

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

September 24, 2019 - 10:14 a.m.
Concord, New Hampshire

NHPUC 80CT19PM4:10

RE: DE 19-142
PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE d/b/a EVERSOURCE ENERGY:
Rate Recovery of Costs in Excess of
the Cumulative Reduction Cap under
the Power Purchase Agreement with
Berlin Station, LLC.
(Prehearing conference)

PRESENT: Cmsr. Kathryn M. Bailey, Presiding
Cmsr. Michael S. Giaimo

Sandy Deno, Clerk

APPEARANCES: Reptg. Public Service Co. of N.H.
d/b/a Eversource Energy:
Robert A. Bersak, Esq.
Eric Newman, Esq.

Reptg. Burgess BioPower, LLC:
Carol J. Holahan, Esq. (Foley Hoag)

Reptg. Residential Ratepayers:
D. Maurice Kreis, Esq., Consumer Adv.
Office of Consumer Advocate

Reptg. PUC Staff:
F. Anne Ross, Esq.
Thomas Frantz, Dir./Electric Div.
Richard Chagnon, Asst. Dir./Electric

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

CERTIFIED
ORIGINAL TRANSCRIPT

P R O C E E D I N G

1
2 CMSR. BAILEY: Good morning. We're
3 here today in Docket Number DE 19-142 to
4 discuss rate recovery of costs in excess of the
5 Cumulative Reduction Cap under the power
6 purchase agreement between Eversource and
7 Berlin Station.

8 I note for the record that we've
9 received an affidavit of publication on
10 December -- sorry -- on September 10th. We
11 have designated Eversource as a mandatory
12 party, and we received a Motion for
13 Intervention from Burgess BioPower.

14 Before we begin, let's take
15 appearances.

16 MR. BERSAK: Good morning,
17 Commissioners. On behalf of Public Service
18 Company of New Hampshire, doing business as
19 Eversource Energy, Robert Bersak, its attorney.
20 Along with me today is Attorney Eric Newman,
21 the newest member of our Legal staff here in
22 Manchester. And, also here with me today is
23 Frederick White and Marc Leménager, who are
24 with us from -- what's your area, Rick?

1 MR. WHITE: Electric Supply.

2 MR. BERSAK: -- Electric Supply and
3 from Regulatory. Thank you.

4 CMSR. BAILEY: Good morning.

5 MS. HOLAHAN: Good morning. Carol
6 Holahan, from Foley Hoag, on behalf of Burgess
7 BioPower this morning. With me, from the
8 company, are Robert Desrosiers and Dammon
9 Frecker.

10 MR. KREIS: Good morning,
11 Commissioner Bailey, Commissioner Giaimo. I am
12 D. Maurice Kreis, doing business as Don Kreis.
13 I am, as you know, the Consumer Advocate, here
14 on behalf of the residential customers of this
15 fine utility.

16 MS. ROSS: Good morning,
17 Commissioners. Anne Ross, Staff Attorney, and
18 with me today is Tom Frantz, Director of the
19 Legal Division, and Rich Chagnon, Assistant
20 Director of the Legal -- I'm sorry, the
21 Electric Division, excuse me.

22 CMSR. BAILEY: All right. Are there
23 any objections to the Motion to Intervene by
24 Burgess BioPower?

1 MR. BERSAK: No. The Company does
2 not object.

3 CMSR. BAILEY: All right. That
4 intervention motion will be granted.

5 MS. HOLAHAN: Thank you.

6 CMSR. BAILEY: All right. I'd like
7 to get a status report from the parties on the
8 current value of the Cumulative Reduction Fund;
9 on any discussions on what happens under the
10 contract, once the Fund has exceeded the
11 \$100 million; how you plan to recover the
12 additional over-market costs; and what it means
13 to "suspend operation of the cap"?

14 MR. BERSAK: We can answer probably
15 all those questions, Commissioner, perhaps with
16 the exception of the last question. But let me
17 kind of go through.

18 I think your first question is the
19 status of the \$100 million cap. And I'll turn
20 to Mr. White here, and you can give us your
21 best guess as to where are we.

22 MR. WHITE: Through August of 2019,
23 the cap is at 99.7 million. So, as we speak,
24 as we proceed through September, it's highly

1 likely that at this point the 100 million has
2 been reached. That will continue to accumulate
3 through the end of the current contract year,
4 on November 30th of 2019, at which point the
5 value, minus 100 million, will define the
6 excess cumulative reduction. Which amount
7 would be credited against invoice payments
8 one-twelfth per month in the following contract
9 year, December '19 through November 2020.
10 That's as the PPA as written.

11 CMSR. GIAIMO: I'm sorry. So, the
12 operating year begins December 1?

13 MR. WHITE: Correct.

14 CMSR. GIAIMO: Okay.

15 MR. WHITE: Contract year, yes.

16 CMSR. GIAIMO: So, the plant first
17 went into operation in November of --

18 MR. WHITE: November 13, subject
19 to --

20 CMSR. GIAIMO: Thank you.

21 MR. WHITE: Correct.

22 MR. BERSAK: So, perhaps the way to
23 address some of your other questions,
24 Commissioner Bailey, is to talk about where --

1 you know, what is the Company's position right
2 now. And when I read the Order of Notice for
3 this docket, it sounds like we are now turning
4 to address the very legal issues that the
5 Office of Consumer Advocate raised in the prior
6 docket 10-195. He raised the issues of
7 constitutionality of contract clauses,
8 retrospective laws, and the like, in a motion
9 that was filed a year ago September in Docket
10 10-195.

11 The Commission -- I'm sorry, the
12 Company set forth its position with respect to
13 that motion from the Consumer Advocate in a
14 letter dated September 28th. And the Company's
15 position remains the same as was set forth in
16 that letter. Basically, it was the Company's
17 position that the terms of the current PPA
18 continue, unless and until the Parties, that's
19 Burgess and Eversource, negotiate an amendment
20 to that PPA.

21 Now, if there is an agreed upon
22 amendment to the PPA, then, under New Hampshire
23 law, we would have to bring that amendment back
24 to this Commission for review and approval,

1 because it would be one that extends beyond a
2 one-year time period.

3 A condition precedent to the effect
4 of this -- of that contract would be the
5 Commission's assurance that the excess costs,
6 the additional costs, would be recoverable by
7 the Company through some type of non-bypassable
8 charge.

9 Whether that is something that's
10 allowed or not allowed, you know, what the
11 impact is of the various laws and
12 constitutional provisions that were set forth
13 in the Order of Notice, is not something the
14 Company is going to take a position on. The
15 only law that we would really take a position
16 on is one that wasn't listed there is the Fifth
17 Amendment's taking clause, which is the Company
18 can't be placed in a position where it has to
19 fork over dollars from its shareholders without
20 some means of recovering those from customers
21 in order to implement this public purpose.

22 So, I think your final question was
23 "what does it mean to 'suspend the operation of
24 the cap'?" Well, that is ambiguous, and that

1 is something that the Parties will have to sit
2 down and negotiate, to see if we and Burgess
3 can come to an understanding as to what that
4 means, because there are multiple
5 interpretations of what that means. And the
6 Legislature was not particularly clear in what
7 their intention was.

8 CMSR. BAILEY: It sounds like,
9 though, that if you just continue "business as
10 usual" under the existing contract, then the
11 law has made no change.

12 MR. BERSAK: Correct. And it's the
13 Company's position that we set forth in our
14 letter from a year ago that the contract, the
15 power purchase agreement between us and this
16 facility, is a PURPA contract that they sell
17 as, you know, an exemption from the Federal
18 Power Act, they sell pursuant to the terms of
19 the Public Utilities Regulatory Policy Act,
20 under which there are, basically, two different
21 rates. One's an avoided cost rate, and that
22 avoided cost rate, as set by this Commission
23 for Eversource, is the ISO-New England's LMP.
24 So, that's not this. Another rate under PURPA

1 is a mutually negotiated rate, which is what we
2 have today. So, unless and until we can come
3 up with a consensually negotiated amendment to
4 the PPA, under PURPA, the current contract will
5 continue to dictate the terms of the
6 relationship between us and Burgess.

7 Now, you've asked "where are we with
8 that?" I have to say, we and Burgess have been
9 meeting very frequently. We've had very frank
10 and open discussions on some way of dealing
11 with the overarching issue of how do we
12 implement the public purpose and the desire of
13 the Legislature to keep that plant operating,
14 but do it in a way that mitigates the costs to
15 customers as best we can.

16 And I have to compliment the folks
17 from Burgess. They have been very creative in
18 thinking outside the box, and have presented us
19 with various proposals that we have considered.
20 I don't feel that we should be discussing the
21 terms and the details of those positions in an
22 open session such as this one, but we have been
23 discussing it with them, and we are doing our
24 best to come up with a resolution to implement

1 the desires of the Legislature.

2 You know, are we there yet? No, we
3 are not there yet. But will we be there in
4 time for a December 1st date, contract date?
5 Perhaps.

6 You know, we certainly -- I don't
7 expect that we will have this Commission's
8 review, approval of assurance of recovery by
9 December 1st. So, as part of the negotiations
10 and discussions, I think that the Company and
11 Burgess will also have to work out a
12 methodology to bridge from December 1st until
13 we have received this Commission's
14 determination as to the acceptability of an
15 amended PPA.

16 CMSR. BAILEY: So, doesn't that mean
17 that you're going to be out of compliance with
18 the law by December 1st?

19 MR. BERSAK: Well, it means we're
20 complying with the federal law.

21 CMSR. BAILEY: Okay. All right.
22 Ms. Holahan.

23 MS. HOLAHAN: We would agree with a
24 vast majority of what Attorney Bersak has

1 stated. I think our interpretation of Senate
2 Bill 577 goes further than his. We believe
3 that "suspension of operation of the cap" means
4 exactly that. That cap was imposed to put a
5 \$100 million limit, and that limit -- and that
6 cap is now -- the operation of that cap is now
7 suspended for a period of three years. And
8 that the Legislature, when it passed 577,
9 understood that the ratepayers would be
10 responsible for those costs. We believe that
11 that is demonstrated in the fiscal analysis, in
12 the testimony before the Legislature.

13 And I think, also, even in the
14 statement or the purpose clause in the
15 legislation itself, it's clear that the
16 Legislature was -- it intended to protect a
17 viable asset in the North Country, one that
18 ensured fuel diversity, one that provided a
19 renewable resource, and one that was an
20 economic anchor in the North Country. And, for
21 those reasons, it made a policy judgment that
22 the cap should be suspended for a period of
23 three years, and that the ratepayers would be
24 responsible for that.

1 With respect to the constitutional
2 issues that were raised by the Consumer
3 Advocate in DE 10-195, we did brief those, we
4 did submit a brief on those issues. I think,
5 first and foremost, the Commission does not
6 need to reach the constitutional issues in the
7 PPA. Between the Parties, there is a "change
8 of law" provision that requires the Parties to
9 negotiate in good faith. If there is a change
10 of law, that affects the terms, and that is
11 exactly and precisely what we have been doing
12 very diligently, as Attorney Bersak stated.

13 If the Commission deems it necessary
14 to reach the constitutional issues, I think, on
15 each and every ground, Senate Bill 577, and any
16 provisions in there, are completely permissible
17 under either the federal or state
18 constitutions.

19 If the Commission, for whatever
20 reason, feels it necessary for us to brief
21 those issues, we will. But the Consumer
22 Advocate raised those issues in September, and
23 the parties in the prior docket did brief them.

24 CMSR. GIAIMO: I just want to make

1 sure I understand the argument. So, allow me
2 to give a hypothetical.

3 The cap is suspended for three years.
4 Over-market excess revenue reaches, let's say,
5 36 million over three years. After the 36th
6 month, the cap is removed. What's the balance
7 of the fund? Is it 100 -- does the \$36 million
8 get repaid? Or, is that completely assumed by
9 the ratepayer? And, for all intent and
10 purpose, the cap is then at 100 million going
11 forward?

12 MS. HOLAHAN: I believe the
13 36 million, I guess it's "does it get repaid by
14 whom?" Just clarification of your question.

15 CMSR. GIAIMO: Does the -- over the
16 next twelve months, would the ratepayers then
17 get credits for the one-twelfth increments
18 monthly to offset their bills?

19 MS. HOLAHAN: So, I think what you're
20 asking is, at the end of that suspension
21 period, whatever it is in the cap, does Burgess
22 have to repay that, consistent with the terms
23 of the PPA, in one-twelfth increments beginning
24 that January of the next one? And our answer

1 to that would be "no".

2 CMSR. GIAIMO: Thank you.

3 CMSR. BAILEY: All right. Mr. Kreis.

4 MR. KREIS: Thank you, Commissioner
5 Bailey. I am not going to surprise anybody
6 here today by telling you that the position of
7 the Office of the Consumer Advocate is exactly
8 the same as it was a year ago, when we
9 attempted to litigate these issues in Docket
10 10-195. And the Commission, not unreasonably,
11 deferred consideration of those questions, I
12 would assume, until now.

13 As we argued at that point, we
14 believe that the bill, SB 577, that lifts the
15 Cumulative -- the cap on the Cumulative
16 Reduction Factor is unconstitutional, because
17 it deprives ratepayers of the benefit of the
18 bargain they struck in the PSNH asset
19 divestiture agreement that was approved by this
20 Commission.

21 We believe that the Commission should
22 either so declare or transfer the relevant
23 legal questions to the New Hampshire Supreme
24 Court for it to so declare. And I would also

1 note that, as we argued a year ago, the
2 Commission should invoke the provisions of SB
3 577 that require the Commission to obtain
4 certain financial records from the Burgess
5 plant upon request; and the Office of the
6 Consumer Advocate hereby renews that request.

7 CMSR. BAILEY: And what would you do
8 with that information, if you had it?

9 MR. KREIS: I would use it to advise
10 the Commission about whether it is in the
11 public interest for the Commission to approve
12 whatever contract Mr. Bersak and Ms. Holahan
13 and their clients are negotiating.

14 CMSR. BAILEY: Hasn't the Legislature
15 already made that decision?

16 MR. KREIS: I don't know. But I will
17 say that the Legislature included that "turn
18 over the records" provision in the bill for a
19 reason. I admit that that reason is not
20 entirely clear. But, to simply say that "we're
21 not going to give effect to those provisions,
22 because we don't think they're relevant or we
23 don't like them or we don't agree with them",
24 is to ignore an express command by the

1 Legislature. I don't think the Commission
2 should do that.

3 CMSR. BAILEY: What about the express
4 commands that you suggest the Commission
5 ignore, that the cap be suspended, because of a
6 Settlement Agreement in the restructuring
7 statute? And, if the Commission were to
8 recover those over-market costs outside of the
9 Restructuring Settlement Agreement, would your
10 argument be the same?

11 MR. KREIS: I'm not urging that the
12 Commission disregard any instructions from the
13 Legislature. I am suggesting that either the
14 statute is unconstitutional or the intent of
15 the Legislature was to require Eversource and
16 its shareholders to eat those over-market
17 costs.

18 I heard Mr. Bersak argue that that
19 itself would be an unconstitutional taking.
20 Maybe that's an issue that needs to be
21 litigated.

22 CMSR. BAILEY: Ms. Ross.

23 MS. ROSS: Thank you. Good morning.
24 Staff is not taking a position at this time.

1 But we would observe that we are concerned
2 about providing for the cost recovery of
3 over-market costs once we hit the \$100 million
4 Cumulative Reduction Factor cap.

5 We are going to suggest that the
6 Commission take administrative notice of the
7 briefs that have been filed in DE 10-195. And
8 we would like an opportunity, maybe in the tech
9 session following this hearing, to talk to the
10 parties about presenting what we believe are a
11 fairly complex group of legal issues that might
12 need Commission decision, in order to get to
13 some understanding of how rate recovery is
14 likely to work, under either a "no agreement"
15 scenario or some potential future agreement.

16 CMSR. BAILEY: All right. Does
17 anybody have anything to add?

18 Ms. Holahan?

19 MS. HOLAHAN: I just wanted to
20 respond to the OCA's argument about the
21 confidential records.

22 I believe, in Docket 10-195, the
23 issue came up, and then Commissioner Honigberg
24 stated that that provision was in the statute

1 because it was a holdover provision from an
2 earlier version of the statute.

3 And I agree absolutely with you,
4 Commissioner Bailey, that the Legislature made
5 the decision, has made the policy decision
6 about who should pay, and the records related
7 to the plant are irrelevant to that
8 consideration. They bear -- they will shed no
9 light on what the Legislature intended in
10 suspending the cap.

11 And I also believe that, if you look
12 at the prior versions of Senate Bill 577 before
13 it passed, it started out as a different bill,
14 at which point the recovery of records or the
15 records may have been relevant. But they are
16 not relevant to this consideration, and we
17 strongly object to any effort on the OCA's
18 behalf to review those records.

19 Thank you.

20 CMSR. BAILEY: What do we do with the
21 legal precedent that the Legislature doesn't
22 include words that don't have any meaning?

23 MS. HOLAHAN: I believe, I have to go
24 back and check the SB 577, but i believe it

1 gives the Commission discretion to award those
2 records. I don't think it's automatic. And I
3 believe that's why the OCA requested them to
4 begin with.

5 I strongly suggest again that those
6 records are irrelevant to this proceeding, and
7 we would object to any movement in that
8 direction.

9 CMSR. BAILEY: All right. Go ahead,
10 Mr. Kreis.

11 MR. KREIS: I really have to respond
12 to that.

13 Ms. Holahan has mischaracterized the
14 language in the statute. Which says: "During
15 the proceedings," which I presume to mean these
16 proceedings, "Burgess BioPower plant shall,
17 upon request, make their cost and profitability
18 records available to the Public Utilities
19 Commission."

20 That word "shall" does not leave any
21 room for any Commission discretion. It doesn't
22 even require the Commission to do anything. It
23 requires Burgess BioPower to do something,
24 which is to say "disclose records to the PUC".

1 CMSR. BAILEY: Ms. Holahan.

2 MS. HOLAHAN: Let me get the language
3 in front of me.

4 CMSR. BAILEY: He read it accurately.

5 MS. HOLAHAN: That's correct. But it
6 says "if the Commission requests it".

7 MR. KREIS: No. It says "upon
8 request".

9 MS. HOLAHAN: Okay.

10 MR. KREIS: And I just made that
11 request again.

12 MS. HOLAHAN: Okay. I'd have to take
13 another look at it. I'm sorry, I disagree with
14 the interpretation. And I also disagree that
15 the records themselves would have any bearing
16 on the proceeding.

17 MR. KREIS: Well, you know, again, I
18 think that's for ultimately you, the
19 Commission, to determine. I mean, simply
20 accepting Burgess BioPower's self-serving claim
21 that those records have no -- that they have no
22 relevance to anything the Commission might
23 decide, I don't know. I haven't seen them.
24 You haven't seen them.

1 CMSR. BAILEY: Can you give me an
2 offer of proof about how they would be
3 relevant? I mean, say they show that Burgess
4 is making money hand-over-fist. How would that
5 be relevant to what we have to do today?

6 MR. KREIS: I'm extremely reluctant
7 to make an offer of proof about information
8 that I have no knowledge of whatsoever. I
9 would be indulging in fantasy at this point.

10 But, if Burgess BioPower were making
11 money hand-over-fist, would it inform whether
12 this contract is in the public interest?
13 Absolutely. Absolutely.

14 CMSR. BAILEY: Okay. Does anybody
15 want to say anything about the idea of further
16 briefing?

17 All right.

18 MR. KREIS: I think it would be
19 useful for the parties to have a little time to
20 think about whether there's been any -- there
21 have been any legal developments that might
22 inform the briefing. I don't think there have
23 been.

24 I'm tempted to say, I just reiterate

1 the pleading that I filed a year ago, and I
2 still think that it is a reasonable
3 articulation of our arguments.

4 CMSR. BAILEY: All right. Well,
5 there may be other issues that could be further
6 developed in legal briefing. So, I think you
7 should talk about it at the technical session,
8 and report back to us with ideas on what should
9 be briefed, if anything, and a schedule for
10 briefing. And, if there are any facts that
11 need to be determined, then you should note --
12 then you should identify those as well.

13 Okay. Is there anything else we need
14 to do today?

15 *[No verbal response.]*

16 CMSR. BAILEY: All right. Before we
17 close, I'd like to welcome Dianne Martin, who's
18 sitting in the back of the room. She just came
19 in to observe the process. She hasn't been
20 sworn in yet, but she has been confirmed.

21 And I ask that all of you respect the
22 *ex parte* rules. Thank you.

23 All right. With that, we'll close
24 the hearing for today, and leave you to your

1 technical session. Thank you.

2 MR. BERSAK: Thank you,

3 Commissioners.

4 ***(Whereupon the prehearing***
5 ***conference was adjourned at***
6 ***10:38 a.m., and a technical***
7 ***session was held thereafter.)***

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