. Yes, I agree with that.

5 Q. And for divestiture to be a realistic
6 alternative, you responded that there would
7 have to have been a -- it would have to be
8 practically feasible and there would have to
9 be a ready, willing and able buyer.

10 A. Qualified buyer, yes.

11 Q. And in response to Subpart B of the question
12 in No. 13, it was your assumption that, once
13 divested, that the buyer would then become
14 the new owner of that station.

15 A. Yes. That would be true, unless the owner
16 decided to flip the plant to some other
17 owner.

18 Q. And then that owner would have to determine
19 how best to comply with any emissions
20 reductions requirements that were required
21 under law; is that correct?

22 A. The owner would have to comply with whatever
23 the law is or turns out to be.

24 Q. Because if you go back to Page 4 of your

1 testimony which we discussed earlier, you
2 said that the law required the owner of
3 Merrimack Station to reduce emissions
4 through installation of a Scrubber system by
5 that July 2013 date; correct?

6 A. Yes.

7 Q. So, in light of this obligation under the
8 law for whoever owns the plant to install a
9 Scrubber, would you agree that a buyer would
10 have considered the Scrubber Law to be a
11 significant economic liability that it would
12 have to take into consideration when making
13 any bid proposal on that plant?

14 A. It would have been priced into the bid or --
15 I'm not even saying that there would be a
16 bid. It might have been a negotiated sale.
17 But it would be priced into the transaction
18 outcome.

19 Q. And that's -- you've testified on
20 divestiture of assets several times; have
21 you not?

22 A. I have.

23 Q. And I believe I recall one where you
24 testified before the Rhode Island Public

1 Utilities Commission here in New England
2 regarding New England Power and Narragansett
3 Electric's divestiture of their generating
4 assets.

5 A. Yeah, that was probably 15 years ago.

6 Q. As part of that testimony, do you recall
7 indicating exactly what you said here today,
8 which is that the existence of an economic
9 liability would be a factor that a bidder
10 would take into consideration, and they
11 would adjust their price accordingly?

12 A. That's right. It would be priced in.

13 Q. Have you reviewed Mr. Reed's testimony on
14 behalf of the Company regarding his opinions
15 on the viability of divestiture of Merrimack
16 Station as an alternative?

17 A. I looked at them briefly, yes.

18 Q. With respect to the issue we were talking
19 about -- that is, the adjustment of a price
20 to deal with the potential economic
21 liability of emissions reduction technology
22 that a new buyer might face -- Mr. Reed
23 indicated that a buyer would likely factor
24 in at least the estimated project cost, if

1 not more, into a bid price. Do you disagree
2 with his testimony?

3 A. I think I would put it a little more
4 precisely. It depends, I think, exactly
5 when the divestiture took place. I think
6 that what the -- since the Project has
7 already been started, I would think that
8 what the buyer would price in would be the
9 costs that it would incur to finish the
10 Project, which might be less than the entire
11 amount.

12 Q. During the course of any such hypothetical
13 divestiture process, since construction had
14 started, would a prudent utility continue
15 construction or stop it and see what
16 happens?

17 A. It would depend on circumstances. To me, it
18 would be logical that what would happen is
19 that the project would continue and that
20 the -- if there was a divestiture taking
21 place -- and that is, if the buyer, in fact,
22 expressed an interest in completing the
23 project -- then what might happen -- and
24 this is very hypothetical -- is that the

1 contracts may get transferred -- that is,
2 the construction contracts might get
3 transferred to the new buyer, and then they
4 would become an obligation of the new buyer.

5 Q. I understand. Thank you.

6 If you would take a look at your
7 testimony at Page 8, Line 25. That's where
8 you testified that an appropriate remedy for
9 any imprudent action for any utility must
10 take into account benefits that would
11 mitigate costs that would otherwise be
12 incurred by customers; is that correct?

13 A. Yes.

14 Q. So, let's say, if we talk about this
15 hypothetical divestiture, if, as part of a
16 hypothetical divestiture process, a bidder
17 would have made an adjustment to their price
18 that exceeded the cost that PSNH incurred to
19 in fact build the Scrubber, then customers
20 are better off by the course of action PSNH
21 took; is that correct?

22 A. I don't know. There would have to be an
23 analysis done to make that determination.
24 It's a very hypothetical circumstance.

1 Q. I understand. The reason for your testimony
2 with respect to having to take into account
3 mitigation, is that based upon like a
4 causation theory -- that is, customers
5 should not receive the mitigating benefits
6 of a utility's investment if they're not
7 obligated to pay for that investment?

8 A. I'm a little confused by the -- could you
9 refer me back to the --

10 Q. Sure. Page 8, Line 25, where you talk about
11 the issue about if there was an imprudent
12 finding, that mitigating benefits must be
13 taken into consideration.

14 CMSR. HONIGBERG: Mr. Bersak,
15 I don't see that on Page 8, Line 25. But I
16 may be looking at the wrong --

17 MS. GOLDWASSER: I don't
18 either.

19 THE WITNESS: I don't.

20 MR. BERSAK: Let me go find
21 it.

22 BY MR. BERSAK:

23 Q. If I could refer you to, rather than looking
24 at the specific place we were looking at,

1 look at Page 9, Line 11, where you say, "The
2 following testimony discusses alternatives
3 that could have mitigated an uneconomic
4 outcome."

5 (Witness reviews document.)

6 A. Yeah. Yes.

7 Q. I don't know where I -- Page 8. Let's take
8 a look at Page 8, Line 27.

9 (Atty. Bersak conferring with Ms.
10 Tillotson.)

11 Q. Okay. Sorry. It's not... let me ask the
12 question this way: Would you agree that any
13 mitigating factors that lessen harm to
14 customers must be taken into account if an
15 imprudence finding was made by the
16 Commission?

17 A. I think so, but let me try to clarify.

18 The mitigation that I think that you're
19 referring to in your question really doesn't
20 go to the issue of whether there was
21 imprudence. Instead, it's really more of a
22 damages question. And if the Company was
23 imprudent and the Company takes measures to
24 mitigate the harm associated with that

1 imprudence, absolutely that should be taken
2 into account. I think that's what you meant
3 by your question, and that's how I interpret
4 it.

5 Q. Thank you.

6 I would like you to turn your attention
7 if you could -- now I hope I have the right
8 reference this time -- to Exhibit 63,
9 response to Data Request 48. Tell me when
10 you have that.

11 A. I've got that.

12 Q. All right. In this question, PSNH asked you
13 about your testimony where you said an
14 economic analysis included in PSNH's report
15 to this Commission in September 2008 "was
16 technically defensible and not
17 unreasonable." I believe that's something
18 that you discussed earlier today; is that
19 correct?

20 A. Right. In the interest of brevity, I didn't
21 go into as much detail as in this answer,
22 but yes.

23 Q. Now, that September 2008 analysis, do you
24 agree was prepared and filed by PSNH

1 pursuant to a specific directive of this
2 Commission?

3 A. Yeah, it was an informational request.
4 That's my understanding. And this study --
5 this is essentially the same analysis that
6 was presented to management earlier that
7 summer.

8 Q. Let me make sure I have the right page this
9 time. Take a look at Page 23 of your
10 testimony at Line 3.

11 (Witness reviews document.)

12 Q. Do you see where you testify that the \$11
13 gas price used in the Company's economic
14 analysis was, "an accident of timing"?

15 A. Yes.

16 Q. If you could turn to your data request
17 response to Question No. 37 that is included
18 in Exhibit 63, I would appreciate it.

19 A. I've got that.

20 Q. Now, we asked you what you meant by your
21 phrase, "an accident of timing." And in
22 that response, isn't it correct that you
23 equate that phrase, "accident of timing,"
24 with "bad luck"?

1 (Witness reviews document.)

2 A. Bad luck or happenstance. That's right, in
3 that, I believe that there might have been a
4 very, very different outcome if an analysis
5 had been done either in 2007 or 2009.

6 Q. So it was just "bad luck" for all of us here
7 today that the Commission chose
8 September 2008 as the date for the Company
9 to prepare that economic analysis.

10 A. No. The timing of the economic analysis
11 that was done was prompted by the change in
12 the Scrubber Project budget from 250 to 457.
13 I believe, if I have my time lines right,
14 that may have been known by the Company in
15 the May or June time frame, even though it
16 was made public in August. And that's what
17 prompted the Company to proceed and do a new
18 economic viability study. And that economic
19 viability study then provided the basis for
20 management approval of the project.

21 And I believe your rebuttal witnesses,
22 Mr. Large and Vacho -- I apologize if I'm
23 messing up the names -- but they even made
24 the point, in response to TransCanada

1 witness Hachey, that the \$11 gas price,
2 which is a figure way outside of historic
3 norms -- and, you know, certainly the
4 pricing norms since 2008, because that's
5 what the market was back in the summer of
6 2008, and that's all, really, I'm saying in
7 this answer and I was in my testimony --
8 that that was the timing. That's what
9 happened. That was the outlook in 2008. I
10 didn't have a huge problem with using \$11
11 gas in that study in 2008 because I agree
12 with your witnesses. That's where the
13 market was at that point in time. But you
14 tried to link it to the Commission, and it
15 was not the Commission. The prime mover
16 here was the change in the Company's budget
17 estimate for the Project.

18 Q. I'd like to turn to your testimony where you
19 compare the Scrubber Project to Entergy
20 Louisiana's Little Gypsy Project. You would
21 agree that a large portion of your testimony
22 relates to the comparisons between Little
23 Gypsy and the Scrubber Project; is that
24 correct?

1 A. Yes, it's a section in my testimony.

2 Q. What was your role in the Louisiana Public
3 Service Commission's review of that project?

4 A. I had multiple roles. That project goes
5 back to a request for proposal that the
6 company issued in 2006. I was retained by
7 the Commission to oversee the company's
8 request for proposal process, in which the
9 company took bids from the market. Within
10 an RFP process, the company was permitted to
11 submit a self-build proposal that could
12 compete with market proposals. And they did
13 just that. That's what the Little Gypsy
14 Project was. The Little Gypsy Project then
15 prevailed in that 2006 RFP. There was a lot
16 of work done after it was selected as the
17 winning bid. The company then proceeded to
18 file a certification case with the
19 Commission, because certification is
20 required even if a project prevails during
21 an RFP process. I was then selected as the
22 Commission consultant for that certification
23 proceeding, which is a docketed proceeding,
24 to assist the Commission Staff. So I was a

1 Commission Staff witness.

2 Q. Thank you.

3 Now, as I understand the Little Gypsy
4 Project, that was going to take an existing
5 gas-fired generating plant owned by Entergy
6 and convert it to use coal as a fuel; is
7 that correct?

8 A. The primary fuel, really, was petroleum
9 coke. But it was a fluidized bed combustion
10 project so that it would have the ability to
11 consume both coal and coke. Since most
12 people are unfamiliar with "coke," we often
13 call it "coal."

14 Q. So the Little Gypsy Project was not the
15 installation of an emissions control device
16 at an existing coal plant.

17 A. There were emission-control devices that
18 were part of the project, yes, including a
19 scrubber.

20 Q. Take look at your response to Data
21 Request 61, please.

22 A. Sure.

23 Q. You agreed, in response to that question,
24 that the reason the Project was undertaken

1 was, "in large part, to add supply diversity
2 to Entergy Louisiana's generation portfolio
3 and reduce reliance on gas-fired resources";
4 is that correct?

5 A. Yes, that was a major public interest
6 consideration.

7 Q. Would it surprise you to learn that there
8 are at least a half-dozen different chapters
9 of New Hampshire's statutes that list fuel
10 diversity as matter of public policy for
11 this state?

12 A. Wouldn't surprise me at all. It's my
13 opinion that that is something that's
14 important.

15 Q. So, ultimately, both the company, Entergy
16 Louisiana, and the regulator, the Public
17 Service Commission in Louisiana, wanted more
18 coal- or coke-fired generation to avoid
19 issues of having too much gas generation; is
20 that correct?

21 A. Absolutely. And they had been making that
22 clear for years.

23 Q. Would you agree that both the company and
24 the Commission were driven by reliability

1 concerns due to an over-reliance on
2 gas-fired generation?

3 A. No, I don't think that reliability was a
4 major concern. It was more fuel diversity
5 than it was reliability. If anything,
6 reliability was the secondary issue.

7 Q. Aren't fuel diversity and reliability linked
8 to some extent?

9 A. I suppose they can be, in the sense that you
10 could -- I'm thinking of the Katrina example
11 down in Louisiana, which is something I
12 remember quite well. During Katrina, there
13 were interruptions of gas supplies. And so,
14 for a short period of time -- and I think
15 this took place in August of 2005 -- there
16 were some concerns about gas supply
17 reliability. But that's kind of the
18 exception.

19 The Commission's real concern was that
20 gas was very volatile in cost. And they
21 were very uncomfortable with this
22 fluctuating fuel adjustment clause that was
23 operating down there because of the gas
24 dependency. I don't think that reliability

1 was a primary issue.

2 Q. Do you know whether today in New England
3 there's an over-reliance on gas-fired
4 generating resources?

5 A. I don't know what you mean by
6 "over-reliance." There's concern about New
7 England being supplied with gas, yes.

8 Q. Was the construction work on the Little
9 Gypsy Project ever completed?

10 A. No. It was cancelled, as I described in my
11 testimony.

12 Q. Yeah. So, did any amounts invested by
13 Entergy Louisiana in that project ever
14 provide service to customers?

15 A. No.

16 Q. And I believe you state in your testimony,
17 if I get the reference correct this time,
18 Page 38, Line 9, that they, Entergy
19 Louisiana, cancelled its project less than a
20 year after beginning construction; is that
21 correct?

22 A. That's correct. The construction, my
23 recollection, is that that began in July of
24 2008. Effectively, the Project really was

1 cancelled by March of 2009. It was over,
2 for all practical purposes, by then, even
3 though a Commission order to that effect
4 hadn't been issued.

5 Q. And after that short duration of
6 construction, is it correct that the company
7 sought recovery of over \$200 million in
8 project abandonment costs?

9 A. Yes. And that's compared to a total project
10 cost of about 1.18 billion. So it was
11 something like 12 cents on the dollar.

12 Q. And as part of your engagement by the Staff
13 of the Public Service Commission in
14 Louisiana, didn't you support recovery by
15 Entergy of that \$200 million amount?

16 A. Yes, I did. And it was securitized, and
17 they are recovering it.

18 Q. So, ultimately, the Commission there did
19 approve recovery of Entergy's abandoned
20 investment.

21 A. Yes, after a proceeding and an explicit
22 finding that the abandonment costs were
23 prudent.

24 Q. In Request 59 asked to you by the Company,

1 which is part of the package as Exhibit

2 63 --

3 A. Can you give me just a second?

4 Q. Sure. Take as long as you like.

5 CMSR. HONIGBERG: Mr. Bersak,
6 while he's doing that, where are you in your
7 outline, roughly?

8 MR. BERSAK: Fifteen, 20 more
9 minutes.

10 CMSR. HONIGBERG: Okay.

11 MR. BERSAK: We could stop now
12 if you'd like. I'm at your pleasure.
13 Whatever you'd like.

14 CMSR. HONIGBERG: No, that's a
15 reasonable estimate. We'll continue.

16 MR. BERSAK: Okay.

17 A. I have 59.

18 Q. If you take a look at the question,
19 Subpart C, where we refer to your resume, it
20 indicates you've testified about
21 construction work in progress, CWIP, many
22 times. We asked whether you consider
23 yourself to have expertise on the matter of
24 CWIP, and your answer was, "Yes, in a

1 ratemaking and financial context"; is that
2 correct?

3 A. Yes. And the reason I qualified that is
4 because I don't hold myself out as an
5 accountant.

6 Q. Now, it seems to be your contention in your
7 testimony that PSNH should have followed the
8 path similar to that chosen by Entergy
9 Louisiana. In response to Data Request
10 1-59-D, which is on that same data request
11 we just referred to, we asked you whether
12 Louisiana has an anti-CWIP statute, a law
13 that prevents the recovery of construction
14 work in progress. Do you recall that
15 question?

16 A. I do.

17 Q. And is it correct in your response -- that
18 your response to that question was that you
19 were not aware of any such statute?

20 A. Yes. I would add to that, that I'm pretty
21 confident that there is no such statute
22 because the utilities in Louisiana have
23 gotten current cash recovery for CWIP.

24 Q. Then, in Subpart E of Section 1-59, Public

1 Service of New Hampshire asked you whether
2 you were aware of the status of an anti-CWIP
3 law in this state. Do you recall that?

4 A. Yes.

5 Q. And the response to the question, "Are you
6 aware of such a law?" your answer was, in
7 fact, "No"; is that correct?

8 A. That's correct.

9 Q. Can you take a look, please, at Subpart G of
10 the same question. We asked you, "Is it
11 your opinion that Entergy Louisiana would
12 have taken the same action as it did if it
13 was legally unable to recoup over
14 \$200 million in plant investment which
15 became abandonment costs?"

16 Is it correct that your answer to that
17 question was, "Mr. Kahal does not know what
18 actions Entergy Louisiana management would
19 take under an entirely different set of
20 factual circumstances"?

21 A. Yes. I viewed this as a hypothetical
22 question. Not only a hypothetical question,
23 but a hypothetical counterfactual question.
24 And I answered that by saying I don't know

1 what would have happened under the
2 counterfactual.

3 Q. At the same time that Entergy Louisiana was
4 pursuing its Little Gypsy Project, isn't it
5 true that it had a steam generator
6 replacement project underway at its
7 Waterford 3 nuclear plant?

8 A. I think it was just the very, very
9 beginnings of the replacement steam
10 generator at Waterford 3, yes.

11 Q. And if I recall, that project was estimated
12 to cost somewhere north of a half-billion
13 dollars?

14 A. Five hundred and eleven million.

15 Q. And are you aware that at the same time that
16 Entergy Louisiana was starting a steam
17 generator replacement project at
18 Waterford 3, it had faced over \$400 million
19 in storm costs associated with two 2008
20 hurricanes?

21 A. Yes. Those are securitized. So it was --
22 there was no financial implication to the
23 firm because of the securitization.

24 Q. According to a filing made by Entergy in the

1 Little Gypsy Project docket, which you
2 participated in, Entergy cited to "potential
3 constraints in obtaining capital financing
4 that would be needed to pay the Little Gypsy
5 Project in light of its other ongoing cost
6 requirements" as one of the reasons for
7 suspending the Project. Were you aware of
8 that?

9 A. Oh, I'm aware that it was mentioned. But
10 that's not the central reason why the
11 project was cancelled. I was intimately
12 involved in that. If the company had
13 concluded that the fuels markets at that
14 time supported proceeding with the Project,
15 I'm confident that they would have. They
16 would have been able to access capital.
17 Even though during the so-called "financial
18 crisis," there was something of a spike in
19 capital costs, and that was a concern.

20 Q. Are you aware of any legislation in
21 Louisiana that mandated Entergy Louisiana to
22 pursue the Little Gypsy Project?

23 A. No, there's none to my knowledge.

24 Q. So, in fact, it was Entergy Louisiana

1 management that made the decision to pursue
2 that project; is that correct?

3 A. Yes, I think with the encouragement of the
4 Commission, as we discussed a few minutes
5 ago, that for years the Commission had been
6 very concerned about gas dependency and
7 improving the fuel mix of the company.

8 Q. If you could take a look, please, at your
9 response to Subsection C of Data Request 65
10 in Exhibit 63. You were asked,
11 hypothetically, if the regulator in
12 Louisiana had determined that it did not
13 want, "a pause in or cancellation of the
14 project," whether it was your opinion that
15 Entergy would have terminated the project
16 anyway. And the response to that
17 question -- is it correct that your response
18 was, "Mr. Kahal does not know what actions
19 Entergy Louisiana management would take
20 under an entirely different set of factual
21 circumstances"?

22 A. Yes. And it's the same answer as before.
23 It's a hypothetical and counterfactual.

24 Q. Similarly, in response to Subpart E of that

1 same question, where you were asked if the
2 regulator had issued an order stating that
3 the cancellation of that project in
4 Louisiana "would not only have significant
5 environmental ramifications, but also would
6 lead to the loss of several hundred
7 short-term and long-term jobs related to the
8 construction and operation of the project,"
9 whether it was your opinion that Entergy
10 Louisiana would still have terminated the
11 project, your answer was indeed the same,
12 that you don't know what Entergy Louisiana
13 would have done under an entirely different
14 set of factual circumstances.

15 A. I do not. I would say that Entergy is
16 pretty diligent about following Commission
17 orders.

18 Q. In response to Subpart D of Question 65, you
19 were asked about your knowledge of a
20 majority report issued by the Science and
21 Technology Committee of the New Hampshire
22 House, wherein that committee stated, "The
23 majority was also concerned that the passage
24 of this bill would lead to a pause in or

1 cancellation of the project. This would not
2 only have significant environmental
3 ramifications, but also would lead to the
4 loss of several hundred short-term and
5 long-term jobs related to the construction
6 and operation of the Scrubber. And the
7 response to that question was what, Mr.
8 Kahal?

9 A. That I was unfamiliar with that report.

10 Q. In light of such a finding from a
11 legislative committee with jurisdiction over
12 this matter, wouldn't a prudent utility
13 consider that an important factor as to
14 whether it should move forward with the
15 project or not?

16 MS. CHAMBERLIN: Your Honor,
17 may I clarify that this is a hypothetical,
18 since the witness said he had no knowledge
19 of the information that he's been asked
20 about?

21 CMSR. HONIGBERG: I think it's
22 pretty clear that he was asking a
23 hypothetical.

24 A. Oh, I have no objection to the notion that

1 the utility should be taking into
2 consideration in its actions the will of the
3 Legislature and the opinions of the
4 Legislature. I don't have a problem with
5 agreeing with that. But that has really
6 nothing to do with what I think is the issue
7 at hand, and that is whether the Company
8 should have updated studies to provide the
9 Legislature with additional information.

10 BY MR. BERSAK:

11 Q. Are you aware that an April of 2000
12 filing -- I'm sorry -- an April 2009 filing
13 that Entergy Louisiana made in that docket
14 before the Louisiana PSC relating to the
15 Little Gypsy Project, that Entergy Louisiana
16 stated, gas prices continued to trend upward
17 for the remainder of the summer of 2008, and
18 that until recently, natural gas prices were
19 expected to increase substantially in future
20 years? And finally, they said it should be
21 noted that it is not possible to predict
22 natural gas prices with any degree of
23 certainty, and Entergy cannot know whether
24 gas prices may rise again?

1 A. Sitting here today, I'm unable to confirm
2 the accuracy of that quote. I don't have
3 the document in front of me.

4 Q. Fine. We'll go with that then.

5 Is it correct that in the Little Gypsy
6 docket, you testified that one cannot
7 predict with certainty the ultimate cost of
8 possible CO2 regulation and natural gas
9 prices over the next 30 years?

10 A. I agree with that statement. Part of the
11 problem with the question is that there were
12 multiple Little Gypsy dockets.

13 Q. Well, at any --

14 A. But I can -- that certainly reflects my
15 opinion.

16 Q. Fine. Thank you.

17 And finally, in the Little Gypsy
18 docket, is it -- do you recall testifying
19 that that project, the Little Gypsy Project,
20 was justified, because without fuel
21 diversity, Entergy would be extremely
22 vulnerable to gas market instability, and,
23 therefore, customers would be vulnerable to
24 rate instability?

1 A. Yes. That was -- to me, fuel diversity was,
2 along with cost-effectiveness, was an
3 important issue. That was an important
4 policy issue.

5 Q. Thank you, Mr. Kahal. It's a pleasure.
6 Hope we can see each other sooner than 30
7 years.

8 A. We're not doing this again in 30 years.
9 Sorry.

10 CMSR. HONIGBERG: Ms. Amidon
11 or Mr. Sheehan? Mr. Sheehan.

12 MR. SHEEHAN: I have questions
13 on one narrow area.

14 CROSS-EXAMINATION

15 BY MR. SHEEHAN:

16 Q. Mr. Kahal, on the issue of what you labeled
17 "damages," assume for the moment that the
18 Scrubber was built at a cost of
19 \$400 million, and assume for the moment that
20 the Commission ruled that decision to be
21 imprudent; and finally, assume that the
22 Scrubber ran, and through our recent cold
23 winters, actually saved customers \$120
24 million. How would that \$120 million play

1 in the calculation, if you will, of the
2 damages resulting from the imprudence?

3 A. Very complicated question, and I'm sorry to
4 say that I think it would be kind of a
5 complicated answer.

6 Q. We get to read it carefully in a transcript
7 later, so go ahead.

8 A. There are many moving parts in the
9 determination of damages, and I'll tell you
10 what those moving parts are. I think you've
11 just identified one, but there are others.

12 The moving parts are, first of all, the
13 cost that is incurred for the Scrubber,
14 which we know to be \$422 million. I think
15 you were just using a round number.

16 Another cost associated with the
17 Scrubber Project is the deferral, because
18 the deferral -- and I don't know what that
19 number is. I'm sure Staff knows what it is.
20 The deferral is a cost that would not have
21 been incurred by ratepayers, and it is a
22 ratepayer's responsibility, to the extent
23 it's determined prudent, but for the
24 existence of the Scrubber. So the total

1 cost to customers is the sum of the deferral
2 and the investment in the Scrubber. That's
3 going to be somewhere way north of
4 \$400 million.

5 Then you have to look -- then there's
6 some things that have to be netted out to
7 get the damages. What has to be netted out
8 would include I guess what we'll call the
9 "cancellation cost." That's been, I think,
10 discussed in these hearings -- that is, the
11 prudently incurred costs that were incurred
12 up to the point of cancellation, including,
13 you know, reasonable contract termination
14 costs, things of that sort, there's some
15 number associated with that.

16 Next is the item that you mentioned,
17 which would be the net ratepayer benefits
18 that took place after the compliance date of
19 July 1, 2013. And I think that Mr. Smagula
20 talks a little bit about that in his
21 rebuttal testimony. And he's got a number
22 attached to it. I don't know whether that's
23 accurate or not.

24 But those benefits then would have to

1 be calculated for the period from July 1,
2 2013, up until, say, the date of the
3 Commission order, or up until the date of
4 divestiture -- up until the date when
5 something happens. That would be calculated
6 as the market value of the energy and
7 capacity produced by the plant minus the
8 variable costs, which I assume would be
9 things like fuel costs associated with the
10 plant -- in other words, what's often called
11 "margins." That calculation would be done.

12 And then the final element would be
13 what happens with the final disposition of
14 the plant. I know that this Commission is
15 going to have a divestiture docket. Let's
16 say, hypothetically, the Merrimack plant is
17 divested. And let's say it sold for \$200
18 million or something like that. Then, that
19 \$200 million would be subtracted out the
20 damages. That would be the math involved.
21 Obviously, it's a lot of numbers. But
22 that's how I see it. You have to take all
23 these things into account to arrive at a
24 damage estimate. There's a lot of work

1 involved.

2 Q. It's very complicated math, but the concept
3 seems relatively simple. It's the cost that
4 they spent on the plant, the deferral cost,
5 and the others that you mentioned, plus some
6 benefit to customers, and some sale of the
7 plant if that were to happen.

8 A. That's right, yes. You know, the devil's
9 going to be in the details. Different
10 people are going to do the math different
11 ways. But I think that's the concept.

12 Q. Why did you use the date of July 2013 rather
13 than the date the Scrubber went into
14 operation, which we know is the fall of
15 2011?

16 A. Because I don't believe that the Scrubber
17 provides any benefits to customers -- the
18 Scrubber itself provides any benefits to
19 customers prior to the compliance date. I
20 mean, if it does -- and I don't know what
21 those benefits are -- that would have to be
22 taken into account. The way I see it is the
23 benefits begin on the compliance date.

24 Q. And I think the evidence in this case -- and

1 if I were to anticipate Mr. Bersak's
2 question -- the Scrubber started working in
3 the fall of 2011, and they would say it was
4 removing mercury from day one. And if that
5 were the case, would that be the more
6 appropriate date to start measuring customer
7 benefits?

8 A. No. If you want to argue that there's a
9 benefit to the environment, then I'm not
10 going to dispute that. But there isn't a
11 ratepayer benefit -- that is, in term of
12 customer rates -- until the compliance date,
13 because in the absence of the Scrubber, the
14 plant could continue to operate, presumably,
15 until July 1, 2013, if the Scrubber had
16 never been built.

17 Q. Meaning, that's the date without the
18 Scrubber they would have had to shut down
19 because of the law, because of the --

20 A. That's right. Assuming retirement's even
21 permitted, yes.

22 Q. I understand.

23 One other twist on that same question,
24 and more of a higher view. Assume

1 imprudence, and assume that at the end of
2 the day there is no harm to customers;
3 that's just the way the numbers work out.
4 So as we would say in basketball, "no harm,
5 no foul." Is that an appropriate outcome,
6 if the numbers were to work that way, that
7 there's a finding of imprudence, and at the
8 end of your complicated math problem, the
9 customers made out positively? Is that an
10 appropriate outcome if the numbers support
11 it?

12 A. Yes. I think I even said that in my
13 testimony. It's theoretically possible,
14 for example, if you obtained a robust enough
15 result, let's say a divestiture, that the
16 math turns out that there's no harm to
17 customers, then there should be no
18 disallowance.

19 Q. Is there a concept where you can have a
20 disallowance, for lack of a better word,
21 "bad behavior" --

22 A. Oh, yes. And I think that --

23 Q. And just to finish the question, that
24 doesn't measure -- can't be measured with a

1 dollar amount?

2 A. That's correct. And I think I even allude
3 to that in my testimony, that because the
4 math can be so challenging, we're dealing
5 with something so complex, that if the
6 Commission feels that the Company's
7 management behavior was inappropriate or
8 imprudent, and even though the Commission
9 finds the actual calculation of damages to
10 be speculative, one approach I suggested in
11 my testimony is that the Company -- or the
12 Commission could arrive at the appropriate
13 outcome by reducing the Company's return on
14 equity as that would be applied to the
15 Scrubber, and perhaps in the deferral as
16 well.

17 Q. Thank you, sir.

18 CMSR. HONIGBERG: Commissioner
19 Iacopino.

20 INTERROGATORIES BY SP. CMSR. IACOPINO:

21 Q. Thank you, sir. At the beginning of your
22 testimony, you indicated that -- in your
23 testimony, you followed principles that are
24 generally recognized in the regulatory

1 community. I guess that's the -- can you
2 tell us just generally what those principles
3 are?

4 A. Yes. And in effect, I cited to a previous
5 Commission order, which, in fact, cited to
6 an Indiana case. And the principles for
7 prudence are whether the company's
8 management made reasonable decisions based
9 upon what was known or knowable or
10 reasonably knowable at the time that the
11 decisions were made. Those are the
12 principles that I think would govern a
13 Commission's prudence determination.

14 Q. And I guess my question is -- and I know
15 that you're not familiar with the New
16 Hampshire Legislature. But you did receive
17 some questions about when the Legislature
18 was in session, and those questions
19 obviously go to efforts to change the law.
20 And I guess my question to you is: Does
21 that -- does the Legislature's calendar, for
22 instance, does that figure into this
23 principle that you've just cited?

24 A. It might. In fact, if the company happens

1 to know that the Legislature is going to
2 adjourn by a certain date -- and I'm
3 unfamiliar with what those days are in New
4 Hampshire -- then that might govern how
5 quickly the company gets on with doing the
6 update, the updated analysis that I
7 recommend that it did.

8 I mean, the problem that we had here is
9 that I know there were on cross-examination
10 a number of statements cited by Mr. Bersak
11 regarding the Legislature's opinion in 2009.
12 Unfortunately, those opinions and statements
13 from the Legislature were set forth without
14 the Legislature really having a proper
15 updated study and recommendation from the
16 company, so that the Legislature had
17 incomplete information. But knowledge of
18 the adjournment date and whether there are
19 procedures for special sessions and things
20 like that, that I know a lot of states have,
21 that should be taken into account by the
22 company, I would think, if in fact there is
23 a need to change the law, which I don't
24 know.

1 Q. Should it be taken into account in a
2 determination whether the company is acting
3 prudently?

4 A. I don't think so; the reason being is that I
5 can't imagine what the possible argument
6 would be for not doing an update. Where's
7 the harm in doing an update?

8 Q. You recognize that there was an update,
9 although you disagree with some portions of
10 it, in September of 2008; correct?

11 A. Right. The study was actually done maybe a
12 month or two earlier than that. But yes.

13 Q. And I think you also said that by, I think
14 it was mid-2010, it would have been too late
15 to pull the plug on the project.

16 A. I think that's probably right, yes.

17 Q. Okay. When is it that you believe that that
18 update, the next update after
19 September 8th -- September 2008, should have
20 occurred?

21 A. The Company should have been reassessing the
22 economic viability and impact on customers
23 of the Project by the fourth quarter of
24 2008. Late in the fourth quarter I would

1 say, but by year end of 2008. At that time,
2 they might or might not have been able to
3 reach a conclusion. If they hadn't, then I
4 would say that within the first quarter of
5 2009 they definitely should have done
6 another update. That was the time frame --
7 that was the time frame that was followed by
8 Entergy Louisiana in a project that was
9 actually a little bit further along than
10 theirs. And really, the reason why Entergy
11 Louisiana took as long as they did -- they
12 effectively really didn't cancel until
13 February of 2009 -- was because they used a
14 much more sophisticated and detailed process
15 for updating their gas forecasts. They
16 relied on outside expert sources. I had
17 extensive discussions with them about that.
18 Those sources were not going to be available
19 to the company until December of 2008;
20 therefore, they really couldn't do their
21 updates until December 2008. It turned out,
22 in fact, that they didn't actually get that
23 material until a few weeks later,
24 January 2009.

1 The way that the Company approaches
2 this, their analysis is much, much simpler.
3 It would have been actually a lot easier for
4 the Company to do an update to their
5 study -- to their analysis than it was for
6 Entergy to do theirs. And Entergy really
7 ran this to the ground by the beginning of
8 February 2009.

9 Q. Were you -- are you aware of any other
10 similar-sized projects that were either
11 cancelled or mothballed during this time
12 frame?

13 A. You know, none others come to mind right
14 now. Obviously, there are reasons why I'm
15 pretty familiar with the Entergy situation.

16 Q. All right. I have no further questions.

17 INTERROGATORIES BY CMSR. HONIGBERG:

18 Q. Good morning, Mr. Kahal.

19 A. Good morning, sir.

20 Q. If the Company had done an update in late
21 2008 or early 2009 -- assume one had been
22 done. You're not making any -- you're not
23 giving any opinion about what would have
24 happened had such an update been provided to

1 the Commission and the Legislature, are you?

2 A. No. What I'm saying is, had an update been
3 done, and if it had fairly taken into
4 account market changes and economic changes
5 during that time period that were pretty
6 obvious to everyone, their updated study
7 would have shown huge ratepayer losses
8 associated with the project. What the
9 Commission and the Legislature would have
10 done next, that I don't know.

11 Q. That's all I have.

12 CMSR. HONIGBERG: Ms.

13 Chamberlin, do you have any redirect?

14 MS. CHAMBERLIN: I do not.

15 CMSR. HONIGBERG: So I think,
16 then, we are done with Mr. Kahal. Thank you
17 very much. You can stand down.

18 And this would be an
19 appropriate time for a break, I think.
20 We'll break for 15 minutes, say 10 minutes
21 after 11. And we'll be coming back with Mr.
22 Brennan; is that right?

23 MS. CHAMBERLIN: Yes.

24 CMSR. HONIGBERG: Okay. Thank

1 you all.

2 (Whereupon a brief recess was taken at
3 10:55 a.m. and resumed at 11:14 a.m.)

4 CMSR. HONIGBERG: Is there
5 anything we need to do before Mr. Brennan's
6 call?

7 (No verbal response)

8 CMSR. HONIGBERG: Seems like
9 no.

10 Ms. Chamberlin?

11 MS. CHAMBERLIN: Your Honor,
12 we have a correction to the testimony --

13 CMSR. HONIGBERG: Can you take
14 the microphone, please?

15 MS. CHAMBERLIN: Sure. We
16 have a correction to the testimony. In our
17 view, it's not material. However --

18 CMSR. HONIGBERG: Are we
19 talking about Mr. Brennan's testimony?

20 MS. CHAMBERLIN: We're talking
21 about Mr. Brennan's testimony. We were
22 going to -- we can just do it on the stand.
23 I wanted to give the parties an opportunity
24 to look at it and see if they concur that

1 it's -- you know, that we can just go
2 forward.

3 CMSR. HONIGBERG: Do you want
4 us to take a quick break while you discuss
5 that with them, or do you just want to do
6 it?

7 MR. BERSAK: A break would be
8 helpful.

9 MS. CHAMBERLIN: What was
10 that?

11 MR. BERSAK: A break would be
12 helpful.

13 MS. CHAMBERLIN: All right. A
14 break would be helpful.

15 CMSR. HONIGBERG: All right.
16 We'll step out. You think this is going to
17 be a couple minutes?

18 MS. CHAMBERLIN: Right.

19 CMSR. HONIGBERG: All right.
20 We'll wait nearby, hoping that you are
21 correct.

22 (Whereupon a brief recess was taken at
23 11:15 a.m. and resumed at 11:20 a.m.)

24 CMSR. HONIGBERG: Ms.

1 Chamberlin.

2 MS. CHAMBERLIN: Thank you.

3 We're ready to proceed.

4 BY MS. CHAMBERLIN:

5 Q. Good afternoon, Mr. Brennan.

6 A. Good afternoon.

7 Q. Please state your name and position.

8 (Court Reporter interrupts.)

9 (WHEREUPON, JAMES BRENNAN was duly sworn
10 and cautioned by the Court Reporter.)

11 JAMES BRENNAN, SWORN

12 DIRECT EXAMINATION

13 BY MS. CHAMBERLIN:

14 Q. Please state your name and position.

15 A. Jim Brennan. Director of Finance for New
16 Hampshire Office of Consumer Advocate.

17 Q. Please summarize your credentials.

18 A. I've been with the OCA for one year. My
19 background is I have a master's degree in
20 business administration, and I have
21 experience in diverse industries, commercial
22 banking, brokerage, management consulting
23 and government. And I've held varying
24 positions as a manager, as an analyst, as a

1 commercial lender, a software developer.
2 Also, I had a six-year span at the PUC,
3 starting in 2006, in three different roles:
4 As a systems analyst, and then for the PUC
5 as a business analyst, and then as a utility
6 analyst in the Electric Division.

7 Q. And your credentials have been marked as
8 Exhibit 18-12; is that correct?

9 A. Correct.

10 Q. Are you adopting testimony filed by Stephen
11 Eckberg on behalf of the Office of Consumer
12 Advocate on December 23, 2013?

13 A. Yes.

14 Q. And have you previously testified before the
15 New Hampshire PUC?

16 A. Yes.

17 Q. And do you have any changes or corrections
18 to make to the testimony?

19 A. Yes, I do. The first correction is in
20 response to information filed by PSNH. The
21 OCA is withdrawing testimony on
22 contributions to Cottontail Habitat.

23 Q. Thank you. And do you have another
24 correction to your testimony?

1 A. Yes. I've submitted a revised version of
2 SRE-11 attachment to Stephen Eckberg's
3 testimony.

4 Q. Could you briefly summarize your
5 corrections.

6 A. That chart is a calculation of a reduction
7 in return the OCA recommends on PSNH's
8 return on equity as compared to the original
9 filing in a document by Hall and Shelnitz.
10 The correction allocates the entire
11 \$11,682,599 to a reduction in return on
12 equity. The original version, it was split
13 evenly between return on equity and return
14 on debt. The testimony discusses a
15 reduction in return on equity, and the
16 correction to the chart is consistent with
17 the testimony.

18 MS. CHAMBERLIN: I'd ask that
19 the correction be marked for identification.
20 I believe we're up to 64?

21 CMSR. HONIGBERG: That's
22 right.

23 (The document, as described, was herewith
24 marked as Exhibit 64 for identification.)

1 Q. With that, do you accept your testimony as
2 true and accurate?

3 A. Yes.

4 Q. Please summarize the main points of your
5 testimony.

6 A. The OCA's position -- and this is
7 notwithstanding the decision made on
8 prudence in my testimony. Our position with
9 regard to the Scrubber is that PSNH must
10 assume some risk. PSNH shareholders must
11 share some of the risk with PSNH customers.
12 The risk of competition and the risk
13 inherent in the energy market have resulted
14 in a diminished economic value of Merrimack
15 and of the Scrubber. We are -- our position
16 to reduce the return on equity is based on
17 three factors: No. 1, excess capacity of
18 Merrimack and the Scrubber; No. 2, PSNH
19 shareholders face no risk of competition
20 relative to the Scrubber, and they receive
21 100 percent of their cost, 100 percent of
22 their return on investment on the excess
23 capacity; and the third factor is a
24 corollary to No. 2, that PSNH customers are

1 bearing all of the risk regarding the cost
2 of the Scrubber, the cost to operate the
3 Scrubber, and the return on investment on
4 the Scrubber.

5 Q. I'm going to show you the data response from
6 PSNH.

7 MS. CHAMBERLIN: And I ask
8 that this be marked as exhibit whatever, 64
9 or --

10 CMSR. HONIGBERG: Sixty-five.
11 (The document, as described, was herewith
12 marked as Exhibit 65 for identification.)

13 MS. CHAMBERLIN: I don't have
14 a helper, so...

15 CMSR. HONIGBERG: Off the
16 record.

17 (Discussion off the record.)

18 BY MS. CHAMBERLIN:

19 Q. This is dated October 6, 2014, and it's a
20 response to TransCanada TC 6-050. Can you
21 discuss the information provided in this
22 data response as it pertains to your
23 testimony?

24 A. Yes. The information provided by PSNH from

1 September 2011 through June 2014 provides
2 monthly megawatt-hour generation. And in
3 this chart you can see months where there's
4 zero megawatt hours generated: June 2014;
5 May 2014; October 2013; October 2012;
6 September 2012; May 2012. And there are
7 also a number of other months where the
8 reported generation was very low. We use
9 this as an indication of excess capacity.
10 I'm not an engineer. But subject to fact-
11 finding, these results would point to a
12 capacity factor well below 50, or below
13 40 percent.

14 Q. You also include testimony on the "used and
15 useful" operation of the truck wash. Could
16 you please summarize that.

17 A. Our position with the truck wash is based on
18 imprudence and based on the fact that the
19 truck wash has never been used. The entire
20 amount should be removed from the rate base.

21 Q. And what is your basis for finding the
22 initial investment imprudent?

23 A. The truck wash, its business model was
24 contingent on a single supplier, Venezuelan

1 Coal, required to make the truck wash
2 economically viable. Anytime you have a
3 single concentration, whether it's a
4 supplier or a single concentration of a
5 customer, this is a risk that cannot be
6 mitigated, subject to scrambling and trying
7 to find another supplier or another
8 customer. The cost of that risk is the
9 revenue requirement that is listed for the
10 truck wash, \$350,000 annually. The
11 probability of that vulnerability, no
12 Venezuelan coal occurring, is somewhere
13 between zero and 100 percent. It turned out
14 that it has occurred. And that is a risk.
15 That is a very high risk in the project and
16 was imprudent to move forward on that basis.

17 Q. Thank you. Are there any other important
18 points you wish to raise at this time?

19 A. The OCA is seeking a balanced solution to an
20 unfair situation where PSNH is receiving 100
21 percent return and 100 percent cost on a
22 facility that is in late stages of its life
23 cycle and has high excess capacity. We've
24 used the "used and useful" argument based on

1 capacity information provided by the
2 Company.

3 Our proposal is measured and we feel
4 fair. The Company will be given a 100
5 percent cost of the Scrubber, recover that.
6 They'll recover 100 percent of the operating
7 cost of the Scrubber going forward; however,
8 a portion of the rate base will be reduced
9 going forward in order to share the risk
10 with the stockholders with PSNH customers.
11 And we feel that's a balanced, fair
12 recommendation.

13 Q. And Mr. Brennan, may I clarify that you
14 intended to say "the prudently incurred
15 costs of the Scrubber"?

16 A. Yes. I would say all of my answers and
17 statements would be subject to, yes,
18 "prudent costs."

19 Q. Thank you.

20 MS. CHAMBERLIN: The witness
21 is available for cross-examination.

22 CMSR. HONIGBERG: Who's going
23 to be going next? Mr. Patch or Ms.
24 Goldwasser?

1 MS. GOLDWASSER: No questions.

2 CMSR. HONIGBERG: Mr. Fabish?

3 MR. FABISH: No questions.

4 CMSR. HONIGBERG: Mr. Irwin?

5 MR. IRWIN: No questions.

6 CMSR. HONIGBERG: Mr. Bersak?

7 MR. BERSAK: Yes, questions.

8 CMSR. HONIGBERG: I just had
9 my hopes up there for a moment.

10 MR. BERSAK: I'm sorry.

11 EXAMINATION

12 BY MR. BERSAK:

13 Q. Good morning, Mr. Brennan.

14 A. Good morning.

15 Q. I think you know who I am. I'm Bob Bersak.
16 I'm an attorney with Public Service Company
17 of New Hampshire. And I appreciate the
18 difficulty of having to have somebody step
19 in and play the role of somebody else who
20 filed testimony. So, thank you very much,
21 and I'll take that into consideration
22 throughout the course of questions today.

23 You started off today by talking about
24 your background. You have an impressive

1 business background, with a degree in
2 finance you said and an MBA from Syracuse.
3 And after that, is it correct that you
4 worked for Chemical Bank, J.P. Morgan?

5 A. That's correct.

6 Q. And then you said that you worked in the
7 securities business for a while, that you
8 were a commercial lender; is that correct?

9 A. That's correct.

10 Q. And I can't remember when you said you first
11 came to the PUC. Was that 2006?

12 A. Yes.

13 Q. Now, as a person with your background in
14 finance and an MBA, you're not claiming any
15 special expertise in engineering or in the
16 operation or maintenance of power plants; is
17 that correct?

18 A. That's correct.

19 Q. And just to clarify one other thing you said
20 this morning. It's my understanding from
21 your testimony that the Office of Consumer
22 Advocate is no longer contesting a \$50,000
23 payment that was made by PSNH to the New
24 Hampshire Division of Fish and Game relating

1 to an issue involving the endangered New
2 England cottontail rabbit; is that correct?

3 A. Yes.

4 Q. So the rabbit is dead.

5 MS. CHAMBERLIN: Hopefully
6 not.

7 BY MR. BERSAK:

8 Q. Hopefully not.

9 Now, you also stated during your short
10 opening statement that part of the reason
11 for your position in this proceeding is that
12 the Company bears no risk and the customers
13 bear all the risk; is that correct?

14 A. I stated specifically risk of competition.

15 Q. So it's not your opinion that, after making
16 this requisite \$422 million investment, that
17 PSNH shareholders take no risks as a result
18 of this proceeding, is it?

19 A. No, there are other risks in addition to
20 competition.

21 Q. You also testified briefly about excess
22 capacity. I just want to clarify. Is it
23 the Consumer Advocate Office's position that
24 during the next four months within ISO-New

1 England, that there will be an excess of
2 generating capacity available to meet
3 customers' needs?

4 A. I'm not taking that position, no. Are you
5 asking me to give an opinion?

6 Q. I'm just asking what you said. You said one
7 of the bases for your testimony was that
8 there's excess capacity. I'm just asking
9 whether during the next four months, whether
10 it is true or not true that there will be
11 excess generating capacity within ISO-New
12 England.

13 A. We're basing our excess capacity -- the view
14 that there's excess capacity on information
15 provided by PSNH, including within
16 Mr. Smagula's testimony in Docket 13-08 --
17 we have that as an exhibit that could be
18 handed out -- a listing of PSNH's capacity
19 factors from 1993 through 2012. And so our
20 statement that there's excess capacity is
21 based on time span, ranges of time, not any
22 one particular month or any one cold winter
23 season.

24 As to the TransCanada discovery table

1 that I spoke to earlier, counting off months
2 of zero megawatt-hour generation, there are
3 other months where there's 280,000 megawatt
4 generation. So, it varies greatly through
5 the year. However, on average, the capacity
6 factor is low, and there is excess capacity.

7 Q. Is the capacity that's created by the
8 affected sources that are identified in the
9 Scrubber Law needed to meet customers'
10 electricity needs during the wintertime?

11 A. I believe PSNH meets its load based on two
12 factors: What it power generates and the
13 power that it purchases. And in cold winter
14 months, it uses high capacity of its
15 generating facility during those months.

16 Q. During those cold winter months, is there,
17 in fact, capacity available in the market to
18 purchase?

19 A. My understanding is that there is either
20 limited or it's more expensive, resulting in
21 PSNH generation for that particular month
22 becoming economic --

23 Q. Are you aware of --

24 A. -- and needed.

1 Q. I'm sorry. Are you aware of any concerns by
2 the operators of ISO-New England about the
3 ability to keep the lights on this coming
4 winter?

5 A. Yes.

6 Q. Let's turn to the truck wash for a second.
7 You mentioned that briefly during your
8 opening statement.

9 During discovery back in August 2012,
10 your office asked PSNH to explain the
11 purpose of the truck wash facility.

12 MR. BERSAK: And I would like
13 to mark as the next exhibit two of those
14 responses to OCA's data requests. One would
15 be PSNH's response to OCA Set 2, No. 15, and
16 also the response to a tech session question
17 that's been identified as 01-11. If I could
18 have those passed out.

19 MS. CHAMBERLIN: I believe the
20 second has already been marked. But I'm not
21 sure. So, go ahead.

22 MR. BERSAK: It's hard to keep
23 track of what's been marked and what has
24 not.

1 And this would be 66; is that
2 correct?

3 CMSR. HONIGBERG: Are they
4 being marked as one exhibit?

5 MR. BERSAK: Yes, I think it
6 would be easier that way.

7 CMSR. HONIGBERG: They're not
8 attached to each other.

9 MR. BERSAK: If you'd like
10 them to be separate, that's fine. Either
11 way.

12 CMSR. HONIGBERG: Let's go off
13 the record for a second.

14 (Discussion off the record)

15 CMSR. HONIGBERG: So we're
16 going to mark them separately. We'll mark
17 the OCA 2-015 as 66 and the other one as 67.

18 (The documents, as described, were
19 herewith marked as Exhibits 66 and
20 67 for identification.)

21 Q. Mr. Brennan, do you have what we've just
22 marked for identification as Exhibit No. 66,
23 which is the response by Public Service of
24 New Hampshire to your office's Request

1 No. 2-015?

2 A. Yes.

3 Q. And is it correct that in this response,
4 PSNH explained the purpose of the truck wash
5 facility?

6 A. Yes.

7 Q. And do you have any disagreement with how
8 PSNH described the purpose of the facility
9 in response to this question?

10 A. No, I agree that under scenarios of having
11 that type of coal that required trucks to be
12 washed, that it was a good economic model,
13 subject to that assumption carrying through.

14 Q. And the "economic model" you just talked
15 about, isn't that the response to the
16 question that was asked in Exhibit 67, which
17 is an analysis to justify construction of
18 the truck wash?

19 A. Is that the other handout?

20 Q. Yes, that would be the response to the
21 Technical Session Question 1-11.

22 A. And your question is again?

23 Q. You were just talking about the financial
24 analysis that justified the construction of

1 the truck wash. I was asking whether the
2 response to Tech Session 1-11 was that
3 analysis you had referred to.

4 A. This response includes some of the variables
5 that would go into an analysis of cost and
6 benefit and business feasibility of a
7 project. I agree with that.

8 Q. And indeed, in this response, isn't it the
9 Company's position that the analysis
10 indicated that by reusing trucks that were
11 delivering coal from the seacoast to
12 Merrimack Station, and on the return trip
13 take gypsum and return it to the seacoast,
14 they would have saved approximately half a
15 million dollars per year?

16 A. Yeah. The key word is "would have." Yes,
17 it would have if it was used.

18 Q. Are you aware that as part of the local
19 permitting process, the Town of Bow was
20 concerned about the potential for increased
21 truck traffic as a result of operation of
22 the Scrubber?

23 A. I heard that from discussions at the hearing
24 this week, yes.

1 MR. BERSAK: I have two more
2 exhibits I'd like to mark at this point.
3 One is entitled "Minutes, Planing Board,
4 September 4, 2008" from Town of Bow; and the
5 second one would be minutes from that same
6 planning board dated April 16, 2009.

7 CMSR. HONIGBERG: So the
8 9/4/08 minutes will be 68.

9 HEARING CLERK: No, 67.

10 CMSR. HONIGBERG: Sorry. No.
11 67 was the OCA Tech Session question.

12 HEARING CLERK: You're right.
13 I'm sorry.

14 CMSR. HONIGBERG: And the
15 April 16 minutes, those will be 69.

16 (The documents, as described, were
17 herewith marked as Exhibits 68 and
18 69 for identification.)

19 MR. BERSAK: Thank you.

20 BY MR BERSAK:

21 Q. Mr. Brennan, do you have what was just
22 identified as Exhibit 68, the minutes from
23 the Bow Planing Board of September 4, 2008?

24 A. Yes.

1 Q. I'd like to turn your attention to Page 3
2 that document. And you see on that there
3 are three numbered Paragraphs 3, 4 and 5,
4 which all refer to aspects of the Scrubber
5 Project that was being pursued in the Town
6 of Bow? Do you see those?

7 A. I see Paragraphs 3, 4, 5, yes.

8 Q. And below those paragraphs, do you see a
9 paragraph that is captioned as "Traffic"?

10 A. Yes.

11 Q. In that paragraph, the planing board's
12 minutes read, "Bob Duval, traffic engineer
13 from TF Moran, stated that there would only
14 be increased truck traffic during
15 construction and that the operation will
16 receive material by rail, and the resulting
17 gypsum would leave the site on the empty
18 coal trucks that already come to the site.
19 Mr. Duval stated that any excess gypsum not
20 hauled away by the coal trucks would leave
21 the site by rail." Do you see that portion
22 of the planing board minutes?

23 A. Yes.

24 Q. Now, if you could turn to the next document,

1 which is Exhibit 69, the April 16, 2009
2 minutes. Let me know when you have that.

3 A. I have it.

4 Q. If you take a look at the fifth page of
5 their unnumbered minutes -- so it would be
6 the next to the last page -- do you see the
7 bulleted item reading "PSNH Scrubber -
8 future use of coal trucked from Portsmouth"?

9 A. Yes.

10 Q. I call your attention to the portion of the
11 planing board minutes that note, "It was
12 noted that what was presented and approved
13 was the dual use of the coal trucks --
14 bringing coal to the site and then being
15 used to remove the gypsum byproduct from the
16 Scrubber operation -- and use of rail should
17 there not be enough trucks to remove the
18 gypsum." Do you see that part of the
19 minutes?

20 A. Yes.

21 Q. So it sounds to me like you really have no
22 disagreement with the original rationale for
23 PSNH installing the truck wash; is that
24 correct?

1 A. I disagree that the Project should have gone
2 forward on the basis of the risk of there
3 being a single supplier, Venezuelan Coal, to
4 justify that project. Loss of that
5 supplier, which has occurred, there is no
6 mitigation to that risk. And as a result,
7 there are costs incurred to be paid by
8 ratepayers, which we feel is unfair.

9 Q. That sounds like you're using a hindsight
10 analysis, knowing what we know today
11 regarding sources of coal, that we shouldn't
12 have done something in the past; is that
13 correct?

14 A. My understanding is that, from data in the
15 file, the source was Venezuelan Coal. And
16 my understanding is that Venezuelan coal is
17 no longer used and, as a result, the truck
18 wash is not needed.

19 Q. At the time the decision was made, did we
20 know whether Venezuelan coal was going
21 continue to be used or not?

22 A. I don't know. I don't know if you knew that
23 or not. Our position is that, if the answer
24 to that question was "no," if there was any

1 possibility below a 100 percent that
2 Venezuelan coal goes away, that's a risk
3 that there is no mitigation for. That's our
4 position as far as prudence and risk on the
5 investment.

6 Q. Can you explain to me why that is not a
7 hindsight analysis?

8 A. At the time -- I would have to ask or seek
9 information at the time you're deciding to
10 build the truck wash what other sources of
11 coal would also be viable for use that would
12 require the truck wash. Information in the
13 file that I'm aware of, I've only seen one
14 supplier, Venezuelan Coal. So, based on
15 that, my understanding is that that's a
16 single concentration, a single supplier.
17 And loss of that would jeopardize the
18 Project. You would have known that at that
19 point in time going in, unless there's
20 information I'm not aware of, that there
21 were many other countries -- many other
22 types of coal that had the same property
23 that would require the truck wash.

24 Q. So you're not contesting that at the time

1 that the truck wash was constructed, that
2 the Company had been using coal shipped to
3 the seacoast from Venezuela and that that
4 had been historic practice of the station
5 for many years.

6 A. I'm basing my response on a chart that was
7 included in discovery OCA 1, which lists by
8 month tons of coal and number of trucks in
9 and out of Merrimack, and it shows zero
10 every month. So I'm not aware of there
11 being any use of that facility.

12 Q. Can you tell me every month that had zero,
13 when those months occurred? Was it prior to
14 the construction of the Scrubber or
15 subsequent to the construction of the
16 Scrubber?

17 A. Hold on. I'll find the piece of discovery.

18 (Witness reviews document.)

19 A. It's attachment SRE-5 in the testimony,
20 which is Data Request OCA 1, dated July 19,
21 2013. And the table covers months of
22 January through December of 2012.

23 Q. And 2012 would be after the Scrubber had
24 been fully completed and placed into

1 commercial service; is that correct?

2 A. Correct.

3 Q. So, again, explain to me why the use of
4 information that became available in 2012 is
5 not a hindsight analysis for prudence
6 purposes of what decisions were made years
7 before?

8 MS. CHAMBERLIN: Your Honor, I
9 object. It's been asked and answered. He
10 said that it was the single source aspect of
11 the Venezuelan coal that created the risk,
12 and that was known at the time that they
13 chose to build the truck wash.

14 CMSR. HONIGBERG: Mr. Bersak.

15 MR. BERSAK: As I believe the
16 response, it was, "I based my opinion on a
17 table where there was zero trucks." But
18 those zero trucks occurred after the
19 Scrubber was completed.

20 CMSR. HONIGBERG: I think, Mr.
21 Bersak, that you and Mr. Brennan may be
22 talking past each other. I actually
23 understood Mr. Brennan's testimony to be
24 what Ms. Chamberlin just said. You have

1 been asking him about after acquiring
2 information. And I could be wrong, but I
3 get the sense that you're not talking about
4 the same thing he is right now. So I wonder
5 if you might get -- see if you can get back
6 on the same page with Mr. Brennan before you
7 explore this too much further.

8 BY MR. BERSAK:

9 Q. Okay. Do you disagree that at the time the
10 truck wash was proposed and built, that PSNH
11 traditionally had been burning coal from
12 Venezuela, among other locations?

13 A. I won't disagree with that.

14 What I'd like to add to my response,
15 and it's based on data in the file -- and
16 this is on Tab SRE-6, which is a discovery
17 question answered by William Smagula,
18 discussing the operation of the truck
19 wash -- he states that coal trucking between
20 Schiller Station and Merrimack Station has
21 not occurred since April 13, 2012 due to
22 unavailability of Venezuelan coal. That's
23 the only reference that I've seen in looking
24 through the docket of the supplier of coal

1 that's needed for this truck stop.

2 CMSR. HONIGBERG: Mr. Brennan,
3 let me ask you a question. Is the reason
4 you think that the investment was imprudent
5 in 2008, 2009, that today they're not using
6 Venezuelan coal? Or, in the alternative, is
7 it that in 2008, 2009, they were using a
8 single source of coal, and that was too
9 risky a proposition for them to proceed
10 with?

11 THE WITNESS: The latter is my
12 point exactly, is that there was one need
13 for this one source of the coal. My
14 understanding from reading through the file
15 is just one source, single source. And
16 notwithstanding how good the business case
17 was and the need to dispose of it, that is a
18 risk that cannot be mitigated and, in fact,
19 now, in hindsight, has come through. But
20 that risk was known as that point in time.

21 CMSR. HONIGBERG: I'm sorry to
22 do that, Mr. Bersak. That may have not been
23 helpful.

24 MR. BERSAK: No, I mean, we're

1 trying to make sure that the two
2 commissioners understand this, not me. I
3 think I understand it. But I was doing a
4 bad job to get you to understand. So, yeah,
5 jump in at any time.

6 BY MR. BERSAK:

7 Q. For how many years had Merrimack Station
8 used Venezuelan coal as part of its
9 provision of electric service to customers?

10 A. I am unaware.

11 Q. Do you dispute the documents before you from
12 the Town of Bow which said that part of
13 their approval of the Scrubber Project was
14 to have dual use of trucks to avoid an
15 increase in truck traffic?

16 A. I agree with that statement.

17 Q. And do you know whether during 2007 we
18 burned Venezuelan coal?

19 A. I do not know that.

20 Q. 2008?

21 A. The information I have on coal is that you
22 needed the truck wash for Venezuelan coal
23 and that it never occurred and the truck
24 wash was never used. You're asking me if I

1 knew the information that PSNH knew at the
2 point in time when it was analyzing to build
3 the truck wash. I wasn't there. I don't
4 have that information.

5 Q. Now, you also testified about the "used and
6 useful" standard that you think should be
7 applied to reduce the return on our
8 investment that would be authorized to be
9 recovered; is that correct?

10 A. That's correct.

11 Q. And although there was a lot of discussion
12 earlier about excess capacity, as I
13 understood your testimony, your argument is
14 that, since the capacity factor of Merrimack
15 is less than it has historically been, that
16 there should be a lesser return that
17 shareholders are allowed to receive; is that
18 correct?

19 A. Our position is that Merrimack has
20 diminished economic value. And we're basing
21 that decision on having high excess capacity
22 based on information provided by us through
23 the Smagula testimony and through the
24 discovery from TransCanada showing up to

1 half the year very low, sometimes no usage
2 at all, zero output of Merrimack.

3 Q. Are you aware that as part of the payments
4 that are made by ISO-New England, that the
5 Company receives capacity payments for the
6 installed capacity at Merrimack Station?

7 A. Yes.

8 Q. Is it part of your testimony that
9 shareholders should get a bigger piece of
10 those capacity payments as a result of your
11 analysis?

12 A. Our testimony is that Merrimack as an asset
13 provides multiple services. It produces
14 energy, the energy service, and it also
15 produces these services that you're
16 mentioning, capacity factor, ancillary
17 services. As a whole, over the life of
18 Merrimack, built back in the 1960s, a large
19 part of the value of Merrimack is diminished
20 because of lower generation. And we base
21 our decision to reduce the return on equity
22 to the shareholders on the fact that that
23 asset has diminished value.

24 Q. So, hypothetically, let's suppose that

1 historically the capacity factor at
2 Merrimack had been 80 percent and that in
3 recent times it's 40 percent. That would be
4 a 50-percent reduction in the capacity
5 factor; correct?

6 A. The information in capacity factors we used
7 was documented in Smagula's testimony
8 from --

9 Q. I don't dispute that. I'm trying to say --
10 let's walk through a hypothetical.

11 Suppose it had been 80 and now it's 40.
12 That would be a 50-percent reduction; right?

13 A. Okay.

14 Q. And if I understand what you're proposing,
15 you would take whatever our authorized
16 return on equity is and say that we would be
17 entitled to half of that as a result of the
18 decrease in capacity factor; is that
19 correct?

20 A. We formulated our position at the starting
21 point that PSNH was sharing no risk or cost
22 of this excess capacity today with its
23 customers. In months where the plant is
24 running at zero megawatt hours, as you see

1 in that diagram, all costs are being
2 recovered, and the return on investment are
3 being recovered 100 percent. And our
4 position is that is unfair and that is
5 unbalanced. And so how to -- how do they
6 rectify this imbalance is that we will --
7 that we propose to reduce PSNH net operating
8 income by a dollar amount. That's the cost
9 if some risk is shared with PSNH. It's
10 going to mean there's a cost associated with
11 it. It will reduce your profitability.

12 So the question is: How do we
13 determine the amount of the reduction?
14 We've designed a formula based on capacity
15 that results in an \$11.6 million reduction.
16 And it's based on the lower capacity from
17 periods since 19 -- sorry -- 1993 to 2012.
18 That's how we developed our dollar amount
19 for reduced net operating income to PSNH.
20 How we then implement it was through a rate
21 base reduction. It could have been -- you
22 could also reduce return on equity. Either
23 way, our goal is to reduce and have PSNH
24 share in the cost of that excess capacity

1 that is now borne 100 percent by customers,
2 which is unfair, particularly as you throw
3 another \$400 million expansion on this
4 facility. It's going to increase the
5 unfairness of the current model for how the
6 Scrubber rate is designed.

7 Q. Does any reduction in capacity factor of the
8 plant reduce the investment that PSNH
9 shareholders have made in that plant?

10 A. The investment -- could you reask that
11 question a different way?

12 Q. Sure. Let's go back to my hypothetical.
13 Historically, the capacity factor had been
14 80; more recently, it's 40. Because the
15 capacity factor now is 40, is the amount of
16 prudently incurred investment made in that
17 plant any more or any less than it would be
18 with any other capacity factor?

19 A. I'm not discussing prudence. I'm discussing
20 use of the facility. So --

21 Q. And my --

22 A. -- ask it in that vein.

23 Q. I'm not asking prudence.

24 A. Okay.

1 Q. I'm just asking about whether the amount of
2 investment that shareholders have made in
3 the facility varies up and down as a result
4 of varying capacity factors.

5 A. No, the investment doesn't vary, but the
6 value has varied. And the value has gone
7 down in that --

8 Q. Does the cost of money that the Company has
9 invested go up or down as a result of
10 capacity factor? You were a commercial
11 lender. You worked for Chemical Bank. Does
12 the price of the money that was invested in
13 the facility go up or down depending upon
14 how much it operates?

15 A. If enterprise-wide a generator's capacity
16 factor drops from 80 percent, which it was
17 historically, to 60 percent, to what it is
18 at least in the last two years of maybe
19 40 percent, yes, your cost of capital is
20 going to rise because that's indicative of
21 low asset quality, basically. That's how
22 return on equity is calculated.

23 Q. So if I understand what you just said, as
24 the capacity factor goes down, the Company's

1 cost of money goes up, but we should get
2 even less than what we started.

3 A. As your capacity factor goes down -- I mean,
4 this is a unique case. We are setting the
5 cost of electricity, the generation assets,
6 using traditional cost of service. But
7 you're going out and competing, you know, in
8 a marketplace. And you are competing. And
9 whether you clear ISO's market or not, and
10 frequently you don't, you're receiving all
11 your costs and all of your profits during
12 that period. That's the basis of our
13 argument.

14 Q. Isn't that the regulatory paradigm?

15 A. However, it is out of balance at this point
16 to have this much excess capacity, and the
17 utility must bear some risk. You do not
18 bare any risk right now in being
19 uncompetitive in generating power. Based on
20 having low capacity, the facility is often
21 non-economic, and that reduces the economic
22 value to the asset. And based on that,
23 we're seeking to reduce the return on equity
24 on those assets.

1 Q. Let me ask it another way perhaps. Were you
2 here the other day when I was speaking with
3 either Mr. Frantz or Mr. Smagula, I can't
4 remember, regarding my hypothetical purchase
5 of a Mercury vehicle? And Mr. Smagula
6 bought his Mercury vehicle, and I had to
7 finance mine down in Manchester, on South
8 Willow Street, at the Payday Loan place. Do
9 you remember that hypothetical?

10 A. Yes.

11 Q. Well, I was lucky. I didn't have to go to
12 the Payday Loan place. I was able to go to
13 Chemical Bank, where you used to work. And
14 Chemical Bank gave me a car loan for
15 8 percent to buy my Mercury vehicle. Now,
16 subsequent to buying it, my job location
17 changed, and I only had to drive half as
18 much. I'm using the car 50 percent less.
19 Is it your position I should be able to go
20 back to Chemical Bank and say, Hey, changed
21 conditions; you only get 4 percent now?

22 A. No. My position, if you're going to use
23 that analogy, is that when you're not using
24 that vehicle, you're renting another one

1 even though you're paying for that Mercury,
2 that you still need to have the service of
3 transportation. And that's what has
4 happened essentially in Merrimack, is that
5 generation has declined. It's been offset
6 by increased supplemental purchases. But
7 the cost of that generation is borne by the
8 ratepayers. PSNH comes out whole.

9 Q. Let's flip this upside down then. Let's
10 take a case where a capacity factor of a
11 plant goes up because of an investment.
12 Let's talk perhaps about, say, Schiller 5,
13 where the Company invested money to convert
14 the plant to burn wood, and now that plant
15 has a high capacity factor. Is it OCA's
16 position that because the capacity factor is
17 now higher, that the Company should be
18 getting a super return, a return above what
19 the Commission traditionally allows?

20 A. No, that's a hypothetical. Our position is
21 with regard to Merrimack, originally a
22 baseload facility, operating well below the
23 way it was intended and designed to, now
24 being expanded, and the cost to run that and

1 the cost of the return borne by ratepayers,
2 even if the facility is not running and
3 producing power. And that's an unfair
4 scenario.

5 Q. Isn't your position -- or the Consumer
6 Advocate Office's position the same one that
7 was rejected by this Commission earlier this
8 year when the Commission stated, "The
9 concept of a partially 'used and useful'
10 status is contrary to rate-setting
11 principles of the New Hampshire Supreme
12 Court"?

13 A. I believe the Commission has the authority
14 to have flexibility to set rates
15 appropriately. I agree, "used and useful"
16 is often the argument in new assets being
17 brought online, that they must be providing
18 service before they're put into rate base.
19 But Merrimack is at the other end of the
20 spectrum. Merrimack isn't in the first
21 stage of its life cycle; it's in the fourth
22 quarter. It's declining, and it's capacity
23 is lower.

24 CMSR. HONIGBERG: Mr. Brennan,

1 do you remember the question?

2 THE WITNESS: Sorry.

3 CMSR. HONIGBERG: Mr. Bersak,
4 why don't you repeat the question.

5 BY MR. BERSAK:

6 Q. Isn't it true that, earlier this year, the
7 Commission rejected the very argument we're
8 making here today, stating, "The concept of
9 a partially 'used and useful' status is
10 contrary to rate-setting principles of the
11 New Hampshire Supreme Court"?

12 A. I believe the rates -- go ahead.

13 MS. CHAMBERLIN: Your Honor, I
14 was going to say he doesn't have the order
15 in front of him. We don't know if he's
16 reading it or characterizing it correctly.
17 But the order speaks for itself.

18 MR. BERSAK: And we can
19 reference the order as Commission Order
20 25,647 in Docket 13-108 at Page 20.

21 CMSR. HONIGBERG: And Mr.
22 Bersak, do you really feel you need an
23 answer to the question?

24 MR. BERSAK: No, I think the

1 order, as Attorney Chamberlin says, will
2 speak for itself.

3 CMSR. HONIGBERG: Fair enough.

4 BY MR. BERSAK:

5 Q. Thank you, Mr. Brennan.

6 A. You're welcome.

7 CMSR. HONIGBERG: Ms. Amidon.

8 MS. AMIDON: We have no
9 questions. Thank you.

10 CMSR. HONIGBERG: Mr.
11 Iacopino.

12 SP. CMSR. IACOPINO: I just
13 have a couple.

14 INTERROGATORIES BY SP. CMSR. IACOPINO:

15 Q. Let me start with the truck wash issue.

16 Did you do any analysis over the length
17 of time that -- considering the length of
18 time that Public Service had been using
19 Venezuelan coal and other market factors?
20 Because you say there was a risk. But did
21 you do anything to assess that risk other
22 than just look at what happened after the
23 fact?

24 A. We did not perform that analysis. We used

1 the data in the file as the basis of our
2 opinion that there was a single supplier
3 concentration.

4 Q. And the single supplier posed a risk that
5 you saw. And your position, if I understand
6 correctly, is that the shareholders of
7 Public Service should share in that risk?

8 A. Yes. Our position is that they should
9 share. We are recommending full return of
10 the cost of it, but not a profit on the
11 facility.

12 Q. I understand that part. But when you
13 assessed the risk at the time of
14 construction, you don't have any way to
15 determine whether that was a high risk or a
16 low risk that ultimately the Venezuelan coal
17 will no longer be used. Or do you?

18 A. I don't. If Venezuelan coal was the only
19 source of coal to make the facility
20 viable -- and I use the word "if" -- then
21 there is no mitigation to that risk. If
22 that risk comes to fruition, then there's
23 going to be cost incurred. There's a cost
24 to that risk.

1 Q. My other question has to do with the "used
2 and useful" that's contained in Mr.
3 Eckberg's testimony from the prior docket
4 that was attached. I guess what is -- why
5 did you choose to use a 1993 through 2001 --
6 I guess that's your -- is that your
7 numerator, and then 2009 through 2012 as
8 your denominator? Or maybe I mixed up the
9 mathematics on it.

10 A. The numerator is recent performance over
11 four years. The denominator is historical
12 performance.

13 Q. Right. But I mean, there's a lot of
14 differences between those two periods of
15 time.

16 A. Yes.

17 Q. One is a three-year period and the other is
18 a seven-year period.

19 A. Correct.

20 Q. And then there's eight years in between that
21 aren't even referenced. Why did you choose
22 those numbers?

23 A. The attempt was to show the current
24 over-capacity using most recent data.

1 Rather than it be one year, a four-year
2 period was chosen to smooth out the effect.

3 Q. Why didn't you compare, for instance, with
4 maybe 2002 through 2007?

5 A. Part of the argument includes the fact that
6 historically, Merrimack was built as a
7 baseload facility prior to competition
8 coming into the state. And many changes
9 exist in that numerator, where PSNH has to
10 go out and compete to sell its power, versus
11 historically when that wasn't a factor and
12 when PSNH operated at a very high capacity.
13 So we used the longer period historically
14 which was available to us.

15 Q. But do these -- I mean, is 2009 when they
16 had to start to compete, or was it a
17 different date?

18 A. This is a judgment as to how this fraction
19 gets created. And you could use -- I mean,
20 it's a judgment call. We used 2009 to 2012.
21 I think if you extend it, the years, it may
22 change the fraction, but it will not change
23 the indication that there is excess
24 capacity.

1 Q. And then --

2 A. Probably on a permanent basis.

3 Q. And then, if I understand at least the
4 testimony that's attached by Mr. Eckberg, I
5 mean, in that testimony you were making a
6 claim for that sort of treatment for the
7 entire fleet of generation of Public
8 Service; is that correct?

9 A. Fossil fuel.

10 Q. Fossil fuel.

11 A. Yes.

12 Q. No further questions.

13 INTERROGATORIES BY CMSR. HONIGBERG:

14 Q. Mr. Brennan, good afternoon. I have a
15 question about the "used and useful." Going
16 on something you were discussing with Mr.
17 Bersak, and I've forgotten the exact phrase
18 that Mr. Bersak used. But I think he said
19 something like, Isn't that the regulatory --
20 or isn't that how the regulation works? And
21 I thought what you were going to say was,
22 "Yes, but we're looking to change that."
23 Isn't that essentially what you're saying:
24 We're looking to move away from what has

1 been the traditional way of doing things
2 because this is a unique situation?

3 A. Yes, this is a unique situation. I agree
4 with that.

5 Q. And would come with that an acknowledgment
6 that you are, in fact, suggesting that we
7 change the way assets like that are treated;
8 correct?

9 A. I agree, yes.

10 Q. It struck me when I read this the first time
11 I saw it and when I reread it more recently,
12 that one of the things about this version of
13 this proposal is that it can only go down.
14 And Mr. Bersak asked you, shouldn't it go up
15 if an asset becomes particularly valuable?
16 If it becomes more valuable than anybody
17 thought, then it should go up. Doesn't that
18 seem like a fair way to go about this if
19 we're going to change the way we treat
20 assets in certain situations?

21 A. Yes, that would be fair, subject to an
22 agreement on how things are calculated.

23 Yes, that would be fair.

24 Q. Are you still -- let me try this a different

1 way.

2 Is this an idea you're still working on
3 as an approach to treating assets? Are
4 there more refined versions of this thought
5 process going on?

6 A. I believe it could be refined. But I
7 believe strongly that the basic concept is
8 very solid; that a diminished asset in high
9 capacity, that the firm -- due to, in this
10 case, competition, that the firm bears some
11 risk, and that risk today is zero. They
12 bear zero risk on being non-competitive with
13 Merrimack. And that's very unfair. I feel
14 that this is a good way to go about doing
15 it.

16 Q. Thank you. I appreciate that. That's all I
17 have.

18 CMSR. HONIGBERG: Ms.
19 Chamberlin, do you have any redirect?

20 MS. CHAMBERLIN: Just to
21 complete the record, Mr. Brennan referred to
22 capacity factor, and we have that data. I'd
23 ask that it be marked as the next exhibit.
24 This is testimony filed by PSNH in another

1 docket.

2 CMSR. HONIGBERG: This is 70.

3 (The document, as described, was herewith
4 marked as EXHIBIT 70 for identification.)

5 CMSR. HONIGBERG: Ms.

6 Chamberlin, are you going to ask him any
7 questions about this, or are you just
8 getting this in the record?

9 MS. CHAMBERLIN: No, I'm
10 getting it in the record. And I draw your
11 attention to page... I believe it's Page
12 100.

13 Is that correct, Mr. Brennan?

14 THE WITNESS: Yes, that's
15 correct. Page 100 has Merrimack Unit 1
16 historical performance and Merrimack Unit 2
17 historical performance.

18 MS. CHAMBERLIN: Thank you. I
19 have no other questions.

20 MR. BERSAK: This is marked as
21 an exhibit?

22 CMSR. HONIGBERG: Yes, this is
23 70.

24 MR. BERSAK: PSNH objects to

1 Exhibit 70. We don't think it's relevant to
2 this proceeding, which is the prudence of an
3 investment for building of a Scrubber, not
4 ratemaking treatment subsequent to that
5 prudence determination.

6 CMSR. HONIGBERG: And at this
7 point, it's been marked for identification.
8 At the time when we're looking to strike,
9 we'll have, I'm sure, some extended
10 discussion about a number of these exhibits.

11 MR. BERSAK: Thank you.

12 CMSR. HONIGBERG: So at this
13 point, Mr. Brennan, thank you. You can
14 stand down.

15 Mr. Patch.

16 MR. PATCH: I just have one
17 quick question, and maybe we can do this off
18 the record, but about order of
19 witnesses from here --

20 CMSR. HONIGBERG: We're going
21 to go off the record and discuss scheduling.

22 MR. PATCH: Okay. Thanks.

23 CMSR. HONIGBERG: Do we need
24 to do anything else on the record before we

1 go off?

2 (No verbal response)

3 CMSR. HONIGBERG: So we're
4 going to go off. Maybe that scheduling
5 discussion will cause us to have to go back
6 on to talk about when we're going to come
7 back. But at this point, I think we're
8 planning on coming back a little before
9 2:00. So let's go off the record.

10 (Discussion off the record)

11 (Whereupon the Morning Session of Day 3
12 recessed at 12:18 p.m. The Afternoon
13 Session of Day 2 is contained under
14 separate cover so designated.)

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C E R T I F I C A T E

1
2 I, Susan J. Robidas, a Licensed
3 Shorthand Court Reporter and Notary Public
4 of the State of New Hampshire, do hereby
5 certify that the foregoing is a true and
6 accurate transcript of my stenographic
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11 I further certify that I am neither
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24

DAY 3 - MORNING SESSION ONLY - October 16, 2014
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