

1 STATE OF NEW HAMPSHIRE
2 SITE EVALUATION COMMITTEE

3 May 8, 2009 - 1:16 p.m.
4 21 South Fruit Street
5 Suite 10, Room 103 DAY 1
6 Concord, New Hampshire

7 In re: SITE EVALUATION COMMITTEE:
8 Docket No. 2009-01: Public meeting
9 and hearing regarding the Motion for
10 Declaratory Ruling by Campaign for
11 Ratepayers Rights, Conservation Law
12 Foundation, Freedom Logistics, Granite
13 Ridge Energy, Halifax-American Energy,
14 TransCanada Hydro Northeast, and the
15 Union of Concerned Scientists regarding
16 modifications to Merrimack Station
17 Electric Generating Facility.

18 PRESENT: SITE EVALUATION COMMITTEE:
19 Thomas S. Burack, Cmsr. Dept. of Environmental Services
20 (Chairman of SEC - Presiding Officer)
21 Thomas B. Getz, Chrmn. Public Utilities Commission
22 (Vice Chairman of SEC)
23 Graham J. Morrison, Cmsr. Public Utilities Commission
24 Clifton C. Below, Cmsr. Public Utilities Commission
25 Harry T. Stewart, Dir. DES - Water Division
26 Robert Scott, Dir. DES - Air Resources Division
27 George Bald, Cmsr. Dept. of Resources & Econ. Dev.
28 Glenn Normandeau, Dir. N.H. Fish & Game Department
29 Brad Simpkins, Dir. Division of Forests & Lands
30 George Campbell, Cmsr. Dept. of Transportation
31 Brook Dupee Dept. of Health & Human Services
32 Michael Harrington Public Utilities Commission

33 COUNSEL FOR THE COMMITTEE: Michael Iacopino, Esq.

34 COURT REPORTER: Steven E. Patnaude, LCR No. 52

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2 APPEARANCES: Reptg. TransCanada Hydro Northeast:
3 Douglas L. Patch, Esq. (Orr & Reno)
4 Reptg. Freedom Logistics, LLC and
Halifax-American Energy Co., LLC:
N. Jonathan Peress, Esq. (Downs...)
Page 1

5 SEC-0508.txt

6 Reptg. Granite Ridge Energy:

7 Maureen Smith, Esq. (Orr & Reno)

8 Howard M. Moffett, Esq. (Orr & Reno)

9 Reptg. Conservation Law Foundation:

10 Melissa Hoffer, Esq.

11 Kristine E. Kraushaar, Esq.

12 Reptg. Campaign for Ratepayers Rights:

13 Robert Backus, Esq. (Backus, Meyer...)

14 Patrick J. Arnold, Esq.

15 Reptg. Union of Concerned Scientists:

16 James Rubens, Esq.

17 Reptg. Public Service of New Hampshire:

18 Christopher J. Allwarden, Esq.

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24

{SEC 2009-01} [Day 1] {05-08-09}

3

1	I N D E X	
2		PAGE NO.
3	ISSUE RE: STANDING	
4	STATEMENTS BY:	
5	Mr. Patch	14
6	Mr. Allwarden	22
7	QUESTIONS BY:	
8	Cmsr. Below	17, 28
9	Atty. Iacopino	18
	Mr. Harrington	21, 33
	Mr. Allwarden	22

	SEC-0508. txt	
10	Vice Chairman Getz	25
11		
12	MOTION BY VICE CHAIRMAN GETZ TO GRANT THE MOTION FOR A DECLARATORY RULING...	38
13		
14	Second by Dir. Normandeau	38
15	DISCUSSION REGARDING THE MOTION:	
16	Mr. Harrington	38, 48, 49
	Vice Chairman Getz	38, 41, 42, 45, 47, 49
17	Cmsr. Below	40
	Cmsr. Campbell	40, 42, 43, 44, 45, 51
18	Chairman Burack	43
	Dir. Scott	47
19	Dir. Normandeau	49
	Mr. Iacopino	50
20		
21	Motion withdrawn by Vice Chairman Getz	51
22	Second withdrawn by Director Normandeau	51
23		
24		

{SEC 2009-01} [Day 1] {05-08-09}

4

1	I N D E X (Continued)	
2		PAGE NO.
3	MOTION BY VICE CHAIRMAN GETZ TO GRANT THE MOTION FOR DECLARATORY RULING TO THE EXTENT NECESSARY TO DETERMINE WHETHER THE SEC HAS JURISDICTION RELATIVE TO THE INSTALLATION OF SCRUBBER TECHNOLOGY AT MERRIMACK	52
4		
5		
6	SECOND BY CMSR. CAMPBELL	52
7	DISCUSSION ON THE MOTION:	
8	Mr. Harrington	52, 54, 56
	Chairman Burack	53
9	Vice Chairman Getz	55
	Cmsr. Below	55, 56
10	Mr. Dupee	57
11	VOTE TAKEN ON THE MOTION	58
12	FURTHER DISCUSSION BY MEMBERS:	
13	Dir. Normandeau	58
14	STATEMENTS REGARDING REMAINING ISSUES AS CONTAINED IN THE WRITTEN BRIEFS BY:	

15	Mr. Patch	60
16	Ms. Hoffer	68, 132
17	Mr. Al Iwarden	89

18 QUESTIONS BY:

19	Vice Chairman Getz	81, 110
20	Mr. Harrington	83, 108, 118
21	Cmsr. Below	84, 122
22	Atty. Iacopi no	85, 113
23	Mr. Dupee	116
24	Dir. Normandeau	126

{SEC 2009-01} [Day 1] {05-08-09}

5

1 I N D E X (Continued)

2 PAGE NO.

3 DISCUSSION REGARDING PROCEDURE BY:

4	Mr. Harrington	129, 131
5	Chairman Burack	129, 134, 136, 137, 138, 141, 142, 143
6	Mr. Iacopi no	130, 137, 138
7	Cmsr. Below	130
8	Mr. Dupee	132
9	Cmsr. Bal d	136, 138, 139
10	Cmsr. Campbell	136, 137
11	Mr. Al Iwarden	140
12	Mr. Patch	142

13

14

15

16

17

18

19

20

21

22

23

24

{SEC 2009-01} [Day 1] {05-08-09}

6

1	E X H I B I T S		
2	EXHIBIT NO.	D E S C R I P T I O N	PAGE NO.
3	Moving Parties 1	Depiction of Merrimack Station: 2008	63
4	Moving Parties 2	Depiction of Merrimack Station: 2013	63
5			
6	Moving Parties 3	Article from Power Engineering entitled "FGD Wastewater Treatment still has a ways to go" by Dr. Thomas Higgins	81
7			
8	Moving Parties 4	Friends of Pinto Creek, 504 F. 3d 1007	81
9			
10	Moving Parties 5	Letter from EPA to Vermont Agency of Natural Resources (09-16-03)	81
11			
12	PSNH 1	ISO-New England filing by PSNH regarding interconnection capability	105
13			
14	PSNH 2	RESERVED (Re: Committee Report from the N.H. House of Representatives)	118
15			
16	Moving Parties 6	Letter from PSNH to Director Scott (06-07-06)	134
17			
18	Moving Parties 7	Letter from PSNH to Director Scott (01-28-08)	134

19

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

2 CHAIRMAN BURACK: Good afternoon, ladies
3 and gentlemen. We are here today for a public meeting of
4 the New Hampshire Site Evaluation Committee. The Site
5 Evaluation Committee is established by RSA 162-H. The
6 membership of this Committee includes the commissioners or
7 directors of a number of State agencies, as well as
8 specified key personnel from various State agencies. At
9 this point, I will introduce myself, and then ask the
10 other members of the Committee who are sitting today if
11 they would also please introduce themselves. My name is
12 Tom Burack. I serve as Commissioner of the Department of
13 Environmental Services, and, by statute, I also serve as
14 Chair of the Site Evaluation Committee.

15 Why don't we just proceed to my left and
16 go right around.

17 VICE CHAIRMAN GETZ: Tom Getz, Chairman
18 of the Public Utilities Commission and Vice Chair of the
19 Site Evaluation Committee.

20 CMSR. MORRISON: Graham Morrison,
21 Commissioner, PUC.

22 DIR. NORMANDEAU: Glenn Normandeau,
23 Executive Director of New Hampshire Fish & Game
24 Department.

{SEC 2009-01} [Day 1] {05-08-09}

1 DIR. SIMPKINS: Brad Simpkins, Interim
2 Director, Division of Forests and Lands.

3 MR. HARRINGTON: Michael Harrington,
Page 6

4 Staff Engineer, PUC.
5 CMSR. CAMPBELL: George Campbell,
6 Commissioner of New Hampshire Department of
7 Transportation.
8 MR. DUPEE: Brook Dupee, here on behalf
9 of Commissioner Toumpas, Department of Health and Human
10 Services.
11 CMSR. BALD: George Bald, Commissioner
12 of Department of Resources and Economic Development.
13 DIR. STEWART: Harry Stewart, Director
14 of Water Division, New Hampshire Department of
15 Environmental Services.
16 DIR. SCOTT: Bob Scott, Director of Air
17 Resources Division, New Hampshire DES.
18 CMSR. BELOW: Clifton Below, Public
19 Utilities Commissioner.
20 MR. IACOPINO: And, I'm Mike Iacopino,
21 Counsel to the Committee.
22 CHAIRMAN BURACK: And, I'd like to call
23 upon the assistance of the Vice Chair to deal with a
24 matter involving the PUC's designation of their engineer.

{SEC 2009-01} [Day 1] {05-08-09}

9

1 VICE CHAIRMAN GETZ: Yes, one
2 housekeeping issue for the three PUC Commissioners. I
3 move that we designate Michael Harrington as the Staff
4 engineer of the PUC to serve on the Site Evaluation
5 Committee for this docket.
6 CMSR. MORRISON: I second.
7 CMSR. BELOW: I concur.
8 VICE CHAIRMAN GETZ: And the motion

9 carries unanimously.
10 CHAIRMAN BURACK: Very well. Thank you
11 very much. The agenda for today's public meeting includes
12 one matter. The matter has been docketed as Site
13 Evaluation Committee No. 2009-01 and entitled "Motion for
14 Declaratory Ruling Regarding Modification to Merrimack
15 Station Electric Generating Facility". And, I will now
16 open the matter with a brief summary.

17 On March 9, 2009, a pleading entitled
18 "Motion for Declaratory Ruling Regarding Modification to
19 Merrimack Station Electric Generating Facility", which we
20 will refer to as the "Motion", was filed with the
21 Committee. The Motion was filed by the following
22 entities: The Campaign for Ratepayers' Rights,
23 Halifax-American Energy Company, LLC, the Conservation Law
24 Foundation, TransCanada Hydro Northeast, Inc., Freedom

{SEC 2009-01} [Day 1] {05-08-09}

10

1 Logistics, LLC, the Union of Concerned Scientists, and
2 Granite Ridge Energy, LLC. I will refer to these entities
3 as the "Moving Parties". The motion concerns the
4 construction, installation and operation of a wet flue gas
5 desulfurization system (Scrubber System) at the bulk
6 power facility owned by Public Service Company of New
7 Hampshire (PSNH), located in Bow, Merrimack County, New
8 Hampshire, and known as "Merrimack Station". The Moving
9 Parties assert that they have standing to bring the motion
10 before the Committee and ask this Committee to make a
11 declaratory ruling, determining whether the construction,
12 installation and operation of the Scrubber System and
13 associated facilities constitute a sizeable addition to

14 Merrimack Station under RSA 162-H: 5, I, and whether the
15 Scrubber System requires a Certificate of Site and
16 Facility. The Moving Parties also ask the Committee to
17 evaluate whether action should be taken against PSNH under
18 RSA 162-H, Section 19, which provides for penalties for
19 the willful violation of RSA 162-H.

20 On April 1, 2009, PSNH filed a formal
21 objection to the Motion. In its objection, PSNH asserts
22 that the Moving Parties lack standing to bring the motion.
23 PSNH also asserts that RSA 125-0, Sections 11 through 18,
24 that's 2006 New Hampshire Laws, Chapter 105, precludes the

{SEC 2009-01} [Day 1] {05-08-09}

11

1 authority of the Committee to issue a Certificate of Site
2 and Facility. Finally, in its objection, PSNH also
3 asserts that the Scrubber System and associated facilities
4 do not constitute a "sizeable addition" to Merrimack
5 Station. On April 13, 2009, the Moving Parties filed a
6 response to the objection filed by PSNH.

7 The authority for this hearing today
8 stems from our enabling statute, RSA 162-H, Section 4, and
9 from our administrative rules pertaining to requests for
10 declaratory rulings, which is found in the administrative
11 rules under Site, that's S-i-t-e, 203.01.

12 On April 10, 2009, the Committee issued
13 an Order of Notice of Public Hearing and Meeting in this
14 docket. The Order of Notice was published in the Concord
15 Monitor on April 15, 2009, and in the Manchester Union
16 Leader on April 16, 2009. The Order of Notice was also
17 posted on the Committee's website. Other than the parties
18 already mentioned, the Committee has received no petitions

19 from others to intervene in these proceedings.

20 We will proceed today as follows:

21 First, I will take appearances from the parties. We will
22 then permit each side approximately five minutes to
23 address the preliminary issue of standing to bring the
24 Motion. Once the arguments on standing have concluded,

{SEC 2009-01} [Day 1] {05-08-09}

12

1 the Committee will deliberate to determine whether the
2 Moving Parties have standing to proceed. If the Committee
3 determines that the Moving Parties do have standing, we
4 will then move on to the remaining issues.

5 I think we, as a Committee, recognize
6 that the remaining issues involve both legal issues and
7 potentially questions of fact that must be determined from
8 a record. I would like the parties to first address the
9 legal arguments, understanding that we have the Motion,
10 the Objection, and the Response to the Objection, I will
11 ask you to keep your legal arguments to no more than 15 to
12 20 minutes per side. Thereafter, if we determine it to be
13 necessary, we will address the process by which we will
14 take evidence.

15 So, at this point, let us begin by
16 taking appearances from the Moving Parties, and then from
17 Public Service of New Hampshire.

18 MR. PATCH: Good afternoon, Mr.
19 Chairman, members of the Committee. My name is Doug
20 Patch. I'm with the law firm of Orr & Reno. And, I'm
21 appearing here today on behalf of TransCanada Hydro
22 Northeast, Inc.

23 MR. PERESS: Thank you, Mr. Chair.

24 Jonathan Peress, with the law firm of Downs, Rachlin
{SEC 2009-01} [Day 1] {05-08-09}

13

1 Martin, PLLC, appearing today on behalf of Freedom
2 Logistics, LLC, and Halifax-American Energy Company, LLC.

3 MS. SMITH: Good afternoon. Maureen
4 Smith, law firm of Orr & Reno, on behalf of Granite Ridge
5 Energy.

6 MS. HOFFER: Good afternoon. Melissa
7 Hoffer, appearing today on behalf of Conservation Law
8 Foundation.

9 MR. BACKUS: Good afternoon. Bob
10 Backus, of Backus, Meyer & Branch, appearing for the
11 Campaign for Ratepayers' Rights, with Patrick Arnold.

12 MR. ARNOLD: Good afternoon. Patrick
13 Arnold, for the Campaign for Ratepayers' Rights.

14 MS. KRAUSHAAR: Good afternoon.
15 Kristine Kraushaar, appearing as well on behalf of
16 Conservation Law Foundation.

17 MR. MOFFETT: Howard Moffett, from Orr &
18 Reno, representing Granite Ridge Energy.

19 MR. RUBENS: Jim Rubens, for Union of
20 Concerned Scientists.

21 CHAIRMAN BURACK: Thank you. Are there
22 any other parties representing the Moving Parties?

23 (No verbal response)

24 CHAIRMAN BURACK: If not, thank you.

{SEC 2009-01} [Day 1] {05-08-09}

14

1 Attorney Allwarden.

2 MR. ALLWARDEN: Thank you, Mr. Chairman.
3 Chris Allwarden, representing Public Service Company of
4 New Hampshire.

5 CHAIRMAN BURACK: Thank you. Now, I
6 would like to ask if the Moving Parties would present
7 their brief arguments on the standing issue.

8 MR. PATCH: Thank you, Mr. Chairman,
9 members of the Committee. Again, Doug Patch. And, I have
10 been asked to speak on behalf of the Moving Parties this
11 afternoon on the standing issue. In the Moving Parties'
12 determination, the standing issue is really very clear.
13 There is a rule that the Committee has, which has been in
14 effect since last summer, Site 203.01, as the Chairman
15 pointed out. It says very clearly "any person can submit
16 a motion for declaratory ruling". The Moving Parties here
17 happen to be a cross-section of entities with various
18 interests in this matter. We're a group of competitive
19 suppliers, environmental groups, ratepayers, and
20 competitive generators. And, where the rule says "any
21 person", clearly, under New Hampshire law, RSA 21:9, the
22 "person" is defined as including "bodies corporate and
23 politic". So, we don't think there's really any argument
24 as to the fact that we meet the requirement of that rule.

{SEC 2009-01} [Day 1] {05-08-09}

15

1 As we pointed out in our pleadings,
2 "declaratory ruling" is defined in the New Hampshire
3 Administrative Procedures Act as an "agency ruling as to
4 the specific applicability of any statutory provision or
5 any rule or order of the agency". And, that's exactly
6 what we're asking for.

7 As we've also pointed out, this
8 Committee was required to adopt rules, and did so, and was
9 required again, in the Administrative Procedures Act, to
10 adopt a rule that provides for the filing of petitions for
11 declaratory ruling. And, as the Administrative Procedures
12 Act further provides, and as New Hampshire case law
13 provides, a rule has the effect of law. So, we don't
14 think that the Committee can ignore what the rule says.

15 We therefore don't think there's a
16 plausible argument that PSNH has put forward as to why the
17 Moving Parties do not have standing. I also want to note,
18 however, that the process that the Moving Parties have
19 followed here is exactly the way this Committee has
20 addressed similar questions in the past. Up until the
21 time that your rules were adopted, questions about whether
22 a project constituted a "sizeable addition" were handled
23 generally by letter. And, PSNH, in fact, submitted such a
24 letter with regard to Schiller Station.

{SEC 2009-01} [Day 1] {05-08-09}

16

1 Since the adoption of the rules, issues
2 with regard to "sizeable addition" have been handled by
3 motions for declaratory ruling. In fact, I think the
4 first one was last summer, when the Committee had before
5 it a letter from Granite Reliable [Ridge?] Energy with
6 regard to a "sizeable addition" issue. And, the Committee
7 voted, in fact, to treat that as a motion for declaratory
8 ruling.

9 The sections in the law that PSNH cites
10 to to support its argument that the Moving Parties do not
11 have standing are there, we believe, for a different

12 purpose. And, they have been utilized, in fact, in
13 situations like the Lempster Wind Project, where the
14 Committee did not automatically have jurisdiction over a
15 project that was under 30 megawatts. And, therefore, the
16 Committee can take jurisdiction of its own, they can be
17 petitioned by groups of individuals, they can be
18 petitioned by selectmen. There are various procedures
19 there for the petitioning of the Committee. But what we
20 are saying here is that the Committee needs to decide
21 whether this project should be subject to the Committee's
22 own process. We believe, even if the Committee were to
23 determine that we not have standing, that, in fact, the
24 Committee has clearly the authority, and we would argue

{SEC 2009-01} [Day 1] {05-08-09}

17

1 the responsibility, to make the determination as to
2 whether or not this project constitute a sizeable
3 addition.

4 In order, again, to adopt PSNH's
5 argument about standing, we argue you would have to ignore
6 the provisions of your rules. And, so, we think we
7 clearly do have standing. And, even if we don't, if for
8 some reason you make that determination, we would argue
9 that the Committee ought to, of its own responsibility, of
10 its own authority and the law, make this determination.
11 And, clearly, we do have arguments on the other legal
12 issues, but my understanding is that we'll hold those
13 until later.

14 CHAIRMAN BURACK: That's correct. Thank
15 you. Are there questions from the Committee for Attorney
16 Patch? Mr. Below.

17 CMSR. BELOW: Mr. Chairman, isn't
18 "person" also defined in our organizational rules, as well
19 as in RSA 162-H? Isn't that the more applicable
20 definition of "person"?

21 MR. PATCH: I don't have that in front
22 of me, but I have it right here on the table.

23 CMSR. BELOW: Site 102.12 says "person"
24 means "person as defined by RSA 162-H:2, IX, namely, any
{SEC 2009-01} [Day 1] {05-08-09}

18

1 individual, group, firm, partnership, corporation,
2 cooperative, municipality, political subdivision,
3 government agency or other organization", which --

4 MR. PATCH: Which would be broad and
5 encompass clearly the Moving Parties.

6 CMSR. BELOW: Okay.

7 MR. PATCH: So, yes.

8 CHAIRMAN BURACK: Other questions for
9 Attorney Patch? Mr. Iacopino.

10 MR. IACOPINO: Mr. Patch, I'd like you
11 to address in a little more detail please Public Service's
12 argument that the term "petition" and "petitioner" is what
13 drives standing in this matter. They have referenced to
14 two places within our statute, in RSA 162-H, where there
15 are actually definitions of "petition" and "petitioner".
16 I'd like to hear you address that in a little more detail.

17 MR. PATCH: Well, I guess the only thing
18 I would say, I think that's clearly an alternative route.
19 It's generally been used, as I noted before, for other
20 purposes, in other situations. But I don't think, because
21 of the fact that that is there and in the statute means

22 that what the Committee has by rule should be ignored.
23 Seems to me there are two different ways of getting issues
24 before the Committee, and there are two different -- they
{SEC 2009-01} [Day 1] {05-08-09}

19

1 have often times, at least in the history of this
2 Committee, been used, you know, for two different
3 purposes, basically.
4 I think what we're asking here is
5 clearly what the Administrative Procedures anticipated as
6 the purpose of having a rule for declaratory rulings.
7 And, so, I don't think the fact that there are those
8 provisions in the statute in any way preclude the
9 Committee from giving us standing to bring the motion, and
10 certainly don't preclude us, and, in fact, authorize us to
11 be bringing this motion before you today.

12 MR. IACOPINO: Do you think that it is
13 possible legally for the term "petition" or "petitioner"
14 to have more than one definition in the context of an
15 enabling statute and the administrative rules?

16 MR. PATCH: Is it possible to have more
17 than one definition?

18 MR. IACOPINO: Legally, is it?

19 MR. PATCH: Yes. I mean, I guess,
20 although, you know, definitions generally are written in a
21 way where they have one particular definition. But, I
22 mean, this isn't technically a petition, this is a motion
23 that we've submitted. And, it's clearly something that's
24 authorized by your rules. And, again, the rules were

{SEC 2009-01} [Day 1] {05-08-09}

20

1 adopted as you were directed by the Administrative
2 Procedures Act, and your rules have the effect of law.

3 So, I guess I don't see one as precluding the other.

4 I don't think -- I don't think there's
5 any way to argue that, just because there are those
6 provisions with regards to "petition" in the statute means
7 that we don't, therefore, have the ability to be able to
8 bring a motion pursuant to the rules that you adopt.

9 MR. IACOPINO: Well, I think what the
10 Respondent's argument is, and obviously we'll hear from
11 them shortly, is that the statute is going to -- is going
12 to, if there is ambiguity between the statute and the
13 rules, the statute's going to apply, and the statute has a
14 specific definition of what a "petition" is and what a
15 "petitioner" is.

16 MR. PATCH: I guess what I'm saying is,
17 I think you can read the two together and separately. I
18 don't think you, you know, the provisions in the statute
19 that they cite to in some way preempt or invalidate the
20 rule. I think they're two separate procedures, and I
21 think we've clearly followed one of those procedures.
22 And, so, I guess I don't think those provisions in the
23 statute mean we can't bring this petition -- or, this
24 motion, I'm sorry.

{SEC 2009-01} [Day 1] {05-08-09}

21

1 MR. IACOPINO: Thank you.

2 CHAIRMAN BURACK: Other questions?

3 Mr. Harrington.

4 MR. HARRINGTON: Yes. Just I wanted to
5 get comment on another portion of the PSNH's response,

6 when they're talking about that "the plain language of
7 this rule defines and limits the Committee's authority to
8 issue a declaratory ruling to matters within its
9 jurisdiction and not to the threshold question of whether
10 or not a particular matter is or is not within the
11 Committee's jurisdiction."

12 MR. PATCH: Well, clearly, "sizeable
13 addition" is a matter within this Committee's
14 jurisdiction. I mean, it's right in the statute that
15 establishes the Committee, and lays out the framework
16 within it which the Committee operates and imposes the
17 obligations on the Committee. So, I think that's a pretty
18 difficult argument to make, that "sizeable addition",
19 which is the issue we're asking you about, isn't within
20 the Committee's jurisdiction.

21 CHAIRMAN BURACK: Other questions for
22 Attorney Patch?

23 (No verbal response)

24 CHAIRMAN BURACK: None. Thank you very

{SEC 2009-01} [Day 1] {05-08-09}

22

1 much, Attorney Patch.

2 MR. PATCH: Thank you.

3 CHAIRMAN BURACK: I'm going to exercise
4 the Chairman's prerogative here. If anyone, ladies and
5 gentlemen, would like to take off coats or other things to
6 be a little more comfortable in here, it's warm in this
7 room, please don't hesitate to do so, because I'm
8 certainly going to do that. Attorney Allwarden.

9 MR. ALLWARDEN: Yes. Thank you, Mr.
10 Chairman. Depending on how much hotter it gets, I may

11 very well have to take advantage of that offer. Let me
 12 just quickly respond to a few things that Attorney Patch
 13 mentioned while they're fresh in my mind. He's indicated
 14 that the Committee has entertained a number of letters in
 15 the past from various parties, and then motions for
 16 declaratory rulings. But I think what I want to emphasize
 17 to the Committee is that every one of those has been
 18 presented to the Committee by an applicant or an owner or
 19 operator of the facility proposing the addition. And, we
 20 don't have that situation here. So, I think this is a
 21 unique one for purposes of the standing argument.

22 Some of our arguments have already been
 23 touched on, but let me just summarize for you what our
 24 position is on standing. We have objected to the standing

{SEC 2009-01} [Day 1] {05-08-09}

23

1 of these seven organizations to request the declaratory
 2 ruling from the Committee. And, as Attorney Patch
 3 indicated, these parties are relying on Committee Rule
 4 Site 203.01. That rule states that "Any person may submit
 5 a motion for declaratory ruling...on matters within the
 6 Committee's jurisdiction." We think there are two
 7 problems with that approach to this issue.

8 First, the plain language of that rule
 9 limits such motions to matters within the Committee's
 10 jurisdiction. And, of course, in this case, that is
 11 really the question that has yet to be determined. Does
 12 the Committee have or will it take jurisdiction over the
 13 Scrubber Project? The Moving Parties are asking the
 14 Committee to determine whether or not it has any
 15 jurisdiction. So, we believe that reliance on that rule

16 is entirely misplaced by the parties in this proceeding.

17 This is not about the Administrative
18 Procedures Act or challenges to a rule that has the force
19 and effect of law. It's my position that it's just a
20 plain reading of the rule. You read it, that's what it
21 says, and only refers to motions on "matters within the
22 Committee's jurisdiction".

23 Secondly, there are specific provisions
24 of the siting law, RSA 162-H, which themselves dictate the
{SEC 2009-01} [Day 1] {05-08-09}

24

1 procedural basis to raise the question of the Committee's
2 jurisdiction. Under the siting law, I have referred to
3 these provisions in our objection, the procedural
4 mechanism to bring a request to the Committee to rule on
5 the applicability of the siting law or this Committee's
6 jurisdiction to a particular project is by a petition, and
7 a petition, in turn, may only be filed by a petitioner.
8 These are defined terms in the law that governs this
9 Committee's proceedings.

10 And, as the Committee members know, from
11 the Lempster Wind Project, and other matters that have
12 come before them, the class of legally permissible
13 petitioners under your siting law is limited. If you are
14 not the applicant of the proposed project, you have to be
15 either a group of 100 or more registered voters in the
16 host community or the communities or abutting communities
17 involved, or you have to be the Board of Selectmen of the
18 host community or two or more boards of selectmen from
19 abutting communities. This makes a lot of sense, because
20 you would expect that these would be the groups of

21 residents or municipal bodies which the Committee could
22 presume would be directly affected by the siting of the
23 proposed project in that particular Committee -- or,
24 community, excuse me.

{SEC 2009-01} [Day 1] {05-08-09}

25

1 The seven Moving Parties represented
2 here today don't fall into the class of any of those
3 legally allowable petitioners under the siting law. And,
4 I don't think there's any dispute on that. So, while they
5 can tell you they have environmental, special
6 environmental interests or other economic interests in the
7 Scrubber Project, what they can't tell you is that they
8 are "petitioners" that meet the definition under your law.
9 This means they have no legal standing under the siting
10 law to even bring this proceeding. That's why we're
11 asking that the Committee dismiss the motion.

12 One other point I think the Committee
13 needs to keep in mind, that if you allow these parties to
14 make such a filing under that rule, you potentially open
15 the floodgates to anybody at any time seeking a
16 declaratory ruling from the Committee to take jurisdiction
17 over a particular project or addition, because they think
18 they might be harmed by it in some way or because they
19 have an interest in seeing the project stopped or delayed.
20 I'm not sure that that's where the Committee wants to go.

21 Thank you. I can take any questions, if
22 there are any.

23 CHAIRMAN BURACK: Yes. Mr. Getz.

24 VICE CHAIRMAN GETZ: Mr. Allwarden, a

{SEC 2009-01} [Day 1] {05-08-09}

1 couple things. First, when you responded to Mr. Patch at
2 the beginning of your remarks, I think -- it seemed to me
3 you're trying to make the case that, under a declaratory
4 ruling, any person may submit a motion for declaratory
5 ruling, that only a person who's asking if he or she can
6 do something themselves can make such a motion, as opposed
7 to -- I think you're making a distinction here that it's
8 improper for a person to ask the question "can he or she
9 do something?" So, I don't know if you follow that
10 distinction, --

11 MR. ALLWARDEN: I'm trying.

12 VICE CHAIRMAN GETZ: -- but is there any
13 case law that would say that the only appropriate means
14 for a declaratory ruling is if you're asking about
15 yourself, you can't be asking about somebody else?

16 MR. ALLWARDEN: I don't think that's
17 quite what I'm saying, Mr. Chairman. I think that the
18 rule, Site 203.01, talks about "motions" in the context of
19 "matters within the Committee's jurisdiction", and clearly
20 says "any person". And, I think the way you can read that
21 rule, consistent with your sitting law, is that, to the
22 extent the Committee has taken jurisdiction over a
23 particular matter, in a proceeding of some type, certainly
24 a person associated with that proceeding or having an

{SEC 2009-01} [Day 1] {05-08-09}

1 interest in that proceeding may well seek a declaratory
2 ruling from the Committee. But what we've got here is a
3 different situation. We've got a situation where the

4 Committee hasn't made any determination on its
5 jurisdiction yet. And, I think the fundamental question
6 of "does the Committee have or does not have jurisdiction
7 over a particular project or addition?" is really what a
8 petition and the definition of "petitioners" is all about.

9 VICE CHAIRMAN GETZ: Well, I guess
10 putting aside the fact that that -- I think that creates
11 kind of Catch-22 for someone outside of an applicant, it
12 seems to be you're taking the position that a petitioner,
13 a valid petitioner, in submitting a petition, is the
14 exclusive way to get this issue before the Committee.
15 But, when I look at, you know, especially in the
16 "Definitions" section in 162-H:2, and it refers to the
17 "petitioners", in at least three places it sets out an
18 alternative "or which the Committee determines should
19 require a certificate". Are you taking the position that
20 the Committee can't, you know, of its own accord, sua
21 sponte, address these issues?

22 MR. ALLWARDEN: I wouldn't take that
23 position, no. I think the Committee certainly has the
24 authority on its own to entertain jurisdiction over a

{SEC 2009-01} [Day 1] {05-08-09}

28

1 particular facility. There are sections of the siting law
2 that allow for that. So, that's not my -- that's not my
3 argument. But, I think, if you've got somebody outside
4 the Committee, a third party of any type, asking the
5 Committee to exercise jurisdiction over a particular
6 project, then I think they need to fall into that category
7 of "petitioners", or they don't have standing to do it.
8 That's the law.

9 CHAIRMAN BURACK: Thank you. Any
10 questions.

11 CMSR. BELOW: Yes.

12 CHAIRMAN BURACK: Mr. Below.

13 CMSR. BELOW: Thank you. Would you
14 agree that the Moving Parties in this case qualify as
15 "persons" under the definition of our rules in 162-H?

16 MR. ALLWARDEN: I think just about
17 anybody does, yes.

18 CMSR. BELOW: Okay. Do you consider the
19 proposed -- or not "proposed", the scrubber upgrade and
20 the facilities that are subject to the motion, do you
21 consider those to be bulk power facilities, power supply
22 facilities, or energy facilities within the meaning of the
23 statute?

24 MR. ALLWARDEN: Well, Merrimack Station
{SEC 2009-01} [Day 1] {05-08-09}

29

1 Power Plant certainly is a bulk power supply facility.

2 CMSR. BELOW: Okay. So, the underlying
3 power plant you would agree is, meets that definition?

4 MR. ALLWARDEN: Yes, sir, I would.

5 CMSR. BELOW: And, then, under 162-H: 5,
6 does that not require that sizeable additions to such
7 facilities be required to have certificates?

8 MR. ALLWARDEN: Let me get the statute,
9 if I may, Mr. Commissioner.

10 CMSR. BELOW: 162-H: 5, I and II.

11 MR. ALLWARDEN: I have it. Thank you.
12 Clearly, yes, there's no question that H: 5, I, does give
13 the Commission -- or, does give the Commission -- or,

14 Committee authority over sizeable additions to existing
15 facilities. But I would mention that I think that there's
16 always a question of whether or not there is a sizeable
17 addition.

18 CMSR. BELOW: And, isn't that precisely
19 what the motion for declaratory ruling gets to? The
20 question of whether the improvements that are at issue
21 constitute a sizeable addition or not?

22 MR. ALLWARDEN: The motion definitely
23 raises the question, but it's a question of jurisdiction.
24 And, the Committee has not yet, until the Committee

{SEC 2009-01} [Day 1] {05-08-09}

30

1 decides that motion, the Committee has not decided that
2 the Scrubber Project or the project that they're concerned
3 about is subject to the Committee's jurisdiction.
4 Therefore, 203.01 should not be applicable.

5 CMSR. BELOW: So, you're saying that, if
6 something is a sizeable addition, it is subject to our
7 jurisdiction, and would you agree that it doesn't require
8 a petition process to determination that, because it just
9 simply is subject to jurisdiction, if it is a sizeable
10 facility?

11 MR. ALLWARDEN: Well, I think the "if"
12 is the question. Not every addition to a power plant is
13 necessarily going to be "sizeable" and subject to the
14 Committee's jurisdiction.

15 CMSR. BELOW: Right. So, is your
16 argument that, if it is a sizeable addition, it's in our
17 jurisdiction, it requires a certificate, does not require
18 either an Applicant or a petitioning party to determine

19 that, but the question of whether or not it's a sizeable
20 addition or not is not within our jurisdiction?

21 MR. ALLWARDEN: No, that's not quite
22 what I'm saying.

23 CMSR. BELOW: Okay. What are you saying
24 then?

{SEC 2009-01} [Day 1] {05-08-09}

31

1 MR. ALLWARDEN: I think you and I are in
2 agreement, but maybe in different ways. Certainly, the
3 Committee has jurisdiction to decide the question "is
4 there a sizeable addition?" And, if the Committee accepts
5 jurisdiction over that, because it finds that it is a
6 sizeable addition, then the matter is now within the
7 Committee's jurisdiction and subject to the requirements
8 of the Committee, including the need, if necessary, for a
9 Certificate of Site and Facility. But the preliminary
10 threshold question has got to be "is the Committee -- is
11 the siting law applicable to that particular addition to
12 the power plant?" And, I think that's what the siting law
13 tells us must be raised by a petition.

14 CHAIRMAN BURACK: Did you have a
15 follow-up?

16 CMSR. BELOW: Well, I'm confused by that
17 assertion. Because -- just hold on a second. The
18 definition of "petition" refers to a particular proposed
19 bulk power supply facility or energy facility. It doesn't
20 reference "sizeable additions", the definition of
21 "petition". And, there's a separate provision that talks
22 about "sizeable additions to existing facilities" being --
23 as, in fact, requiring a certificate. So, what I'm

24 confused about is your argument that the petition is the
{SEC 2009-01} [Day 1] {05-08-09}

32

1 only way in which we can determine whether or not this is
2 a sizeable addition, when it doesn't even seem to go to
3 sizeable addition, if you grant that the underlying
4 facility meets the definition of a "bulk power supply
5 facility", then the only real question is whether or not
6 it's a sizeable addition, in terms of whether it's subject
7 to -- whether it requires a certificate.

8 MR. ALLWARDEN: That's a subset of the
9 main question, which is, "is the siting law and is this
10 Committee's jurisdiction applicable to the particular
11 addition that's being proposed?" Is it sizeable or not?
12 That's a jurisdictional determination. "Petition", as
13 defined in the statute, refers to a request to the
14 Committee to rule on the applicability of the siting law
15 to a bulk power supply facility or an energy facility.
16 Clearly, Merrimack Station is a bulk power supply
17 facility. And, the question relates to an addition to
18 Merrimack Station. I don't know why that question, the
19 question that's being raised here, is not therefore
20 covered by the definition of "petition", and then they
21 have to be a petitioner to bring it.

22 CMSR. BELOW: Okay, I think I understand
23 your argument.

24 CHAIRMAN BURACK: Mr. Harrington.
{SEC 2009-01} [Day 1] {05-08-09}

33

1 MR. HARRINGTON: Yes. You'll have to
2 bear with me a little bit here, since I'm not a lawyer, so
Page 27

3 I'm just trying to determine what you're trying to say.
4 Going back to the 203.01, you're saying that that doesn't
5 apply here because it's a motion for declaratory judgment
6 to the Site Evaluation Committee on matters within its
7 jurisdiction, and it has not been determined that this
8 matter is within its jurisdiction? Is that what you're
9 saying?

10 MR. ALLWARDEN: That's correct.

11 MR. HARRINGTON: Okay. So, you're
12 saying then, when you go to the law, in 162-H:2, X-a, it
13 says a "'petition" means a request to the Committee to
14 rule on the applicability of this chapter to a proposed
15 bulk power supply facility". Now, we've stipulated, I
16 guess, that it's a bulk power supply facility. So, it's
17 "rule on the applicability of this chapter to the Scrubber
18 Project at Merrimack". And, you're saying that needs to
19 be done via a petition, is that correct?

20 MR. ALLWARDEN: Yes, sir.

21 MR. HARRINGTON: Okay. And, then, you
22 say that "a petition then can only be done as laid out in
23 that same section, in Section XI", which is by the
24 registered voters or selectmen and so forth. And, is that

{SEC 2009-01} [Day 1] {05-08-09}

34

1 correct?

2 MR. ALLWARDEN: That's correct.

3 MR. HARRINGTON: Okay. So, that sort of
4 leaves us then, if the -- your position is, if the
5 registered voters in the town, the host community, or
6 abutting community or the Board of Selectmen or two or
7 more boards of the town or the abutting communities, or

8 the applicant don't file a petition, then there is no way
9 for the Committee to rule on the applicability of this
10 chapter to a particular facility?

11 MR. ALLWARDEN: Basically, that's
12 correct.

13 MR. HARRINGTON: Okay.

14 MR. ALLWARDEN: If the Committee hasn't
15 been asked by those petitioning -- any one of those
16 applicable petitioning parties to rule on a question,
17 unless for some reason the Committee decides on its own to
18 take some action with respect to that, --

19 MR. HARRINGTON: Let's get to that --
20 oh, excuse me.

21 MR. ALLWARDEN: -- that's the analysis.

22 MR. HARRINGTON: And, getting back to
23 the "definition" section, 162-H:2, H:2, I always get these
24 things -- Roman (a), and it goes on to talk about the size

{SEC 2009-01} [Day 1] {05-08-09}

35

1 of an electric generating facility, and at the end it says
2 "or when it receives a petition", as defined in the
3 sections we just referred to, "or which the Committee
4 determines should require a certificate". And, this is
5 where I'm getting a little confused, because we don't have
6 any of these petitions, so there's no request for the
7 Committee to rule on the eligibility of the chapter, in
8 which case I would think they could look at "is it
9 eligible, let's see, does it constitute a "sizeable
10 addition"?"

11 The only way the Committee could do it,
12 in lieu of a petition, is to say "the Committee determines

13 this should require a certificate." So, would they have
14 to make a determination of "sizeable addition" in order to
15 make that or does the Committee have the authority to
16 simply just declare "we want to" -- "we think this should
17 have a certificate"?

18 MR. ALLWARDEN: I think the Committee's
19 authority to determine whether something requires a
20 certificate really is driven -- has to be driven by what's
21 going on, what's the project, what's involved. I think
22 the Committee has jurisdiction over a sizeable addition,
23 if the Committee decides that it's a sizeable addition.
24 But I think you need to make that finding.

{SEC 2009-01} [Day 1] {05-08-09}

36

1 MR. HARRINGTON: Okay. So, under then
2 162-H: 2, II, Roman (a), where you say "which the Committee
3 determines should require a certificate", that would be --
4 the "determine" there would be "determined it to be a
5 sizeable addition", in the case of a modification to an
6 existing facility?

7 MR. ALLWARDEN: Well, the provision that
8 you're sitting to does not really speak to "sizeable
9 additions".

10 MR. HARRINGTON: Right.

11 MR. ALLWARDEN: I think that provision
12 clearly is a definition of what is a "bulk power supply
13 facility", and it contemplates a new facility, and gives
14 guidance to the Committee and to potential applicants
15 that, if you have something like that, it's going to be
16 subject to the Committee's jurisdiction, or, if you choose
17 not to apply to the Committee, the Committee could

18 determine that it's subject to their jurisdiction. The
19 statute that you're referring to does not refer to
20 "sizeable additions". But, if we dovetail it, I think,
21 with the other statute, that says that you need a
22 Certificate of Site and Facility for a sizeable addition,
23 then you have to accept, I think, reasonably, that the
24 Committee, if it so chose, could inquire on its own,

{SEC 2009-01} [Day 1] {05-08-09}

37

1 without a request by anybody, as to whether or not a
2 particular addition to a bulk power supply facility is
3 sizeable.

4 MR. HARRINGTON: Can I just follow up on
5 this? I'm sorry. This will be my last question.

6 CHAIRMAN BURACK: Go ahead. Thank you.

7 MR. HARRINGTON: It goes on from that,
8 "If the Committee determines it should require a
9 certificate consistent with the findings and purposes set
10 forth on RSA 162-H: 1", which is the declaration of
11 purpose, which doesn't mention "sizeable additions" one
12 way or the other. So, is it your opinion that the
13 Committee could determine that a modification requires a
14 certificate clearly just based on 162-H: 1, and would not
15 have to make a ruling on "sizeable additions" one way or
16 the other?

17 MR. ALLWARDEN: Oh, I don't think -- I
18 think the Committee either -- it either has to be a bulk
19 power supply facility subject to the Committee's
20 jurisdiction or it has to be a "sizeable addition". And,
21 obviously, that leaves open the question of what is or is
22 not a "sizeable addition" in any particular case. And,

23 that's exactly the jurisdictional question that's being
24 raised here.

{SEC 2009-01} [Day 1] {05-08-09}

38

1 MR. HARRINGTON: All right. Thank you.

2 CHAIRMAN BURACK: Mr. Getz.

3 VICE CHAIRMAN GETZ: Yes. Mr. Chairman,
4 I'd like to make a motion, and I'm going to phrase it in
5 the alternative: I would move that we grant the motion
6 for a declaratory ruling to the extent necessary to
7 determine whether the Site Evaluation Committee has
8 jurisdiction relative to the installation of scrubber
9 technology at Merrimack or, in the alternative, that the
10 Committee on its own motion determine the extent of its
11 jurisdiction relative to the installation of scrubber
12 technology.

13 CHAIRMAN BURACK: Is there a second to
14 that motion?

15 DIR. NORMANDEAU: I'll second it.

16 CHAIRMAN BURACK: Second by
17 Mr. Normandeau, Director Normandeau. Discussion of the
18 motion? Mr. Harrington.

19 MR. HARRINGTON: Just a question. Could
20 you kind of go over that a little slower? I mean, maybe
21 give a little explanation as to the "either/or" or "which"
22 that you've got in there?

23 VICE CHAIRMAN GETZ: Yes. The purpose
24 of the motion is two parts. One suggests that, in

{SEC 2009-01} [Day 1] {05-08-09}

39

1 reaction to the motion for declaratory ruling, that we --
 2 that we grant that motion, in order that we, but there are
 3 other things in the motion, but we grant the motion as
 4 necessary to make a determination about the extent of our
 5 jurisdiction, which would entail looking at the legal
 6 issues and the factual issues. And, in the alternative,
 7 the motion would entail that we would take jurisdiction or
 8 assert jurisdiction based on our own motion, which -- to
 9 rule on the issue of the extent of our jurisdiction
 10 relative to the scrubber technology.

11 MR. HARRINGTON: And, it's a package
 12 deal. So, I'm not sure, what are we voting on? Both
 13 together or -- I'm not quite following this. We vote on
 14 the first half of it, and, if that doesn't, we vote on the
 15 second half or we vote collectively?

16 VICE CHAIRMAN GETZ: My motion is "vote
 17 on both pieces". And, then, I guess, to the extent some
 18 day that some court of appeals in New Hampshire Supreme
 19 Court were to determine that we were wrong, with respect
 20 to the issue of interpretation of the motion for
 21 declaratory ruling, that it also could look at our
 22 authority to take this matter on our own motion under
 23 advisement.

24 MR. HARRINGTON: So, it's either/or?

{SEC 2009-01} [Day 1] {05-08-09}

40

1 VICE CHAIRMAN GETZ: Yes.

2 MR. HARRINGTON: Now I understand.

3 Thank you.

4 CHAIRMAN BURACK: So, what you're
 5 stating is that we have two different bases for taking

6 jurisdiction of this matter, effectively?

7 VICE CHAIRMAN GETZ: Yes.

8 CHAIRMAN BURACK: Discussion, comment on
9 the motion?

10 (No verbal response)

11 CHAIRMAN BURACK: Any discussion?

12 CMSR. BELOW: Well, I'll just say, Mr.
13 Chairman, I agree. I think it's not really the petition
14 -- the petition is about proposed bulk power facilities
15 and energy facilities, that process. This is not a
16 proposed bulk power supply facility or energy facility.
17 The question is "whether it's a sizeable addition to an
18 existing such facility?" If it is sizeable, then the
19 statute requires a certificate. If it isn't, then it
20 doesn't. So, I think that's the question we should get
21 to, so I would support the motion.

22 CHAIRMAN BURACK: Commissioner Campbell.

23 CMSR. CAMPBELL: Mr. Vice Chairman, I
24 wonder, in the past, absent a motion or a petition, how
{SEC 2009-01} [Day 1] {05-08-09}

41

1 does the Site Evaluation Committee take jurisdiction on a
2 facility, if there is no motion by the Applicant or
3 petition by the -- by any interested party or a motion by
4 an interested party under our rules? In the past, how
5 does -- I mean, do you have a staff that looks at projects
6 and brings it to the Committee? How do you make that
7 determination, absent a motion or a petition, to decide
8 that the Site Evaluation Committee has jurisdiction?

9 VICE CHAIRMAN GETZ: Well, the Site
10 Evaluation Committee is different from other agencies, in

11 the respect that there is no continuing staff.

12 CMSR. CAMPBELL: I understand that.

13 VICE CHAIRMAN GETZ: But, to the extent
14 that matters, you know, become apparent to any member of
15 the Committee, then I suppose -- now, again, this isn't a
16 hypothetical, because we have facts before us in a formal
17 way. If you're asking the question, "if we hadn't got
18 this motion for declaratory ruling, how would we have
19 proceeded?" And, I guess I would turn to counsel, but my
20 view would be anyone of us, I think, could, who are
21 members of the Committee, at a minimum, could make a
22 motion, file something in writing to the Committee asking
23 that the Committee address whatever that issue happened to
24 be. So, I think there is a -- that would be one way of

{SEC 2009-01} [Day 1] {05-08-09}

42

1 doing it.

2 CMSR. CAMPBELL: I understand that. I
3 guess I'd just like to bear in, because I understand what
4 the motion tries to accomplish, and it tries to be a
5 forward-looking motion under appeal. But what I'm -- But
6 what's been presented to us today is a ruling on whether
7 or not these Movants have standing. And, this motion you
8 presented to us, you know, it somewhat sidesteps that,
9 because it adds in the modifier of our ability to bring
10 something forward. And, as a new person, this is the
11 first time I've sat with the Site Evaluation Committee, I
12 want to understand a process. In other words, is that all
13 of a sudden precedential? That we've decided, absent any
14 motion, absent any petition, and absent a process, you
15 know, of determining what projects are about in the State

16 of New Hampshire that we ought to be bringing to us, and
 17 there is no process that I know of, and I haven't heard
 18 one, I'm concerned that, are we then saying -- well, let's
 19 say we put this motion in place, and we vote this in with
 20 that second half, the "or" part, are we then saying that
 21 we need to be having a process of self-determination on
 22 projects across the state? That's my question.

23 VICE CHAIRMAN GETZ: And, I guess I
 24 would just say that the second part just recognizes our
 {SEC 2009-01} [Day 1] {05-08-09}

43

1 authority to do that.

2 CMSR. CAMPBELL: No, I understand we
 3 have the authority. That I understand. But I haven't
 4 gotten back that we've done it as any kind of precedence
 5 or that we have a staff to do it or that we have a process
 6 to do it.

7 CHAIRMAN BURACK: Commissioner Campbell,
 8 I think the question that you raise is an important one.
 9 It, in fact, is a question that I have discussed with the
 10 staff within the Department of Environmental Services,
 11 particularly in light of the fact that, as we are moving
 12 into era in which I think we all recognize there are
 13 likely to be substantially more new energy facilities
 14 proposed or modifications to energy facilities proposed,
 15 we do need to develop a process whereby those of us in
 16 state government who are engaged in this work, including
 17 the work of the Site Evaluation Committee, can, in some
 18 kind of systematic way, be aware of what is occurring out
 19 there. And, if matters are not voluntarily brought to us
 20 by the proponents of projects, we would have some process

21 by which we would determine whether or not we should be,
22 at a minimum, seeking information from them to determine
23 if, in fact, we have jurisdiction. I think that's a
24 process that, as a Committee, we're going to need to

{SEC 2009-01} [Day 1] {05-08-09}

44

1 discuss and really set some -- determine how we want to
2 proceed with that. And, I respectfully suggest that we
3 don't have really the time or we haven't noticed that
4 issue properly for the full Committee to discuss that
5 today, but I think it is a matter that we should take up
6 as a full Committee at a later time.

7 CMSR. CAMPBELL: With the forbearance, I
8 --

9 CHAIRMAN BURACK: Please.

10 CMSR. CAMPBELL: -- just it seems to me
11 that the second half of the motion is precedential. I
12 understand that we have the authority. What I'm saying
13 is, I don't -- we don't have the process and we don't have
14 the tradition or the precedence, would seem to be a better
15 word, and we haven't done it that way before, I understand
16 that the motion buttresses the first part of the decision,
17 should we be wrong. I just want it clear to me what I'm
18 voting on. And, you're confirming, as Chair, that, if we
19 vote for this motion, we're both determining that the
20 Movants do have standing, which is the first half, and
21 that the second half we're saying is that we're taking
22 jurisdiction in a proactive, selective way by the Site
23 Evaluation Committee. Is that a fair interpretation?

24 CHAIRMAN BURACK: I will ask Vice Chair

{SEC 2009-01} [Day 1] {05-08-09}

1 Getz if he feels that's a fair interpretation?

2 VICE CHAIRMAN GETZ: Well, certainly, I
3 think this is the first time I know of that the Committee
4 would have acted on its own accord. Now, of course, it's
5 phrased in the alternative, in the context of something
6 that's been brought before us through a motion.

7 CMSR. CAMPBELL: Right.

8 VICE CHAIRMAN GETZ: Now, if you're
9 concerned about precedent, as we see in this case and
10 every other case, we see -- the same actions can be argued
11 as precedent for both sides of a proposition. I'm not
12 particularly concerned that we are setting a bad precedent
13 today by taking such an action on this motion. If you are
14 more comfortable that we only act on the first part of the
15 motion, with respect to the -- what's the extent and
16 propriety of a motion for declaratory ruling, that's, you
17 know, another issue. I think the benefit of having it
18 done in the alternative is, to the extent that we were
19 ever found by the Supreme Court to have been wrong on that
20 legal issue, then there would have been a valid legal
21 basis for proceeding on our own motion.

22 CMSR. CAMPBELL: I think, and I'm sorry

23 --

24 CHAIRMAN BURACK: Please.

{SEC 2009-01} [Day 1] {05-08-09}

1 CMSR. CAMPBELL: -- sorry to drag this
2 out on a hot Friday afternoon. But it seems to me we came
3 prepared to vote and to -- to hear testimony and vote and
4 discuss on standing. Now, none of us know how that would

5 go. I think that the -- but the issue of us asserting
6 jurisdiction, you know, is we haven't given, either the
7 Movants or the Respondents or anybody on this Committee
8 time to sort out those things. And, I'm not particularly
9 concerned about precedence, I'm more concerned that, when
10 you do something precedential, that you set up a
11 responsibility. You know, to, especially in a case like
12 this, a responsibility to have a review process in place,
13 as an Evaluation Committee, to look -- how would you have
14 equity, if you don't have a process in place to say that
15 some other project that might be sizeable in a bulk energy
16 plant didn't happen to have a movant or a petitioner come
17 forward, where would we assert the jurisdiction? So,
18 that's my concern. One, that we didn't come here prepared
19 for, I think, the nuances of that alternative motion.
20 And, that's a concern. And, secondly, I don't know what
21 the consequences of voting on that are. I understand what
22 they are legally, to help us, I think. But I don't
23 understand what they are, in terms of our bureaucracy, and
24 which is what we are. And, so, that's a concern of mine.

{SEC 2009-01} [Day 1] {05-08-09}

47

1 And, I guess you've answered my questions. I've raised
2 those concerns. I respect what the motion is trying to
3 accomplish. Appreciate it.

4 CHAIRMAN BURACK: Thank you. Mr. Scott.

5 DIR. SCOTT: A statement and then a
6 question. At least in my view, a ruling on the standing
7 is it's a given or predicated that that assumes we have
8 jurisdiction without making a determination with regard to
9 jurisdiction. It's a condition, in my view. But my

10 question, in any case, is, before we vote on this, could I
11 hear the motion again, since there's been so much
12 discussion, and I would like to have in mind what the
13 motion is.

14 [Court reporter interruption]

15 CHAIRMAN BURACK: Do you have it?

16 VICE CHAIRMAN GETZ: Yes. The motion is
17 that "We grant the motion for declaratory ruling to the
18 extent necessary to determine whether the Site Evaluation
19 Committee has jurisdiction relative to the installation of
20 scrubber technology at Merrimack or, in the alternative,
21 that the Committee on its own motion determine the extent
22 of its jurisdiction relative to the installation of
23 scrubber technology."

24 And, I really didn't think it was that
{SEC 2009-01} [Day 1] {05-08-09}

48

1 complicated, but I guess that's how it rolls.

2 CHAIRMAN BURACK: Director Normandeau,
3 and then Mr. Harrington.

4 DIR. NORMANDEAU: Just to kind of -- I
5 understand what Commissioner Campbell is saying, I think I
6 understood what your motion was saying. And, I'm
7 certainly no lawyer, but, you know, when I seconded it, my
8 thought on this was -- is to simply try to get to what in
9 my mind is the issue, which is "do we have jurisdiction?"
10 or, maybe more accurately, "are we going to take
11 jurisdiction?" You know, we have -- I heard both
12 arguments here. And, it's asserted -- they're circling
13 around. And, so, we're going to stay circling around here
14 all afternoon on the question, I think, of who is --

15 whether there's standing or not. Until we decide the
16 question of "do we even have or are we going to take
17 jurisdiction over the topic?" So, you know, otherwise,
18 that's just going in circles. So, somehow, to get past
19 that point, we need to do something, it seems to me, or
20 we'll be here the rest of the afternoon just arguing those
21 points.

22 CHAIRMAN BURACK: Mr. Harrington.

23 MR. HARRINGTON: Yes. On the second
24 part of the motion, which would be "the Committee is going
{SEC 2009-01} [Day 1] {05-08-09}

49

1 to assert jurisdiction on its own", I'm trying to
2 determine what part of the statute allows us to do that?

3 VICE CHAIRMAN GETZ: I think there is
4 some confusion about "taking jurisdiction", "asserting
5 jurisdiction", because I think that goes to the underlying
6 question of "whether we have jurisdiction?" We either
7 have jurisdiction or we do not. The question is, how do
8 we get to the point where we can make the decision whether
9 we do or not have jurisdiction. And, the second part of
10 the motion was that we -- that we, on our own motion,
11 determine the extent of our jurisdiction, relative to the
12 installation of scrubber technology.

13 Now, if the second part of the motion is
14 causing confusion, I'd be happy to, you know, remove the
15 second part. I thought it was -- I offered it in the
16 hopes that it would ensure the viability of any decisions
17 we make relative to jurisdiction.

18 So, it's, I guess, from my perspective,
19 Mr. Chairman, I don't know how you want to handle this,

20 whether we vote on just the first part or on both parts,
21 I'm -- you know, I really don't feel that strongly on
22 which way we go.

23 CHAIRMAN BURACK: Mr. Harrington.

24 MR. HARRINGTON: Just to follow up, I
{SEC 2009-01} [Day 1] {05-08-09}

50

1 guess, and this is the part I'm trying to get straight.
2 So, what you're saying is the Committee always has the
3 ability to say "Here's an issue. We can deliberate on
4 whether we have jurisdiction over this particular issue or
5 not on their own accord." And, I'm just trying to find
6 where in the statute does the Committee get that authority
7 to say that or is it just standard law practice? I don't
8 know, I'm asking.

9 MR. IACOPINO: Well, I would -- would
10 you like me to draw his attention?

11 CHAIRMAN BURACK: Please.

12 MR. IACOPINO: I would draw your
13 attention, Mr. Harrington, to RSA 162-H, Section, I
14 believe it is 4.

15 MR. HARRINGTON: Powers of the
16 Committee.

17 MR. IACOPINO: Section 4, II: "The
18 Committee shall hold hearings as required by this chapter
19 and such additional hearings as it deems necessary and
20 appropriate". So, the Committee can deem it necessary and
21 appropriate to make a determination of whether or not they
22 should assert jurisdiction in any particular case.

23 MR. HARRINGTON: My question was
24 answered. Thank you. And, I have no further objection to

1 the second part being included then.

2 CHAIRMAN BURACK: Mr. Campbell.

3 CMSR. CAMPBELL: I have a suggestion,
4 which is that we ought to vote on -- we ought to have two
5 motions in front of us, not an alternative motion. But, I
6 think, for clarity, we ought to put a motion of standing
7 before us and vote on that. And, then, since we're
8 convened, if somebody wants to make and second a motion in
9 the alternative, I think they have that as a possibility
10 way to do it. But, absent that, I think --

11 CHAIRMAN BURACK: Would you like to
12 withdraw your motion and we can start afresh?

13 VICE CHAIRMAN GETZ: I'd be happy to
14 withdraw my motion and start over, if it's going to move
15 the discussion along.

16 CHAIRMAN BURACK: Okay. Do you withdraw
17 your second? Director Normandeau withdraws his second to
18 the motion. Do you want to make the motion or,
19 Commissioner Campbell, would you like to make a motion?

20 CMSR. CAMPBELL: Well, I think the first
21 half of the motion, you know, ought to be put forward,
22 which is to determine standing of the Movants. Isn't that
23 what we're here for to begin with? So, I would make that
24 -- you have the language. You know, I think the first

1 half of your motion ought to be brought forward.

2 VICE CHAIRMAN GETZ: Well, the granting

3 of the motion in the first instance doesn't specifically
4 say "standing", it presumes standing. So, I guess I would
5 move that we grant the motion for declaratory ruling to
6 the extent necessary to determine whether the Site
7 Evaluation Committee has jurisdiction relative to the
8 installation of scrubber technology at Merrimack.

9 CMSR. CAMPBELL: Right. Standing of the
10 movant parties. I'd second that.

11 CHAIRMAN BURACK: Okay. We have a
12 motion and a second.

13 MR. HARRINGTON: I have a question.

14 CHAIRMAN BURACK: Mr. Harrington.

15 MR. HARRINGTON: And, my question on
16 this is, getting back to the 162-H:2, the very bottom of
17 the page, X-a, X-a. And, this is the question on the --
18 the ""petition" means a request of the Committee to rule
19 on the applicability of this chapter to a proposed bulk
20 power facility". Are we saying here that it can be done
21 by a declaratory judgment and not just a petition, because
22 that's -- the PSNH argument was that the only way that the
23 Committee can rule on the applicability of this chapter is
24 via a petition, which we don't have. We know that a

{SEC 2009-01} [Day 1] {05-08-09}

53

1 petition wasn't filed. Or, they could simply, under the
2 section that Mr. Iacopino mentioned a few seconds ago,
3 they could ascertain to do it on their own accord. And,
4 the PSNH argument was that that section of the statute
5 superseded the rules in Section 203.01 that permits any
6 person to submit a motion for declaratory judgment from
7 the Site Evaluation Committee on matters within its

8 jurisdiction, because it hasn't been determined to be
9 within its jurisdiction yet. So, that rule doesn't apply.
10 Can anyone clarify that in my mind?

11 CHAIRMAN BURACK: Let me try, if I may,
12 to simplify this. I think there are actually three
13 different ways that a matter can come before the
14 Committee. The first is that there can be a, and can
15 possibly be four, the actual applicant itself can simply
16 file an application for a bulk power facility or the owner
17 of a bulk power facility could come to us and say "We're
18 planning an addition. We need a determination from you as
19 to whether or not this is a sizeable addition and whether
20 we need to have a full hearing on that."

21 Secondly, under 162-H:2, there are
22 provisions for petitioners to ask the Committee to take
23 jurisdiction. Okay? And, as I read the statute, unless
24 I'm missing something, if we, in fact, receive a petition

{SEC 2009-01} [Day 1] {05-08-09}

54

1 that meets the requirements of 162-H:2, XI, (a) through
2 (d), which includes the application filed by the potential
3 applicant, under any one of those circumstances, we must
4 take jurisdiction. Okay?

5 The other way that a matter can come
6 before us is if somebody files a -- and it reads "any
7 person", files a motion for declaratory ruling, now that
8 is not actually asking us to take jurisdiction, a motion
9 for declaratory ruling, which is what we have before us
10 today, is really asking us to determine if we have
11 jurisdiction. And, then, if we have jurisdiction, we make
12 the determination whether we, in fact, are going to

13 exercise that jurisdiction. But, in the first instance, I
14 believe what we've been asked to do here today is to
15 simply make a determination as to whether or not we have
16 jurisdiction. That's the motion that's before us. And,
17 that's how I slice and dice this.

18 MR. HARRINGTON: And, I understand
19 exactly what you're saying. But this is where I have the
20 question. Where the rule says "submit a motion for
21 declaratory judgment for the Committee on matters within
22 its jurisdiction". And, we're saying, it's not within --
23 we haven't determined whether it's in our jurisdiction, so
24 how do you use the rule that says "it's got to be

{SEC 2009-01} [Day 1] {05-08-09}

55

1 something within your jurisdiction to determine if it is
2 in your jurisdiction?"

3 VICE CHAIRMAN GETZ: I think what is
4 within our jurisdiction is to determine whether certain
5 additions are sizeable or not.

6 MR. HARRINGTON: Okay. And, that's what
7 your --

8 VICE CHAIRMAN GETZ: Yes.

9 MR. HARRINGTON: Okay.

10 CHAIRMAN BURACK: Mr. Below.

11 CMSR. BELOW: And, if I may, I don't
12 really see this fitting into the definition of "petition"
13 and "petitioner", because the reference to petition talks
14 about "a request to the Committee to rule on the
15 applicability of this chapter to a particular proposed
16 bulk power supply facility or energy facility". I think,
17 based on both parties' presentation, there's nobody who's

18 asserting that this is a proposed bulk power supply
19 facility or energy facility. Because there's already an
20 existing energy facility, and, under a different part of
21 the chapters, in the normal process for a proposed new
22 facility, there's a different part of the chapter, 122-H: 5
23 [162-H: 5?] that says "sizeable changes or additions to
24 such facility shall be certified pursuant to this

{SEC 2009-01} [Day 1] {05-08-09}

56

1 chapter". So, if something is an energy facility or bulk
2 power supply facility, then a sizeable addition says "it
3 shall be certified pursuant to this chapter". So, the
4 petition for declaratory ruling was whether the proposed
5 modifications or the ongoing modifications constitute a
6 sizeable addition. So, that's why I support the motion
7 with regard to sort of taking jurisdiction, because I
8 think it's fundamentally within our jurisdiction to
9 determine whether something constitutes a sizeable
10 addition within the meaning of the chapter. I don't know
11 who else would do that in the first instance, if we don't.
12 So, that's why I think it makes sense. And, why I think,
13 if they had brought a petition, if they met the petitioner
14 requirements, it would be a question whether they could do
15 it under that process, because it's not a proposed new
16 facility. The question is "whether or not it's a sizeable
17 addition?"

18 MR. HARRINGTON: So, I think what you're
19 saying is, the "proposed" here is the question about
20 whether it qualifies as a bulk power supply facility, and
21 everybody is saying that there's no question about that,
22 in fact, it is a bulk power facility.

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23 CMSR. BELOW: Well, the underlying
24 Merrimack Station is --
{SEC 2009-01} [Day 1] {05-08-09}

57

1 MR. HARRINGTON: Is, right.
2 CMSR. BELOW: -- is a bulk power supply
3 facility, or at least that's what has been recognized by
4 both parties. The underlying facility is. It's existing,
5 so, obviously, it doesn't need a certificate. It's not a
6 proposed new facility. The real question is whether the
7 additions or the modifications constitute sizeable
8 additions within the meaning of the chapter. And, I think
9 that's the question or at least one of the questions we
10 have to get to.

11 MR. HARRINGTON: Thank you. That helps.

12 CHAIRMAN BURACK: If there are no
13 further discussion, I'd like to call -- Mr. Dupee, I'm
14 sorry.

15 MR. DUPEE: Sorry, Mr. Chairman, but
16 thank you for recognizing me. When we started this
17 discussion out, we were hearing from the parties as to
18 their thoughts as to jurisdiction, who might have that,
19 and we heard from one side, and we heard partially from
20 the other side, but I don't think we heard perhaps fully
21 what they had to say. And, I'm not sure maybe they had
22 completed what they had to say to us. But, in the off
23 chance they hadn't, I was wondering if we would wish to
24 hear any further thoughts from the parties, since they

{SEC 2009-01} [Day 1] {05-08-09}

58

1 spent time preparing to talk to us today?

2 CHAIRMAN BURACK: Mr. Allwarden, do you
3 have anything further?
4 MR. ALLWARDEN: I'm all set. Thank you.
5 CHAIRMAN BURACK: You're all set.
6 MR. PATCH: No, sir. Thank you.
7 CHAIRMAN BURACK: Okay. Thank you very
8 much, Mr. Dupee. Let's now just, by show of hands, see
9 how many support the motion.
10 (Show of hands by members.)
11 CHAIRMAN BURACK: Opposed?
12 (Show of hands by members.)
13 CHAIRMAN BURACK: Abstentions?
14 (No show of hands.)
15 CHAIRMAN BURACK: Okay. Thank you. The
16 motion carries. So, we have now taken a -- determined
17 that we have jurisdiction for purposes of determining
18 whether we -- whether this is a sizeable addition or not.
19 And, Mr. Normandeau.
20 DIR. NORMANDEAU: Just a quick question.
21 Because of the way that this, the legislation that
22 prompted the installation of this scrubber, at least from
23 my point view, I'm not prepared to say that "sizeable
24 addition" is the only criterion involved in this instance,
{SEC 2009-01} [Day 1] {05-08-09}

59

1 as to whether or not we have jurisdiction, or at least not
2 in my view. If you understand what I'm saying?
3 CHAIRMAN BURACK: I do. I think it will
4 be important for us to hear the arguments from the parties
5 on the legal issues that they have raised and have a
6 chance to fully --

7 DIR. NORMANDEAU: No, I understand. I'm
8 just saying --

9 CHAIRMAN BURACK: -- to fully question
10 them on those, and then, as a Committee, we can determine
11 if there are any other legal issues that we believe the
12 parties have not raised, but that should be raised, and I
13 think we can get to that at a later time.

14 DIR. NORMANDEAU: Okay.

15 CHAIRMAN BURACK: Before we move off
16 this issue of jurisdiction, does anyone wish to make a
17 motion relating to the second half of Chairman Getz's
18 original motion or are we going to leave that aside for
19 the moment?

20 (No verbal response)

21 CHAIRMAN BURACK: Okay. We will leave
22 it aside for the moment. Let me suggest that we do this.
23 We've all been sitting here for quite a while. Why don't
24 we take a break for roughly 12 minutes or so, and

{SEC 2009-01} [Day 1] {05-08-09}

60

1 reconvene here, by the clock in the back of the room, at
2 25 minutes of 3, if we could. And, at that time, we will
3 ask the parties if they would please to be prepared, in 15
4 or 20 minutes or so each, to make their remaining legal
5 arguments. Thank you.

6 (Whereupon a recess was taken at 2:24
7 p.m. and the hearing reconvened at 2:38
8 p.m.)

9 CHAIRMAN BURACK: Okay. I'd like to
10 resume here, if we could please. And, would like to call
11 upon Attorney Patch or his colleagues to present their

12 legal arguments on all the other matters that you have
13 briefed.

14 MR. PATCH: Thank you, Mr. Chairman,
15 members of the Committee. Melissa Hoffer, from CLF, and I
16 are going to split our time. So, I'm going to try to keep
17 my remarks to under ten minutes. And, I think she'll try
18 to do the same.

19 CHAIRMAN BURACK: Fair enough. And, are
20 these your pictures here?

21 MR. PATCH: Yes.

22 CHAIRMAN BURACK: So, we will mark these
23 eventually, is that your intention?

24 MR. PATCH: Well, that would probably be
{SEC 2009-01} [Day 1] {05-08-09}

61

1 a good idea, I guess, to do that. And, I'll just describe
2 them briefly when I get to them.

3 CHAIRMAN BURACK: Mr. Harrington.

4 MR. HARRINGTON: I just had a question
5 on what we're looking at here, before we go forward here,
6 based on what Commissioner Normandeau said -- or, Director
7 Normandeau. Are we looking at anything as to whether it's
8 jurisdictional or are we looking at whether this
9 constitutes a sizeable addition?

10 CHAIRMAN BURACK: We are hearing legal
11 arguments from the parties on all of the matters that they
12 have briefed.

13 MR. HARRINGTON: Okay.

14 CHAIRMAN BURACK: Okay. So, everything
15 they briefed is what we're now going to hear.

16 MR. PATCH: Okay. Thank you. We
Page 51

17 brought this motion because we believe there's a serious
18 question as to whether the Scrubber Project at Merrimack
19 Station constitutes a sizeable addition. The Site
20 Evaluation law is very clear, as I think you've already
21 noted, that a sizeable addition must be approved by this
22 Committee. And, although there is no definition in the
23 law or your rules about what constitutes "sizeable", the
24 practice has been to ask this Committee for a

{SEC 2009-01} [Day 1] {05-08-09}

62

1 determination of whether a particular project is a
2 sizeable addition, as PSNH did with the Schiller Project
3 and as many other generators have done over the years.
4 From everything that we know about the
5 Scrubber Project, and it hasn't really been a very
6 transparent process to date, we think it certainly sounds
7 like this is a sizeable addition. According to the latest
8 estimates that we know of, this project will cost
9 approximately \$457 million. Although, in fact, it is
10 likely to cost more than that, if that includes the
11 capacity increase that is proposed to be done at the same
12 time. It will significantly increase the footprint of the
13 existing facility. And, in terms of this argument, I
14 would ask you to look at the blow-ups that we have
15 presented to you here, which we obtained, they're public
16 documents, we obtained them I believe from DES. I believe
17 this is the "before" and this is the "after". And,
18 there's a description here in this particular slide of all
19 of the different aspects of it that are being added to the
20 footprint.

21 CHAIRMAN BURACK: Attorney Patch, why
Page 52

22 don't we go ahead now and just mark these exhibits,
23 because I'm sure other folks, you and other folks will
24 want to refer to them in the future.

{SEC 2009-01} [Day 1] {05-08-09}

63

1 MR. PATCH: Exhibit 1 would be the
2 "before" and Exhibit 2 the "after", and I don't know if
3 have "Moving Parties 1" and "Moving Parties 2", or however
4 you would like to --

5 CHAIRMAN BURACK: Why don't we designate
6 them in that fashion. So, "Moving Parties Exhibit 1" will
7 be entitled "Merriack Station: 2008" and "Moving Parties
8 Exhibit 2" will be "Merriack Station: 2013".

9 (The documents, as described, were
10 herewith marked as Moving Parties
11 Exhibit 1 and Moving Parties Exhibit 2,
12 respectively, for identification.)

13 MR. PATCH: As we noted in our
14 pleadings, PSNH itself has referred to this as "an
15 enormous project", and we cited to the legislative history
16 in that. PSNH argued in its objection that RSA 125-0
17 provides language that suggests they do not have to come
18 before you. But, frankly, RSA 125-0 says the opposite.
19 Section 13 says that they "must obtain all necessary
20 approvals". And, clearly, RSA 162-H:5 requires approval
21 for a sizeable addition. So, we don't think their
22 argument holds water.

23 Moreover, PSNH, citing the PUC decision
24 last fall, argued, based on the public interest finding in

{SEC 2009-01} [Day 1] {05-08-09}

64

1 RSA 125-0 that the Legislature had, in essence, already
2 made the finding that this Committee would make, and,
3 therefore, that the Site Evaluation process is precluded
4 by law. However, the findings that this Committee must
5 make, as I'm sure you know, are clearly different than a
6 public interest finding. In fact, they're much more
7 specific.

8 If you look at RSA 162-H:16, IV, there
9 are a number of very specific findings that must be made
10 before a project can proceed. And, we believe the
11 standards in these two laws are very different. We also
12 believe that RSA 125-0 clearly says that the achievement
13 of this requirement, and I'm quoting, "is contingent upon
14 obtaining all necessary permits and approvals from
15 federal, state, and local regulatory agencies and bodies.
16 However," and again I'm still quoting, "all such
17 regulatory agencies and bodies are encouraged to give due
18 consideration to the general court's finding that the
19 installation and operation of scrubber technology at
20 Merrimack Station is in the public interest."

21 Clearly, by law, the Site Evaluation is
22 one of the regulatory bodies that must approve a sizeable
23 addition. Due consideration is to be given to the
24 Legislature's public interest finding, but that does not

{SEC 2009-01} [Day 1] {05-08-09}

65

1 and should not preclude the Site Evaluation Committee from
2 doing its job and looking into whether this addition meets
3 the specific RSA 162-H statutory standards.

4 In our opinion, if this project does not

5 constitute a sizeable addition, then that provision in the
 6 law will have virtually no meaning going forward. And, we
 7 believe, under principles of statutory construction, that
 8 you must give meaning to the provision in RSA 162-H.
 9 Again, under principles of statutory construction, two
 10 statutes are supposed to be read together, not to be read
 11 in a way that would amount to a repeal by implication of
 12 one statute and not, you know, one statute over the other.
 13 If there's a way to read them together, as our Supreme
 14 Court has indicated, then that clearly is the way that you
 15 ought to go. And, when interpreting two statutes that
 16 deal with similar subject matter, it is appropriate and,
 17 in fact, necessary to construe them so they do not
 18 contradict each other, and so they will lead to reasonable
 19 results and effectuate the legislative purpose of this
 20 statute.

21 We don't think see anything in RSA 125-0
 22 that suggests that Site Evaluation Committee approval is
 23 not required. And, we think 162-H is very clear that
 24 sizeable additions require the Committee's approval. The

{SEC 2009-01} [Day 1] {05-08-09}

66

1 explicit purpose of your Committee's enabling statute,
 2 stated in 162-H:1, II, is "all entities planning to
 3 construct facilities in the state", "all entities",
 4 "should be required to provide full and complete
 5 disclosure to the public of such plans." We believe that
 6 provision in the law should and must be effectuated, and
 7 PSNH should be required to live by the same rules as other
 8 owners of electric generating facilities in this state
 9 have.

10 There's a way for you to give due
11 consideration to the Legislature's public interest finding
12 as you go through the process. And, we believe that's
13 what you ought to do. But we do believe that you need to
14 go through the process and make the determination
15 ultimately as to whether or not this project meets the
16 standards in the statute. Even if this Committee were to
17 go through the application process and ultimately
18 determine that the project could go forward, as it has
19 done with other projects of this nature in the past, it is
20 likely that it would impose a number of conditions to
21 ensure that the environment, public health, safety, water
22 quality, air quality, compliance with the state energy
23 policy, decommissioning, and other issues like that, that
24 the Committee typically reviews and is required by law to

{SEC 2009-01} [Day 1] {05-08-09}

67

1 review, are adequately addressed.

2 For example, this Committee's order on
3 the 24-megawatt Lempster Wind Power Project contained
4 numerous conditions pertaining to a number of different
5 issues. Some of those conditions were worked out with the
6 various parties of interest in the case, like the town in
7 which the facility is located, a neighboring town, and
8 Public Counsel. Some of them were conditions recommended
9 by State agencies, some were added by members of the
10 Committee.

11 In the case of a Londonderry gas-fired
12 facility, where the entire 720-megawatt project was built
13 for essentially the same amount as the latest estimate for
14 Merriack Station, there were close to 500 conditions

15 imposed by the Committee.

16 Please do not forgo the opportunity to
17 exercise the oversight that you have been charged with by
18 law. It is this process that gives the public, the
19 neighboring towns, the other interested parties, the
20 opportunity to provide input on the construction of
21 generating facilities in our state. And, if you do not
22 exercise that oversight, PSNH will be allowed to construct
23 this enormous project that will significantly extend the
24 life of the generating facility, I believe it's somewhere

{SEC 2009-01} [Day 1] {05-08-09}

68

1 in the range of at least 15 years, on its own terms,
2 without the benefit of this Committee's input and
3 oversight, and that would be unprecedented in this state.
4 There's nothing in the law that says that the Legislature
5 intended that as an outcome. And, in fact, we submit the
6 law provides just the opposite.

7 MS. HOFFER: Good afternoon, Committee
8 members. Melissa Hoffer, for Conservation Law Foundation.
9 I appreciate the opportunity to speak with you this
10 afternoon. And, I'm going to address some of the
11 pertinent environmental issues related to this matter.
12 You would believe, perhaps, after reviewing PSNH's brief,
13 that the Company has obtained all of the necessary
14 environmental permits that currently are required, and
15 that this Committee's view would therefore be duplicative.
16 But that's not true and it's simply not the case. I'm
17 going to spend a lot of time talking about a specific
18 instance of that to illustrate that point. But the
19 reality of the situation is that the FGD system will

20 result in a discharge of wastewater to the Merrimack River
21 that likely will contain mercury. The Legislature has
22 provided here for consideration of environmental, economic
23 and technical issues in an integrated fashion, and that's
24 what sets this Committee's review apart. It must take

{SEC 2009-01} [Day 1] {05-08-09}

69

1 into consideration the totality of the environmental
2 impacts of this particular project, caused not only by
3 construction, but also by operation, as set forth at RSA
4 162-H:4, and it must consider those in relationship to the
5 economic and technical issues.

6 The Legislature intended, therefore,
7 that this Committee review the substance -- that its
8 review be substantive and that it consider the project as
9 a whole. In other words, the Committee's review here is
10 not satisfied by a mere determination that required
11 permits have been obtained. It's something more than the
12 sum of those parts.

13 Secondly, the Legislature has emphasized
14 the importance of early, full review of environmental
15 consequences in full transparency of the planning process.
16 And, as I walk through a concrete example with you, I
17 think that you will understand why that becomes so
18 important, because it gives this Committee the opportunity
19 to think early on about appropriate conditions that should
20 be put in place with respect to the environmental
21 operations of the project.

22 The Committee has the authority to
23 mandate and take all of the serious environmental impacts
24 into account that are associated with this project. Here

1 again, some of which no agency has yet reviewed, and,
2 importantly, to consider alternatives. That is a mandate
3 that this Committee has. It looks at the impacts, it must
4 consider alternatives, and then it must condition the
5 Company's activities as appropriate.

6 Everybody understands, I think, that the
7 -- and when I refer to "FGD system", I'm speaking about
8 the Flue Gas Desulphurization System, or what we've been
9 referring to here colloquially as the "Scrubber". I think
10 everyone understands that the scrubber technology removes
11 mercury from the air. And, when mercury is removed from
12 the air, it transfers it to another media, and that can be
13 a liquid or a solid waste stream. The FGD system produces
14 wastewater, and wastewater contains mercury.

15 In addition to mercury, there's a fairly
16 complex set of characteristics of this wastewater. And, I
17 want to make sure that we understand what's in it, so I'm
18 going to offer a few technical details. And, I have
19 provided a few articles, if the Committee would like me to
20 submit them, I'm happy to do that as well. In addition to
21 mercury, the FGD wastewater contains the highly toxic
22 metalloid arsenic, which I think everyone understands is a
23 poison, not just for humans, but to other environmental
24 receptors, selenium, boron, cadmium, zinc, iron, aluminum,

1 ammonia, chloride, fluoride, and sulphate. The wastewater
2 also has a high temperature and can reach at points up to
3 140 degrees Fahrenheit.

4 In a 2008 article titled "FGD wastewater
5 treatment still has a ways to go", published in the power
6 industry trade magazine "Power Engineering", Dr. Thomas
7 Higgins has concluded that "mercury is particularly
8 difficult to remove in FGD wastewater due to the high
9 concentrations of chloride, which can form soluble
10 complexes." So, I just want to emphasize again that this
11 is from a trade publication that is widely read throughout
12 the power industry. Yet, given these risks, there has
13 been none, let alone a full or complete disclosure by
14 PSNH, of how it plans to treat this additional discharge
15 associated with the Scrubber Project. There has been no
16 opportunity for any regulator at this point in time to
17 take a look at the environmental impact of this additional
18 discharge. And, PSNH's 29-page objection to the Parties'
19 motion, the FGD System wastewater is not mentioned one
20 time.

21 Despite PSNH's representations that it
22 would submit an application for a discharge permit to the
23 Department of Environmental Services by September of 2008,
24 the Company has not yet done so, nor has it sought to

{SEC 2009-01} [Day 1] {05-08-09}

72

1 amend its National Pollution Discharge Elimination System,
2 or NPDES, permit application, currently pending with the
3 Environmental Protection Agency to include this discharge.
4 That NPDES permit was issued in 1992. It expired in 1997.
5 It has been administratively continued for 12 years.

6 What we do know is that PSNH proposes to
7 discharge wastewater, from which it will be very difficult
8 to remove mercury, to the Merrimack River, which is a

9 river that is impaired from mercury, which is governed by
10 a TMDL, or a Total Maximum Daily Load, which is like a
11 pollution budget for mercury, and which is governed by a
12 fish advisory, due to unacceptably high concentrations of
13 mercury in the tissues of fish that live in the river.

14 PSNH will likely tell the Committee that
15 there is an applicable ambient water quality standard for
16 toxic substances with which it will confirm and that there
17 is no cause for concern, but that's simply not the case.
18 And, there's a couple reasons for that. The first is
19 legal. There was a 2007 9th Circuit decision, Friends of
20 Pinto Creek versus EPA. The citation is 504 F.3d 1007,
21 and I have brought a copy for the Committee today. It's a
22 9th Circuit case from 2007. And, it expressly prohibits
23 EPA from issuing a NPDES permit for a new discharge of
24 wastewater containing a pollutant for which the receiving

{SEC 2009-01} [Day 1] {05-08-09}

73

1 water is impaired. So, that would be our facts here,
2 where we have a receiving water that is impaired for
3 mercury, and PSNH would be seeking a permit to discharge
4 additional mercury to the water, even when a new discharge
5 would be offset by the elimination of an existing
6 discharge, which is a probably particularly pertinent fact
7 for our consideration here. So, under Pinto Creek, PSNH
8 likely would not be able to obtain a permit for any FGD
9 wastewater discharge containing mercury to the Merrimack
10 River.

11 Further, in a 2007 [2003?]
12 correspondence to the Vermont Agency of Natural Resources,
13 EPA has made clear that there are very limited

14 circumstances in which permits for discharges into
15 impaired waters may be issued consistent with respect to
16 federal regulations, and in this instance it was prior to
17 TMDL development. So, technically, a stronger case here,
18 where we do have a TMDL in place. But, in any event,
19 these limited circumstances don't apply here. What those
20 are are where the discharge does not contain the pollutant
21 for which the water is impaired. So, here, the discharge
22 likely would contain mercury, that is the pollutant for
23 which the river is impaired. The second circumstance
24 involving non-bioaccumulative and non-persistent

{SEC 2009-01} [Day 1] {05-08-09}

74

1 pollutants, of course, mercury is highly bio accumulative
2 and quite persistent in the environment. And, the third,
3 where the permit contains effluent limits that are at or
4 below the numeric criteria for a quantification of a
5 narrative water quality criterion for such effluent. I
6 brought a copy of this letter for the Committee as well,
7 and I'm happy to provide that copy.

8 Notwithstanding those legal arguments,
9 because our scientific understanding of FGD wastewater
10 treatment is still evolving, there's no clear established
11 methodology at this time for regulators to translate the
12 existing ambient standards into an adequate end-of-pipe
13 standard. To make that determination, what's going to be
14 necessary in this instance is for a risk assessment,
15 essentially, where regulators are going to need to take
16 into account the risks posed by this additional discharge,
17 taking into account potential impacts on human health and
18 the environment, and in which the State's own legal

19 prohibitions on discharges of toxic substances in
20 concentrations or in combinations that can injure plants,
21 animals, humans, aquatic life, or persist or accumulate,
22 as mercury does, in the environment.

23 You may hear from the Company today as
24 well that the wastewater treatment system design process

{SEC 2009-01} [Day 1] {05-08-09}

75

1 is quite complicated. It is. Another reason why this
2 Committee should assert its jurisdiction now and have the
3 opportunity to understand what the potential impacts are
4 and appropriately condition them. That the scrubber will
5 provide a net benefit. That any mercury discharge to the
6 river will be inconsequential. Under Pinto Creek, there
7 is no de minimis exception. There is no discharge of the
8 constituent for which the water body is impaired.

9 Bottom line is that PSNH has provided no
10 information about the discharge and its environmental
11 impact to relevant agencies, to this Committee, or to the
12 public. And, of course, that's a very important purpose
13 of this process, is for full transparency, for the public
14 to understand the total environmental impacts of this
15 project. So, it's impossible to evaluate at this time
16 what the environmental impact is. And, I think that the
17 Committee can play an extremely important and valuable
18 role in that. The time to assess it is now. It's
19 certainly not after, and, in fairness to the Company, not
20 after the Company has poured into this project the FGD
21 System wastewater treatment facility component itself,
22 millions of dollars, if the determination is going to be
23 ultimately that there's really no adequately protective

24 means for discharging that wastewater into the river.

{SEC 2009-01} [Day 1] {05-08-09}

76

1 Perhaps it's going to be necessary to find an alternate
2 means of disposing the FGD wastewater off-site. So,
3 sooner, rather than later, is the time to start looking at
4 that now. There are ratepayer impacts associated with it
5 as well. Don't want to put a lot of money into developing
6 that, later to find out that we're going to need to spend
7 money to ship it off-site.

8 In the interest of time, I would just
9 like to emphasize that the Committee was mandated to fully
10 review the environmental impact, consider available
11 alternatives before reaching a determination that the
12 project will have no unreasonable adverse effect on air
13 and water quality and the natural environment, as set
14 forth at RSA 162-H:16, IV. And, again, it has the
15 authority to condition approval, the powers are vested in
16 the Committee to ensure transparency of the full
17 consideration of these impacts.

18 An important consideration is that the
19 Committee here has authority to place a condition on the
20 project that does require performance in excess of an
21 applicable environmental compliance standard, and it's
22 done so in the past. I would just provide one example of
23 that for the Committee's consideration.

24 In the Lempster Wind order, dated

{SEC 2009-01} [Day 1] {05-08-09}

77

1 June 28th, 2007, which is docket 206-01 [2006-01?], the

2 Committee required the Company to obtain an Alteration of
3 Terrain Permit, with a redesign for a 25-year storm event.
4 And, that was distinguished from what would typically be
5 required, designed for a regulatory 100-year storm event,
6 to address storm water run-off. This condition, of
7 course, went well beyond the regulatory minimum, and this
8 Committee has the authority to do that.

9 Let's see. A final point, just touching
10 very briefly on air issues, because I think there's
11 already some significant familiarity with those here. We
12 still don't know the exact capacity by which the turbine
13 was expanded last year in 2008. The Company has told the
14 Department of Environmental Services that the MK2 capacity
15 expansion will result in production of an additional 6 to
16 13 megawatts. In a request for an up-rate to the
17 Independent System Operator, it has sought to add an
18 additional 31.75 megawatts for wintertime operation, which
19 would be almost, and, in fact, in excess of the 30
20 megawatt size of some of the other projects that have come
21 before this standing alone. And, it has told this
22 Committee that it will produce up to an additional 17.175
23 megawatts. So, we have three different representations
24 about the capacity expansion to three different regulatory

{SEC 2009-01} [Day 1] {05-08-09}

78

1 agencies. And, that's important, in terms of what the air
2 emissions impact is. We don't really know how much more
3 electricity the plant will produce. We don't really know
4 how much of that will be offset by parasitic load. And,
5 so, we don't really know what the air emissions impact is
6 going to be.

7 Most of the Committee members probably
8 know that EPA has recently initiated an investigation of
9 PSNH to determine whether the Company has violated the
10 Clean Air Act in connection with its Merrimack and
11 Schiller Stations. It's requiring PSNH to provide, and
12 this is the relevant point for this Committee and for the
13 Scrubber Project, information relating to pollution
14 reduction or control measures taken by PSNH "pursuant to
15 legislation enacted by the New Hampshire State
16 Legislature", and has requested that the Company provide
17 an itemized list of capital and recurring operation and
18 maintenance costs associated with implementing those
19 measures. In addition to many other items, PSNH has also
20 been ordered by EPA to provide information on "all life
21 extension or life optimization studies" related to
22 "extending the life of any boiler or boiler component at
23 each facility or increasing operating time and
24 availability". So, clearly, despite DES review, questions

{SEC 2009-01} [Day 1] {05-08-09}

79

1 remain for EPA about the air quality impact of the
2 Scrubber Project and the associated capacity expansion at
3 Merrimack Unit II.

4 So, for these reasons, the parties
5 respectfully request this Committee to exercise its
6 jurisdiction now, at a time when appropriate conditions
7 could be placed on the operations. Thank you.

8 CHAIRMAN BURACK: Thank you very much,
9 Attorney Hoffer. Are there questions that folks have now
10 that they would like to have answered right away, by
11 either Attorney Patch or Attorney Hoffer, before we hear

12 arguments from the other side?

13 MR. HARRINGTON: Just a process
14 question.

15 CHAIRMAN BURACK: Yes, sir.

16 MR. HARRINGTON: I realize it's getting
17 late here, and it's hot. But will we be able to ask
18 questions on this at a later time?

19 CHAIRMAN BURACK: I think we'll hear
20 arguments, and then decide we're going to have to then --
21 we'll have a little time probably to ask some questions.
22 If we determine that we need additional time or if we
23 determine that we need an evidentiary -- effectively, an
24 evidentiary hearing in order to get additional

{SEC 2009-01} [Day 1] {05-08-09}

80

1 information, factual information on the record, relating
2 to the "sizeable addition" issue, we will need to schedule
3 an additional date for further proceedings here. Do you
4 have anything to add to that?

5 MR. IACOPINO: No, I have a question.

6 CHAIRMAN BURACK: Okay. Attorney
7 Iacopi no.

8 MR. IACOPINO: Just for clarity sake,
9 Ms. Hoffer, my notes indicate that during your
10 presentation you mentioned three, three sources of
11 information, one being the Pinto Creek case, which is out
12 of the 9th Circuit, a trade journal article, and a letter.
13 Do you have copies of those to present to the Committee?

14 MS. HOFFER: Yes, I do.

15 MR. IACOPINO: Could you -- Could we
16 have those presented and have them marked please?

17 MS. HOFFER: Yes.

18 CHAIRMAN BURACK: Why don't we mark them
19 as Moving Parties Exhibits 3, 4, and 5, consistent with
20 the order in which Attorney Iacopino listed them. Were
21 there any other documents, Attorney Hoffer or Attorney
22 Patch, that you identified in your arguments?

23 MR. PATCH: No.

24 CHAIRMAN BURACK: Okay. I don't know
{SEC 2009-01} [Day 1] {05-08-09}

81

1 that we necessarily need to get those right now and mark
2 them at this very moment. But, if you have them, that's
3 great, and we'll provide them to Mr. Patnaude.

4 MS. HOFFER: May I approach?

5 CHAIRMAN BURACK: Please do.

6 MS. HOFFER: Thank you.

7 CHAIRMAN BURACK: Thank you very much.

8 (The documents, as described, were
9 herewith marked as Moving Parties
10 Exhibits 3, 4, and 5, respectively, for
11 identification.)

12 CHAIRMAN BURACK: Mr. Getz.

13 VICE CHAIRMAN GETZ: Yes, Mr. Chairman.

14 I have a question for Ms. Hoffer. And, I don't really
15 recall precisely what Mr. Patch indicated would be the
16 separation of issues that he would address and you would
17 address. But is it fair to say that your issues were
18 really not directed to whether we have jurisdiction or not
19 in the first instance, but they seem to be more about the
20 issues that we would consider in a proceeding, if we
21 determine that we had jurisdiction and the Applicant

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22 needed to get a certificate?
23 MS. HOFFER: The issues that I presented
24 today certainly do not relate to the question of whether
{SEC 2009-01} [Day 1] {05-08-09}

82

1 this is a sizeable addition.
2 VICE CHAIRMAN GETZ: Or, whether we have
3 authority in looking at the interaction between RSA 125-0
4 and 162-H?

5 MS. HOFFER: I think that, specifically,
6 with respect to the turbine capacity expansion, and I
7 could speak to you about that, I think there is no
8 plausible basis for you to conclude that you cannot assert
9 jurisdiction to review that. There is no public interest
10 finding in RSA 125-0 with respect to the capacity
11 expansion. And, there is no mandate set forth in that
12 statute for the Company to expand its capacity. There is
13 a mandate to install an FGD System. And, there is
14 precatory language that would permit the Company to expand
15 its capacity to the extent necessary to address parasitic
16 load.

17 MR. PATCH: Mr. Chairman, could I just
18 respond to the Vice Chairman's question as well?

19 CHAIRMAN BURACK: Please.

20 MR. PATCH: We may not have been as
21 clear on this, too, as we would have liked to have been,
22 but I think part of what Ms. Hoffer was trying to address
23 was the response that PSNH gave with regard to the fact
24 that or essentially arguing that they believe that they
{SEC 2009-01} [Day 1] {05-08-09}

83

1 had, through the other permits they obtained, there was no
2 need for this Committee to take jurisdiction, because, in
3 effect, they had already had a review done by all of these
4 other agencies.

5 And, I think part of what she was trying
6 to point out was the fact that, well, there are, in fact,
7 things that have not been reviewed, and would not be
8 reviewed, unless this Committee takes jurisdiction.

9 CHAIRMAN BURACK: Thank you.
10 Mr. Harrington.

11 MR. HARRINGTON: Just a follow-up
12 question. I'm trying to get straight now, based on what
13 was just said. You're saying that the addition of the
14 scrubber constitutes a sizeable addition in and of itself,
15 and also the upgrade to the turbine constitutes a sizeable
16 addition in and of itself or collectively they need to be
17 both considered, or they can be both looked at separately
18 and considered sizeable issues?

19 MS. HOFFER: We have been considering
20 them together as aggregate, and the Company has made
21 representations to various regulatory bodies that the
22 capacity expansion was necessary to accommodate the
23 scrubber installation.

24 MR. HARRINGTON: But you made some point
{SEC 2009-01} [Day 1] {05-08-09}

84

1 about that the turbine upgrade was only mentioned in the
2 law under the fact that they could -- they could upgrade
3 to make -- pick up the parasitic load that the scrubber
4 would consume?

5 MS. HOFFER: And, that was in response
Page 70

6 to the question that I received.
7 MR. HARRINGTON: Okay.
8 MS. HOFFER: But, clearly, there are
9 implications of this project that make it jurisdiction --
10 asserting jurisdiction appropriate here.
11 MR. HARRINGTON: Okay. Again, so,
12 you're saying, collectively, --
13 MS. HOFFER: Yes.
14 MR. HARRINGTON: -- the turbine upgrade
15 and the scrubber together constitute a sizeable addition?
16 MS. HOFFER: Yes.
17 MR. HARRINGTON: Okay. Thank you.
18 CHAIRMAN BURACK: Okay. Thank you. Go
19 ahead.
20 CMSR. BELOW: Thank you, Mr. Chairman.
21 Mr. Patch, in your original brief, on Page 8, or I guess a
22 motion, not really a brief, but, at the top of the page
23 you quote Terry Large as saying "this is a monumental
24 project in terms of size", and then there's a reference to

{SEC 2009-01} [Day 1] {05-08-09}

85

1 Attachment G. And, when I looked at Attachment G, I
2 didn't find that quote. I found a similar one, but
3 slightly different. I just was wondering if that might be
4 an error? What I found in Attachment G is a statement of
5 Mr. Large, as part of a longer sentence, "This is a
6 monumental project in terms of that site". So, is that an
7 error in your original brief?
8 MR. PATCH: I think that is, Mr.
9 Chairman, I apologize -- I mean, Commissioner, and I
10 apologize for that. But I think the legislative history,

11 and I don't know if this is the correct page, I made
12 reference in my argument to the fact that it was described
13 by Mr. Large as a "enormous project". And, if it isn't in
14 this page, and I can't review it that quickly, I'm almost
15 positive it's in the legislative history. And, so, I'd be
16 happy to try to correct the record on that.

17 CMSR. BELOW: Okay. Thank you.

18 CHAIRMAN BURACK: Thank you. Okay,
19 having no further questions at this time -- one question
20 from Mr. Iacopino.

21 MR. IACOPINO: Mr. Patch, I just want to
22 address some of your statutory construction. You argued
23 to us that the two statutes have to be read in conjunction
24 with each other, and, if they can, to be read not to

{SEC 2009-01} [Day 1] {05-08-09}

86

1 contradict each other. Can you tell us what your position
2 with respect to the relative timing of the statutes are?
3 Obviously, 162-H preexisted and was existing at the time
4 that 125-0 was passed by the Legislature. Does that have
5 any effect on your argument?

6 MR. PATCH: I guess only in the sense
7 that, again, the existing statute 162-H, when the
8 Legislature passed 125-0, I mean, you never have two
9 statutes pass at exactly the same point in time anyway.
10 And, so, I think the Supreme Court has been pretty clear
11 that any -- anybody who's interpreting two laws together
12 should go out of their way to try to make the two statutes
13 work together. You know, and they frown upon, you know,
14 making one essentially preempt another. And, so, I think
15 the Committee ought to take pains, and I don't think it

16 really needs to take pains to do this, but I think it
17 ought to be very careful to try to give effect to both
18 statutes.

19 MR. IACOPINO: You also mentioned a
20 couple of times that Public Service should be subjected to
21 the same rules under RSA 162-H that other folks, like your
22 client, are subject to, if they're going to create a
23 sizeable addition to a plant. Are you aware of any other
24 situation where the Legislature has required a specific
{SEC 2009-01} [Day 1] {05-08-09}

87

1 utility or a specific company to undertake a specific
2 project?

3 MR. PATCH: No, I can't honestly say
4 that I am. But, again, I think you need to look at that
5 in the context in which that statute was written. And, I
6 don't think there's anything in that statute that says to
7 this Committee "don't exercise your jurisdiction and don't
8 review a "sizeable addition". "

9 MR. IACOPINO: Right. But what I see in
10 the statute, and I'd like you to address this for the
11 record, is this statute does say that "the Company shall
12 put the scrubber in service before 2013", I believe is the
13 language.

14 MR. PATCH: Yes.

15 MR. IACOPINO: And, I understand your
16 argument that there's a modifying sentence after that.
17 But how should this Committee address that language, that
18 the Company "shall" put this technology into service?

19 MR. PATCH: Well, first of all, I think,
20 if you look at 125-0 as a whole, and I don't have the

21 statute right here in front of me, but there is a
22 provision later in 125-0 that essentially allows PSNH to
23 request a waiver, you know, from DES, if, you know, and
24 there are a number of bases on which they could request

{SEC 2009-01} [Day 1] {05-08-09}

88

1 that. So, the "shall" is qualified by other provisions in
2 125-0. In addition to that, again, if you read the
3 statute as a whole, there are provisions very clearly in
4 125-0 that say that you have to get the approvals of these
5 other state, federal regulatory bodies, and that due
6 consideration is to be given to that public interest
7 finding. But that's a lot different than saying "nobody
8 else needs to approve this. You know, this is over and
9 done with."

10 MR. IACOPINO: What does the word
11 "necessary" mean in that modifying sentence? It says
12 "necessary permits", doesn't it?

13 MR. PATCH: Yes.

14 MR. IACOPINO: Well, what does that
15 mean, from your perspective, we'd like that in the record?

16 MR. PATCH: Well, from my perspective,
17 it means, you know, what's otherwise required by law.
18 And, clearly, under 162-H, it is necessary to obtain a
19 certificate from this Committee if there's a sizeable
20 addition. So, the issue really is, "is this sizeable or
21 not?" Because, if it is, it's necessary under 162-H to
22 get this Committee's approval.

23 CHAIRMAN BURACK: Thank you. Seeing no
24 other questions at this time, and certainly we may have an

{SEC 2009-01} [Day 1] {05-08-09}

1 opportunity for additional questions, I'd like to ask
2 Attorney Allwarden if he would please present his
3 arguments on behalf of Public Service of New Hampshire.
4 MR. ALLWARDEN: Thank you, Mr. Chairman.
5 Let me just dispel one notion that we just heard from
6 Attorney Hoffer. These seven parties have decided, I
7 think for their own convenience, to sort of lump together
8 the Scrubber Project and the Turbine Project. Our
9 position is they're two separate, independent projects.
10 And, frankly, there's a reference to the fact that we've
11 portrayed them as "one dependent on the other", I think
12 that's not -- that's not correct. And, in my arguments on
13 "sizeable addition", which I will get to, I think we'll
14 try and distinguish for the Committee the differences
15 between the two and how the two should be looked at, if
16 they're going to be looked at at all, as independent, in
17 terms of the "sizeable addition" question.

18 Given the time, I've shortened up my
19 remarks, but there is a bit I want to cover, because I
20 think I have a jurisdictional issue here that the
21 Committee needs to focus on first. And, it concerns the
22 applicability of the scrubber law.

23 As many of the Committee members are
24 aware, PSNH has been involved for several years now in the

{SEC 2009-01} [Day 1] {05-08-09}

1 process of compliance with what we're calling the
2 "scrubber law". That's contained in RSA Chapter 125-0.
3 It was enacted into law by the Legislature in 2006. The

4 scrubber law was the end result of a long collaborative
 5 process among various stakeholders in the state,
 6 environmental regulators, the Governor's Office,
 7 legislators, environmental organizations, and PSNH, to
 8 reduce mercury emissions from coal-burning power plants.
 9 The particular emphasis of this effort was PSNH's
 10 Merrimack Station, because of its size and the relative
 11 amount of mercury contained in its emission stream as
 12 compared to other sources.

13 The passage of the scrubber law imposed
 14 upon PSNH a clear and direct mandate. As the owner of
 15 Merrimack Station, PSNH was directed that "it shall
 16 install and have operational scrubber technology to
 17 control mercury emissions at Merrimack Units 1 and 2 no
 18 later than July 1, 2013." This unambiguous direction to
 19 PSNH was supported by a number of purposes and findings
 20 expressly set forth by the Legislature in Section 125-0:11
 21 of the scrubber law. I've set all the -- I've set that
 22 entire section out in our objection, but let me just
 23 review very quickly for the Committee several of those key
 24 findings, because I think it's important that the

{SEC 2009-01} [Day 1] {05-08-09}

91

1 Committee recognize these.

2 First, I'm quoting from Section 11, "It
 3 is in the public interest to achieve significant
 4 reductions in mercury emissions of coal-burning electric
 5 power plants in this state as soon as possible." Second,
 6 "To accomplish this objective, the best known commercially
 7 available technology shall be installed at Merrimack
 8 Station no later than July 1, 2013." Third, "The

9 Department of Environmental Services has determined that
 10 the best known commercially available technology is a wet
 11 flue gas desulphurization system, hereafter "scrubber
 12 technology", as it best balances the procurement,
 13 installation, operation, and planned efficiency costs with
 14 the projected reductions in mercury and other pollutants".
 15 Again, quoting from Section 11, "The installation of
 16 scrubber technology will not only reduce the mercury
 17 emissions significantly but will do so without
 18 jeopardizing electrical reliability and with reasonable
 19 costs to consumers."

20 Again, emphasizing the public interest,
 21 "the installation of such technology is in the public
 22 interest of the citizens of New Hampshire and the
 23 customers of the affected sources." And, lastly, "The
 24 mercury reductions requirements set forth in this

{SEC 2009-01} [Day 1] {05-08-09}

92

1 subdivision represent a careful, thoughtful balancing of
 2 cost, benefits, and technological feasibility and
 3 therefore the requirements shall be viewed as an
 4 integrated strategy of non-severable components."

5 How much clearer could the Legislature
 6 have been? PSNH is directed to proceed and operate -- to
 7 install and operate at Merrimack Station the specified
 8 scrubber technology by a specified date to achieve mercury
 9 -- reductions in mercury emission. That direction is
 10 declared to be in the public interest of the citizens of
 11 New Hampshire, and it's declared to be a careful and
 12 thoughtful balancing of all the costs and benefits.

13 Since the passage of the scrubber law in

14 2006, PSNH began and has been engaged in continuous
15 efforts to design, engineer, permit, procure, and is now
16 in the process of constructing the required scrubber
17 technology at Merrimack Station. It is a project which,
18 at its core, has the purpose of the significant reduction
19 of what we all agree is a harmful pollutant in our
20 environment, mercury, and it is a beneficial pollution
21 control project in the plainest sense.

22 Against this backdrop of the scrubber
23 law and the clearest legislative public interest directive
24 there could be, we now have a motion before you for

{SEC 2009-01} [Day 1] {05-08-09}

93

1 declaratory ruling filed by the seven Moving Parties,
2 which essentially says "Stop what you're doing. PSNH
3 should not have proceeded with the Scrubber Project
4 without first coming to the Site Evaluation Committee for
5 a determination as to whether or not the Scrubber Project
6 amounted to a sizeable addition to PSNH's Merrimack
7 Station." In other words, whether PSNH needed to first
8 get a Certificate of Site and Facility from the Committee
9 to authorize PSNH to install and operate the scrubber at
10 its power plant.

11 As a threshold jurisdictional matter,
12 PSNH maintains that the Committee lacks the jurisdictional
13 authority to consider any aspects of the Scrubber Project
14 in light of the legislative mandates of the scrubber law
15 that I just read to all of you. The basic function and
16 authority of the New Hampshire Site Evaluation Committee
17 is to evaluate the siting of energy and power facilities
18 in this state as required in the public interest. That is

19 clear from the declaration of purposes set forth by the
20 Legislature in the opening provisions of the siting law,
21 RSA 162-H: 1. While the Committee is clearly charged with
22 the responsibility under the siting law to consider a host
23 of factors, orderly development of the region, state
24 energy policy, environmental aspects of a project, in the
{SEC 2009-01} [Day 1] {05-08-09}

94

1 end, the Committee's role is to issue or deny a
2 Certificate of Site and Facility to allow the construction
3 and operation of a particular facility at a particular
4 site in the public interest. The Committee has expressly
5 acknowledged in its past siting decisions that its purpose
6 derives from the public interest requirements set forth in
7 RSA 162-H: 1.

8 PSNH maintains that, in this case, the
9 scrubber at Merrimack Station, the Committee's role, that
10 siting function, that public interest determination has
11 been removed from the jurisdiction of the Committee by the
12 scrubber law. As I've already indicated, the scrubber law
13 mandates, in the public interest, the installation and
14 operation by PSNH of scrubber technology at Merrimack
15 Station by 2013. The scrubber law dictates the public
16 interest siting decision of this Committee by mandating
17 what must be installed, where it must be installed, and
18 when it must be in operation. The Committee's siting
19 role, we would argue to you, has been precluded by
20 specific legislative direction that PSNH proceed to
21 construct and operate the scrubber at Merrimack Station in
22 the public interest.

23 The Moving Parties have contended that

24 PSNH has somehow unilaterally and improperly exempted
{SEC 2009-01} [Day 1] {05-08-09}

95

1 itself from Committee review, by proceeding with the
2 Scrubber Project without first seeking a jurisdictional
3 determination from the Committee. That contention misses
4 the point. PSNH has not unilaterally determined anything;
5 it is following the law. The Scrubber Project is not a
6 voluntary undertaking by PSNH. It is unlike any other
7 discretionary or merchant project which the Committee has
8 considered, whether it's a wind project or anything else.
9 The Legislature, not PSNH, has mandated in the public
10 interest that PSNH install and operate the scrubber. That
11 legislative determination and direction took the entire
12 matter out of the Committee's purview. It renders it
13 unnecessary and inappropriate for the Committee to act
14 here, because the Committee has no authority to act in
15 contravention of the law.

16 I might mention that the Committee is
17 not the first body to deal with this issue. As some of
18 the members of the Committee know, the Public Utilities
19 Commission has already ruled that the scrubber law's
20 specific public interest determination has precluded it
21 from exercising its authority under another statute to
22 decide whether installation of the scrubber at Merrimack
23 is in the public interest. Now, that ruling is under
24 appeal to the Supreme Court, but so far it remains in

{SEC 2009-01} [Day 1] {05-08-09}

96

1 place. And, PSNH has every reason to believe it will stay
2 that way. And, by the way, the State Attorney General's

3 Office filed a brief in that appeal, and they agree with
4 the Public Utilities Commission determination, on behalf
5 of the State.

6 Which brings us to the section that the
7 Moving Parties have referenced in the scrubber law about
8 the need to obtain other permits and approvals. Our
9 position is this: That the Committee's approval of the
10 Scrubber Project was not legally necessary, PSNH maintains
11 that it was not required to seek a Committee
12 jurisdictional determination for review under
13 Section 125-0:13 of the scrubber law. That provision of
14 the scrubber law states that "achievement of the
15 requirement to install and operate scrubber technology at
16 Merrimack's Unit 1 and 2 is contingent upon obtaining all
17 necessary permits and approvals from federal, state, and
18 local agencies and bodies." And, clearly, there are a
19 host of those that are necessary, for purposes of
20 construction, environmental impacts and so forth
21 associated with the project. And, we've gone into all of
22 those in our objection. A public interest siting
23 determination by this Committee is not necessary, because
24 of the scrubber law.

{SEC 2009-01} [Day 1] {05-08-09}

97

1 If I may, Mr. Chairman, I just need a
2 drink?

3 CHAIRMAN BURACK: Please. Take your
4 time.

5 MR. ALLWARDEN: So, that's, in a
6 nutshell, maybe a little more than a nutshell, the
7 argument that we make on jurisdiction. And, I think, if I

8 understood the Committee's direction, I'm prepared to
9 address the question of "sizeable addition" if that is
10 where the Committee wants me to go. But I think the
11 jurisdictional determination up front needs to be made.
12 And, I would advocate that, despite the motion that was
13 just passed, which as I took to address standing, and
14 standing only, the Committee still needs to make the very
15 fundamental determination of whether it has jurisdiction
16 to consider its jurisdiction in light of the scrubber law.

17 So, Mr. Chairman, with your permission,
18 I'll address "sizeable additions", if that's what you'd
19 like?

20 CHAIRMAN BURACK: Why don't you go ahead
21 and address that briefly please. And, I think we all
22 understand that, if we're going to take the "sizeable
23 addition" on, we'll need to have an evidentiary hearing in
24 order to have the facts presented.

{SEC 2009-01} [Day 1] {05-08-09}

98

1 MR. ALLWARDEN: Understood.

2 CHAIRMAN BURACK: Mr. Harrington.

3 MR. HARRINGTON: Just a question. Would
4 it be appropriate to ask a couple of questions now on what
5 he just said or do you want to hold them all till the end?

6 MR. ALLWARDEN: I'll do it either way.
7 Whichever is easier for you.

8 CHAIRMAN BURACK: Why don't we let him
9 make the rest of his argument, and then we'll come back to
10 questions, okay? Mr. Allwarden.

11 MR. ALLWARDEN: Thank you. On the
12 question of "sizeable addition", we would maintain that

13 neither the Scrubber Project nor the Turbine Replacement
14 Project amount to "sizeable addition" subject to your
15 authority. And, we maintain we're not legally obligated
16 to seek a determination with regard to those in the first
17 instance. As we've already talked about, the Committee
18 already does clearly have jurisdiction under the siting
19 law to determine -- to require, excuse me, a Certificate
20 of Site and Facility for sizeable additions to existing
21 facilities. However, there is nothing in the siting law
22 which requires the owner or operator of an existing
23 facility to come to the Committee to request a
24 determination of whether or not a planned addition is a

{SEC 2009-01} [Day 1] {05-08-09}

99

1 sizeable one. And, that appears to be, and is, in fact, I
2 believe what the Moving Parties are suggesting should have
3 been done by PSNH. PSNH had to first come to you to get
4 this determination. But we don't think that's reasonable,
5 we don't think that's legally required. Clearly, there
6 are going to be additions to power plants of many types,
7 of varying scope, and not everyone needs to come to the
8 Committee for a determination. And, we all know that the
9 siting law offers very little guidance, virtually no
10 guidance, on what is or is not a sizeable addition to an
11 existing facility. There is simply no definition of it.
12 So, we are left with applying some common sense to the
13 plain meaning of those words. And, more importantly, I
14 think we have several prior Committee determinations on
15 the subject of "sizeable additions" to draw from. And, in
16 fact, I think both the parties have done just that.

When we look at those prior decisions,
Page 83

18 prior determinations, we see that the Committee I think
 19 has indeed used a common sense approach to basically rule
 20 out an addition as a sizeable addition when there's no
 21 basic siting determination to be made. And, frankly,
 22 that's true in a lot of those types of cases. In other
 23 words, we find pretty consistently that the typical
 24 addition to the power plant facility that the Committee is

{SEC 2009-01} [Day 1] {05-08-09}

100

1 being asked to look at really has no siting option other
 2 than to be sited right where it is. Within the confines
 3 of the existing power plant site, with the existing
 4 footprint of a plant, or on the land and at the location
 5 that is already in use for the existing facility. This is
 6 typically because the proposed addition is tied into or is
 7 an integral part of a plant itself or its function.
 8 Whether it be the turbine replacement at Seabrook that
 9 you've previously considered, the conversion of the wood
 10 burner or the coal-burner to wood over at Schiller,
 11 transmission upgrades by FPL at Seabrook.

12 And, PSNH's Unit 2 turbine replacement
 13 and the scrubber installation are no different. Both of
 14 these projects are located in our Merrimack Station in
 15 Bow. The location where we've had a power plant in
 16 continuous operation since 1960, both are literally at the
 17 site of the power plant itself. The turbine project
 18 replaced the existing Unit 2 turbine in the plant itself.
 19 The Scrubber Project, by its nature as a pollution control
 20 system, has to be placed at the source of the flue gas
 21 stream it is treating in order to achieve its purpose of
 22 reducing mercury emissions. In short, there are no siting

23 options for either of these projects. They have to be
24 where they are at the Merrimack Station site.

{SEC 2009-01} [Day 1] {05-08-09}

101

1 When compared to other factors that the
2 Committee has considered in other determinations, these
3 projects are clearly not sizeable additions. One of these
4 is the expansion of the footprint of the plant. But,
5 again, I'm going to try and treat each one of these
6 separately. The turbine replacement was a change-out of
7 the existing turbine. Resulted in no expansion of the
8 existing footprint of the plant at all. That's no
9 different than the FPL Turbine Replacement Project at
10 Seabrook that the Committee previously determined was not
11 sizeable. The scrubber, because of its function,
12 comprises a number of different component facilities, some
13 of which you see on the charts in front of you. But, as
14 we've pointed out in our objection, even those facilities,
15 when taken together, will represent a very small
16 percentage increase in the total building coverage area as
17 compared to the entire Merrimack site.

18 It's also not at all dissimilar from the
19 wood conversion project at Schiller that we had, which has
20 a number of component facilities. And, if some of you
21 have been out to see that, there's a woodyard and there's
22 a boiler building and there's a wood storage building.
23 So, these types of projects, by their very nature, involve
24 more than just one small, discrete item or facility.

{SEC 2009-01} [Day 1] {05-08-09}

102

1 Another factor the Committee has
2 considered is the projected cost of the project. At
3 slightly more than \$11 million, the turbine replacement
4 costs much less than the cost that the Committee heard
5 with regard to the Schiller wood conversion, 70 million,
6 or the two FPL Seabrook projects, 46 and 38 to 44 million,
7 all of which the Committee found to be not sizeable.

8 Now, there's been a lot of debate about
9 the cost of the scrubber, presently estimated by PSNH at
10 \$457 million. No question a large amount. But I think
11 the Committee needs to recognize that that cost is not
12 within PSNH's control. Because, under the scrubber law,
13 we have to install a particular type of facility at a
14 particular location by a particular date. PSNH is
15 required to install and operate the best known
16 commercially available technology. It's not inexpensive.
17 Keep in mind also that what PSNH ultimately spends on that
18 project will be subject to a prudency review by the Public
19 Utilities Commission. So, the costs of the Project are
20 not going to go unscrutinized. I think one other point to
21 keep in mind on the cost issue is that, in those prior
22 determinations, the Committee has never decided that,
23 based on cost alone, that a project is sizeable.

24 Still another factor, which the

{SEC 2009-01} [Day 1] {05-08-09}

103

1 Committee has considered in past determinations, is
2 generating capacity, we've heard some comments on that.
3 Again, let me take each project discretely and separately.
4 The experience, with regard to the scrubber, there will be
5 no increase in generating capacity. None. In fact, based

6 on a phenomenon known as "parasitic load", which is really
7 the amount of electricity and power it takes to run the
8 components of the project, once it's operational, it's
9 estimated that there will be a decrease in the total
10 megawatt generating output of the power plant.

11 The Unit 2 turbine replacement involved
12 a replacement of the existing turbine with a more energy
13 efficient one. And, as you might expect, we've estimated
14 that those increased energy efficiencies could actually
15 increase the generating capacity of Unit 2. We've
16 estimated that initially at a range of somewhere between 6
17 to 13 megawatts. And, if we translate that to a
18 percentage increase of Unit 2 summer capacity, which is
19 320 megawatts, we're talking about an increase 1.9 to
20 4 percent, much less than the 102 megawatt increase or the
21 6.7 percent increase in generation capacity of the
22 Seabrook Station transmission up-rate project, or, excuse
23 me, turbine up-rate project, which the Committee decided
24 was not sizeable.

{SEC 2009-01} [Day 1] {05-08-09}

104

1 Let me just quickly touch on the fact
2 that the moving parties have pointed to an ISO-New England
3 filing made by PSNH. And, there is some confusion on
4 that, I think. I think the confusion is on their part.
5 If you look at the filing, and I have the folks here who
6 can explain it, if there's questions about it, PSNH has
7 indicated that, for purposes of interconnection approval,
8 we were estimating upwards of a 17.175 megawatt increase.
9 And, that's different than our normal operating capacity
10 increase that we would project. So, yes, we have filed

11 with ISO for that amount. There is not going to be any --
12 we haven't filed for any increase in the winter
13 interconnection capability, just the summer. So, the idea
14 that there's going to be a 28 to 32 megawatt increase, as
15 suggested by these parties, is simply not correct.

16 CHAIRMAN BURACK: Attorney Allwarden, if
17 I may interrupt you for just a moment. Would you have a
18 copy of that ISO-New England filing that we could mark at
19 some point here as "PSNH Exhibit 1"?

20 MR. ALLWARDEN: Yes. I'd be happy to,
21 yes.

22 CHAIRMAN BURACK: Thank you.

23 MR. ALLWARDEN: I don't know if I have
24 the whole thing, but I have the cover sheet that shows

{SEC 2009-01} [Day 1] {05-08-09}

105

1 what we filed for. But, if we don't have it all, and you
2 want it all, I'll make sure we get it to the Committee as
3 a record request.

4 CHAIRMAN BURACK: Very good. Thank you.

5 MR. ALLWARDEN: You're welcome.

6 (PSNH Exhibit 1 reserved.)

7 MR. ALLWARDEN: I'm almost done. And, I
8 appreciate the Committee's patience, but I need to get
9 through this.

10 The last point I want to make on
11 "sizeable additions", I think we find in prior situations
12 where the Committee has considered the question of
13 "sizeable additions" that other regulatory permits and
14 approvals always comes up in some context. The Committee
15 wants to know have they been obtained, will they be

16 obtained, does the Applicant intend to obtain any other
17 permits, and I understand why the Committee would want to
18 know that. Because these are important things that the
19 Committee needs to know, if they're going to say "well,
20 this sizeable addition is not subject to our
21 jurisdiction", they want to make sure that the project
22 doesn't escape the kind of permit and regulatory scrutiny
23 that it ought to.

24 We've presented in our objection a very
{SEC 2009-01} [Day 1] {05-08-09}

106

1 long list and explanation of the many federal, state, and
2 local permits and approvals which PSNH has worked to
3 obtain to allow it to commence construction for the
4 scrubber. A number of those have been issued by members
5 of this, agencies represented by members of this
6 Committee. And, I'm not going to go into each one of
7 them. But the achievement of all those permits has gotten
8 to the point where we're now able to have commenced
9 construction of the project. And, we'll continue to get
10 all additional permits that we need to get as we move
11 along, including operational permits. That's required by
12 the scrubber law. We've done it and we'll continue to do
13 it.

14 Which brings me to the point, this
15 allegation that I think Ms. -- Attorney Hoffer spoke to
16 you about, about wastewater discharge and mercury-laden
17 wastewater discharge, is the way I think they have termed
18 it in their motion. The obvious question is "why would
19 PSNH invest the time and expense of installing a scrubber
20 at that power plant to take the mercury out of the air and

21 discharge it right back into the river?" Does anybody on
22 this Committee really think that's what we're planning to
23 do? It's nonsense.

24 The facts are that we intend to fully
{SEC 2009-01} [Day 1] {05-08-09}

107

1 and properly permit our wastewater discharge from the
2 scrubber operations through the EPA and through DES. And,
3 those permitting efforts are already underway. It's
4 important to recognize that that is an operational permit
5 that's needed, not a construction permit. We've done
6 nothing wrong by commencing construction. And, we intend
7 to and we'll comply fully with the Clean Water Act, the
8 NPDES Program and all applicable discharge standards. The
9 scrubber project includes a new state-of-the-art
10 wastewater treatment facility, which is intended to assure
11 the removal of mercury contaminants from the wastewater
12 discharge stream. The purpose of the scrubber is to
13 collect mercury and get it out and keep it out of the air
14 and the water. That's what we're building. That's what
15 it will achieve. And, there will be no discharge of
16 mercury-laden wastewater into the Merrimack River.

17 To conclude my remarks, we strongly urge
18 the Committee not to take a step that could bring to an
19 abrupt halt a beneficial environmental project, a project
20 that's required by law, and declared to be in the public
21 interest by the State of New Hampshire.

22 That concludes my comments. Thank you,
23 Mr. Chairman.

24 CHAIRMAN BURACK: Thank you very much,
{SEC 2009-01} [Day 1] {05-08-09}

1 Attorney Allwarden. I know we had a few questions folks
2 wished to ask about the first part of your arguments.
3 Mr. Harrington, did you have a question?

4 MR. HARRINGTON: Getting back to the
5 separation of the turbine and the scrubber, you stated
6 that they were "two separate projects". Would the turbine
7 up-rate have been performed without the mandate from RSA
8 125-0 to put in the Scrubber Project?

9 MR. ALLWARDEN: Yes. In fact, my
10 understanding is, it was in the works long before the
11 Scrubber Project law was passed.

12 MR. HARRINGTON: Okay. And, maybe
13 getting to the second part of what you stated, there's
14 been a lot of, obviously, a lot of discussion here as to
15 whether there needed to be a declaratory judgment request
16 by Public Service on this particular project. In the
17 past, on the Schiller Station, you submitted one. It's on
18 the record here that there was two submitted by Florida
19 Power & Light for various projects there. Was this a
20 deliberate decision that Public Service made? Did you sit
21 down and evaluate and specifically analyze this case and
22 come to the conclusion that it was not necessary to seek a
23 declaratory judgment or is it simply something that just
24 didn't happen?

{SEC 2009-01} [Day 1] {05-08-09}

1 MR. ALLWARDEN: No, fundamentally,
2 that's right. I mean, we had in mind, obviously, the
3 scrubber law, and the fact that there's a clear direction
4 that we proceed with it and we install it, and we get it

5 operational by a certain date. And, it was our position
6 and our belief, and still is, that that rendered
7 unnecessary a siting determination, a public interest
8 determination of any kind. That's not to say that we
9 didn't need to get the operational permits, the
10 construction permits that we need from the various
11 federal, state, and local agencies.

12 MR. HARRINGTON: Just one more
13 follow-up?

14 CHAIRMAN BURACK: Please. Go ahead.

15 MR. HARRINGTON: So, when you're talking
16 about the section, I guess, of the -- I guess it's now
17 called the "scrubber law", --

18 MR. ALLWARDEN: 125.

19 MR. HARRINGTON: Yes. Where it makes
20 the statement about "all necessary permits/approvals from
21 state and federal" and whatever, if the Legislature had
22 made a conscious decision at least at that point, they
23 could have eliminated certainly none of the federal
24 requirements, but they could have specifically stated that

{SEC 2009-01} [Day 1] {05-08-09}

110

1 the Site Evaluation Committee approval was not required
2 and put that into statute at that point for this
3 particular project?

4 MR. ALLWARDEN: They could have. They
5 didn't. But they also didn't specify what -- what
6 approvals were or were not necessary. They simply said
7 "We're making this determination. All other necessary
8 approvals still have to be obtained. And, we want all
9 those agencies that have to look at those necessary

10 approvals to give due consideration to our public interest
11 determination." And, I think that's what -- that's what
12 takes it out of this Committee's purview. There's no need
13 for this Committee to look at siting this project at
14 Merri-mack.

15 MR. HARRINGTON: Okay. Thank you.

16 CHAIRMAN BURACK: Mr. Getz.

17 VICE CHAIRMAN GETZ: Thank you, Mr.
18 Chairman. I want to follow up on this issue of "necessary
19 permits and approvals", Mr. Allwarden, because I think
20 that's the pivotal issue. In your objection on April 1,
21 on Page 9, in numbered paragraph 12, you state that "The
22 necessary permits and approvals referenced in the wording
23 of 125-0:13, I, obviously included land use, municipal,
24 environmental, and other construction permits and

{SEC 2009-01} [Day 1] {05-08-09}

111

1 approvals related to design, engineering, construction",
2 etcetera. And, I guess what I'm trying to understand is
3 the argument why some land use permits and approvals are
4 -- you would concede that the Company needs to get, but
5 you contend that the Company doesn't need approval from
6 the Site Evaluation Committee? And, I think -- I believe
7 the Movants point out, in 162-H:1, talks about the Site
8 Evaluation Committee, part of the purpose of this is to be
9 looking at significant aspects of land use planning. So,
10 I need to understand the argument or the rule that
11 determines what's a necessary permit and approval and what
12 is not a necessary permit and approval in this area?

13 MR. ALLWARDEN: Well, we don't -- what
14 we don't see in the scrubber law is any real -- I mean,

15 the scrubber law dictates the type of technology to be
16 used, and it says where you have to do it and when you
17 have to do it by. So, but what it doesn't say is, you
18 know, exactly how it should be built, how it should be
19 designed and constructed and so forth. So, clearly, when
20 I say to the Committee that these other approvals appear
21 to be necessary, I think that's just a fair and reasonable
22 reading of the statute as a whole. There was no direction
23 in 125-0:13 with regard to what those other approvals
24 should be, but there's clearly the word "necessary". So,

{SEC 2009-01} [Day 1] {05-08-09}

112

1 we get to -- there we get to the public interest question
2 under the "necessary" argument, and you have to -- I think
3 you have to look at the type of approval that's being
4 considered. This Committee has to make a public interest
5 determination on siting. That's what the law says, that's
6 what it is. And, the public interest has already been
7 determined. So, I think it's a fair reading of that
8 statute, though no use of the word "unnecessary", to
9 conclude that this Committee's review and approval of the
10 placement of a scrubber at Merrimack is unnecessary.

11 And, I think the Committee needs to look
12 at that argument in the context of the rest of the story.
13 And, the rest of the story, in part, what I've tried to
14 explain to you folks is that we have proceeded
15 nonetheless, and we'll continue to proceed, to get all
16 appropriate land use, environmental, and other permits
17 that relate to the construction, the design, the
18 engineering, the discharges from that scrubber.

19 So, I think, given that, I think the
Page 94

20 Committee, if there's any question about the Committee's
21 jurisdictional "should we or should we not exercise
22 jurisdiction?", I think the fact that we're doing more
23 than representing to you that we will, we've already done
24 it. We've gone out and we've gotten them. And, they have

{SEC 2009-01} [Day 1] {05-08-09}

113

1 been obtained. And, we will continue to obtain all the
2 types of permits and to address the kind of issues that
3 the Committee would otherwise be looking at, if they were
4 to accept review.

5 CHAIRMAN GETZ: Mr. Iacopino, and then
6 Mr. Dupee.

7 MR. IACOPINO: Mr. Allwarden, I guess
8 the question that I have is your company has determined
9 that certain permits are necessary. And, if I understand
10 your argument correctly, you're not telling the Committee
11 that you went out and got these permits gratuitously.
12 You're saying these are permits that we determined were
13 necessary and therefore required by 125-0. Is that right?
14 Am I understand your argument correctly?

15 MR. ALLWARDEN: Well, yes. Clearly, if
16 you're going to, for example, site plan approval by the
17 Town of Bow is necessary in the Town of Bow site plan
18 regulations, it's a necessary approval. It's certainly
19 not an approval that this Committee gets involved in, but
20 it's necessary. It's legally required.

21 MR. IACOPINO: Why wouldn't 125-0
22 preclude the ability of the Town of Bow to require you to
23 file a site plan, just as it precludes, under your
24 argument, the ability of the Site Evaluation Committee to

1 issue a certificate?

2 MR. ALLWARDEN: Well, I think my
3 argument, my preclusion argument is premised on the public
4 interest finding and determination. And, I think, just as
5 the Public Utility Commission authority relates to the
6 public interest under the statute that I alluded to in the
7 previous PUC decision, here the Committee's determination
8 is a public interest determination as well. I think where
9 you have a public interest determination, which is what
10 the Committee's siting authority is all about, then I
11 think that is susceptible to the notion that there is a
12 preclusion here. That the Legislature intended that those
13 types of fundamental public interest determinations need
14 not be made, because we're making it. And, the siting
15 determination -- I mean, the siting aspect of this is
16 directed by the scrubber law as well.

17 MR. IACOPINO: But isn't part of a
18 siting decision that this Committee, the Site Evaluation
19 Committee would make, include, for instance, whether your
20 company has adequate financial, managerial, and technical
21 experience to conduct the construction and operation?

22 MR. ALLWARDEN: That's one of the
23 criteria that has to be looked at, if the Committee
24 accepts jurisdiction.

1 MR. IACOPINO: So, that's not just about
2 siting?

3 MR. ALLWARDEN: Well, it is siting.
4 It's all about the siting -- the siting is the ultimate
5 role of the Committee. Should we allow, in the public
6 interest, this particular facility or this particular
7 addition to the facility to be sited at this location?

8 MR. IACOPINO: Do you agree that --

9 MR. ALLWARDEN: As part of that, you
10 have to consider, I think, a number of factors.

11 MR. IACOPINO: Do you agree that the
12 public interest determination under RSA 369-B made by the
13 PUC is a different public interest determination than made
14 by the Site Evaluation Committee?

15 MR. ALLWARDEN: Well, they are two
16 different statutes. They're clearly a -- They clearly are
17 both public interest determinations. The PUC's authority
18 to look at a modification to a PSNH generating asset as to
19 whether or not it's in the public interest is not at all
20 that different from what the Committee ultimately has to
21 do here. Obviously, it's not exactly the same, but it's
22 still a public interest determination and they share that
23 common feature.

24 CHAIRMAN BURACK: Mr. Dupee.

{SEC 2009-01} [Day 1] {05-08-09}

116

1 MR. DUPEE: Thank you, Mr. Chairman.
2 Attorney Allwarden, it sounds like you're pretty familiar
3 with the scrubber law, RSA 125-0.

4 MR. ALLWARDEN: A little bit.

5 MR. DUPEE: And, are you at all
6 familiar, usually when the House passes a law, it places
7 on the calendar, along with it a description about the

8 Committee has determined that a bill might be handled by
9 the entire body, it's called a "blurb", it's called the
10 "Committee report". Are you familiar with that?

11 MR. ALLWARDEN: Not in this case.

12 MR. DUPEE: Mr. Chairman, I'm just
13 wondering, often times those Committee reports will
14 reflect the thinking of the Committee and what
15 determinations it was thinking at the time, which perhaps
16 the public interest is addressed in there as a resolution
17 to this question.

18 MR. ALLWARDEN: The legislative history
19 are you asking about now?

20 MR. DUPEE: In part, yes.

21 MR. ALLWARDEN: Yes.

22 MR. DUPEE: The history would be broader
23 than my question.

24 [Court reporter interruption]

{SEC 2009-01} [Day 1] {05-08-09}

117

1 MR. DUPEE: My question to the attorney
2 had to do with the so-called "blurb", otherwise known as
3 the "Committee report". Typically, in the House, when a
4 bill is brought forward by a committee, the committee will
5 provide its guidance and recommendation to the full body.
6 So, given the fact that we're wondering what -- how the
7 law was meant to apply to "public interest", my question
8 to the attorney was "does that Committee report shed any
9 light on that topic?" And, I believe his answer back to
10 me was he was "not familiar with it".

11 MR. ALLWARDEN: We haven't cited to it,
12 and I know that folks have looked at that. I'm not

13 certain that there was much that that could add to the
14 debate.

15 MR. DUPEE: Mr. Chairman?

16 CHAIRMAN BURACK: Yes, Mr. Dupee.

17 MR. DUPEE: If we could have a copy of
18 that as part of the record, I would appreciate it.

19 MR. ALLWARDEN: I would be happy to
20 obtain it and provide it.

21 CHAIRMAN GETZ: Okay. Thank you. So,
22 you will provide a copy of the Committee report is
23 specifically what's being requested?

24 MR. ALLWARDEN: To the extent it's there
{SEC 2009-01} [Day 1] {05-08-09}

118

1 and it's available, we'll get it and we'll file it.

2 CHAIRMAN BURACK: Okay. Very good.

3 And, we'll have that marked as "PSNH Exhibit Number 2".

4 (PSNH Exhibit 2 reserved)

5 CHAIRMAN BURACK: Mr. Harrington.

6 MR. HARRINGTON: Yes. Just trying to
7 follow up on Mr. Iacopino's question. Getting to what the
8 Site Evaluation Committee actually finds, you say it's
9 just a public interest standard. But, you know, in
10 162-H:16, the section is called "Findings", and there's a
11 very specific list of things that the Site -- that they
12 "must find that the site and facility", and then there's a
13 list of (a), (b), (c), (d) that has to be met. And, for
14 example, under (b) it says "Will not unduly interfere with
15 the orderly development of the region with due
16 consideration having been given to the views of municipal
17 and regional planning commissions and municipal governing

18 bodies." Now, are you ascertaining that, in the process
19 of writing 125, the Legislature took in the views of the
20 regional planning commissions, for example, or are you
21 saying that their views are no longer required, because
22 125 declared the Scrubber Project to be in the public
23 interest?

24 MR. ALLWARDEN: As we pointed out in our
{SEC 2009-01} [Day 1] {05-08-09}

119

1 objection, we had extensive proceedings at the local
2 level, for various zoning and other site plan and other
3 approvals. And, that process involved a declaration by
4 the Bow Planning Board that this was a project of regional
5 impact, it required notification to a wide range of
6 municipalities besides Bow. It also required PSNH to make
7 presentations to the Southern New Hampshire and the
8 Central New Hampshire Regional Planning Commission. The
9 process that has occurred here has already taken into
10 account all of the comments and all of the views and
11 considerations of those types of commissions and planning
12 bodies and land use bodies, if that's the question.

13 MR. HARRINGTON: Well, I guess I'm not
14 questioning whether those people were consulted, but it
15 says that the Site Evaluation Committee must consult with
16 them and take their views into account. And, my question
17 is, you seem to be saying that, because 125-0 determines
18 this Scrubber Project to be in the public interest, that
19 it's not required for the Site Evaluation Committee to
20 make these specific findings that are required by 162-H.
21 One of which is to check with regional planning
22 commissions, to have -- check and see if there's an

23 unreasonable adverse effect on aesthetics or historic
24 sites, for example. I'm trying to figure how the finding
{SEC 2009-01} [Day 1] {05-08-09}

120

1 of public interest in 125 took that into consideration.
2 Was the Legislature thinking when they wrote that they --
3 we're superseding these requirements in 162-H to check
4 aesthetics and contact regional planning authorities?

5 MR. ALLWARDEN: Well, the only -- the
6 best answer I can give you is that, clearly, the
7 Legislature was thinking that, and making it clear, that
8 the public interest requires this to be installed at this
9 spot by a certain date. And, I can't tell you did they
10 intend to exclude municipal comment, did they intend to
11 exclude those kinds of things that you've pointed out. I
12 think, clearly, the language that "all necessary approvals
13 would be obtained" suggests that they had in mind that
14 there would be other types of construction, design,
15 engineering, operational permits that would be needed, and
16 they weren't saying "you don't need those". But they were
17 saying that "there's an overriding public interest
18 determination that we're making here that ought to dictate
19 what is and what is not necessary." And, that's our
20 position. This is not -- A siting determination by this
21 Committee is not necessary. Now, we can -- and, that's
22 kind of an initial jurisdictional argument that I'm
23 making. And, if the Committee doesn't accept that
24 argument, and moves into the question of "is this or is

{SEC 2009-01} [Day 1] {05-08-09}

121

1 this not a sizeable addition?", then I think it becomes

2 very relevant at that point to look at "well, what has
3 PSNH done?" Has it already gone to regional planning
4 commissions? Has it obtained the kind of input that the
5 Committee might otherwise do? So, I think that's relevant
6 to the "sizeable addition" question for sure. But, in
7 terms of the public interest determination, I think that's
8 a broader jurisdictional preclusion that we're arguing.

9 MR. HARRINGTON: Okay. Again, trying to
10 get a little bit specific, in 162-H, it does start out in
11 the beginning saying that having the Site Evaluation
12 Committee basically establish that it's in the public
13 interest. But, then, it says in particular cases it has
14 to do these, certify these multiple list of things here
15 that have to be determined.

16 MR. ALLWARDEN: And, I agree.

17 MR. HARRINGTON: But you're saying the
18 determination has been precluded or is unnecessary because
19 of the public interest finding in 125-0?

20 MR. ALLWARDEN: Correct.

21 MR. HARRINGTON: Okay. I just wanted to
22 make sure I understood your argument. Thank you.

23 CHAIRMAN BURACK: Okay. Are there any
24 additional questions just to clarify the arguments here,

{SEC 2009-01} [Day 1] {05-08-09}

122

1 because then we need to discuss process from here on this?
2 Mr. Below, and then Mr. Normandeau.

3 CMSR. BELOW: Thank you, Mr. Chairman.
4 Mr. Allwarden, I guess just to clarify that point, you've
5 said repeatedly that the primary purpose of the Site
6 Evaluation Committee is with regard to siting, and we

7 don't need to make a public interest determination,
8 because that's been made. I guess the first question I
9 have is, can you cite any place in 162-H, RSA 162-H, that
10 calls for this Committee to make a public interest
11 determination, using the word "public interest"?

12 MR. ALLWARDEN: Well, 162-H:1 references
13 the public interest nature of the Committee's site
14 evaluation function. That's what we rely on.

15 CMSR. BELOW: But isn't that a statement
16 that the Legislature finds it's in the public interest to
17 have the Site Evaluation Committee do its work?

18 MR. ALLWARDEN: Yes. But it also, I
19 think, defines the Site Evaluation Committee's work as a
20 public interest function and determination. The role, the
21 siting determination that you make is a public interest
22 determination. "Is it in the public interest to site this
23 facility at this place, at this location?"

24 CMSR. BELOW: You've argued both in your
{SEC 2009-01} [Day 1] {05-08-09}

123

1 objection, written objection, and today orally, that the
2 fundamental role of the Siting Committee is to make siting
3 decisions. If really we don't need to make decisions
4 unless it involves -- implicates siting, then why would
5 the statute state that "certificates are required for
6 sizeable additions to existing facilities", when, by
7 definition, an addition to an existing facility is at the
8 site of the existing facility, and doesn't, per se,
9 implicate siting, but something else?

10 MR. ALLWARDEN: Well, I can't -- I can't
11 give you an example of a sizeable addition that might not

12 -- might be so broad, so large, that you're essentially
13 looking at a new siting issue. Maybe Unit 2 at Seabrook,
14 I don't know. But, yes, the statute gives you
15 jurisdiction over sizeable additions. But I still think
16 the function of the Committee is to look at that in the
17 context of a siting question. The Committee is not -- The
18 Committee is not a land use board, it's a siting
19 committee. It has, as its function and its purpose,
20 "okay, what's going to be built, where is it going to be
21 built, and is that a proper siting decision, proper siting
22 consideration?"

23 CMSR. BELOW: On what basis do you argue
24 that this is not a land use board?

{SEC 2009-01} [Day 1] {05-08-09}

124

1 MR. ALLWARDEN: It's not a land use
2 board in the sense that you're not a planning board,
3 you're not a zoning board. You're not -- If you have
4 jurisdiction over an issue, land use issues clearly need
5 to be considered. But it's part of a whole number of
6 issues that you need to be looking at in connection with
7 making a siting decision. But all I meant was the Board
8 -- the Committee is not a land use board.

9 CMSR. BELOW: Well, then what meaning
10 would we give to RSA 162-H:16, I -- oh, I'm sorry, II,
11 that says "a majority vote of the Site Evaluation
12 Committee shall be conclusive on all questions of siting,
13 land use, air, and water quality"?

14 MR. ALLWARDEN: Well, I think that's a
15 legislative judgment. That, if you've looked at all the
16 issues, then there's no need for there to be separate

17 planning board or local land use board review. And, the
18 Committee's criteria for looking at something require that
19 the Committee consider municipal, local land use,
20 municipal considerations and views. So, I think that's a
21 recognition simply that, if the Committee takes
22 jurisdiction over a project, and it's going to get into
23 all the factors that it needs to get into, of necessity,
24 it's going to get into municipal issues, and therefore

{SEC 2009-01} [Day 1] {05-08-09}

125

1 there's no particular reason why there has to be separate
2 land use approvals after the Committee approves it. That
3 doesn't in and of itself make the Committee a land use
4 board.

5 CMSR. BELOW: And, I think you've
6 acknowledged that "necessary permits" that you construe
7 under 125-0 include permits for the construction of the
8 modifications. So, I guess I wonder what meaning you'd
9 also give to the "purpose" statement of 162-H:1, where it
10 says "The Legislature therefore hereby establishes a
11 procedure for the construction of large electric
12 generating facilities", and later, by implication,
13 sizeable additions thereto?

14 MR. ALLWARDEN: It's not an exclusive
15 process. Not every construction project or not every bulk
16 power supply facility is going to be subject to the
17 Committee's jurisdiction. I think that's what we're
18 discussing. Do we have a project that's subject to the
19 Committee's jurisdiction? If you make a determination
20 that it is, then all of these factors are relevant. What
21 I'm saying is, before you get to that, I'm asking that the

22 Committee look at the overall question "does it have
23 jurisdiction to get into this question, given the scrubber
24 law?"

{SEC 2009-01} [Day 1] {05-08-09}

126

1 CHAIRMAN BURACK: Thank you.

2 Mr. Normandeau.

3 DIR. NORMANDEAU: Just a quick question.
4 Given the scrubber law, which appears to be unique, if I'm
5 not mistaken, in this whole situation, since I'm
6 relatively new here. If this went through this Committee,
7 and this Committee makes such determinations that you were
8 financially incapable or could not manage the project,
9 etcetera, etcetera, what would be the consequences, based
10 on the fact that the scrubber law exists and you're still
11 being mandated to put this in by a certain date and time,
12 etcetera?

13 MR. ALLWARDEN: Well, I mean, I think
14 you've hit the nail on the head. We're mandated, we're
15 required by law to install it. I must honestly say I
16 haven't thought out the consequences of another
17 determination that says "we can't install it for some
18 reason." There would be -- There would be a problem.

19 DIR. NORMANDEAU: That's all.

20 CHAIRMAN BURACK: Okay. Thank you. Not
21 seeing any additional questions at this time for Mr.
22 Allwarden, thank you again very much, Attorney Allwarden.

23 MR. ALLWARDEN: Thank you.

24 CHAIRMAN BURACK: We have now heard

{SEC 2009-01} [Day 1] {05-08-09}

127

1 legal arguments. We've had a chance to ask questions of
 2 both sides. I don't believe we're going to try to
 3 deliberate today on what I do believe Attorney Allwarden
 4 has raised and other parties have identified as a central
 5 legal question, that is "do we, in fact, have jurisdiction
 6 over this matter, based upon RSA 125-0?" That clearly is
 7 a legal issue that this Committee is going to have to
 8 decide, having made our initial determination effectively
 9 there is standing, and, therefore, that we are going to
 10 hear -- consider this matter.

11 I think the other question that's out
 12 there, which we have heard briefing on, but we have not
 13 taken any testimony on, therefore we don't have a factual
 14 basis on which to make rulings, is the issue of "sizeable
 15 addition". And, what I would suggest that the Committee
 16 take as a course of action here is that we schedule an
 17 additional date for an evidentiary hearing on the issue of
 18 a -- the issue of "sizeable addition", so that we can
 19 understand facts about what is, in fact, being proposed
 20 here and have a factual record that we could base findings
 21 and rulings on. And that, having done that, we would then
 22 be in a position to make some final decisions or
 23 determinations through deliberative process on, again,
 24 confirming that we are where we are at this point on the

{SEC 2009-01} [Day 1] {05-08-09}

128

1 issue of standing, and then making a determination on this
 2 threshold legal issue of "what is the preclusive effect or
 3 not of RSA 125-0?" And, then, depending on how we rule on
 4 that issue, "is there, in fact, a sizeable addition?"

5 It may be, notwithstanding the
6 complexity that Mr. Getz raised when he brought the
7 initial proposal -- initial motion in, in the alternative,
8 it may be that, for purposes of our review and
9 consideration of this matter, that even if we were to
10 find, and I'm not suggesting that we, at this point, any
11 of us know how we would rule on this, if we were to find
12 that there were effectively a preclusive effect of
13 preemption by RSA 125-0, there may still be some benefit
14 to our nevertheless making a finding with respect to the
15 issue of "sizeable addition".

16 So, that's my suggestion for a way that
17 we proceed. I think it probably means we need to
18 schedule at least one additional, probably full day here,
19 although I don't know how long it would take, Attorney
20 Allwarden, for you to, do you think, to put in the basic
21 facts about the nature and the scope of the project that's
22 being proposed, we'd have to have an opportunity for
23 members of the Committee to ask questions, for
24 cross-examination by the Moving Parties, and then we would

{SEC 2009-01} [Day 1] {05-08-09}

129

1 see where we are at that point, in terms of our ability to
2 then move to -- move to deliberations here.

3 So, just put that out there for
4 discussion. Attorney Hoffer, I see you, I know you'd like
5 to speak, but I would like to give an opportunity for
6 other members of the Committee to --

7 MS. HOFFER: Thank you.

8 CHAIRMAN BURACK: -- to react to this
9 suggestion as a way to proceed. Mr. Harrington.

10 MR. HARRINGTON: Yes, Mr. Chairman. I'm
11 a little confused, I guess, on the legal process. If we
12 haven't done the issue of whether or not the 125-0
13 supersedes our jurisdiction in this case, until we decide
14 that, if we decided that, in fact, it does, as Public
15 Service ascertains, we never get to the "sizeable
16 addition" question, is that correct?

17 CHAIRMAN BURACK: I think, as a legal
18 matter, I think that's right.

19 MR. HARRINGTON: So, why wouldn't we
20 resolve that issue first, before we start having hearings
21 on "sizeable additions"?

22 CHAIRMAN BURACK: Again, it would be an
23 issue, as Mr. Getz suggested before, that if we take -- if
24 we address both of the issues, then, if there were an

{SEC 2009-01} [Day 1] {05-08-09}

130

1 appeal of this case, if we were -- if we were to determine
2 that there was a preclusive effect, and the Supreme Court
3 at a later date were to determine that "no, we were
4 mistaken in that determination, that there is not a
5 preclusive effect", we would not then have to go back and
6 reopen this entire proceeding in order to look at the
7 issue of "sizeable addition or not".

8 MR. IACOPINO: It would be a matter of
9 avoiding undue delay, in the event that we were overruled.

10 CHAIRMAN BURACK: Mr. Below.

11 MR. HARRINGTON: I'm sorry, I didn't
12 hear what you said.

13 MR. IACOPINO: I said it would be a
14 matter of avoiding undue delay, if, in fact, that decision

15 were to have been overruled. In other words, the factual
16 decision was already made, as well as the jurisdictional
17 decision.

18 CHAIRMAN BURACK: Mr. Below.

19 CMSR. BELOW: Yes. And, the reverse
20 would also be true. I mean, if we made the factual
21 determination that it's not "sizeable addition" within the
22 meaning of the chapter, then we wouldn't need to get to
23 the other question. But, you're suggesting, procedurally,
24 is to get to both questions to avoid undue delay,

{SEC 2009-01} [Day 1] {05-08-09}

131

1 whatever?

2 CHAIRMAN BURACK: That's my suggestion.

3 And, again, I make that suggestion in part because I think
4 that's consistent with the legislative directive in RSA
5 125-0, which is that this project needs to be dealt with
6 on a very expeditious time frame. Mr. Harrington.

7 MR. HARRINGTON: Okay. Well, given
8 that, I don't know what the legal way of doing this, but
9 it would seem to me, based on the statements made by
10 Public Service, and dealing with the turbine upgrade
11 versus the scrubber, in fact, what they have said that the
12 turbine upgrade was going to go forward and was being
13 planned prior to the enactment of 125-0, I would suggest
14 that we try to separate those issues. And, if we're going
15 to look at whether we have the jurisdictional issue and,
16 clearly, the substantial upgrade issue, we could possibly
17 separate the two and make the process go even faster.
18 Because, I think, based on the history of, for example,
19 the Seabrook project, there is certainly -- the upgrade at

20 Seabrook is much similar to the turbine upgrade that's
21 being proposed here, which this Committee has already said
22 was -- did not require a Site Evaluation Committee
23 approval. So, that may make our process be a little bit
24 more efficient if we handle them as two separate issues.

{SEC 2009-01} [Day 1] {05-08-09}

132

1 CHAIRMAN BURACK: Certainly, we could do
2 that. We could, on the "sizeable addition" question, we
3 could take those as two separate components. We could do
4 that. Are there other comments here? Mr. Dupee.

5 MR. DUPEE: Thank you, Mr. Chairman.
6 Just I thought that it would be interesting for me at
7 least to hear what our counsel thinks about the legal
8 issues here. Not, obviously, at the moment, but over
9 time, give us some thoughtful analysis as to the fact we
10 do have some several statutes here that seem to point the
11 Committee in potentially different directions, and what
12 his thoughts on that will be of interest, I think to me,
13 perhaps to others.

14 CHAIRMAN BURACK: Our counsel will
15 prepare some legal analysis for the Committee itself to
16 consider.

17 MR. IACOPI NO: I would also point out,
18 Mr. Chairman, that there are some documents that we need
19 to distribute to the Committee members that were requested
20 as record requests, including one that Public Service is
21 going to have to obtain and provide to us.

22 CHAIRMAN BURACK: Attorney Hoffer, you
23 wish to make a comment?

24 MS. HOFFER: Thank you, Commissioner

1 Burack. And, I'll be brief. I just wanted the
2 opportunity to provide two additional documents into the
3 record this afternoon. Running directly to the question
4 that was raised just now. The first is a January 28th,
5 2008 letter from PSNH to Director Scott, in which the
6 Company says "Following the completion of MK2 HP/IP
7 turbine project", which is the capacity expansion, "and
8 associated generator work, MK2 is expected, per the
9 contract guarantee, to produce an additional 6.5 megawatts
10 of electricity. The actual net output will range between
11 6 and 13 megawatts. And increase that is necessary to
12 support the large power consumption of the future new
13 scrubber system."

14 And, a second letter, dated June 7,
15 2007 [2006?], also from the Company to Director Scott,
16 where the Company stated: "The installation of the
17 scrubber will require a new stack, material storage and
18 handling system, wastewater treatment plant [system?],
19 balance of plant work, MK2 High Pressure/Intermediate
20 (HP/IP) turbine and generator work", which is the capacity
21 expansion, "in addition to the installation of the
22 scrubber vessel." And, in a separate paragraph, titled
23 "Planned Maintenance Outages", goes on to state "In order
24 to meet the July 2013 deadline, it will be necessary for

1 PSNH to complete as much of the balance of plant work as
2 possible during planned and maintenance outages in the
3 years preceding 2013, which it has done."

4 I don't have three copies of this, but I
5 could leave the entire brief as a portion of the record
6 today, however you'd like to do it.

7 CHAIRMAN BURACK: I think it will be
8 easier if you were to provide copies later. We will mark
9 those, I think they will be "Moving Parties Exhibit 6" and
10 "7".

11 MS. HOFFER: Thank you.

12 CHAIRMAN BURACK: And, if you would
13 please get those to Mr. Patnaude.

14 (Moving Parties Exhibit 6 and 7 were
15 reserved)

16 CHAIRMAN BURACK: One thought here, and,
17 Attorney Allwarden, I'll get to you in just a moment,
18 there certainly could be significant benefit, I think, to
19 all parties, if it were possible for the Moving Parties
20 and PSNH to endeavor to reach agreement, in fact, to reach
21 agreement on a stipulated set of facts regarding the scope
22 of the project. And, if we are able to do that, that
23 would certainly, I think, move this process along much
24 more quickly for all concerned, and would ask the parties

{SEC 2009-01} [Day 1] {05-08-09}

135

1 to make a real good faith effort to attempt to accomplish
2 that.

3 Attorney Allwarden.

4 MR. ALLWARDEN: I was just going to
5 mention that I haven't been given any of the exhibits that
6 these folks have referred to, and I want to make sure I
7 get a copy of everything that they're marking. Thank you.

8 CHAIRMAN BURACK: Thank you, Attorney
Page 113

9 All I warden.

10 MS. HOFFER: Yes.

11 CHAIRMAN BURACK: I think we all owe
12 each other the courtesy of making sure that copies of all
13 exhibits that any party is presenting to be provided not
14 only to the Committee, but also to the other parties, and
15 request that that be done expeditiously by everyone. I
16 think it would be prudent on our part, as a Committee, to
17 go ahead and schedule at least one additional day for us
18 to take testimony, if it's necessary, if it is not
19 possible for the parties to reach agreement on a
20 stipulated set of facts. But I would encourage the
21 parties to agree on as much as you possibly can on a
22 stipulated basis, and leaving only those things on which
23 you simply cannot agree as to be the matters on which we
24 would have to actually take oral testimony with the

{SEC 2009-01} [Day 1] {05-08-09}

136

1 examination and cross-examination of the witnesses.

2 I'm going to have to ask our
3 stenographer, our court reporter here, how long do you
4 think it will take to prepare the transcript here?

5 MR. PATNAUDE: When do you want it?

6 CHAIRMAN BURACK: When do we want it? I
7 think, realistically, we'd like to have this as soon as
8 possible. I will tell you that the calendar that I'm
9 hoping to achieve, if we can do this, I'm hoping that we
10 could look at coming back sometime during the week of May
11 18th, either May 18th, May 19th, May 21st, or May 22nd.
12 Those are dates that I would like to try to target for
13 accomplishing this next meeting here. And, --

14 CMSR. BALD: Mr. Chairman, I can tell
15 you right now the 18th and 19th, I won't be in the city.

16 CHAIRMAN BURACK: Okay. Are there any
17 others for whom the 18th and 19th is simply infeasible?

18 CMSR. CAMPBELL: The 19th doesn't work.

19 CHAIRMAN BURACK: I've had a suggestion
20 here that we work on the scheduling off line, and I'm
21 certainly happy to do that. And, I guess, before taking
22 this to a process which we would ask Attorney Iacopino to
23 coordinate, what I just want to know is, are there any
24 folks who feel that any of those dates that week, that

{SEC 2009-01} [Day 1] {05-08-09}

137

1 none of those dates could possibly work? Any sense at all
2 on that? In other words, do we need to be looking at
3 later dates beyond that for the --

4 DIR. NORMANDEAU: I cannot tell you
5 sitting here.

6 CHAIRMAN BURACK: Okay.

7 MR. IACOPINO: Mr. Chairman, I think
8 it's important for the Committee to recognize that, under
9 our own rules, we have 90 days from March 9th to issue a
10 final decision on the motion for declaratory ruling in
11 this case, my calculation brings us to June 8th for that
12 particular date.

13 CHAIRMAN BURACK: So, again, thank you,
14 Attorney Iacopino. This is why I'm suggesting that we
15 ought to try to get our next hearing on this sooner rather
16 than later. Commissioner Campbell.

17 CMSR. CAMPBELL: What's the quorum
18 requirement, if you have a scheduling --

19 CHAIRMAN BURACK: A quorum requirement
20 would be 8 members, and at this time we have 12 members
21 sitting on this matter.

22 CMSR. CAMPBELL: Okay.

23 CHAIRMAN BURACK: So, we do have some
24 flexibility there. But my preference would be to have,

{SEC 2009-01} [Day 1] {05-08-09}

138

1 obviously, as many of us who have sat on the first day of
2 this, continue to sit through the remainder of the
3 proceeding.

4 Okay. We will --

5 MR. IACOPINO: The only thing I would
6 point out about the quorum question is, that if we're
7 going to be taking testimony, please try, try your best to
8 be able to make it to that evidentiary hearing. Because
9 there are issues of credibility, the Supreme Court
10 requires that you observe the witness in their testimony.

11 CHAIRMAN BURACK: Okay. Thank you.
12 Anything else from any members of the Committee?
13 Mr. Bald.

14 CMSR. BALD: Does that mean you're
15 expecting another meeting after that?

16 CHAIRMAN BURACK: I think what we can
17 realistically effect, it's a very good question, I think
18 what we can realistically expect is, when we next meet, we
19 would hear the testimony, to the extent that there is not
20 a stipulation with respect to the facts on the "sizeable
21 addition" issue. I would hope that we could deal with
22 that piece of this fairly expeditiously, and that we could
23 then move to deliberations on the legal issues. I think

24 our practice in the past, as a Committee, has been that,
{SEC 2009-01} [Day 1] {05-08-09}

139

1 once we have deliberated orally, there then needs to be a
2 draft document prepared by our counsel for all of us to
3 review, sometimes we have been able to complete our review
4 and approval of that final decision document without
5 having to convene for a final meeting. At other times, we
6 have had to convene again, in order to review the document
7 together, make any final changes we want to make
8 collectively, before we, in fact, all agree and sign the
9 final order.

10 So, I think we can expect at least one
11 more meeting, possibly two more. That would be my
12 expectation at this point.

13 CMSR. BALD: Mr. Chairman.

14 CHAIRMAN BURACK: Mr. Bald.

15 CMSR. BALD: I don't mean to be a pain
16 in the neck, and I know all State employees are on
17 overtime now, so I'll try to be real quick. Help me out.
18 What I understand is we're going to meet and get testimony
19 on the issue of if this is a sizeable addition, and then
20 we're going to decide "do we have jurisdiction?" And, if
21 we do, then we're going to decide "is it a sizeable
22 addition?"

23 CHAIRMAN BURACK: That's the way I'm
24 currently proposing this. We could certainly consider
{SEC 2009-01} [Day 1] {05-08-09}

140

1 taking these in the opposite order. That is, first

2 deliberating on the jurisdictional issue, and then, from
3 there, although we would be prepared to hear the
4 testimony, if necessary, and to take -- proceed to
5 stipulation, to then look at the facts on the "sizeable
6 addition" question, and then deliberate on the "sizeable
7 addition" question. That's an alternative sequence in
8 which we could proceed.

9 But, either way, we have to meet again.
10 I think we have to meet again. And, again, suggesting, in
11 order to move this process more quickly for all concerned,
12 is that we ask the parties to come prepared to address --
13 help us address both of those issues when we next get
14 together.

15 CMSR. BALD: Thank you.

16 CHAIRMAN BURACK: Okay. Any further
17 questions or considerations? Attorney Allwarden.

18 MR. ALLWARDEN: Just a quick point of
19 clarification, Mr. Chairman.

20 CHAIRMAN BURACK: Please.

21 MR. ALLWARDEN: I just -- I have no
22 problem with trying to work out a stip to help this
23 process along. But I want to make sure I understand that
24 what we're talking about here is the issue, the factual

{SEC 2009-01} [Day 1] {05-08-09}

141

1 issues associated with the "sizeable addition" question.
2 Not factual issues that may be associated with questions
3 on the project that might come up if the Committee were to
4 accept jurisdiction and start delving into environmental
5 impacts, that kind of thing. I think that -- I don't want
6 that to create an impasse as we try and work through a

7 stip, if we can, on the "sizeable addition" question.

8 CHAIRMAN BURACK: Right.

9 MR. ALLWARDEN: Thank you.

10 CHAIRMAN BURACK: Thank you, Attorney
11 Allwarden, for asking. I think that's exactly right. We
12 are asking for a stipulation solely with respect to facts
13 that would pertain to the "sizeable addition" question.

14 MR. ALLWARDEN: Thank you.

15 CHAIRMAN BURACK: That's what we're
16 asking for. Because we recognize that if, in fact, the
17 Committee were to determine that we have jurisdiction and
18 that this is a sizeable addition, then, effectively, we
19 would be convening a proceeding that would get us into
20 whatever other issues there might be out there, including
21 some that have been raised today, such as those relating
22 to permitting for wastewater discharges and matters of
23 that kind. And, I think we would consider those -- issues
24 of that kind, such as the wastewater, to be outside the

{SEC 2009-01} [Day 1] {05-08-09}

142

1 scope of what we're asking the parties to be prepared to
2 stipulate to for our next gathering.

3 MR. ALLWARDEN: Thank you.

4 MR. PATCH: Mr. Chairman, could we just
5 be clear, though, so the Moving Parties have a sense.
6 What we're talking about basically stipulating to is the
7 scope of the projects. What's involved with the project?
8 What sort of buildings are necessary? What sort of
9 facilities are necessary? You know, what sort of issues
10 are being addressed? That's my understanding. And, if
11 I'm incorrect, I just want to make sure I'm corrected.

12 CHAIRMAN GETZ: That's correct. That is
13 what we're asking you to stipulate to.

14 Any other questions or comments at this
15 time?

16 (No verbal response)

17 CHAIRMAN BURACK: If not, again, I'm
18 going to ask Attorney Iacopino to coordinate with all the
19 parties to identify a date during that week of May 18th,
20 and it looks like it would probably be the 21st or 22nd,
21 but we're going to have to confirm when we have greatest
22 availability of the parties for us to reconvene and
23 continue this matter.

24 MR. PATCH: I'm sorry, Mr. Chairman, but
{SEC 2009-01} [Day 1] {05-08-09}

143

1 just one more question. I know there was some discussion
2 about this being two separate projects. Now, my
3 understanding is the stipulation would address the
4 capacity and the scrubber together. And, I want to be
5 clear on that before we head out.

6 CHAIRMAN BURACK: And, I appreciate that
7 you've asked the question. I'm not sure that I'm
8 necessarily going to be able to give an answer that going
9 to make everybody happy here. But I think it would be
10 helpful if we could get a stipulation as to the size of
11 the turbine addition, and what the capacity is of the
12 turbine -- of the turbine addition. And, I would not ask
13 you all to agree, because it's apparent that you're not
14 going to be able to agree on whether the turbine, in fact,
15 is or is not part of the overall Scrubber Project. Okay?
16 And, I think that should make it easier for you all to

17 stipulate. Again, I believe these should be fairly basic
18 facts that we're asking you to stipulate to. And, by not
19 tying the two, I think it may make it easier for you all
20 to see what you can agree on. And, we understand you all
21 are going to have differences of opinion as to whether
22 these are integrated or not. And, we're going to have to
23 make separate findings on that, I suspect. And,
24 presumably, you all will come prepared to present whatever

{SEC 2009-01} [Day 1] {05-08-09}

144

1 testimony you want to present on those issues.

2 Anything else?

3 (No verbal response)

4 CHAIRMAN BURACK: If not, thank you all
5 very much. We will stand adjourned.

6 (Whereupon the public meeting was
7 adjourned at 4:31 p.m.)
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{SEC 2009-01} [Day 1] {05-08-09}