

1 STATE OF NEW HAMPSHIRE

2 PUBLIC UTILITIES COMMISSION

3
4 **January 9, 2020 - 10:17 a.m.**
5 Concord, New Hampshire

NHPUC 30JAN20am11:17

6 **RE: DE 19-142**
7 **PUBLIC SERVICE COMPANY OF NEW**
8 **HAMPSHIRE D/B/A EVERSOURCE ENERGY,**
9 **RATE RECOVERY OF COSTS IN EXCESS**
10 **OF THE CUMULATIVE REDUCTION CAP**
11 **UNDER THE POWER PURCHASE AGREEMENT**
12 **WITH BERLIN STATION, LLC.**
13 **(Prehearing Conference)**

14
15 **PRESENT:** Chairwoman Dianne Martin, Presiding
16 Commissioner Kathryn M. Bailey
17 Commissioner Michael S. Giaimo

18 Jody Carmody, Clerk

19
20 **APPEARANCES:** **Reptg. Public Service Co. of NH...**
21 Robert A. Bersak Esq.

22 **Representing Burgess Biopower, LLC:**
23 Carol J. Holahan, Esq.

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

Reptg. PUC Staff:
F. Anne Ross, Esq.

Court Reporter: Susan J. Robidas, NH LCR No. 44

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

2 CHAIRWOMAN MARTIN: Okay. We're
3 here this morning in Docket DE 19-142, which
4 is the PSNH, d/b/a Eversource, Rate Recovery
5 of Costs in Excess of the Cumulative
6 Reduction Cap Under the Power Purchase
7 Agreement with Berlin Station, LLC. And I
8 understand that there was a request that we
9 would proceed to hearing today. We did not
10 notice this as a hearing, and we also have
11 some questions. So I think we'll decline
12 that request today.

13 Let's start with appearances,
14 please.

15 MR. BERSAK: Good morning,
16 Commissioners. On behalf of Eversource,
17 myself, Robert Bersak, and my aide-de-camp
18 here, Jessica Chiavara. And we also have
19 with us two subject-matter experts in case
20 there are substantive questions: Mr. Rick
21 White, and Ms. Erica Menard behind me.

22 MS. HOLAHAN: Carol Holahan from
23 Foley Hoag, on behalf of Burgess Biopower
24 this morning. With me I have Company VP

1 Robert Desrosiers.

2 CHAIRWOMAN MARTIN: Thank you.

3 MR. KREIS: I think it might be my
4 turn. Good morning. I am D. Maurice Kreis,
5 the Consumer Advocate, here on behalf of
6 residential utility customers.

7 CHAIRWOMAN MARTIN: Thank you.

8 MS. ROSS: Good morning,
9 Commissioners. Anne Ross. And with me today
10 is Tom Frantz, Director of the Electric
11 Division; Rich Chagnon, Assistant Director of
12 the Electric Division; Brian Buckley, Staff
13 attorney; and Steve Eckberg, analyst with the
14 Electric Division.

15 CHAIRWOMAN MARTIN: Thank you. We
16 do have a Petition to Intervene, and I see
17 that Attorney Boldt is not here. Are there
18 any objections to that petition?

19 MS. HOLAHAN: I just got off the
20 phone with Chris. I was surprised he wasn't
21 here. He misread the Order of Notice and
22 thought the hearing was at 1:00 today. He is
23 currently en route.

24 CHAIRWOMAN MARTIN: Oh, okay.

1 Thank you.

2 But no objections from the other
3 parties as to that intervention?

4 MS. HOLAHAN: No.

5 CHAIRWOMAN MARTIN: Okay. Then we
6 are prepared to grant the intervention today
7 based upon the written motion.

8 I think we will move next, unless
9 there are any other initial matters folks
10 need to cover, we'll move to hear your
11 initial positions on the settlement
12 agreement, starting out with you, Mr. Bersak.

13 MR. BERSAK: Thank you, Chairwoman
14 Martin.

15 Back in 2018, the legislature saw
16 fit to enact a law that was basically
17 identified as Chapter 340 of the laws of
18 2018. That law was intended to provide a
19 methodology whereby the wood-fired power
20 plant up in Berlin, the Burgess Biopower
21 plant, would be able to continue to operate
22 for another three-year period, to give that
23 plant time to figure out how, you know, how
24 to structure things to allow it to

1 economically continue to generate well into
2 the future. Since the enactment of that law,
3 Burgess and Eversource have had a number of
4 ongoing discussions to try to figure out is
5 there some way of implementing the law and
6 implementing the intent of the legislature in
7 a way that would minimize impacts on
8 customers. Ultimately, you know, as a result
9 of those ongoing discussions, we entered into
10 an amendment to the existing power purchase
11 agreement. That amendment was filed with the
12 Commission back on November 19th of last
13 year. Under that amendment, we would
14 effectuate what it is the legislature asked
15 us to do, which is basically to change one of
16 the terms in the existing power purchase
17 agreement, such that the PPA does not revert
18 to a sort of market-based cost for the next
19 three years.

20 So what will happen during the next
21 three years is, instead of that market-based
22 mechanism going into effect, it will be
23 suspended so that the plant will continue to
24 get the full power -- the full energy prices

1 of the agreement, and then at the end of the
2 three years, the power purchase agreement
3 will go back into place. So at the end of
4 the three years, if nothing changes, the
5 entire amounts that we're talking about that
6 are -- that would have been refunded each
7 year annually to customers will be refunded
8 in one lump sum. So there's a potential of a
9 \$60 million payback to customers at the end
10 of this three-year period. If something
11 changes during this three-year period by
12 additional legislature or changes in the
13 marketplace, you know, we'll deal with it
14 accordingly.

15 We also use the opportunity of this
16 change to the PPA to deal with one other
17 outstanding issue, which was there was a
18 dispute, or a lack of understanding at least,
19 between Eversource and Burgess on how certain
20 property tax issues would be dealt with as a
21 result of properties up in Berlin that were
22 dedicated solely to the Burgess plant. We've
23 resolved that, and that resulted in a
24 property tax payment of outstanding amounts

1 owed to Eversource north of a million
2 dollars. And we've come up with a
3 methodology going forward. So we used the
4 law as a way of resolving another issue as
5 well, which really isn't germane to today's
6 proceeding.

7 The parties got together, all the
8 parties in the room, with the exception of
9 Berlin. So it was Staff, Consumer Advocate,
10 Burgess and Eversource got together to
11 discuss where do we go with this, and what
12 should we do with the amended PPA. There
13 were certain issues which the Commission
14 noticed in its Supplemental Order of Notice,
15 issues that OCA had raised. As a result of
16 the discussions between all the parties,
17 we've resolved all the outstanding issues. A
18 settlement agreement amongst the parties was
19 filed on December 31st. And all the parties
20 are onboard, you know, to resolve this issue,
21 this matter, expeditiously, with a desire to
22 be able to implement the impact on rates as
23 part of the February 1st stranded cost
24 recovery charge change. Hence, that was the

1 request that was relayed to you earlier today
2 about turning this into a hearing so that we
3 have a resolution of this issue, so that the
4 costs of implementing this law could be
5 included in our stranded cost charge
6 effective February 1st. As part of the
7 settlement, there are no longer any issues
8 outstanding.

9 It's my information and belief that
10 the City of Berlin is supportive of the
11 settlement. Hopefully Mr. Boldt will get
12 here and he can speak for himself. But there
13 are no other parties to this proceeding.
14 There are no issues that need to be hashed
15 out. We have the witnesses here in the event
16 that the Commissioners have substantive
17 questions. They can discuss this and be
18 sworn in and talk about whatever issues you
19 may have. But our desire is to have the
20 settlement approved, which would approve the
21 amended power purchase agreement; that the
22 impacts would be included in the stranded
23 cost rate; that the stranded cost hearing on
24 I believe the 21st of this month, with an

1 order to follow, and rates effective
2 February 1st of this year.

3 We do have marked or we're
4 potentially ready to mark three exhibits.
5 One exhibit would be the amended PPA that was
6 filed with the Commission back on
7 November 19th between Eversource and Burgess,
8 the second exhibit would be the settlement
9 agreement that was filed on December 31st,
10 and the third exhibit would be the prefiled
11 testimony of Mr. White. So there are matters
12 in the record that support whatever the
13 Commission does.

14 Now, I did hear this morning the
15 Commission's decision not to turn this into a
16 hearing today. But perhaps the Commission
17 can get the information it needs in order to
18 rule on this matter by an order nisi; that
19 way, there would not be a need for a hearing,
20 and the Commission's decision would be
21 published. And should anybody have anything
22 they wish to say, there will be an
23 opportunity per the notice to bring matters
24 to the attention of the Commission. But that

1 would be a methodology that would allow us to
2 be in a position to effectuate the rates as
3 part of the February 1 rate changes.

4 So that's where we are. And we are
5 ready and willing to answer whatever
6 questions the Commission has. And we're very
7 hopeful that we can in fact get to a result
8 that allows for approval of the amended PPA
9 and settlement and inclusion of the rates as
10 of February 1st. Thank you.

11 CHAIRWOMAN MARTIN: Thank you. Ms.
12 Holahan.

13 MS. HOLAHAN: Good morning. As the
14 Commission is aware, this case has a long and
15 complicated history spanning a number of
16 dockets and a parade of parties in more than
17 a decade. The issue currently before the
18 Commission, the issues relate to the
19 intersection of energy policy as implemented
20 by the legislature, bilaterally negotiating
21 the PPA and amendment between the parties,
22 and the Commission's jurisdiction and
23 authority related to both of those issues.
24 While the Order of Notice and Supplemental

1 Order of Notice both raise a myriad of
2 statutory and constitutional issues, Burgess
3 takes the position, as Mr. Bersak just stated
4 as well, that the joint settlement agreement
5 filed by the parties on the 31st of December,
6 makes it unnecessary for the Commission to
7 reach the vast majority of them.

8 It's Burgess's position that, in
9 light of the settlement agreement, really the
10 sole issue before the Commission at this
11 point in time is whether the PPA filed by
12 PSNH on -- the PPA amendment, excuse me,
13 filed by PSNH on November 19th is in the
14 public interest.

15 Burgess further asserts, however,
16 that the Commission's public interest review
17 of this amendment differs from the vast
18 majority of PPA amendments and PPAs in a
19 number of material respects. First, the
20 Commission approved the underlying PPA in
21 this proceeding -- or excuse me -- in DE
22 10-195 more than ten years ago after a very
23 contentious hearing. Second, the amendment
24 that the parties have entered into resulted

1 from the invocation of the change in law
2 provision in the PPA itself after the New
3 Hampshire legislature passed Senate Bill 577,
4 also referred to earlier.

5 And then finally in that
6 legislation, the New Hampshire Legislature
7 made a series of findings that supported its
8 policy choices that related to the facility's
9 importance to the fuel diversity, capacity
10 and sustainability here in New Hampshire.
11 So, in essence, in enacting Senate Bill 577,
12 it's our position that the legislature
13 determined what it deemed to be in the public
14 interest. And the Commission, in its order
15 in December of 2018, accepted that
16 determination when it amended its final order
17 in DE 10-195 and lifted or suspended
18 operation of the cumulative reduction factor.

19 So in our view, the Commission's
20 review should consist of what I'll call an
21 enhanced compliance standard. Really, they
22 should look at is the amendment consistent
23 with the findings in Senate Bill 577, and
24 does it comply with the Commission's order in

1 DE 10-195. And because the amendment does
2 both of those things, the Commission should
3 determine that it's in the public interest.

4 The remainder of the issues
5 outlined in the Order of Notice or the
6 Supplemental Order of Notice I think have
7 already been briefed or are just not material
8 to the Commission's decision.

9 We support Mr. Bersak's recently
10 advocated position of an order nisi or any
11 other procedural mechanism that would get the
12 issues before the Commission by January 21,
13 in order that the new rates could go into
14 effect by February 1.

15 CHAIRWOMAN MARTIN: Thank you. Mr.
16 Kreis.

17 MR. KREIS: Thank you, Chairperson
18 Martin. Good morning, everybody.

19 The Office of Consumer Advocate has
20 made no secret of the fact that across
21 numerous dockets here at the PUC and
22 elsewhere, we are concerned about the extent
23 to which the ratepayers of this state,
24 particularly the residential ratepayers of

1 this state, are called upon again and again
2 to assume financial responsibility for
3 maintaining the existence of power plants
4 that may not otherwise be economical in the
5 region's wholesale electricity market. And
6 consistent with that general perspective, as
7 the Commission is aware, we raised a number
8 of significant issues with the implementation
9 of Senate Bill 577.

10 Nevertheless, I agree with
11 everything that Mr. Bersak and Ms. Holahan
12 have just said. I signed the settlement
13 agreement because the resolution that we
14 propose in this case differs, but it doesn't
15 ultimately resolve the question of how much
16 additional financial responsibility
17 ratepayers will bear, particularly
18 residential ratepayers, for the public policy
19 advantages of assuring the continued
20 operation of the wood-burning facility in
21 Berlin.

22 Beyond that, I would say that we
23 made an assessment of the litigation risks
24 associated with the arguments that we made,

1 and we believe that the settlement agreement
2 fairly apportions the retail rate impacts as
3 between the various customer classes in a
4 manner that we find acceptable on behalf of
5 residential utility customers.

6 With respect to the sort of
7 procedural posture of where we are today, I
8 would point out the following: Paragraph V
9 of Section 31 of RSA 541-A, which is the
10 Administrative Procedure Act, says that
11 unless precluded by law, informal disposition
12 may be made of any contested case at any time
13 prior to the entry of a final decision or
14 order by stipulation, agreed settlement,
15 consent order or default.

16 So, from an Administrative
17 Procedure Act perspective, that is exactly
18 the situation that we confront here. Every
19 single party to this proceeding is a
20 signatory to the settlement agreement, except
21 for the City of Berlin. My impression is the
22 same as Mr. Bersak's, that the City of Berlin
23 is either supportive of or has no objection
24 to the settlement agreement. And so I don't

1 see any legal impediments to the Commission
2 simply issuing an order after today's
3 prehearing conference approving the
4 settlement agreement, provided that whatever
5 questions and concerns or uncertainties you
6 may have as Commissioners are resolved.
7 Obviously, if in the wake of such an order
8 some party finds that they're aggrieved by
9 this Commission's determination, then a
10 rehearing or a request for rehearing is
11 available pursuant to RSA 541.

12 So I would urge the Commission to
13 approve the settlement agreement as
14 expeditiously as it can for the reasons that
15 Mr. Bersak has articulated. Getting this
16 into rates quickly is in the interest of what
17 I would call rate stability. So that is what
18 I would suggest the Commission do, and I
19 think that's all I have to say.

20 CHAIRWOMAN MARTIN: Thank you.

21 Ms. Ross.

22 MS. ROSS: Good morning. The Staff
23 doesn't need to add any substantial amount to
24 what's already been said. Staff did sign the

1 settlement agreement. The reason for signing
2 it was to avoid what appeared to us to be
3 unnecessary and time-consuming litigation
4 when we were faced with SB 577, which clearly
5 requires the Commission to amend the order
6 approving the prior PPA, and I quote,
7 "notwithstanding any other provision of law
8 to the contrary." We believe that the
9 settlement agreement conforms to the terms of
10 Senate Bill 577, and for that reason we
11 entered into the settlement and support it.

12 CHAIRWOMAN MARTIN: Thank you.

13 Okay. As I said at the beginning,
14 the Commission has a few questions, and we
15 will share those today. And I want to start
16 with Mr. Bersak.

17 You had addressed, laid out why
18 expedited treatment is sought in this case I
19 think in the first instance. And so the
20 question we have in return is if this were to
21 be heard on the 21st of January and resolved
22 in time for the February 1st rates, would
23 that not address the issue here you're
24 concerned with?

1 MR. BERSAK: As long as we have an
2 order prior to February 1st that accepts the
3 settlement here and accepts the rate
4 treatment and that the Commission includes
5 that as part of the SCRC order which will
6 also be issued, I suppose that that would
7 meet the needs of the Company to effectuate
8 this on February 1st.

9 CHAIRWOMAN MARTIN: And what
10 happens if it's not treated in an expedited
11 manner and we go past February 1st?

12 MR. BERSAK: Then what will happen
13 is we will be making payments to Burgess that
14 we are not recovering through rates. So
15 those costs will be rolled over until August,
16 and then we will have to include in rates,
17 you know, what we've paid, with a return to
18 be recovered from customers. So it will
19 create an aberrant increase. Very small, but
20 it'll be a larger increase in rates in
21 August, along with the return on the monies
22 we have not yet collected.

23 (Commissioners confer off the record.)

24 MR. BERSAK: And Mr. White reminds

1 me that the term of the amended power
2 purchase agreement is that it does not take
3 effect until we have an order from this
4 Commission. So what would happen if not
5 ruled on now is that Burgess will not get its
6 money and will have to continue to operate
7 for another half-year at reduced rates. And
8 what economic impact it has on them I
9 couldn't answer.

10 CHAIRWOMAN MARTIN: Is there any
11 reason we would have to wait until August, or
12 could it be addressed in March or sometime --

13 MR. BERSAK: Obviously, the
14 Commission can do whatever it sees fit. But
15 we've had rate changes to effectuate changes
16 in transmission costs or stranded costs or
17 whatever energy service costs on a
18 semi-annual basis. And right now that
19 schedule is February 1st and August 1st,
20 intended to try to avoid having multiple
21 different rate changes throughout the year.
22 Is it possible? Sure, we could do that. But
23 it hasn't been the practice to do that.

24 CHAIRWOMAN MARTIN: Thank you. So

1 there are a couple of areas -- and we
2 obviously were not aware of the request to
3 move this forward today -- there were a
4 couple areas we wanted to address because of
5 the request to expedite. We were looking to
6 get information in advance of the 21st, and I
7 think at this time we'll still proceed under
8 that assumption. And if anything changes
9 before the end of today, we'll revisit.

10 But we wanted to have a record
11 request asking what is the rate impact of
12 this agreement on the typical residential
13 customer.

14 MR. BERSAK: I think we are
15 prepared, if you would like, to have either
16 or both Ms. Menard or Mr. White to be sworn
17 in. I think they can answer your questions
18 on the spot right now. And if you'd like, we
19 could also mark those three things that I
20 said we're prepared to have as exhibits. We
21 can have those marked right now as well.

22 CHAIRWOMAN MARTIN: Well, let me
23 get through all of the questions, and then
24 see we'll if that makes sense.

1 MR. BERSAK: Okay.

2 CHAIRWOMAN MARTIN: The second
3 request was what is the rate impact of the
4 agreement for a typical C & I customer and
5 the classes reflected in Attachment A to the
6 Eversource filing dated 12/31/19.

7 MR. BERSAK: Got it.

8 CHAIRWOMAN MARTIN: And we would,
9 depending on how this plays out, we would
10 reserve Exhibit 1 and 2 for those.

11 And then the larger question: The
12 legislature provided that the Commission can
13 obtain the cost and profitability records
14 from Burgess. The Committee noted that the
15 settlement agreement provides that those will
16 not be provided as part of this.

17 We would like to hear from the
18 parties today as to how we could approve the
19 settlement agreement which contemplates
20 returning the excess cumulative reduction in
21 year four without looking at the cost and
22 profitability records to know whether that
23 return of that money to the customers is
24 likely to happen. So I think we'd like to

1 hear from each of the parties today on that
2 issue. We can start with you, Mr. Bersak.

3 MR. BERSAK: I can start. I shall
4 do that.

5 Your predecessor faced this very
6 issue of what does that provision of the 2018
7 law mean, you know, given where we are and
8 given what the legislature actually passed.
9 And at that point, Chairman Honigberg made
10 the determination that the provision of the
11 2018 law relating to the request for the
12 financial records of the Burgess plant was
13 really a holdover from the original version
14 of the legislation and wasn't really
15 applicable to the ultimate law that came out
16 the other side. So he felt that it was an
17 error perhaps on the legislature in drafting.
18 But nonetheless, even though it's still in
19 the law, it also was not particularly
20 relevant to where we were. I think that the
21 former chair's observations were probably
22 accurate. The legislature did not do a
23 particularly good job when it changed the
24 original format of this law to what it

1 ultimately passed, No. 1; and No. 2, given
2 where we are today, that the books and
3 records of Burgess are not relevant to the
4 proceeding. So we don't think that is an
5 issue or there's a need to deal with books
6 and records at this time.

7 CHAIRWOMAN MARTIN: How do you
8 address the question of the public interest?
9 And I did hear Ms. Holahan's position on this
10 already. But how do you address the question
11 of public interest that the Commission has to
12 answer in order to approve the settlement
13 agreement without looking at that question
14 that I just --

15 MR. BERSAK: I believe that the
16 legislature, through its enactment of the law
17 in 2018, basically made the public interest
18 determination as to what's in the best
19 interest in the State of New Hampshire. In
20 other words, it's kind of fundamental that
21 this Commission is a creature of the
22 legislature and only have the powers and
23 authorities delegated to it by the
24 legislature. In this particular case, the

1 legislature has come up with a scheme that it
2 wants to put into place. So I'm not sure
3 that, given the law that we're dealing with,
4 that there needs to be any further review of
5 public interest. We're just implementing a
6 law that is on the books that the legislature
7 has enacted and that the governor signed into
8 law.

9 (Commissioners confer off the record.)

10 CHAIRWOMAN MARTIN: I'm going to
11 recognize Commissioner Bailey to follow up on
12 that.

13 MR. BERSAK: Yes, ma'am.

14 CMSR. BAILEY: You created a
15 term -- you all created a term in the
16 settlement that puts this in play, and that
17 is that there's some expectation that in the
18 fourth year ratepayers will have an
19 opportunity to, I think you said, be
20 refunded. And so without looking at the cost
21 and profitability, how do we know if that
22 term has any meaning? And yes, we are a
23 creature of the legislature. And the
24 legislature said if we ask for them, they

1 have to be provided. So I'd like to hear a
2 little bit more about that, please.

3 MR. BERSAK: Obviously, you people
4 are the ultimate arbiters of what needs to be
5 done in this situation. If you feel you need
6 anything, you'll make that determination.

7 But what we did is we tried to implement the
8 law as best we could, given that it was not a
9 paragon of clarity. We implemented the law
10 in a way that we felt was -- that preserved
11 everybody's rights going forward. You know,
12 did Burgess agree with our interpretation of
13 the law? Not necessarily, but we all came to
14 an agreement to move this forward. All the
15 law said was -- I'm paraphrasing. I don't
16 have it in front of me -- is that the
17 operation of the cumulative reduction factor
18 would be suspended for three years from the
19 date when it otherwise would have taken into
20 effect. So what we viewed that to mean is
21 not that it goes away, but that we will not
22 put it into operation until three years down
23 the road. So instead of going into operation
24 when the current PPA's limit of \$100 million

1 was hit, we will continue to accrue
2 additional amounts. And you can say,
3 nominally, if the legislature had in mind
4 that it was going to cost \$20 million a year,
5 you can kind of say, hypothetically, that at
6 the end of three years this cumulative
7 reduction fund will be \$160 million. So we
8 suspended the operation. And when it goes
9 back into effect, what we would do is say,
10 fine, the PPA says whatever amount above that
11 \$100 million threshold that's on the books at
12 that next contract year will be refunded to
13 customers by a credit to the energy bill over
14 the following 12 months. So if we use a \$60
15 million amount above the 100, that would mean
16 there would be a \$5 million credit on the
17 energy bills each month going forward in that
18 year. Will Burgess be able to pay that? I
19 don't know. Will the legislature do
20 something else in the interim to fix this
21 problem that it created? I don't know that
22 either. Basically we were handed an
23 ambiguous law. We implemented it as best we
24 could, and that resulted in the amended power

1 purchase agreement and the parties all
2 supporting that amended power purchase
3 agreement.

4 CHAIRWOMAN MARTIN: Thank you.

5 MR. BERSAK: You're welcome.

6 CHAIRWOMAN MARTIN: Ms. Holahan.

7 MS. HOLAHAN: I think in addition
8 to what Attorney Bersak has argued, Senate
9 Bill 577 does not require the Commission to
10 ask for the books and records. It makes that
11 a discretionary function within the
12 Commission if it chooses to do so. We would
13 argue that the Commission has made the public
14 interest determination already and that it's
15 unnecessary to look at the books and records
16 at this time. It is -- the statute certainly
17 could be a lot clearer, could be written
18 clearer. But I think the important thing is
19 that the legislature made some very important
20 energy policy choices that it deemed were in
21 the best interest for the State of New
22 Hampshire as a whole with respect to the
23 renewable portfolio standards, with respect
24 to fuel diversity, with respect to

1 sustainability and capacity. And those
2 should be the overriding principal factors
3 upon which the Commission views whether this
4 is in the public interest and that the
5 continued viability of the Burgess facility
6 for a period of three years by suspending the
7 cap is paramount in that determination of
8 public interest.

9 CHAIRWOMAN MARTIN: Thank you.

10 Mr. Kreis. I apologize. I jumped
11 the gun here. I'm going to recognize
12 Commissioner Bailey.

13 CMSR. BAILEY: With all that in
14 consideration, don't you think it's incumbent
15 on us when we're looking at the public
16 interest to understand whether each term of
17 the settlement agreement is meaningful or
18 not?

19 MS. HOLAHAN: I think you can
20 determine whether the term is meaningful
21 without looking at the books and records. I
22 think that there is public interest that goes
23 well beyond. In terms of energy policy, that
24 should be the primary focus of what is in the

1 public interest. And the legislature
2 determined that that paramount interest is
3 the continued viability of this plant. And
4 whether -- for energy and economic reasons
5 within the state. And that is the context in
6 which I think the public interest
7 determination should be viewed.

8 CMSR. BAILEY: Then why is that
9 term in the settlement agreement?

10 MS. HOLAHAN: The books and
11 records?

12 CMSR. BAILEY: No, the term that
13 says in the fourth year the cap will -- for
14 illustrative purposes, the \$60,000 [sic]
15 would be paid back in the fourth year?

16 MS. HOLAHAN: I think because if we
17 didn't address it in the settlement
18 agreement, it would not have been reflective
19 of the issues that have been at issue in this
20 case. I don't see how we could not have
21 addressed it. It's addressed in the PPA
22 amendment. It's addressed in -- I think it's
23 addressed in Mr. White' testimony. But
24 certainly, I mean, how do we resolve the

1 issue if we don't address that issue?

2 CMSR. BAILEY: Well, I think I hear
3 you say that the argument is that the
4 legislature has made the determination that
5 above all else, and the only thing we need to
6 consider, is that the plant should stay open
7 for another three years. And you put that
8 provision in the settlement agreement. Why,
9 if that's the only thing we need to consider?
10 And you don't have to answer that today.
11 Maybe we can get to that at the hearing.

12 CHAIRWOMAN MARTIN: Okay.

13 Mr. Kreis.

14 MR. KREIS: Thank you, Chairperson
15 Martin.

16 I need to be very careful about
17 what I say for the following reason: I am on
18 occasion accused of signing settlement
19 agreements and then reneging on them. And
20 one of the ways I get accused of reneging on
21 settlement agreements, actually the chief
22 way, maybe even the only way, is I am
23 sometimes accused of taking positions here
24 that are inconsistent with the language in

1 the settlement agreement. And one of the
2 things that we agree to do in settlement
3 agreements is to support them when we present
4 them for consideration by you, the
5 Commissioners. And, you know, there's just
6 very little I can say about this, other than
7 our agreement to the terms of the settlement
8 agreement reflects our assessment of the
9 litigation risk. And by "litigation risk," I
10 mean both the risk of an adverse
11 determination here at the Commission and a
12 risk of an adverse determination at the New
13 Hampshire Supreme Court if any of the terms
14 of SB 577 or any decisions implementing SB
15 577 were ultimately subject to rehearing and
16 appeal.

17 I think that if I were the
18 Commission and I were confronting the
19 question of whether to approve this
20 settlement agreement, and particularly the
21 terms that waive the Commission's opportunity
22 to inspect the books and records, I would do
23 two things: One, I would consider the
24 scenario in which the money is not paid back

1 to ratepayers and essentially assume that
2 that money won't get paid back; and then I
3 would consider the extent to which -- because
4 Burgess Biopower is not a regulated utility
5 and is not a publicly traded corporation, I
6 don't really know how illuminating its books
7 and records would truly be. I mean, they
8 would give you, I think, some kind of
9 accounting snapshot of where the company
10 would like you to think it is right now. And
11 I don't mean to cast aspersions. One thing I
12 can say, having worked on this docket with
13 all of the other parties in the room, is that
14 I think there's a lot of good faith. And I
15 have no reason to doubt the voracity of any
16 representations made to me either on the
17 record or in private. But I don't really
18 know what the financial viability of Burgess
19 Biopower is. And I don't necessarily think
20 that we need to -- I assume that any
21 documents that they might generate in
22 response to a Commission request for
23 financial records would be tailored to make
24 you approve the settlement agreement. So I

1 therefore think the Commission should just
2 approve the settlement agreement.

3 CHAIRWOMAN MARTIN: I'm interested
4 to hear, though, consistent with the other
5 parties, whether you think we can make the
6 public interest finding that we need to
7 without doing that.

8 MR. KREIS: I think that you can
9 for largely the reasons you've already heard.
10 One, I think the legislature has arguably
11 sent you a message via SB 577 that it thinks
12 that continued operation of Berlin Station is
13 super, super important. So important that it
14 is worth the high amount of risk that
15 ratepayers will ultimately bear the financial
16 cost of keeping that plant in business. And
17 I think that -- I think I'm forgetting the
18 second point I was going to make. I think
19 that's essentially what you have to think
20 about.

21 Oh, I also think that we should and
22 can reasonably expect that there will be
23 additional efforts, both at the legislature
24 and outside the legislature, to develop a

1 long-term solution to this problem of how to
2 keep Berlin Station in business because I
3 think it is in the economic interests of that
4 part of the state, maybe even the entire
5 state, to keep that plant in operation. And
6 I think the owners of the plant will face a
7 lot of pressure to figure out a way to ensure
8 their long-term viability.

9 I hope that's helpful.

10 CHAIRWOMAN MARTIN: Yes. Thank
11 you.

12 Okay. We'll move on to Ms. Ross.

13 MS. ROSS: Thank you. I am in much
14 the same position -- Staff, I should say, is
15 in much the same position that the OCA is.
16 We signed the settlement. But I can at least
17 share our thinking in supporting this aspect
18 of the settlement.

19 A couple things to keep in mind:
20 We did not review the books and records of
21 this project when we originally approved it.
22 There is no language in 577 that imposes a
23 separate public interest standard. In fact,
24 it is clear that we are to amend our approval

1 order notwithstanding other legal provisions.

2 The Company -- I'm sorry -- Berlin
3 Station, in its briefs earlier in this
4 docket, argued that the legislative intent
5 with regard to the additional stranded costs
6 that would be -- or the additional
7 over-market costs that would be paid during
8 the three years was that ratepayers would be
9 on the hook for them. And that argument was
10 supported by the fiscal note and some
11 references to the record. Without deciding
12 that issue, we think that's a colorable
13 argument. And what we did in the settlement
14 was to improve that situation and to have
15 Berlin Station on the hook potentially to
16 repay the money. It is a contractual
17 provision. It may or may not be enforceable.
18 But the fact that it exists is an advantage
19 in the future in negotiating with this
20 facility about whether it continues to run.
21 I think it's safe to assume that the facility
22 is not viable if it has to pay market costs.
23 That certainly was the information that was
24 given to the legislature when it enacted 577.

1 So we can't make that factual determination,
2 obviously, without the books and records.
3 But I'm not sure that the Commission needs
4 to, I believe.

5 Again, we signed the settlement
6 because we believe the public interest is
7 very narrowly drawn here, and that having
8 amended our order and approved the amendment,
9 we really are now just looking at whether or
10 not this amended PPA is consistent with our
11 prior amended order and with the legislation.

12 CHAIRWOMAN MARTIN: Thank you.

13 MS. ROSS: Thank you.

14 (Commissioners confer off the record.)

15 CHAIRWOMAN MARTIN: Okay. Thank
16 you, everyone, for answering that difficult
17 question. We have decided that we are going
18 to at this point proceed with the plan to
19 have a hearing on this and that we will -- if
20 we decide to grant expedited review, we will
21 issue a secretarial letter outlining the
22 expectations for the parties' representations
23 at that hearing. And I think with that,
24 unless there are other issues, we will --

1 MR. KREIS: I just want to clarify
2 that, from my perspective, we're not -- I
3 know that the motion pending before you says
4 please give this expedited review. But based
5 on the APA provision that I quoted earlier; I
6 don't think we're actually asking you to
7 expedite anything. I think you have routine
8 authority under the APA and the Commission's
9 rules to go ahead and approve this settlement
10 agreement. I have no problem with coming
11 back for a hearing later this month so that
12 any factual questions or uncertainties can be
13 resolved, but I don't actually think it's
14 expedited. That may be just a little too
15 focused on that one word. But I just wanted
16 to lay that out there.

17 CHAIRWOMAN MARTIN: Does anyone
18 else want to be heard on that?

19 [No verbal response]

20 CHAIRWOMAN MARTIN: Okay. Thank
21 you for that. And with that, we will
22 adjourn.

23 MR. BERSAK: I have one other
24 procedural question. You identified two

1 record requests.

2 CHAIRWOMAN MARTIN: Yes.

3 MR. BERSAK: One regarding
4 residential rate impacts and one for
5 commercial and industrial customers. And
6 then you went on to the third, which you
7 heard input from the various parties here on
8 the record. So are there only two
9 outstanding record requests at this point?

10 CHAIRWOMAN MARTIN: There are
11 currently two. And if there are any
12 additional requests or things that we expect
13 at the hearing, we'll put that in the
14 secretarial letter.

15 MR. BERSAK: Good. We'll take care
16 of them.

17 CHAIRWOMAN MARTIN: Okay. Thank
18 you very much. We're adjourned.

19

20 (Hearing adjourned at 11:00 a.m.)

21

22

23

24

C E R T I F I C A T E

I, Susan J. Robidas, a Licensed Shorthand Court Reporter and Notary Public of the State of New Hampshire, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of these proceedings taken at the place and on the date hereinbefore set forth, to the best of my skill and ability under the conditions present at the time.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action; and further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

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