

1 STATE OF NEW HAMPSHIRE
2 SITE EVALUATION COMMITTEE

3 July 7, 2009 - 1:12 p.m.
4 21 South Fruit Street
5 Suite 10, Room 103
6 Concord, New Hampshire

DAY 3

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 Clifton C. Below, Cmsr. Public Utilities Commission
24 Harry T. Stewart, Dir. DES - Water Division
25 Robert Scott, Dir. DES - Air Resources Division
26 Glenn Normandeau, Dir. N.H. Fish & Game Department
27 George Campbell, Cmsr. Dept. of Transportation
28 Brook Dupee Dept. of Health & Human Services
29 Michael Harrington Public Utilities Commission

30 COUNSEL FOR THE COMMITTEE: Jaye Rancourt, Esq.

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

32 APPEARANCES: Reptg. TransCanada Hydro Northeast:
33 Douglas L. Patch, Esq. (Orr & Reno)
34 Reptg. Granite Ridge Energy:
35 Howard M. Moffett, Esq. (Orr & Reno)

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Reptg. Conservation Law Foundation:
Melissa Hoffer, Esq.

Reptg. Public Service of New Hampshire:
Christopher J. Allwarden, Esq.
Barry Needleman, Esq. (McLane, Graf...)

{SEC 2009-01} [Day 3] {07-07-09}

3

1
2
3
4
5
6
7
8
9

I N D E X

PAGE NO.

QUESTION 1: WHETHER THESE PROJECTS ARE TO BE
TREATED AS INDEPENDENT OR AS ONE
IN THE SAME PROJECT FOR PURPOSES
OF OUR CONSIDERATION? 18

DISCUSSION BY:

Mr. Harrington 18, 23
Dir. Stewart 21
Cmsr. Below 21
Chairman Burack 22
Dir. Normandeau 26

10 SHOW OF HANDS (Straw poll) 24

11

12 * * *

13 QUESTION 2: Finding that the Turbine Replacement 24
 14 Project is a separate project, whether
 15 the Committee should issue a
 16 declaratory ruling finding that this
 17 project constitutes a sizeable change
 or addition pursuant to RSA 162-H: 5, I,
 for which a Certificate of Site and
 Facility would otherwise be required?

18 DISCUSSION BY:

19 Dir. Scott 25
 20 Cmsr. Below 27, 35, 38
 21 Chairman Burack 34
 Mr. Harrington 36

22 SHOW OF HANDS (Straw poll) 40

23

24 * * *

{SEC 2009-01} [Day 3] {07-07-09}

4

1 I N D E X

2 PAGE NO.

3 QUESTION 3: Viewing the Scrubber Project as a 40
 4 separate project, and not including
 5 the turbine upgrade as a component
 6 of the project, should the Committee
 7 issue a declaratory ruling finding that
 the Merrimack Station Scrubber Project
 constitutes a sizeable addition pursuant
 to RSA 162-H: 5, I, for which a Certificate
 of Site and Facility is required?

8 DISCUSSION BY:

9 Cmsr. Below 41, 64
 10 Mr. Harrington 42, 56, 62
 Chairman Getz 45, 60
 Mr. Dupee 49, 59
 11 Dir. Scott 50
 Dir. Normandeau 51
 12 Cmsr. Campbell 53
 Dir. Stewart 57
 13 Chairman Burack 68

14 SHOW OF HANDS (Straw poll) 71

15		* * *	
16	QUESTION 4:	Do the provision of RSA 125-0:11	72
17		through 18 obviate the need for the	
18		Committee to make declaratory ruling	
19	DISCUSSION BY:		
20	Chairman Burack		72
21	Vice Chairman Getz		73
22	Mr. Harrington		73
23	SHOW OF HANDS (Straw poll)		74
24		* * *	

{SEC 2009-01} [Day 3] {07-07-09}

5

1

2

I N D E X

3

PAGE NO.

4

5	QUESTION 5:	Who shall be responsible for paying	74
6		the costs of this proceeding,	
7		including the Committee's legal fees	
8		and the costs of the court reporter?	

7

DISCUSSION BY:

9	Chairman Burack	74, 91, 94, 96,	108
10	Mr. Harrington	78, 89, 90, 95, 102, 103, 105, 107,	108
11	Vice Chairman Getz	88, 89, 103,	108
12	Mr. Dupee	92, 93	
13	Dir. Normandeau	93, 105	
14	Cmsr. Campbell	94, 106	
15	Cmsr. Below	97	
16	Dir. Stewart	99	
17	Dir. Scott	100	

OTHER COMMENTS BY:

15	Mr. Allwarden	81
16	Mr. Patch	82
17	Mr. Needl eman	86

17	SHOW OF HANDS (Straw poll)	102
----	----------------------------	-----

* * * * *

19	MOTION BY CMSR. CAMPBELL that the committee finds	112
	that the scrubber project and the turbine project	

20 are not a single project 112
 21 Second by DIR. NORMANDEAU

22 VOTE ON THE MOTION 112

23 * * *

24

{SEC 2009-01} [Day 3] {07-07-09}

6

1 I N D E X

2 PAGE NO.

3 MOTION BY CMSR. CAMPBELL that we determine that 113
 4 the turbine project, under 162-H:5, I, is not
 a sizeable addition
 5 Second by MR. HARRINGTON 113

6 VOTE ON THE MOTION 113

7 * * *

8 MOTION BY CMSR. CAMPBELL that the Committee 113
 9 determine that the Scrubber Project is not a
 sizeable addition pursuant to RSA 162-H:5, I
 10 Second by MR. HARRINGTON 114

11 VOTE ON THE MOTION 114

12 STATEMENT BY VICE CHAIRMAN GETZ 115
 STATEMENT BY CMSR. CAMPBELL 118

13 * * *

14 DISCUSSION RE: ISSUE OF DECLARATORY RULINGS BY:

15 Cmsr. Campbell 116, 117
 16 Mr. Harrington 117
 Chairman Burack 118

17 MOTION BY DIR. SCOTT that Movants pay legal fees 119
 18 Second by DIR. NORMANDEAU 120

19 DISCUSSION BY: 119
 Mr. Scott 120
 20 Mr. Harrington 122
 Dir. Normandeu 122
 Dir. Stewart 123, 127
 21 Vice Chairman Getz 123
 Chairman Burack 124
 22 Cmsr. Below 125
 Cmsr. Campbell 128

24 VOTE ON THE MOTION 130

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. My
9 name is Tom Burack. I serve as Commissioner of the
10 Department of Environmental Services and also as Chairman
11 of the Site Evaluation Committee.

12 And, at this point, I would like to ask
13 the other members of the Committee who are present at this
14 meeting to introduce themselves, including our counsel
15 today. Mr. Dupee, would you please start.

16 MR. DUPEE: Certainly, Mr. Chairman. My
17 name is Brook Dupee, representing the Department of Health
18 and Human Services.

19 DIR. STEWART: Harry Stewart, New
20 Hampshire Department of Environmental Services, Water
21 Division Director.

22 DIR. SCOTT: Bob Scott, New Hampshire
23 DES, Air Resources Division Director.

24 CMSR. BELOW: Clifton Below, Public
{SEC 2009-01} [Day 3] {07-07-09}

1 Utilities Commissioner.

2 MS. RANCOURT: Jaye Rancourt, standing
3 in for Counsel to the Site Evaluation Committee, Mike
Page 6

4 Iacopi no.

5 VICE CHAIRMAN GETZ: Tom Getz, Chairman
6 of the Public Utilities Commission and Vice Chair of the
7 Site Evaluation Committee.

8 CSMR. CAMPBELL: George Campbell,
9 Commissioner of Transportation.

10 MR. HARRINGTON: Mike Harrington, New
11 Hampshire PUC.

12 CHAIRMAN BURACK: Thank you all very
13 much. I will also note that we do expect Director Glenn
14 Normandeau of the Department of Fish & Game to join us
15 probably around 1:30 or so. I am also going to ask folks,
16 if they would, to please turn off their cellphones or put
17 them to vibrate, so that we won't have a lot of
18 interruptions here.

19 The agenda for today's public meeting
20 includes one matter. This matter has been docketed as
21 Site Evaluation Committee Number 2009-01, and entitled
22 "Motion of the Campaign for Ratepayers Rights, et al, for
23 Declaratory Ruling Regarding Modification to Merrimack
24 Station Electric Generating Facility."

{SEC 2009-01} [Day 3] {07-07-09}

9

1 I will open today's consideration of
2 this matter with a brief summary. On March 9, 2009, a
3 pleading entitled "Motion for Declaratory Ruling Regarding
4 Modification to Merrimack Station Electric Generating
5 Facility". The Motion was filed with the Committee. The
6 Motion was filed by the following entities: The Campaign
7 for Ratepayer Rights, Halifax American Energy Co., LLC,
8 the Conservation Law Foundation, TransCanada Hydro

9 Northeast, Inc., Freedom Logistics, LLC, the Union of
10 Concerned Scientists, and Granite Ridge Energy, LLC. I
11 will refer to these entities as the "Moving Parties".

12 The Motion concerns the construction,
13 installation and operation of a wet flue gas
14 desulfurization system, the Scrubber System, at the bulk
15 power facility owned by Public Service Company of New
16 Hampshire, PSNH, located in Bow, Merrimack County, New
17 Hampshire, and known as "Merrimack Station". The Moving
18 Parties asserted that they have standing to bring the
19 motion before the Committee and asked this Committee to
20 make a declaratory ruling determining whether the
21 construction, installation and operation of the Scrubber
22 System and associated facilities constitute a sizeable
23 addition to Merrimack Station under RSA 162-H: 5, and
24 whether the Scrubber System requires a Certificate of Site

{SEC 2009-01} [Day 3] {07-07-09}

10

1 and Facility. The Moving Parties also ask the Committee
2 to evaluate whether action should be taken against PSNH
3 under RSA 162-H: 19, which provides for penalties for the
4 willful violation of RSA 162-H.

5 On April 1, 2009, PSNH filed a formal
6 objection to the Motion. In its objection, PSNH asserted
7 that the Moving Parties lack standing to bring the Motion.
8 PSNH also asserted that RSA 125-0, Sections 11 through 18,
9 of 2006 New Hampshire Laws Chapter 105, precludes the
10 authority of the Committee to issue a Certificate of Site
11 and Facility. Finally, in its objection, PSNH also
12 asserts that the Scrubber System and associated facilities
13 do not constitute a "sizeable addition" to Merrimack

14 Station. On April 13, 2009, the Moving Parties filed a
15 response to the objection filed by PSNH.

16 On May 8, 2009, the Committee held an
17 initial public hearing in this matter. At that hearing,
18 after deliberation, the Committee determined that it did
19 have jurisdiction to consider the Motion as brought by the
20 Moving Parties. We also determined that we would schedule
21 an evidentiary hearing, and noted that we would like the
22 parties to stipulate to as much of the factual record as
23 possible. The May 8, 2009 hearing was recessed until May
24 22, 2009. Thereafter, PSNH filed a motion to extend time

{SEC 2009-01} [Day 3] {07-07-09}

11

1 and reschedule. That motion was assented to by all of the
2 parties and the matter was rescheduled for today -- I'm
3 sorry, rescheduled for a later date, which I believe was
4 -- ended up being the 26th of June. In granting that
5 motion, we also extended the time frame to issue a
6 decision on this Motion until July 8, 2009. On June 2,
7 2009, we issued an Order and Notice of Reconvened Public
8 Meeting and Hearing, reconvening the May 8th, 2009 hearing
9 to June 26, 2009, and notice of that meeting was mailed
10 and emailed to all parties and posted on the Committee's
11 website.

12 On June 25, 2009, the parties filed a
13 stipulation regarding certain factual matters. On
14 June 26, 2009, we held a full day session, in which we
15 accepted the stipulation, took testimony from one witness
16 for PSNH, received public comment from two individuals,
17 and then closed the fact-finding portion of this
18 proceeding, subject to receipt of certain additional

19 information that had been requested of the Moving Parties
20 and PSNH. All of that requested information has now been
21 received by the Committee.

22 We also agreed to reconvene today, July
23 7th, to deliberate on this matter. And, the Moving
24 Parties and PSNH all concurred in extending to August 10,
{SEC 2009-01} [Day 3] {07-07-09}

12

1 2009 the date by which the Committee will issue a written
2 decision in this matter.

3 Today's hearing is a reconvened public
4 hearing. The authority for this hearing stems from our
5 enabling statute, RSA 162-H:4, and from our administrative
6 rules pertaining to requests for declaratory rulings, Site
7 203.01.

8 Today I propose to proceed as follows:
9 There are five legal issues that are before us, although
10 it may not be necessary to resolve all of them in order to
11 decide this matter. These issues are as follows: First,
12 do the Turbine Upgrade Project and the Merrimack Station
13 Scrubber Project constitute a single project for purposes
14 of RSA 162-H:5, II? If so, should the Committee issue a
15 declaratory ruling finding that the combined projects
16 constitute a sizeable addition -- I'm sorry, a sizeable
17 change or addition, pursuant to RSA 162-H:5, II, for which
18 a Certificate of Site and Facility is required?

19 The second question, and I understand
20 that those first two are really a compound question, but,
21 essentially, we're asking are these going to be dealt with
22 together or separately? And, if we're going to deal with
23 them together, then we would proceed immediately to a

24 decision or a discussion of whether together they
{SEC 2009-01} [Day 3] {07-07-09}

13

1 constitute a sizeable change or addition?

2 If we determine that they are not to be
3 considered together, then, if the turbine -- the second
4 question is, if the Turbine Upgrade Project is a separate
5 project, should the Committee issue a declaratory ruling
6 finding that the Turbine Upgrade Project constitutes a
7 sizeable change or addition pursuant to RSA 162-H:5, II,
8 for which a Certificate of Site and Facility is required?

9 The third question that we will address
10 is, if the Scrubber Project is a separate project, should
11 the Committee issue a declaratory ruling finding that the
12 Merrimack Station Scrubber Project constitutes a sizeable
13 change or addition pursuant to RSA 162-H:5, II, for which
14 a Certificate of Site and Facility is required?

15 The fourth question is, do the provisions
16 of RSA 125-0, Sections 11 through 18, obviate the need for
17 the Committee to make a declaratory ruling decision or
18 decisions in this matter?

19 And, the last question that we will need
20 to address is, who shall be responsible for paying the
21 costs of this proceeding, including the Committee's legal
22 fees and the costs of the court reporter.

23 I note that we have a quorum present,
24 and that a majority vote of members present satisfies the

{SEC 2009-01} [Day 3] {07-07-09}

14

1 requirements of RSA 162-H. So, here's how I propose to

2 proceed with these deliberations: I suggest that we take
3 up these questions one at a time; discuss them,
4 encouraging the airing of any views that members have; and
5 then take a straw poll, without binding votes, on each of
6 the items as we consider them. Once we've been through at
7 least the first three items relating to the "sizeable
8 change or addition" issues on this type of informal basis,
9 we should have a good sense of the Committee on that set
10 of issues, and we may then wish to decide how best to
11 address the statutory construction issue relating to RSA
12 125-0 and RSA 162-H. And, once we have a sense of the
13 consensus of the Committee on these issues, we can then
14 consider the issue of the legal fees and court reporter
15 fees.

16 Prior to adjourning, we will then hold
17 formal votes on the issues and set a preliminary schedule
18 for drafting reviewing and finalizing our decision.

19 And, unless there is significant
20 objection from any Committee members to this approach, I
21 propose that we get started with deliberation on the first
22 issue. I do want to make two other points here. At some
23 point, our court reporter here, Mr. Patnaude, will likely
24 tell us he needs to take a break. So, we will take breaks

{SEC 2009-01} [Day 3] {07-07-09}

15

1 periodically. Also, while it is certainly not necessary
2 in our discussions that we cite to specific pages or
3 statements in the record, to the extent that we are able
4 to identify particular statements in the Stipulation or
5 elsewhere in the record, now it may be helpful to us and
6 to our counsel in actually drafting an opinion, but we

7 certainly don't need to find all of those citations today.
8 I think, more importantly, we need to make sure that we
9 all have a full discussion of the facts and the legal
10 issues here.

11 So, if we can, I'd like to suggest that
12 we start with a discussion of whether the Turbine Upgrade
13 Project or Turbine Replacement Project should be
14 considered, for purposes of RSA 162-H:5, II, as part of
15 the Merrimack Station Scrubber Project? And, would
16 welcome any thoughts, in terms of the facts, on that issue
17 first. I note, Commissioner Below, that I know there may
18 be an interest in discussing the definition of "sizeable
19 addition" and "sizeable change or addition". And, I think
20 we can get to that as soon as we have had a basic
21 discussion of whether these projects are to be considered
22 together or separately.

23 CMSR. BELOW: Well, I actually have a
24 question even before that. I think you were referring to

{SEC 2009-01} [Day 3] {07-07-09}

16

1 "RSA 162-H:5, II", as in the statute that applies. And, I
2 wonder if it isn't, in fact, "162-H:5, I". It's a subtle
3 difference, and it may not matter, but I'll just point out
4 my concern. II says that "Facilities certified pursuant
5 to RSA 162-F or RSA 162-H prior to January 1, 1992, shall
6 be subject to the provision of those chapters; however,
7 sizeable changes or additions to such facilities shall be
8 certified pursuant to this chapter."

9 And, I don't believe this facility, I
10 think that the Stipulation of Facts indicated this
11 facility was never certified, it was not certified

12 pursuant to those prior statutes, 162-F or 162-H, because
13 it simply predates any certification.

14 So, the reference is to "sizeable
15 changes or additions to such facilities", meaning those
16 that were certified pursuant to those former chapters.
17 And, I think the previous, I, actually is probably more
18 applicable. And, the only real difference is it doesn't
19 use the word "change", it just uses the words "sizeable
20 additions", because it refers to "No person shall commence
21 to construct any bulk power or energy facility within the
22 state unless it has obtained a certificate pursuant to
23 this chapter." I think the Merrimack Station, in general,
24 clearly meets the definition of a bulk power or energy

{SEC 2009-01} [Day 3] {07-07-09}

17

1 facility just by the description of those definitions.
2 And, then it says "such certificates are required for
3 sizeable additions to existing facilities".

4 So, I think it's -- to the extent
5 there's a question, that seems to be the on-point section
6 of the RSA, because the question is whether one or both of
7 these modifications constitute sizeable additions to an
8 existing facility for purposes of this chapter, and thus
9 requires a certificate.

10 CHAIRMAN BURACK: Commissioner Below,
11 thank you. Your point is very well taken. And, in fact,
12 I've just gone back and pulled out the original Motion for
13 Declaratory Ruling that was filed in this matter. And,
14 you are correct that, on Page 3, the issue presented, as
15 the Moving Parties describe it, they, in fact, cite to
16 "RSA 162-H:5, I", not to II.

17 MR. HARRINGTON: I'm sorry, could you
18 repeat what you just said?

19 CHAIRMAN BURACK: Yes. What I said is,
20 is, in fact, the way the Moving Parties have, in fact,
21 brought the case to us, they brought it to us -- they
22 brought the issue, in their motion, pursuant to RSA
23 162-H:5, I, not II. And, I was just checking to see if
24 there was a reference here. There is a -- yes, I believe
{SEC 2009-01} [Day 3] {07-07-09}

18

1 that's the case. I don't believe they actually reference
2 the other, other provision.

3 Having said that, unless others feel
4 strongly otherwise, I will certainly ask you all to agree
5 that we will amend my opening remarks to indicate that
6 we're considering this pursuant to, the first three
7 questions, pursuant to RSA 162-H:5, I, and not under the
8 other provision, which is II. Is there any objection to
9 that?

10 (No verbal response)

11 CHAIRMAN BURACK: Okay. Seeing none,
12 thank you very much for bringing that to all of our
13 attention. And, let's now turn to the first question,
14 which is whether these are to be treated as independent or
15 as one in the same project for purposes of our
16 consideration?

17 Anybody wish to share any initial
18 thoughts on this?

19 MR. HARRINGTON: Well, as I look back at
20 the transcripts on this, and look at some of the
21 questions, I think the conclusion I draw is that these

22 were two separate projects that came together because it
23 made sense to do that. But the initial changing out or
24 the upgrading of the turbine was going to happen whether
{SEC 2009-01} [Day 3] {07-07-09}

19

1 or not the Scrubber Project went forward. Under
2 testimony, the Public Service witness said that they were
3 going to do this, and that decision was made in 2005,
4 before the legislation mandating the Scrubber was passed.
5 He stated that it made economic sense, and it would be a
6 fairly short payback period for the ratepayers, because it
7 would improve the efficiency and output of Merrimack
8 Station.

9 So, I think that you really don't need
10 to link the turbine upgrade as part of the Scrubber
11 Project, because I think that would have happened in and
12 of itself. It still leaves the question as to whether the
13 turbine upgrade, by itself, constitutes a sizeable
14 addition. And, I think, if you look at the description of
15 that project, and you compare it to the description of
16 what was done at Seabrook, with their most recent upgrade,
17 that was a declaratory judgment by the Site Evaluation
18 Committee saying that that wasn't a sizeable addition.
19 And, you know, I've had personal experience at Seabrook,
20 and I can tell there was a lot of things changed out by
21 that particular thing, but it was very similar to this
22 one, in that it was improvements in efficiency in the
23 turbine and in the secondary side of the plant, were you
24 did your feed -- you know, steam separators and reheaters
{SEC 2009-01} [Day 3] {07-07-09}

20

1 and valves were replaced and some of the pumping was
2 replaced. So, it was on a larger scale for two reasons.
3 There was a little bit more equipment actually changed
4 out, and Seabrook being about three or four times the size
5 of Merrimack. Everything is on a larger scale there. But
6 that was found not to be a sizeable addition by the Site
7 Evaluation Committee. And, I think, if you were to go
8 into Merrimack Station, based on the explanation that was
9 given by the Public Service witness, you probably wouldn't
10 be able to tell, unless you really knew what you were
11 looking for, if you looked at before and after the turbine
12 modification was done.

13 CHAIRMAN BURACK: Thank you,
14 Mr. Harrington. I recognize you've brought forward facts
15 or arguments relating to both the first and potentially
16 the second question here.

17 MR. HARRINGTON: Uh-huh.

18 CHAIRMAN BURACK: So, what I want to do
19 is see if anybody has any further thoughts or observations
20 with respect to the factual record or other observations
21 they want to share, relating specifically to the question
22 of whether the turbine upgrade or turbine replacement is
23 or should be considered, for purposes of our review under
24 RSA 162-H: 5, I, should be considered part of the same

{SEC 2009-01} [Day 3] {07-07-09}

21

1 project as the Scrubber Project? Mr. Stewart.

2 DIR. STEWART: I agree with
3 Mr. Harrington. I found Mr. Smagula's testimony as to how
4 these projects became, you know, sort of were running on
5 parallel tracks was incredible. The Turbine Project was

6 really a replacement of an old piece of equipment. So,
7 there was an economic analysis that was performed to make
8 that value judgment. The fact that there was an
9 incremental increase in capacity I think one would expect,
10 and it was marginal, I believe. But any new piece of
11 equipment these days is going to have a little bit more,
12 for the same size, it's going to have more capacity. So,
13 that really isn't a factor. It was a question of
14 efficiency and cost-effectiveness and replacement of an
15 old piece of equipment.

16 So, I would suggest that the proper
17 decision is to carve the turbine out, and also that it's
18 not a sizeable addition.

19 CHAIRMAN BURACK: Thank you. Are there
20 other observations for the record that folks would like to
21 bring forward? Mr. Below.

22 CMSR. BELOW: Just to observe that the
23 change-out of the turbine occurred in time before the
24 commencement of construction of the Scrubber Project.

{SEC 2009-01} [Day 3] {07-07-09}

22

1 And, certainly, the evidence, I think the record shows
2 that the decision to go forward with the turbine
3 replacement occurred or was begun, the decision-making
4 process to undertake that project was begun prior to the
5 enactment of the legislation requiring the scrubber
6 installation.

7 So, I think it's -- I agree with the two
8 prior speakers, that I think it's -- the evidence
9 indicates that they're really two distinct, separate
10 modifications to the facility that we should consider

11 separately.

12 CHAIRMAN BURACK: Are there other
13 observations on this particular issue?

14 (No verbal response)

15 CHAIRMAN BURACK: I'll just offer the
16 observation that it appears to me, and I think that all
17 the statements made so far are consistent with my
18 understanding of the record and the facts, it also appears
19 to me that effectively what happened here is that, after
20 RSA 125-0 was enacted, giving PSNH permission to add
21 capacity to address the parasitic load from what was then
22 to be the mandated scrubber, PSNH chose effectively to
23 designate that the Turbine Replacement Project that they
24 had already decided to move forward with as the new

{SEC 2009-01} [Day 3] {07-07-09}

23

1 capacity, that they consider themselves to have the
2 permission of the Legislature to install pursuant to RSA
3 125-0. And, evidently, they chose to do that in lieu of
4 identifying a new project that would otherwise cover that
5 parasitic load. And, I think that's -- that's where the
6 linkage exists here, but I concur with what everybody
7 said, that it really is a separate project.

8 Mr. Harrington.

9 MR. HARRINGTON: Just as a follow-up to
10 what you said, Mr. Chair, that I think that linkage is
11 important, because, if they had not gotten the part in the
12 Scrubber Law that allowed them to make -- to increase
13 capacity to make up for the parasitic load, they would
14 have had to file with the Public Utilities Commission
15 under the other section of the law that requires them to

16 do that for modifications, major modifications, whatever
17 the correct term is, to their plant, modifications, I
18 guess. But, in this case, it was already allowed under
19 the scrubber statute that they could do capacity upgrades
20 to compensate for the parasitic load. So, I think I
21 agree, that's how the two became merged, but they would
22 have gone -- one would have gone without the other.

23 CHAIRMAN BURACK: So, again, you're
24 suggesting that the Scrubber Project could proceed without

{SEC 2009-01} [Day 3] {07-07-09}

24

1 the turbine upgrade, and vice versa?

2 MR. HARRINGTON: Right. That's my
3 opinion.

4 CHAIRMAN BURACK: Are there any
5 additional observations or ideas that folks would like to
6 share on this particular question?

7 (No verbal response)

8 CHAIRMAN BURACK: If not, I'd just like
9 to get, again, this is not binding on us, just to get a
10 sense of where we are. If you would just raise your hand
11 if it's your view, at least at this time, that the turbine
12 upgrade or turbine replacement project is a separate
13 project from the Merrimack Station Scrubber Project?

14 (Unanimous show of hands by the members
15 of the Site Evaluation Committee.)

16 CHAIRMAN BURACK: Okay. Thank you.
17 It's helpful to understand where folks likely will be.
18 Let's move then, if we can, to the second question that I
19 think is now called for, which is to look specifically at
20 this turbine upgrade or replacement project, considering

21 it as a separate project, and asking whether the Committee
22 should issue a declaratory ruling finding that this
23 project constitutes a sizeable change or addition pursuant
24 to RSA 162-H:5, I, for which a Certificate of Site and

{SEC 2009-01} [Day 3] {07-07-09}

25

1 Facility would otherwise be required? And, I know we've
2 already heard views from I believe from Mr. Harrington and
3 Mr. Stewart on this point. Mr. Scott, and then Mr. Below.

4 DIR. SCOTT: Yes. On this issue,
5 Mr. Chair, to recap again, I think, as Mr. Harrington
6 mentioned, the Florida Power & Light decision is the most
7 germane to this particular project for the turbine.
8 Obviously, as mentioned, the scale of that plant is much
9 bigger. But, as a percentage, my understanding is the
10 increase in rating for that facility was slightly less
11 than a 7 percent increase. Where I think, what's been put
12 forth with this project, is closer to three or 4 percent
13 increase, with some variability there. So, based on that,
14 I think we've -- it fits within the same bounds that we've
15 done for Florida Power & Light.

16 Also, we've heard from the testimony
17 that the turbine itself, by definition, had to be, in
18 effect, an exact fit into the existing footprint in order
19 to match the existing machinery. So, I don't think
20 there's a footprint issue there also -- or, either.

21 CHAIRMAN BURACK: Thank you. I'd like
22 to welcome Director Glenn Normandeau from the Department
23 of Fish & Game. And, Director Normandeau, we have just
24 done some initial review. I've laid out, and I will share

{SEC 2009-01} [Day 3] {07-07-09}

1 with you a copy of the draft opening remarks that I gave.
2 But, essentially, we are looking at five questions here in
3 sequence, and taking these, initially just discussing
4 them, talking them through, having informal straw poles to
5 get a sense of where folks are, before we ultimately, at
6 the end, would take specific motions on a final decision
7 on the questions.

8 And, the first question that we
9 discussed was the issue of whether the Turbine Upgrade
10 Project or Turbine Replacement Project is a separate
11 project from the Merrimack Station Scrubber Project or
12 part of that project. And, based on the discussion that
13 we had, it was the unanimous view of those present that
14 they were separate projects.

15 DIR. NORMANDEAU: And, I would concur
16 with that, based on my reading and listening to the
17 testimony.

18 CHAIRMAN BURACK: Okay. Thank you very
19 much. So, we have now just begun discussing the second
20 question, which is "whether the Turbine Upgrade Project,
21 as a separate project, is a sizeable addition under RSA
22 162-H:5, I?" And, it has been pointed out to me by
23 counsel here that I have misspoken a few times here, since
24 Mr. Below brought to all of our attention that, in fact,

{SEC 2009-01} [Day 3] {07-07-09}

1 we're making these determinations pursuant to Section 1 or
2 I of 162-H:5, and not II. And, pursuant to that section,
3 the issue is whether it constitutes a sizeable addition,

4 not a "sizeable change or addition". So, forgive me if
5 I've misspoken, but that essentially is the test, is "is
6 this a sizeable addition?" So, we're looking specifically
7 now at the turbine, and asking "is that a sizeable
8 addition?"

9 Commissioner Below.

10 CMSR. BELOW: I think it might be
11 helpful to spend a few minutes just looking at the
12 language of the statute. I think we're being asked, as
13 the Site Evaluation Committee has been asked in the past,
14 to apply what is essentially subjective language
15 objectively, make an objective decision about language
16 that is not precise. And, the language is the words
17 "Certificates are required for sizeable additions to
18 existing facilities". And, one of the principles of
19 statutory construction is to look at the plain meaning of
20 the words in the statute as a first step. And, I look to
21 my desktop dictionary, which is Webster's II New College
22 Dictionary Third Edition, which is what was bought for me
23 out of the standard State Office Catalog when I first
24 started work here at the PUC two and a half years ago.

{SEC 2009-01} [Day 3] {07-07-09}

28

1 And, the easy word to define is
2 "addition", I think. "The act or process of adding;
3 something added, especially a room or annex added to a
4 building." So, we kind of know what an "addition" is.
5 "Sizeable" is defined as an adjective, "having
6 considerable size", a fairly subjective criteria. Looking
7 at the word "size", is defined as first "physical
8 proportions, dimensions, magnitude or extent." And,

9 another definition is "considerable extent, amount or
10 dimensions." So, you have this notion of "considerable",
11 "sizeable" being of "considerable size", and some metric,
12 some measure of something, which is -- sounds more
13 objective. And, then, "considerable", the first
14 definition is "large in amount, extent or degree"; and the
15 second is "worthy of consideration, important." And, I
16 find that second definition kind of particularly
17 interesting, because, again, we're just back to sort of a
18 large metric. But "worthy of consideration" or
19 "important", I think really brings meaning in the context
20 of the statute.

21 So, I think, you know, when I started
22 thinking about this, then I turned to the statute and said
23 "well, what's worthy of consideration pursuant to the
24 chapter and what metric does the chapter overall use for

{SEC 2009-01} [Day 3] {07-07-09}

29

1 measuring size?" And, I think there's sort of two places
2 to look. In particular, the "declaration of purpose" of
3 the statute, and then some of the definitions. The
4 definitions are more objective, in a sense. So, I'll
5 start there. In both the definition of "bulk power
6 facilities" and "energy facilities", a particular metric
7 is used as a threshold to say "anything above this size,
8 by statutory definition, is worthy of consideration. It's
9 subject to review." And, in the case of "bulk power
10 facilities", it's "an electric generating station
11 equipment and associated facilities designed for or
12 capable of operation at any capacity of 30 megawatts or
13 more." That's RSA 162-H:2, 11-a.

14 And, there's also definitions related to
15 "transmission lines", referencing "lines in excess of 100
16 kilovolts", particularly if they're over a route that's
17 not already occupied or of a particular length. A new
18 criteria was added of any "transmission line in excess of
19 115 kilovolts [kilowatts?]", "kilovolts" is now the
20 definition.

21 And, then, under "energy facility", I'll
22 sort of cut to the chase, this is VII under that same
23 section of the statute, it talks about all sorts of
24 different kind of energy facilities, but it brings them

{SEC 2009-01} [Day 3] {07-07-09}

30

1 back to an ability to "store or produce on site a quantity
2 to provide seven days of continuous operation at a rate
3 equivalent to the energy conversion [requirements?] of a
4 30 megawatt electric generating station and its associated
5 facilities."

6 So, we have these, sort of a broad
7 criteria of "30 megawatts or equivalent" or "an ability to
8 store or pipelines perhaps process or flow through at some
9 equivalency to 30 megawatt electric generating station".

10 And, finally, under VII [XII?], there's
11 "renewable energy facility", again defined as "certain
12 types of electric generating facilities and associated
13 facilities designed for or capable of operation at a
14 nameplate capacity of greater than 30 megawatts or less
15 than 120 megawatts", and powered by certain sources. And,
16 it goes further to say that it -- well, let me just pause
17 right there.

18 So, in general, the first criteria, the

19 primary criteria that the statute is using as a threshold
20 is energy output, and 30 megawatts is sort of a threshold
21 of worthy of consideration. However, all of these
22 sections, these three definition terms, have an additional
23 provision that the Committee, either on its own motion, or
24 as a result of a petition by the applicant or two or more

{SEC 2009-01} [Day 3] {07-07-09}

31

1 petitions within a certain category of types of
2 petitioners could also consider plants that are smaller,
3 facilities that are smaller than these thresholds, if the
4 Committee finds that it should require a certificate
5 consistent with the findings and purposes set forth in RSA
6 162-H:1, the "Declaration of Purpose" of the chapter.

7 So, in general, it does say, you know,
8 it's not necessarily just 30 megawatts that's worthy of
9 consideration, it could be something that's smaller than
10 that in size, if the Committee finds that that's
11 appropriate or that it should be certified in pursuit of
12 fulfilling the purposes of the statute.

13 With renewable energy facilities,
14 though, it does set a lower threshold, and, in effect,
15 says that "anything less than 5 megawatts," if it's a
16 renewable facility, "can't be considered". That is simply
17 too small. That's sort of a lower threshold below which
18 it's sort of never worthy of consideration or requiring
19 certification.

20 So, I think that sort of brings us back
21 to the "Declaration of Purpose" of the statute. And, I
22 think another thing that helps sort of inform that or
23 point to that is RSA 162-H:4, IV, which says "In cases

24 where the committee determines that other existing
{SEC 2009-01} [Day 3] {07-07-09}

32

1 statutes provide adequate protection of the objectives of
2 RSA 162-H:1, the Committee may, within 60 days of filing
3 of an application, exempt the applicant from the approval
4 and certificate provisions of this chapter", subject to
5 some additional provisions.

6 But, there again, the statute is
7 suggesting, even something that is -- requires, normally
8 would require a certificate could be exempted, if the
9 objectives of the "purpose" statement of the statute are
10 otherwise fulfilled. So, I think we come back to the
11 "Declaration of Purpose" and thinking about what is
12 "worthy of consideration", thus what is a sizeable
13 addition.

14 And, if you just bear with me, I'll
15 finish up here in a minute. But I think the "Declaration
16 of Purpose", I'm just going to recap some of the key
17 language in it. There's a I and a II within that that are
18 sort of parallel. The first part's about "energy
19 facilities", the second is about "bulk power supply
20 facilities". Those two separate definitions are going
21 away shortly, when the total revision of the statute comes
22 into effect. But they're sufficiently similar that they
23 are effectively the same. But they obviously talk about
24 recognizing that "selection of sites for energy facilities

{SEC 2009-01} [Day 3] {07-07-09}

33

1 will have a significant impact on welfare of the
2 population, economic growth of the state, and the

3 environment of the state. The Legislature finds that the
4 public interest requires that it's essential to maintain a
5 balance between the environment and the possible need for
6 new energy facilities; that undue delay in construction of
7 any needed facilities be avoided; and that the state
8 ensure the construction and operation of energy facilities
9 is treated as a significant aspect of land-use planning,
10 in which all environmental, economic, and technical issues
11 are resolved in an integrated fashion." They, therefore,
12 set up this "procedure for review, approval, monitoring,
13 and enforcement of compliance in the planning, siting,
14 construction and operation of energy facilities."

15 With regard to bulk power facilities,
16 there's some additional language that talks about
17 identifying a state position with respect to each proposed
18 site. And, other than that, it's pretty much parallel,
19 and makes reference to "assuring adequate reliable supply
20 of electric power in conformance with sound environmental
21 utilization", and so forth, generally tying it back to
22 siting, but also, to some extent, talking about this whole
23 -- this integration of concerns and factors that should be
24 considered in this process.

{SEC 2009-01} [Day 3] {07-07-09}

34

1 So, I'll just stop there. I just think
2 that sort of informs what is worthy of consideration and
3 therefore what would be a sizeable addition for purpose of
4 this statute.

5 CHAIRMAN BURACK: Commissioner Below,
6 thank you for that. Just a couple of questions for you
7 here. I think you may have, in your reference to the

8 definition of "renewable energy facility", you may have
9 given an incorrect citation. My understanding is the
10 citation would be to 162-H:2, XII?

11 CMSR. BELOW: Yes.

12 CHAIRMAN BURACK: Okay. I thought you
13 may have said "VII", --

14 CMSR. BELOW: I may have. It is XII.

15 CHAIRMAN BURACK: -- but just wanted to
16 clarify that. The other question I have for you is,
17 through what date is the version of 162-H that you cited
18 to amended?

19 CMSR. BELOW: July 7th, 2008.

20 CHAIRMAN BURACK: Okay. I'm just
21 wondering, because, unless I misheard you in your reading
22 of RSA 162-H:1 -- or, Section 1, II, I thought, in the
23 last line, I heard you use the word "operation". And, I
24 don't see that in the statute, at least through amendments

{SEC 2009-01} [Day 3] {07-07-09}

35

1 as of June 26 of 1998. Am I mistaken?

2 CMSR. BELOW: Well, I was reading a
3 section from 162-H:1, I.

4 CHAIRMAN BURACK: I'm sorry. I see
5 where you were.

6 CMSR. BELOW: About the third sentence
7 in.

8 CHAIRMAN BURACK: I see, okay. You were
9 in I, not in II. Okay.

10 CMSR. BELOW: Right.

11 CHAIRMAN BURACK: Thank you.

12 CMSR. BELOW: And, I'm not sure if that
Page 29

13 exact language repeats itself in II, perhaps not. I think
14 the somewhat odd thing is that, on the face of it, you'd
15 think this would meet the criteria of Merrimack Station,
16 the underlying station, if it was built today, of being a
17 bulk power supply facility. But, in fact, pursuant to RSA
18 162-H:5, IV(b) states, in effect, that "After the date when
19 competition" in the electric industry "has been certified
20 to exist, pursuant to RSA 38:36, ... all proposed electric
21 generating facilities of capacity greater than 30
22 megawatts shall be considered energy facilities, and shall
23 not be considered bulk power supply facilities." So, I
24 mean, if Merrimack Station were being built today, it

{SEC 2009-01} [Day 3] {07-07-09}

36

1 would be considered, for purposes of this statute, a bulk
2 -- an energy facility, not a bulk power supply facility.
3 The main difference had to do with whether it went to the
4 PUC first for a separate PUC certificate of need kind of
5 review.

6 But, all that being said, I think the
7 overall purpose of the statute is reasonably clear, but,
8 again, fundamentally subjective in nature. So, then, I
9 think we can turn to, you know, some of the previous
10 decisions of the Committee with regard to what constitutes
11 a "sizeable addition" to help inform our decision today.

12 CHAIRMAN BURACK: Very good. Thank you
13 very much for sharing that, that overview with us. Again,
14 let's, as Commissioner Below has suggested, let's continue
15 specifically the discussion of the question of "whether
16 this Turbine Replacement Project is a" -- I'm sorry,
17 "whether, as a separate project, it would constitute a

18 sizeable addition to this facility?"

19 Are there folks who would like to share
20 particular observations based on the record beyond what
21 we've already heard? Mr. Harrington.

22 MR. HARRINGTON: Yes. I think I'd just
23 like to look to Data Request TS-01, dated 02/03/09. This
24 is Mr. Smagula. And, it was a -- the question was "Please
{SEC 2009-01} [Day 3] {07-07-09}

37

1 provide a listing of the work done at Merrimack Unit 2
2 during the turbine outage, separated into capital and
3 O&M." And, then, the response, under "Capitalized
4 Projects", the first two line items are the "HP/IP turbine
5 replacement" and the "Generator rotor replacement", which
6 are, in fact, the ones we're discussing today. But, if
7 you go on, you also see that there was an "Air heater tube
8 replacement", a "Boiler floor replacement", an "SCR
9 replacement", a "Secondary superheater inlet bank
10 replacement, "Station batteries were relocated and
11 replaced, "Excitation switchgear voltage regulator
12 equipment went from analog to digital", a "Computer
13 System, replaced the distributed control system". They
14 replaced a "bypass control valve", a "Main boiler feed
15 pump control valve", and some "Expansion Joints".

16 And, I guess my point is, that's all
17 part of routine maintenance outages, where you go in and
18 replace equipment in power plants. And, I think, if it
19 wasn't for the fact of the Scrubber Project, which we
20 apparently are going to de-link from the turbine and
21 generator replacement, we wouldn't be talking about the
22 turbine or the generator whatsoever. It would simply be a

23 couple of issues or items being replaced in a list of
24 quite a few items that is done routinely during scheduled

{SEC 2009-01} [Day 3] {07-07-09}

38

1 maintenance outages at power plants.

2 So, I think that this, if we -- if the
3 straw vote were to hold, and we say that the turbine and
4 scrubber are not, in fact, one project, but a separate
5 project, I think, just by looking at this list, it shows
6 that, clearly, no one's saying the "boiler floor
7 replacement", for example, constitutes a sizable addition,
8 or that, collectively, all these other capitalized
9 projects do. And, I think the turbine and the generator
10 rotor fit into that same thing. That, if it wasn't for
11 the scrubber, we wouldn't even be talking about it.

12 CHAIRMAN BURACK: Other observations on
13 this issue? Okay. Commissioner Below.

14 CMSR. BELOW: One observation is, I
15 think -- I was just trying to look at the Stipulation of
16 Facts as to what the net output would increase by. And, I
17 think the reference is Stipulated Exhibit E. I can find
18 it in Exhibit K, which is "6 to 13 megawatts", but I'm not
19 sure I see it in Exhibit E. Perhaps somebody can see it.

20 CHAIRMAN BURACK: Well, I know that, I
21 can't put my figures on it, but in the record I know that
22 there are references to "an increase in the range of 6 to
23 13 megawatts, with a maximum of potential of
24 17 megawatts." And, we can find the references later to

{SEC 2009-01} [Day 3] {07-07-09}

39

1 the specific place --

2 CMSR. BELOW: Right.

3 CHAIRMAN BURACK: -- in the record where
4 those numbers appear.

5 CMSR. BELOW: But, just simply looking
6 at those megawatts, I mean, even if it was a free-standing
7 project, that wouldn't trigger the automatic size
8 thresholds in the statute of 30 megawatts. So, it's well
9 within that threshold. I think, to the extent that it is
10 sort of expected practice in this day and age that, if
11 you're looking at the age of equipment and replacing it,
12 you would look to put in more efficient equipment when the
13 time comes, whether it's a new refrigerator or a rooftop
14 air conditioning unit or a motor, generally, products
15 today, you can get a higher efficiency rating than what
16 you could get some years ago. The fact that there's no
17 increase in the amount of fuel burned for the efficiency
18 upgrade, that it is precisely, as others have said, a
19 replacement within the existing, not footprint, not just
20 for the facility, but, literally, of the existing turbine
21 component, it fits precisely in its replacement turbine.
22 I think altogether those facts and previous precedent
23 would indicate that the turbine replacement doesn't
24 constitute -- does not constitute a sizeable addition for

{SEC 2009-01} [Day 3] {07-07-09}

40

1 purposes of this statute.

2 CHAIRMAN BURACK: Are there any other
3 observations anyone would like to share, before we just
4 have an initial straw poll on this issue?

5 (No verbal response)

6 CHAIRMAN BURACK: Seeing none, please
7 raise your hand if it is your view, and again this is not
8 binding at this point, but if it is your view at this
9 point in time that the Turbine Upgrade Project does not
10 constitute a sizeable addition?

11 (Unanimous show of hands.)

12 CHAIRMAN BURACK: Okay. Thank you. So,
13 we are unanimous on that issue as well.

14 Let us then proceed to the third
15 question here, which is "Viewing the Scrubber Project as a
16 separate project, and not including the turbine upgrade as
17 a component of the project, should the Committee issue a
18 declaratory ruling finding that the Merrimack Station
19 Scrubber Project constitutes a sizeable addition pursuant
20 to 162-H:5, I, for which a Certificate of Site and
21 Facility is required?"

22 So, again, let's have a discussion
23 specifically relating to the Scrubber Project itself.
24 Commissioner Below.

{SEC 2009-01} [Day 3] {07-07-09}

41

1 CMSR. BELOW: I'll just start by saying
2 I think this is the more difficult question, because it's
3 not clear-cut. I mean, if you look at the dollar
4 investment, it's a -- I would argue it's a sizeable
5 investment. There's a considerable amount of investment
6 going into this Scrubber Project. There were some
7 arguments about the potential volume. I mean,
8 volumetrically, you know, there's arguments there, but,
9 you know, it says "significant dimension, size", what's
10 being added, if you look at it as a room on a house,

11 dimensionally, there's some size to that. The volume, per
12 se, has never been a criteria, and I don't think the
13 statute indicates that it's any significance one way or
14 the other. I think the statute, the overall scheme is
15 "What's the energy output? What are the integrated site
16 issues relative to the environment and the welfare of the
17 population of the state and so forth?"

18 So, you know, it sort of comes back to,
19 just because it's a sizeable investment, does it
20 constitute a "sizeable addition" for purpose of the
21 statute? And, you know, we start to get into the
22 questions of the mandate from the Legislature. It's
23 actually going to reduce the power output of the plant in
24 and of itself, and, obviously, it's being done, not for

{SEC 2009-01} [Day 3] {07-07-09}

42

1 the purpose of producing more energy, but producing more
2 -- producing the energy that it produces more cleanly, you
3 know, somewhat less energy, but much more cleanly. You
4 know, it's mandated as an environmental improvement. So,
5 I'll just leave it at that for right now.

6 CHAIRMAN BURACK: Okay. Thank you.
7 Mr. Harrington.

8 MR. HARRINGTON: Just a follow-up
9 comment on that. I guess the -- there's nothing in the
10 statute that talks about monetary value, so -- or, it just
11 talks about a "sizeable addition". It doesn't say if
12 it's, you know, a "sizeable cost" or whatever like that.
13 And, in fact, one of the things that was discussed during
14 the hearing was, I think it was given that this was a --
15 that the 450 or approximately \$450 million was an enormous

16 increase in the book value, because the book value at
17 Merrimack Station was now at 90 million. But it was also
18 pointed out in testimony that that 90 million had been
19 written down over the last 40 something years, and, in
20 fact, most of that was due to additions made to the
21 Station since it was built, and the actual original book
22 value is probably pretty close to nothing at this point,
23 simply because it's over 40 years old. So, I think, if
24 you looked at that, and you can't make a straight

{SEC 2009-01} [Day 3] {07-07-09}

43

1 one-for-one comparison between the cost of the addition
2 and the book value of the plant, because they're really in
3 total different dollars and they have been written down so
4 much.

5 But I do agree with Commissioner Below,
6 that I think the main guidance that the Legislature has
7 supplied us here is the fact that, if you have a plant
8 that is less than 30 megawatts, you can go to a
9 "greenfield" site, and you can go through the whole
10 process of developing that site, including roads,
11 substations, transmission lines, I believe -- of course, I
12 have to mention this for Glenn, that we want to make sure
13 we protected the Burnell's [Bicknell's?] thrush and the
14 three-toed woodpeckers and all of that. But, I mean, we
15 saw that in the last hearing on the Granite Reliable
16 project, that there's a sizeable amount of environmental
17 issues that come up. And, if you would just look back to
18 that project on the top of either Dixville, and I can't
19 remember the name of the other peak, but, taken by
20 themselves, those projects, as a separate thing, wouldn't

21 constitute 30 megawatts. So, you could have a sizeable
22 addition. The Lempster Project was a windmill project
23 that went through this Committee because it was requested
24 by the people in Lempster. There was no such request made

{SEC 2009-01} [Day 3] {07-07-09}

44

1 in this particular case. So, I think, if you look at, you
2 have to use as a yardstick, a sizeable addition should be
3 something that's at least comparable to a 30-megawatt
4 "greenfield" plant being built. And, if you're going to
5 do that, whether it's a wind project, that involves a
6 substantial amount of clearing of land. Obviously,
7 there's the visual aspects of having this, all the things
8 we've gone through with noise and birds and so forth, if
9 you're going to have a 30 -- a slightly less than 30
10 megawatt thermal plant, you're, obviously, going to have a
11 cooling system, you're going to have, again, transmission
12 lines, distribution, you're going to have a substation.
13 You're going to have all sorts of equipment that's
14 required, plus you're going to need fuel coming in.

15 That, in the case of the Schiller
16 Station, we were told that this Committee has ruled that
17 it's not a sizeable addition when it was converted to
18 wood, but they were getting in 450,000 tons of wood, I
19 can't remember, it was -- going in and out of there. And,
20 it was a substantial amount. And, if you built a new
21 biomass plant, you'd be getting, you know, less than that,
22 but still an awful lot of wood would be coming in, so
23 you'd have traffic issues and roads and all these other
24 things that go along with that. Of course, you'd have to

{SEC 2009-01} [Day 3] {07-07-09}

1 have -- any thermal plant puts out some pollution of some
2 type through its stack, there would have to be permitting
3 and so forth like that. In this case, we're seeing not
4 more pollution, but less pollution.

5 So, I think, if you look at it in the
6 entirety, you have to really kind of use that as a
7 yardstick. At least that's what I intend to look at, as
8 what would be allowed for a 29 megawatt plant, either
9 renewable or thermal, that this Committee wouldn't have
10 jurisdiction on, unless we opted to take it, which we
11 didn't do in this case, or it was requested, which, by the
12 residents or the municipality, which wasn't in this case.
13 So, that's the kind of yardstick I'll be looking at more
14 as we continue our deliberations.

15 CHAIRMAN BURACK: Thank you. I'm sorry,
16 Mr. Getz, I think you had a comment?

17 VICE CHAIRMAN GETZ: Yes. Well, I think
18 it's been said at least once or twice, that I don't think
19 that the Legislature has given us much guidance. And, I
20 think what we're all struggling to do is to try to divine
21 some guidance from what's in the statute, and maybe a
22 couple of previous decisions from this Committee about
23 what constitutes "sizeability".

24 And, I think, in the first instance, it
{SEC 2009-01} [Day 3] {07-07-09}

1 has to include some sort of proportionality. What may be
2 sizeable at the site of a 50 megawatt biomass facility
3 that was certificated by the Committee may not be sizeable
4 at Merrimack, Granite Ridge or at Seabrook. So, I think

5 there has to be some notion of proportionality. Although,
6 I guess Mr. Harrington suggests that there may be a bottom
7 threshold around 30 -- what would be the equivalent of
8 30 megawatts. But I still think you have to look at that
9 in the context of the particular site.

10 I also wanted to harken back to the
11 previous hearing. And, I think there was some discussion
12 about relevance of volume as one measure of size. And, I
13 just wanted to make the distinction between what's
14 relevant and what might be dispositive. I don't think
15 there's any serious argument against the notion that
16 height and volume are relevant. But I think that there
17 may, depending on anybody's particular view of
18 proportionality and sizeability, you know, volume may not
19 be the determinative or deciding factor. So, I just
20 wanted to make that distinction.

21 And, I was trying to understand, too, a
22 second distinction, and I think it comes out of
23 Commissioner Below's discussion about the difference in
24 162-H: 5, I and II. And, where, in one situation, it talks

{SEC 2009-01} [Day 3] {07-07-09}

47

1 about "sizeable additions" and the other talks about
2 "sizeable changes or additions". Now, the Legislature has
3 obviously made some distinction, and it's difficult what
4 -- what I should infer from that distinction. Because, in
5 some respects, I'm not sure if I understand the logic of
6 it. Because, in one case, if you're a certificated
7 facility, you have to come back for approval for a change
8 or addition. But, if you're a grandfathered
9 non-certificated facility, you only have to come before

10 the SEC for an addition.

11 And, I think where Commissioner Below is
12 going, and maybe he has to answer this question for me,
13 is, you know, it seems "addition", vis-a-vis "changes or
14 additions", an addition is a more limited or limiting
15 requirement. So, was the import of where you were going
16 was that, only if it was -- involves the addition of
17 electrical capacity output that, so, for example, in the
18 instance of the turbine, that involved electrical output,
19 so that's an addition. Now, we've concluded it wasn't
20 sizeable. But, here, on the other thing, that it's not --
21 and it may be sizeable, but it may not be an addition,
22 because it's not an addition of electrical output? Is
23 that the bottom line of --

24 CMSR. BELOW: That's not really where I
{SEC 2009-01} [Day 3] {07-07-09}

48

1 was going. I was just trying to avoid reading the
2 definition of "change" too. But, no, seriously, I was
3 just looking at the language of the statute and just
4 thinking that it didn't apply, just because of the way --
5 because of the plain language of the statute. But I
6 think, you know, I guess I'm wondering, do you disagree,
7 perhaps, or wondering if a "sizeable change" should be
8 considered? I mean, "change" is "to make different or
9 alter; to exchange or replace by another".

10 VICE CHAIRMAN GETZ: I guess what I'm
11 struggling at is trying to understand the statutory
12 approach, and what, if anything, was meant by, in the one
13 instance, pointing to "additions" and, in the other
14 instance, pointing to "changes or additions".

15 MR. HARRINGTON: Mr. Chair, Chairman
16 Getz, I might, saying this as a former legislator, you may
17 be giving them too much credit. I would look at this and
18 say "this is probably just an oversight." And, someone
19 put in "changes and additions", and someone else put in
20 "changes", and no one ever caught it. Because, to me,
21 they're almost synonymous. And, I don't see anything in
22 the statute that would limit it, a "sizeable addition" to
23 mean it would have to be a sizeable amount of megawatts.
24 It's just the plain definition of the word "addition", as
{SEC 2009-01} [Day 3] {07-07-09}

49

1 Commi ssi oner Below had read. And, I would think that you
2 could certainly have an addition without having a increase
3 in megawatts in the production facility, and the question
4 is then whether it becomes sizeable or not, is, I think,
5 the issue. But I just -- I don't know, my experience
6 tells me that that was probably just not caught by someone
7 when it was written.

8 VICE CHAIRMAN GETZ: And, I'm just
9 trying to go through the analysis of trying to give import
10 to the words. And, that's Step 1.

11 MR. HARRINGTON: It didn't help much.
12 The Legislature didn't help much on this one.

13 CHAIRMAN BURACK: Are there other
14 observations? Mr. Dupee.

15 MR. DUPEE: Thank you, Mr. Chairman.
16 When you have statutory uncertainty, it's not uncommon,
17 for an entity such as ours, to basically drive a stake in
18 the ground and say, "For our purposes, we believe the
19 following value to be adequate", "sufficient", however you

20 want to determine that. That value is then reviewed by
21 society, perhaps goes through legal challenge, and over
22 time, one sort of creates this background of what is
23 reasonable. I was just noticing that the cost of this
24 particular project I believe is 450 million, thereabouts,
{SEC 2009-01} [Day 3] {07-07-09}

50

1 for the Scrubber Project. And, the previous Seabrook
2 case, which we chose not to consider sizeable, was on the
3 order of \$40 million, a roughly ten-fold difference. So,
4 it may be that cost is a proxy for a sizeable addition. I
5 just make that comment for the record.

6 CHAIRMAN BURACK: Mr. Scott.

7 DIR. SCOTT: Two issues I'd like to
8 discuss a little bit more in detail. One is, again, it's
9 "what was meant when this was written?" When I look at
10 the "Declaration of Purpose", I see words like "land use",
11 "environmental". And, why that's important to me is what
12 we're talking about here is an air pollution control
13 project. And, what I can't help thinking is, an air
14 pollution control project, regardless of the size, is that
15 really intended under this "Declaration of Purpose" to
16 fall under here. So, that's one issue I get kind of stuck
17 on when I go down this road.

18 The other is when I look at other
19 decisions we've made. The Northern Wood Project at
20 Schiller Station, when I look at that, when I look at this
21 whole issue of volume and other things, as we discussed
22 during the hearing, the last hearing. My understanding
23 and my experience with the Northern Wood Project is it was
24 a 100 percent replacement of a boiler unit, with all the

1 structure that goes around that. There was a large
2 conveyor, a woodyard, a tipping station, for those who
3 haven't seen it, which involves the tractor-trailer trucks
4 actually getting tipped up. It's rather impressive, if
5 you haven't seen it.

6 But all that is a very, you know, I'll
7 probably use the wrong word here, a very significant
8 amount of construction equipment and many things. And,
9 so, when I look at that, again, I struggle with, and we
10 did, we ruled that that was not a sizeable addition. So,
11 I'm struggling with why this would be. So, those are the
12 three things in my mind that I'd like to share.

13 CHAIRMAN BURACK: Mr. Normandeau.

14 DIR. NORMANDEAU: First of all, I'd like
15 to say I totally agree with Chairman Getz on the
16 proportionality thing. I mean, so, and when I look at it
17 and I listen to what I'm hearing from the past, you know,
18 it's related to "has the site been added to or has the
19 power -- I think the primary thing is power generation. I
20 mean, I agree completely that, you know, we have a
21 pollution control structure going in here. It's really
22 something separate. I mean, there's been several theories
23 advanced to what constitutes "sizeable". I mean, the idea
24 that, you know, the plant can stay in business longer

1 because it will meet pollution standards if it has this.
2 You know, the cost, although I would say, if you're going

3 to talk cost, you talk -- you put it in relation to what
4 that plant would cost to build today. What's been written
5 down in the books, that's an accounting issue. But I
6 believe testimony was that plant today would be somewhere
7 between \$2.1, \$2.3 billion or whatever. So, when you
8 start to compare, you know, apples-to-apples, it sort of
9 brings down that ratio, if you will.

10 But, you know, I would put my stake in
11 the ground, as was mentioned earlier, around a percentage
12 increase in power output and a percentage increase in
13 footprint on the ground outside of the original -- outside
14 of the original footprint. And, if you look at it that
15 way, there's no power increase essentially. And, the
16 footprint increase is a miniscule percentage over what's
17 there now.

18 And, so, you know, the volume thing, you
19 know, I mean, and you can say "okay, it's physically
20 bigger", but I have a hard time thinking in the terms of
21 the statute that that was what was intended. Not that I,
22 you know, can read the tea leaves of the Legislature any
23 better than anybody else. But, you know, the whole
24 statute is about power and energy generation. And, it

{SEC 2009-01} [Day 3] {07-07-09}

53

1 would seem to me that that's the focus of what -- what
2 constitutes a large addition.

3 CHAIRMAN BURACK: Thank you.
4 Commissioner Campbell.

5 CSMR. CAMPBELL: I kind of look at it,
6 and I said some of this at the last meeting, that, if
7 you're looking to define "sizeable", you're trying to

8 define it to a public purpose. You know, if we did define
9 it as "sizeable", what are we trying to accomplish, you
10 know, by reaching the jurisdiction? In other words,
11 that's the only place we can reach the jurisdiction. And,
12 so, if you are, what are you trying to make happen? And,
13 you're trying to determine, if you've done the right
14 things to the site. I mean, we've taken the turbine off
15 the table, so we're left with the scrubber. And, the
16 scrubber, we know, environmentally, is an improvement. It
17 wouldn't be there. And, so, the real issue is "what are
18 we doing to the site?"

19 And, where I look at it is on four
20 points: (1) The permits around Alteration of Terrain
21 permits from the state have been secured, which look at
22 the same issues that we'd be looking at. I'd look at site
23 plan review, both Phase I and Phase II have been done
24 locally, and the wetlands permits have been done locally.

{SEC 2009-01} [Day 3] {07-07-09}

54

1 So that, at the end of the day, no matter -- no matter
2 whether or not we reach in the jurisdiction or not, the
3 issue is about what's going on on that site, so that the
4 scrubber, you know, had been dealt with both at the state
5 and local level. So, permits that have been secured,
6 which have been submitted to us in these proceedings, I
7 think at least help inform me.

8 The second thing is that the precedence
9 of the past is helpful. And, I look at it that the
10 footprint that we're talking about here is 86,000 square
11 feet, or, as I understand it, a disturbance of maybe
12 1.8 percent of the land that's available in that area.

13 And, that that's, you know, what we're dealing with. And,
14 now it seems -- it doesn't seem sizeable to me, when you
15 consider that what we're talking about is a pollution
16 facility that's being attached to an operating plant.

17 (3) You'd have the height issue. And,
18 around the height issue, other than the one chimney, most
19 of the buildings, you know, don't change the height a
20 lot, I mean, they bring in their own height, and we have
21 all the numbers in front of us. But it's not like looking
22 at a "greenfield" site. One day you've got wheat growing,
23 and the next day you've got, you know, 80 and 100-foot
24 buildings. So, it doesn't seem to me that it's changing

{SEC 2009-01} [Day 3] {07-07-09}

55

1 that a lot.

2 And, finally, to the cost issue, when
3 you do look at a site law, what you're looking at for cost
4 is the ability of the developer, in this case the utility,
5 to pay those costs. So that you know, as a public entity,
6 that somebody is not just coming out there with a "field
7 of dreams" and that they can't finance it. And, that's
8 the PUC that determines whether that -- whether they get
9 the right rates, where they can charge that.

10 So, it seems to me, when you look at the
11 whole piece of it, Mr. Chairman, that you come down to --
12 I don't see how you make the reach that it's a sizeable
13 addition.

14 And, I guess the last point I'd make and
15 reiterate is, I don't -- I'm not persuaded by the "volume"
16 argument, and I don't have to go to dispositive. I can
17 look at height and width and footprint, but I don't

18 really think that I'm in the business of permitting how
19 much air is in the building. And, it's the usable
20 footprint that I'm concerned about. And, unless I misread
21 things, we've got 86,000 square feet of usable footprint.
22 So, that's how I look at this.

23 CHAIRMAN BURACK: Mr. Harrington,
24 something further?

{SEC 2009-01} [Day 3] {07-07-09}

56

1 MR. HARRINGTON: Yes. One other, just
2 one other thing I wanted to bring up, because it has been,
3 as Commissioner Getz pointed out, there's a lot of
4 nonguidance by the Legislature in this law. So, it
5 doesn't give us much. But there was a statement made by
6 Representative Walz that was made to the Committee. And,
7 without reading the whole thing, basically said that this
8 issue was brought up, it was known to the Legislature in
9 this particular session. There were specific bills that
10 came up and were considered. And, it talked to the
11 Senate, both the Committee and unanimous or near
12 unanimous, I think there was one vote in opposition, chose
13 to reject the bill that would have questioned whether this
14 was proper policy to have this scrubber be built.

15 So, I think, you know, we also have this
16 -- we have the Legislature not giving us very much
17 guidance. But, by their silence this time, and it wasn't
18 just an act of omission, there was actually -- there were
19 bills brought in front of the Legislature. It was
20 discussed, there were hearings, and the Legislature chose
21 not to take any additional action. Clearly, if they chose
22 to do so, they could have said "define more what a

23 "sizeable addition" was", said that "this should go --
24 refer to the PUC for more study", or quite a few other
{SEC 2009-01} [Day 3] {07-07-09}

57

1 options. And, with all being considered, they chose not.
2 So, I think that we have to at least look to say that
3 there's some additional guidance from the Legislature on
4 what their intent was.

5 CHAIRMAN BURACK: Okay. Thank you. Mr.
6 Getz.

7 VICE CHAIRMAN GETZ: Let Harry. He
8 hasn't gone yet.

9 CHAIRMAN BURACK: Mr. Stewart.

10 DIR. STEWART: I guess I want to address
11 the "extension of life of the facility" question that
12 Director Normandeau put on the table, which was mentioned
13 I think by the Moving Parties. The equipment is being
14 installed to meet an environmental mandate, and a state
15 and federal mandate to comply with certain requirements
16 for air pollution emissions. And, I guess my view of that
17 is that this may increase the useful life of the facility,
18 certainly. You know, and in concept, a facility that's in
19 non-compliance should shut down, you know, tomorrow. But
20 I don't believe that this should be a factor in terms of a
21 "sizeable addition" judgment by the Committee. The
22 facility life is extended by this installation. But I
23 just don't see that, in the context of the statute, as a
24 significant criteria that we should apply.

{SEC 2009-01} [Day 3] {07-07-09}

58

1 In terms of the size of the project, the
Page 48

2 physical size of the project, I think I would point out
3 that, first, this is essentially an industrial lot. So,
4 what's happening here is that there's an expansion of a
5 project within the footprint of a property of an
6 industrial lot. It hasn't been, you know, planned that
7 this was vacant land that would be there for other
8 environmental purposes or something like that. It's
9 essentially an industrial lot. And, when we look at the
10 introduction to the statute, it talks about land use,
11 planning, and environmental significance.

12 In terms of the land development aspect,
13 I don't think this is a significant project or a
14 significant issue. You know, we're dealing with an
15 industrial lot, and we're expanding the footprint within
16 an industrial lot. It's not a new facility on a new piece
17 of land and a significantly sensitive area or something
18 like that.

19 Finally, as far as height, having been
20 on a number of these hearings, the height question, in
21 terms of new facilities, has been raised. The major one
22 was Londonderry, where the airport was an issue. You
23 know, the thing -- the proposed facility was in the --
24 almost on a flight path for the airport.

{SEC 2009-01} [Day 3] {07-07-09}

59

1 Other than that, I think height, it
2 could be argued, and has at times, that it's an aesthetic
3 issue. But, again, I think the practical issue is flight
4 paths and things like that, and we don't really have that
5 here.

6 CSMR. CAMPBELL: Right.
Page 49

7 CHAIRMAN BURACK: Mr. Dupee, and then
8 I'll go to Mr. Getz.

9 MR. DUPEE: Thank you, Mr. Chairman.
10 Earlier, during our deliberations, I had mentioned that
11 perhaps costs could be a proxy for sizeable addition.
12 And, then, as I was sitting here, another thought occurred
13 to me, which is going back to the statute itself, and look
14 at the four tests that we're asked to apply as a Committee
15 to whether or not to issue a certificate. And, wondered
16 whether or not, as we had talked about each of those
17 points, "is this a facility in need of having those
18 particular points addressed?"

19 So, for example, under 162-H:16, V, they
20 give us four tests. (1) Does the Applicant have the
21 money and the expertise and the managerial skills? I
22 think, in this case, most people agree that the Applicant
23 does -- or, not the Applicant, but PUC, whatever -- that
24 PSCo does.

{SEC 2009-01} [Day 3] {07-07-09}

60

1 Secondly, whether or not we're going to
2 "unduly interfere with the orderly development?" I think
3 you've heard testimony and you've heard some other
4 Committee members suggesting that would not be the case.

5 Thirdly, we want to make sure that, or
6 if we were to take this particular instance on, would be
7 the question about aesthetics. And, we've heard
8 individuals here talk about the fact that this is an
9 industrial area, and nothing's particularly changing
10 because of this addition that would be an aesthetic issue.

11 And, lastly, the question raised under
Page 50

12 the statute is "is this consistent with the state energy
13 policy?" And, I think we all know that the Legislature
14 had passed legislation that, in fact, that the scrubber
15 shall be built. So, I think that the public interest
16 question, and consistent with the energy policy, has been
17 sort of answered for us.

18 CHAIRMAN BURACK: Thank you.
19 Commissioner Getz.

20 VICE CHAIRMAN GETZ: Well, I guess that
21 analysis basically suggests that, if it were before us,
22 what might happen? But I'm really stuck at the visible
23 comparison of Exhibits B and D that were much of the
24 discussion that was brought before us. And, it's hard for
{SEC 2009-01} [Day 3] {07-07-09}

61

1 me not to conclude that some sizeable change is occurring
2 between 2008 and 2013.

3 Now, Public Service, you know, has put
4 in its testimony that what you really should be looking at
5 is comparing square footage changes and what the change or
6 addition from 2008 to 2013 is two-thirds of 1 percent.
7 The Petitioners have tried to rearrange the stipulated
8 facts and make I guess what they would conclude is a
9 apples-to-apples comparison and are arguing that it's a
10 56 percent change. Now, Mr. Smagula I think has testified
11 that that number is too high for a variety of reasons, and
12 I don't think that the Petitioners seriously argue about
13 that. But I'm sure they would argue that it's a number,
14 that the proper comparison is a number far higher than
15 two-thirds of a percent, even though it's something less
16 than 56 percent.

17 But I'm also looking, in trying to
18 compare these exhibits, it would seem hard for me to
19 believe that, if all of the additional construction that
20 is -- that you can see occurred between 2008 and 2013, if
21 that were for additional generating capacity, and if, you
22 know, \$457 million were being spent to generate a couple
23 of hundred more megawatts of electricity, it would be hard
24 for me to believe that we wouldn't be concluding that this

{SEC 2009-01} [Day 3] {07-07-09}

62

1 is a sizeable addition.

2 Now, I mean, there's a certain irony
3 here that the Company is being told to put in these
4 facilities for environmental purposes. But I'm stuck with
5 the plain language or words of the statute that says "a
6 certificate is required for a sizeable addition to an
7 existing facility", and, you know, it may go a different
8 way, depending on how you interpret 125-0. You know, it
9 may be a -- things might play out, as Mr. Dupee suggests,
10 in a proceeding. But I think I'm at -- I find it tough
11 not to conclude that this is a sizeable addition.

12 CHAIRMAN BURACK: Are there other
13 thoughts or comments that folks would like to share?
14 Mr. Harrington.

15 MR. HARRINGTON: Well, I just think one
16 thing we need to be, if we're looking at this, and this
17 kind of goes on, not only with what Chairman Getz just
18 said, but also Mr. Scott just had said before, what the
19 purpose of this is. This is not an increase in
20 generation, this is, in fact, a pollution control device,
21 it's a project that's being added. And, if we were to

22 Look at a very large increase in electric production, as
23 Chairman Getz suggested, a couple of hundred megawatts,
24 what we'd see there is there would be a dramatically

{SEC 2009-01} [Day 3] {07-07-09}

63

1 larger increase on how the rest of the world outside of
2 the Merrimack site was affected. And, by that I mean the
3 extra 200 megawatts would require, you know, a virtually
4 50 percent increase in the cooling capacity of the plant.
5 So, you'd have a large impact that way. You would require
6 a large amount more of fuel delivery, and, even though we
7 didn't have the specifics here, we have been able to
8 determine in testimony that the amount of new material
9 being delivered under this was fairly small, in the form
10 of limestone, as compared to the amount of coal that's
11 delivered on a regular basis. If we were to increase the
12 megawattage by 200 megawatts, that coal deliveries would
13 go up by 50 percent as well. And, undoubtedly, it would
14 probably increase the amount of pollution that was given
15 of in various forms off-site.

16 So, in this case, we have something that
17 has nominal impact outside, to the outside world, that's
18 not on the existing, as it was stated, existing industrial
19 site where the Merrimack plant is. There is going to be a
20 slightly taller tower, but there's already a tower there.
21 And, again, I compare that to a new plant, that you'd have
22 to say, if it was a new 25, 26 megawatt thermal plant,
23 they would be putting up a stack, too, in some place where
24 there never was one before to look at. And, as far as

{SEC 2009-01} [Day 3] {07-07-09}

64

1 pollution effects go on this, there's actually going to be
2 -- it's a negative effect. It's going to be substantially
3 reducing the amount of pollution that the plant emits.
4 And, so, again, I think, as it affects the outside world,
5 which is how I kind of look at the "Declaration of
6 Purpose" statement, there is actually very little, and in
7 some ways you could say it's having less affect on the
8 outside world than the plant does right now, because of
9 the reduction in the SOx and NOx and the mercury.

10 So, you know, based on that, I tend to
11 conclude it's not a sizeable addition.

12 CHAIRMAN BURACK: Mr. Below.

13 CMSR. BELOW: I kind of keep jumping
14 back to the notion of "sizeable" being "considerable size"
15 and "worthy of consideration" and the purposes of the
16 chapter. And, I think there's some very curious language,
17 when you look at 125-0 with 162-H. And, I know that's
18 sort of the next question, but I think it's somewhat -- it
19 bears on the question of whether it's worthy of
20 consideration under 162-H. And, specifically, though I'd
21 point out that technically, if it was built today, it
22 would be an energy facility. And, the language in that
23 "Declaration of Purpose" talks about setting up a process
24 "in which all environmental, economic and technical issues

{SEC 2009-01} [Day 3] {07-07-09}

65

1 are resolved in an integrated fashion." At the time it
2 was built, if the statute would have been effective, would
3 have been considered an "electric generating facility".
4 And, part of the specific purpose of the review process

5 was to identify a state position with respect to each
6 proposed site and expressly talks about the public
7 interest requiring a "maintenance of a balance between the
8 environment and the need for new power sources", and full
9 and timely consideration of environmental consequences of
10 the proposed project.

11 And, I tie this back to the question of
12 125-0, because it uses some language that sort of relates
13 to the language and the purpose of this statute.
14 Obviously, 125-0:11, I, there was a statement that "The
15 general court finds that it's in the public interest to
16 achieve significant reductions in mercury emissions at the
17 coal-burning electric power plants in this state as soon
18 as possible." And, it goes on and talks specifically
19 about Merrimack Station. But ends up concluding that,
20 "the installation", under VI, "the installation of such
21 technology is in the public interest of the citizens of
22 New Hampshire and the customers of the affected sources",
23 and VIII, "the mercury reduction requirements as set forth
24 in this subdivision represent a careful, thoughtful

{SEC 2009-01} [Day 3] {07-07-09}

66

1 balancing of costs, benefits, and technological
2 feasibility, and therefore the requirement shall be viewed
3 as an integrated strategy of non-severable components."

4 Now, I cite to that because part of the
5 purpose, part of what's worthy of consideration, is to
6 have a process where a state position can be identified
7 with respect to each proposed site, or I would parse it or
8 paraphrase to say "the utilization of the site or proposed
9 sizeable additions to the site." And, in this case, the

10 general court has spoken and stated the state position.
11 There's a known state position, and it's the law. And,
12 furthermore, it talks -- the statute talks about having an
13 integrated approach to resolving environmental, economic,
14 and technical issues. And, the statute expressly refers
15 to having an integrated approach to balancing costs,
16 benefits, technological feasibility and, obviously, the
17 environmental concerns. So, I think, for the purposes of
18 the site evaluation statute, that this -- I guess I come
19 to the conclusion that it doesn't constitute a sizeable
20 addition for purposes of what the statute's intended to
21 do, what our job would be to do in reviewing this.

22 That being said, I don't think it's an
23 easy call. And, I think it -- we would have been much
24 better off if PSNH had come forth earlier in the process

{SEC 2009-01} [Day 3] {07-07-09}

67

1 and asked this question to be resolved earlier, rather
2 than having the Petitioners have to bring this forward.
3 But, that being said, I think, on balance, when you come
4 down to it, to the extent there are objective criteria in
5 the statute suggesting 30 megawatts, it doesn't go there.
6 The footprint is -- there is some increase in the
7 footprint, but, in the context of the utilization of the
8 site, it's not a -- it's not a major alteration of the way
9 the site is used. It's not -- if you were to fly over it
10 before and after, you'd just -- I think you'd probably
11 have the same impression that there's a power generating
12 plant there. One image would be a little bit more
13 cluttered, because most of what's being built is sort of,
14 if you drew a circle around, if you look at those pictures

15 that have been referred to, 2008 versus to 2013, and you
16 sort of drew a circle around where the equipment is now
17 and the facilities, most of what's being built for this
18 project is sort of within the circle of where the site's
19 already developed, sort of in-filling and increasing the
20 density between some of the storage buildings and the
21 power plant itself and the outside wastewater treatment
22 area. But I think all those factors sort of lean me in,
23 you know, I go in the direction of thinking, for the
24 purposes of this statute, it's not worthy of

{SEC 2009-01} [Day 3] {07-07-09}

68

1 consideration, it's not a sizeable addition.

2 CHAIRMAN BURACK: Thank you very much.
3 I think that the points that have been raised by others
4 are largely the points that I had on my list of things to
5 point out here. I'll just perhaps add a few things here.
6 I'm not sure anybody mentioned that our understanding --
7 my understanding, based on the record, is that no
8 additional land is necessary to be purchased for
9 construction of the Scrubber Project. I think we have
10 references in the record to the net change in the
11 footprint, depending on whether you're looking at just the
12 area of where the plant activities currently exist or the
13 entire site, it's between 0.6 to something like
14 1.8 percent increase, we'll get the exact cite out of the
15 record. And, that compares to, as I understand it, the
16 Schiller site, there was a 28 percent increase in
17 footprint. And, again, we can confirm those figures from
18 the record.

19 I just want to address briefly this

20 issue of cost. I generally concur with those who
21 certainly recognize that it's something that could be
22 considered. My overall sense is that it's not a useful
23 measure, because it's really not clear what the comparison
24 would be to. We have had a discussion about the book

{SEC 2009-01} [Day 3] {07-07-09}

69

1 value issue, which really is, from my perspective, really
2 an -- based on an artificial set of accounting rules.
3 And, replacement cost, we've had some testimony here that
4 it's in the range of at least \$2 billion or more. But, I
5 think, most significantly, I believe it's important that
6 we recognize that cost is really a function of market
7 factors and inflation and things of that kind. And, I
8 think we have to ask ourselves, if the cost of a project
9 that's already underway suddenly increased, would that
10 project suddenly become sizeable, and therefore subject to
11 our having to take it on in the middle of the review --
12 or, in the middle of the construction process, or at least
13 consider it. And, from my perspective, I really think
14 that would be unworkable from our perspective. And, I
15 don't think cost is a useful measure here.

16 On the volumetric issue that's been
17 raised, I think it's important to understand that it has
18 never been an issue -- or, a factor before, I should say.
19 Certainly, looking at general dimensions of facilities and
20 structures I believe has been something that's been looked
21 at. But we really do not have any basis for a comparison
22 from earlier cases. And, I think the testimony that we've
23 heard demonstrates the real difficulty in determining what
24 should be included in the numerator and the denominator,

1 if you were to try to make those kinds of determinations.

2 I would also just point out, and I'm not
3 much of an artist, but I know a little bit about it, that
4 we need to understand that these pictures that have been
5 provided to us, while I believe they have been represented
6 in the record as being "accurate depictions of what's
7 being constructed", what we are seeing is we are seeing
8 closest up to us the pieces that are being added on. And,
9 if you were to look at this from different perspectives,
10 different pieces might look smaller than they do, or
11 perhaps larger. But we need to understand that we're
12 really seeing this from the angle that allows us to see
13 the actual areas to which the additions are being made.

14 A final point I would simply like to
15 make here is following up on Director Scott's comment. I
16 do think that there is a very real issue for us to
17 consider as to whether or not pollution control equipment
18 really is something that's intended to be covered here
19 when looking at additions. Because we just have to
20 recognize that there would be additional findings that
21 would have to be made if pollution control equipment had
22 to be considered as an addition to any particular
23 facility. And, we have to recognize that most often there
24 really is very little flexibility, in terms of the type or

1 the size, the location or the timing of the installation
2 of pollution control equipment. But, having said that,
3 that's not a significant factor, in my view of this. And,

4 I think, probably based on the comments I've shared with
5 you all, that you get a sense that my belief, based on the
6 statute and the facts, is that this is not a sizeable
7 addition for purposes of the statute.

8 So, does anyone else want to share any
9 other thoughts before we take a straw on this issue?

10 (No verbal response)

11 CHAIRMAN BURACK: Okay. Seeing none,
12 let's have just an initial showing of hands of how many
13 believe that, viewed as a separate project, the Scrubber
14 Project, again not including the turbine upgrade, would
15 constitute a sizeable addition pursuant to RSA 162-H:5, I,
16 for which a Certificate of Site and Facility is required?
17 How many believe that it is a sizeable addition?

18 (Show of hands.)

19 CHAIRMAN BURACK: Okay. How many
20 believe that it is not a sizeable addition?

21 (Show of hands.)

22 CHAIRMAN BURACK: Okay. Thank you. So,
23 we have, again, just based on the straw, we have eight --
24 one saying that it is a sizeable addition and eight saying

{SEC 2009-01} [Day 3] {07-07-09}

72

1 that it's not a sizeable addition.

2 Let me suggest that we take a break here
3 for 15 minutes or so, until 3:00, and we will resume our
4 deliberations at 3:00.

5 (Whereupon a recess was taken at 2:45
6 p.m. and the deliberations reconvened at
7 3:02 p.m.)

8 CHAIRMAN BURACK: Okay. I think, in the
Page 60

9 interest of efficient use of everyone's time, we will go
10 ahead and reconvene here, understanding that we expect
11 Commissioner Campbell is likely to rejoin us shortly. The
12 Committee I think now needs to give consideration as to
13 whether we need to take action on what I had initially
14 identified as the fourth question for our consideration.
15 And, I had phrased that question, in essence, as follows:
16 "Do the provisions of RSA 125-0:11 through 18 obviate the
17 need for the Committee to make declaratory ruling
18 decisions in this matter?"

19 I think, in light of the straw votes
20 that we have held on the first three issues relating to
21 the question of whether the turbine replacement or the
22 Scrubber Project constitute sizeable additions, I think,
23 in light of those, it is not necessary for us to actually
24 reach this legal issue, which was raised by PSNH. We

{SEC 2009-01} [Day 3] {07-07-09}

73

1 certainly heard some observations on this issue from
2 Commissioner Below earlier. But, I think, before we
3 entertain a discussion of this question in a substantive
4 way, it would be appropriate for us to consider whether we
5 can, following notions of judicial economy, if we can
6 effectively decide this case based upon the determinations
7 that we've made, assuming that we take final votes on
8 these, the determinations we've already made, or whether
9 we do or should reach this next question? And, I just
10 open that up for folks thoughts on that. Commissioner
11 Getz.

12 VICE CHAIRMAN GETZ: Thank you,
13 Commissioner Burack. I would suggest that we not reach

14 the issue. There's no need to address the issue. So, I
15 would hesitate to get into lengthy deliberations or some
16 analysis of the comparison between the relevant statutes,
17 when there's no pressing need to do so.

18 CHAIRMAN BURACK: Are there other
19 thoughts? Mr. Harrington.

20 MR. HARRINGTON: Yes, I would agree with
21 that completely. I think the 125 statute specifically
22 addresses the Merrimack plant. So, it's not like we're
23 looking for a precedent that could be applied to some
24 other power plants somewhere down the road as to whether

{SEC 2009-01} [Day 3] {07-07-09}

74

1 or not they should be applying to the Site Evaluation
2 Committee. So, I agree with Chairman Getz. I don't think
3 it's necessary.

4 CHAIRMAN BURACK: Thank you. Any other
5 thoughts anyone would like to share on this?

6 (No verbal response)

7 CHAIRMAN BURACK: I just want to get a
8 straw here then. All those who feel that it is not
9 necessary for us to reach this issue, please raise your
10 hand?

11 (Unanimous show of hands.)

12 CHAIRMAN BURACK: Okay. Thank you. We
13 have a unanimous view on that issue that we do not need to
14 reach that issue.

15 That brings us then to the final issue
16 that's before us. And, again, the way I had phrased this
17 at the output set was "Who shall be responsible for paying
18 the costs of this proceeding, including the Committee's

19 legal fees and the costs of the court reporter? And, if
20 you all will please bear with me here for just one moment,
21 I'm trying to find a file relating to this particular
22 issue, just to provide a little bit of background here.

23 When this matter was first received by
24 the -- or, the motion was first received by the Committee
{SEC 2009-01} [Day 3] {07-07-09}

75

1 from the Moving Parties, I, as is customary, contacted
2 Attorney Iacopino, asked if he would be available to
3 represent the Committee in this matter. Attorney Iacopino
4 indicated that he was, in correspondence with me dated
5 April 7th of 2009, which was copied to all of the parties.

6 Subsequently, upon receipt of the first
7 invoice in this matter, for Attorney Iacopino and his
8 firm's services, I forwarded that invoice to Attorney
9 Patch, who had been identified as the lead attorney for
10 the Moving Parties. And, I did so in the belief and
11 understanding that the Moving Parties effectively were
12 applying to the Committee for action or for some relief.
13 I subsequently received a letter from Attorney Patch,
14 dated May 15, 2009, in which Attorney Patch objected to
15 the payment of our fees, and asked that we withdraw our
16 request for payment of legal costs by the Moving Parties.

17 Following that, I received a letter
18 dated May 20, 2009, from Attorneys Needleman and
19 Allwarden, on behalf of Public Service of New Hampshire,
20 to quote or paraphrase "strongly disagreeing with the view
21 of Attorney Patch", and stating their basis for why they
22 believe that they were not responsible, that is PSNH was
23 not responsible for paying the legal fees.

24

We have here both legal fees that will
{SEC 2009-01} [Day 3] {07-07-09}

76

1 need to be covered, as well as the cost of the
2 stenographer. And, I think it's fair to say that we have
3 received and heard the positions from both parties in
4 writing on this, copies of these communications I believe
5 are in the record and have been provided to the members of
6 the Committee.

7 But, having said that, I think there may
8 be some benefit, recognizing that, again, as I said, the
9 Moving Parties certainly have applied to us for relief,
10 and it could be the position of the Committee that we read
11 the statute as indicating, and I can bring you to the
12 specific section of the statute, if you all give me a
13 moment here please. The section of the statute that
14 relates to this issue is RSA 162-H:10, V, which, among
15 other things, authorizes the Site Evaluation Committee to
16 employ a consultant or consultants, legal counsel, and
17 other staff, in furtherance of the duties imposed by this
18 chapter, the cost of which shall be borne by the applicant
19 in such amount as may be approved by the Committee in the
20 case of an energy facility.

21 Again, as I indicated before, we could
22 take the position that those who apply to us for relief
23 are applicants and would be asked to cover these fees. I
24 understand that some may say "Well, but the Moving Parties
{SEC 2009-01} [Day 3] {07-07-09}

77

1 don't technically meet the definition, at least as we have

2 understood in the past of "applicant", and the "applicant"
3 would have to be considered to be PSNH, since it is their
4 facility that is at issue here."

5 I'm going to suggest that before we, as
6 a Committee, attempt to address this issue, that we might
7 ask the parties here if they might take 15 minutes or so
8 and see if, between themselves, they can come to any
9 agreement as to how these costs might be covered, and see
10 if there is -- if there is some basis for some agreement
11 here. And, if there isn't, then we will, obviously, have
12 to reconvene as a Committee and make some determination on
13 this issue. My preference would be to see if some
14 understandings might be worked out.

15 I've asked Attorney Rancourt to be
16 available to the parties, once we go into recess, to
17 provide you with information on what the current fees are
18 and what they're likely to amount to. I think you all
19 have at least as good a sense, if not better, than those
20 of us on the Committee as to what the cost for the
21 transcripts might be here. But, certainly, our
22 stenographer, Mr. Patnaude, can give you all at least an
23 estimate of what that number is likely to be. And, would
24 ask you, if you would please, if you could, to take a few

{SEC 2009-01} [Day 3] {07-07-09}

78

1 minutes, perhaps 15 minutes or so, certainly sooner if
2 you're able to let us know "yes, you can come to some
3 agreement" or "no, you can't". And, if we could recess
4 until 3:25, and then reconvene, unless you collectively
5 come and tell us that you're ready to tell us where you
6 are sooner. Mr. Harrington?

7 MR. HARRINGTON: Yes, I just had a
8 question for informational purposes, which I don't have
9 any idea what the answer is on this. I know there was --
10 previously there have been applications, one for the
11 Schiller Station, we mentioned the one for Seabrook, and
12 there have probably been others, where the applicant has
13 requested a declaratory judgment that there wasn't a
14 sizeable addition. I guess two-fold, were there any costs
15 associated with those and who paid them?

16 CHAIRMAN BURACK: I can't give you a
17 definitive answer to that, because I personally was not
18 involved in those matters. They predated my service here
19 on the Committee. Chairman Getz, do you have any
20 recollection?

21 VICE CHAIRMAN GETZ: I do not recall,
22 no.

23 CHAIRMAN BURACK: I will tell you what
24 standard practice has been. That, whenever a matter

{SEC 2009-01} [Day 3] {07-07-09}

79

1 arises for the Committee's consideration, we have engaged
2 counsel, because, as I think we're all aware, we do not
3 have any independent staff or paid staff to otherwise
4 support the work of the Committee. So, we have hired
5 legal counsel to do that, to provide that support. And,
6 in the past, those costs have always been charged to the
7 applicant, which I believe, although I can't state this
8 with absolute certainty, I believe the applicant in the
9 past has always been the owner of the facility or the
10 proposed facility. And, to my knowledge, those fees have
11 always been paid, along with the other costs associated

12 with the Committee's deliberations, including stenographer
13 costs, other consultant costs, and other costs necessary
14 to support the work of the Committee.

15 So, having said that, we've taken up a
16 few minutes here, perhaps we would ask the parties if we
17 could, by that clock, reconvene at 3:30, or sooner, if
18 you're prepared to tell us that you're prepared to meet
19 sooner. Thank you.

20 (Whereupon a recess for the parties to
21 confer was taken at 3:14 p.m. and the
22 deliberations reconvened at 3:28 p.m.)

23 CHAIRMAN BURACK: Very good. Thank you.
24 We will resume here. And, I realize that we did not

{SEC 2009-01} [Day 3] {07-07-09}

80

1 previously ask the parties to make appearances. So, I
2 will ask the parties, before we hear from them on this
3 issue, if they would just introduce themselves for the
4 record, starting with the Moving Parties please.

5 MR. MOFFETT: Mr. Chairman, Howard
6 Moffett, from Orr & Reno, representing Granite Ridge
7 Energy, one of the Moving Parties.

8 MR. PATCH: Douglas Patch, from Orr &
9 Reno, representing TransCanada Hydropower Northeast.

10 MS. HOFFER: Melissa Hoffer, on behalf
11 of Conservation Law Foundation.

12 CHAIRMAN BURACK: Thank you.

13 MR. NEEDLEMAN: Barry Needleman, from
14 McLane, Graf, Raulerson & Middleton, representing PSNH.

15 MR. ALLWARDEN: Chris Allwarden,
16 representing the PSNH.

SEC-0707.txt
CHAIRMAN BURACK: Thank you very much.

17
18 And, again, just before we recessed, we asked the parties
19 if they might be able to come to some agreement between
20 themselves relating to the payment of costs for this
21 proceeding, including the legal fees and the costs of the
22 court reporter. I, in one sense, have to apologize to all
23 of you for putting on the spot in this way, I know you
24 didn't have any prior warning that we might do this, but I

{SEC 2009-01} [Day 3] {07-07-09}

81

1 thought it might be a way of resolving this without the
2 Committee having to take formal action on it. So, my
3 question for counsel, I don't know who will lead or be
4 spokesperson here, initially is have you been able to
5 reach some agreement or do you think it's possible to?

6 MR. ALLWARDEN: The answer to that,
7 unfortunately, is, no, Mr. Chairman. We have been unable
8 to reach an agreement. I think both, both sides have
9 taken the position that neither one should be obligated to
10 pay any of the costs. So, I think we're so far apart that
11 there's no basis for any compromise at this point.

12 CHAIRMAN BURACK: Okay. Thank you for
13 that. I'm going to ask, do the members have with them
14 copies of the two letters that we received on this issue?
15 One dated May 15, 2009, from Attorney Patch, and the other
16 dated May 20, 2009, from Attorneys Needleman and
17 Allwarden.

18 CSMR. CAMPBELL: I don't have them.

19 CHAIRMAN BURACK: I don't want to
20 unnecessarily prolong these proceedings, but we can do
21 this one of two ways. If enough folks have these or we

22 can get copies made, or, alternatively, I could invite
23 counsel for each of the parties to give us a very brief
24 summary of their arguments.

{SEC 2009-01} [Day 3] {07-07-09}

82

1 CSMR. CAMPBELL: I would think a five
2 minute briefing from each would be helpful.

3 CHAIRMAN BURACK: Is there any objection
4 to hearing legal arguments on this issue from the parties?

5 (No verbal response)

6 CHAIRMAN BURACK: Okay. I'm going to
7 ask you if you could each do it in less than five minutes
8 on each side, but I think it would be helpful if, and you
9 can designate whomever you wish, Attorney Patch, you're
10 the one who wrote this letter, if you could summarize for
11 us your legal arguments as to why you don't believe the
12 Moving Parties are responsible for these fees.

13 MR. PATCH: Thank you, Mr. Chairman,
14 members of the Committee. I think our position is very
15 clearly laid out in the May 15th letter. And, since you
16 don't all have a copy of that letter, I'll just run
17 through those arguments again.

18 First of all, the statute, which was I
19 think read to you before, but I'll read it again, because
20 I think the language is very important. "The Site
21 Evaluation Committee", and then I'll skip a few words,
22 because I think they're irrelevant here, "are authorized
23 to assess the applicant for all travel and related
24 expenses associated with the processing of an application

{SEC 2009-01} [Day 3] {07-07-09}

83

1 under this chapter." Above that, it refers to the
2 Committee being able to "employ a consultant or
3 consultants, legal counsel and other staff in furtherance
4 of the duties imposed by this chapter, the cost of which
5 shall be borne by the Applicant in such amount as may be
6 approved by the committee."

7 For those of you who have been on the
8 Committee for a number of years I think you know, I cannot
9 think of one instance where the word Applicant has been
10 meant to mean anyone else but the owner of a bulk power
11 supply facility or somebody who is applying to build one,
12 or an energy facility. I don't know of any precedent
13 before this Committee that would suggest that the
14 Applicant is anyone else. If you look at the language of
15 162-H, throughout that statute the word "applicant" is
16 used again very specifically to refer to somebody who is
17 either applying to build a new facility or, in this case,
18 applying because they're the owner of a facility and they
19 are actually adding on to that facility or modifying that
20 facility.

21 We think that we presented you with a
22 legitimate legal question. We think, as Commissioner
23 Below suggested, I think, in some of his comments, that,
24 in fact, PSNH should have been here asking you for a

{SEC 2009-01} [Day 3] {07-07-09}

84

1 determination, as they did in Schiller, of whether or not
2 this particular "modification", we'll call it, is one that
3 you should have taken jurisdiction over. They didn't come
4 before you. We, as Moving Parties, felt an obligation to
5 do that.

6 There are seven Moving Parties here.
7 Some of them are non-profits, some of them are competitive
8 generators, but it's a combination of folks who all
9 believed that there was a serious legal issue here that
10 wasn't being addressed. And, so, that's why we came
11 before you.

12 I guess the other thing that I want to
13 point out, which, when you adopted rules last year, you
14 came up with a definition of "applicant". And, I think
15 it's perfectly appropriate in rulemaking context to try to
16 further define or try to add specifics to a law that's
17 very general. And, that's, in fact, what you did. If you
18 look at your rules, if you look at Site 102.03, there's a
19 definition of "applicant" that refers to "any person
20 seeking to construct and operate any energy, renewable
21 energy or bulk power supply facility within this state."
22 We certainly are none of those. None of the seven Moving
23 Parties here come anywhere near being anything that is
24 referred to in that definition.

{SEC 2009-01} [Day 3] {07-07-09}

85

1 The other thing that I think is
2 important to point out to you, and as we pointed out in
3 the letter, is the chilling effect that a decision would
4 have on other parties that might want to come before you
5 and raise a question about whether a particular generating
6 facility, maybe my client, maybe Mr. Moffett's client,
7 maybe some of the other Moving Parties, if they had a
8 serious question about whether this Committee should take
9 jurisdiction, and you determine that those Moving Parties
10 should have to pay the legal expenses, based on what I

11 think are not the language in the law and not the language
12 in your rules. And, I think that will have a chilling
13 effect, that I don't think you want. Because I think you
14 want a citizenry here in this state that is willing to
15 raise important legal issues. And, so, I think it would
16 be -- I think it would be the wrong decision for the
17 Committee to make, to assess these expenses against the
18 Moving Parties.

19 And, one other thing I would like to
20 point out. If you look at RSA 125-0, and, unfortunately,
21 I don't have that statute right in front of me, but there
22 is a provision in there that basically required PSNH,
23 within one year of the effective date of that law, to go
24 back, and I think it says "if appropriate to the Public

{SEC 2009-01} [Day 3] {07-07-09}

86

1 Utilities Commission", and also to go to other agencies.
2 And, I would submit that what PSNH should have done is to
3 come back to you, within a year of the effective date of
4 that law, and ask you the question "whether or not this
5 project would be subject to your jurisdiction?"

6 They didn't do that. We had to file the
7 motion. And, they, in fact, did that with Department of
8 Environmental Services, within the year, as required by
9 125-0.

10 So, I guess I would summarize by saying
11 I don't think there's any basis at all for charging the
12 legal expenses to the Moving Parties. And, I appreciate
13 your listening to my argument.

14 CHAIRMAN BURACK: Thank you very much,
15 Attorney Patch. Attorney Needl eman.

16 MR. NEEDLEMAN: Thank you, Mr. Chairman.
17 Let me begin by starting someplace where Mr. Patch made a
18 comment. He said that he's not aware of any instance
19 where this Committee has required someone in the position
20 of the Moving Parties to pay fees. I'm not entirely
21 familiar with all the proceedings of the Committee, but
22 I'm not aware of any proceedings like this one. Where
23 somebody was brought before the Committee the way PSNH has
24 been brought involuntarily, as a consequence of another

{SEC 2009-01} [Day 3] {07-07-09}

87

1 party invoking this Committee's jurisdiction to make this
2 type of decision. So, in that respect, this is unique.
3 And, so, that argument I don't think carries any weight.

4 I think -- I'm going to harken to what
5 Commissioner Below was doing earlier today, which is
6 looking at the words and looking at the plain meaning of
7 "applicant". We haven't applied for anything. We haven't
8 applied for a certificate, because we didn't believe we
9 needed one. We haven't invoked this Committee's
10 jurisdiction in any respect, because we didn't think that
11 that was necessary. We have been brought here essentially
12 involuntarily by the Moving Parties. The Moving Parties
13 invoked the jurisdiction of the Committee. In the context
14 of a declaratory judgment proceeding, how can anyone else,
15 besides the Moving Parties, be the applicant. Any other
16 construction makes no sense, and I can't imagine how that
17 could be supported under the law.

18 The question of whether we should have
19 been here or not, the issue that Commissioner Below
20 raised, we understand that that's an issue of concern to

21 the Committee, at least to some members of the Committee.
22 And, that's something that we could talk about in an
23 academic context, but that has no bearing on this
24 question. The only issue before you is "who invoked the
{SEC 2009-01} [Day 3] {07-07-09}

88

1 Commission's jurisdiction and who is going to be
2 responsible for those fees as a consequence?" And, that
3 issue is perfectly clear. And, I would conclude by
4 saying, in that context, we think it's unreasonable and
5 unfair to have PSNH's customers pay for the action taken
6 by the Moving Parties. Thank you.

7 CHAIRMAN BURACK: Thank you very much,
8 Attorney Needl eman.

9 CSMR. CAMPBELL: Thank you, Mr.
10 Chairman.

11 CHAIRMAN BURACK: Well, thank you for
12 that suggestion that we hear argument from both sides.
13 Would any members like to begin discussion of this issue?
14 Chairman Getz.

15 VICE CHAIRMAN GETZ: Yes. Let me just
16 look at the statute, it's always a good place to start,
17 162-H:10, V, V talks about that the applicant could pay
18 the cost of consultants, legal counsel, etcetera. So, I
19 guess the question then, is this exclusive? Does this
20 provision mean that the -- only in the case of an
21 applicant for a certificate, is that the only time we have
22 any authority or discretion to require parties to a
23 proceeding to pay, pay certain costs? And, you know,
24 we're in another area where I don't see any guidance to

1 suggest that this is exclusive, to say that we don't have
2 some discretion in other instances, such as motions for
3 declaratory ruling, to procure payment of necessary legal
4 assistance to the Committee and to the payment of the
5 court stenographer.

6 So, I guess I would, you know, raise the
7 issue that there's I think a good argument that this is
8 not exclusive, and that we have some general authority to
9 exercise discretion between parties to a proceeding and
10 who should pay what costs of the proceeding.

11 MR. HARRINGTON: A follow-up question to
12 that?

13 CHAIRMAN BURACK: Please.

14 MR. HARRINGTON: Chairman Getz, let me
15 make this a little bit more direct. What you're saying
16 is, you think the statute gives us sufficient flexibility
17 that we can collect from somebody to pay for these costs?

18 VICE CHAIRMAN GETZ: Well, I would start
19 with saying that there is a specific provision -- provi so
20 in certain instances who should pay for what. I don't --
21 I can't read the statute to tell me that that's the only
22 way that the Committee can require payment of necessary
23 costs of the proceeding.

24 MR. HARRINGTON: Okay.

{SEC 2009-01} [Day 3] {07-07-09}

1 VICE CHAIRMAN GETZ: And, if we do have
2 the discretion, then it's a question of what we do with
3 it, --

SEC-0707.txt
DIR. NORMANDEAU: Do with it.

4
5 VICE CHAIRMAN GETZ: -- if there is
6 agreement that we do have discretion.

7 MR. HARRINGTON: Could I just ask the
8 Chairman a question?

9 CHAIRMAN BURACK: Go ahead,
10 Mr. Harrington.

11 MR. HARRINGTON: So, I guess what we're
12 -- it's almost putting -- setting this up to be two steps
13 now. The first one being, do we have discretion under
14 this because there is no official applicant in this
15 particular case to collect from somebody? And, then, if
16 we do, who that somebody is? Is that the direction we're
17 heading here?

18 VICE CHAIRMAN GETZ: Yes.

19 MR. HARRINGTON: And, if we decided we
20 didn't have the discretion to collect from somebody, then
21 we still -- Steve still has a bill, so does counsel. So,
22 what is the alternative then? Who pays that then? Assess
23 the Fish & Game licenses a surcharge.

24 VICE CHAIRMAN GETZ: I would say that
{SEC 2009-01} [Day 3] {07-07-09}

91

1 there must be some reason that the Commissioner of the
2 Department of Environmental Services is made Chairman of
3 this Committee.

4 MR. HARRINGTON: Because of its large
5 budget. I'm just saying, is there an option, I'm trying
6 to find out, is if we decided -- you've raised it as a
7 question, that we have to make that as almost like the
8 first step to this is say that the statute does give us

9 the authority to assess somebody, in this case, where
10 there isn't a clear applicant, as you would in most of
11 these cases. So, if we decided there wasn't an applicant,
12 is there any other alternate method of paying these bills
13 that still have to be paid?

14 CHAIRMAN BURACK: The answer is, there
15 really is no source of funds available to cover these
16 costs.

17 MR. HARRINGTON: Okay.

18 CHAIRMAN BURACK: The statute
19 contemplates that they will be covered by parties to the
20 actions that are before us. And, I take -- it should be
21 quite clear to us that, effectively, we have really three
22 options before us. And, before I outline those, I will
23 turn to Mr. Dupee.

24 VICE CHAIRMAN GETZ: Health and Human
{SEC 2009-01} [Day 3] {07-07-09}

92

1 Services may be offering something.

2 MR. DUPEE: Apparently, you haven't seen
3 our budget, Commissioner. Thank you for recognizing me.
4 I'm just wondering what is exactly at issue here? Are we
5 talking about the cost that this Committee has incurred,
6 which would be the law firm of Iacopino and the
7 stenographer or are we talking about the total cost of all
8 of the legal services rendered here today?

9 CHAIRMAN BURACK: All that we are
10 talking about is the cost for Counsel to the Committee and
11 the cost of the court stenographer.

12 MR. DUPEE: So that, if parties felt
13 that either owed them money, they could take whatever

14 actions they wish to take amongst themselves, between
15 themselves, separate from what this Committee may do?

16 CHAIRMAN BURACK: That's right. The
17 parties bear their own legal costs for their own counsel.
18 Those are not and have never been considered to be part of
19 the costs associated with the work of the Committee. So,
20 we're solely talking about Counsel to the Committee and
21 the stenographer here.

22 So, it seems to me that the options we
23 have before us as a Committee is we could assess the
24 charges all to the Moving Parties, all to PSNH, or we

{SEC 2009-01} [Day 3] {07-07-09}

93

1 could devise some basis for dividing the costs. Those are
2 really the three options that we have before us.

3 Mr. Normandeau.

4 DIR. NORMANDEAU: I think that, given
5 the ambiguity around here and the way it has to go, or the
6 fact that it has to be done in some method, is that, you
7 know, it seems to me that those that brought us to the
8 party have to pay or should pay. I mean, that's the way
9 it is in any other proceeding I'm aware of, and I would
10 have to go along with that. I mean, to me, it seems as
11 though the Moving Parties are essentially the applicant in
12 this scenario. And, it appears like this is unique, but
13 it is what it is. None of us would be here without their
14 pushing this issue. So, it seems to me kind of the common
15 sense way it would be in any legal proceeding.

16 CHAIRMAN BURACK: Mr. Dupee.

17 MR. DUPEE: Thank you, Mr. Chairman. I
18 think I would concur with Director Normandeau's point of

19 view. I think that if there was a substantial amount of
20 money at play, then that could raise a consideration about
21 chilling anybody wanting to come and ask a question of
22 this Committee. We're not talking that kind of money
23 here. I don't think the costs in question are going to
24 cause people not to come to us. Therefore, I think that

{SEC 2009-01} [Day 3] {07-07-09}

94

1 Director Normandeau has got the right approach. Those who
2 brought us to the party should pay for the beverage.

3 CHAIRMAN BURACK: Is there others who
4 wish to express their views? Mr. Campbell.

5 CSMR. CAMPBELL: It's not going to help
6 us in this case, but I think, in further cases, in future
7 cases, if it's not a clear -- clearly a utility applicant,
8 I think, as Chair, we should get a determination ahead of
9 time, and get some kind of escrow. With a utility,
10 they're not going somewhere. But, you know, we can be in
11 a situation where we're chasing eight applicants down, and
12 I don't have a financial on anybody. So, I just think
13 that, if we get back into this at any future date, that
14 that should be determined by the Committee up front.

15 Having said that, I don't also know, and
16 I don't know if it's relevant, but do you have any sense
17 of what this bill that we're talking about is or we don't
18 know or do know? Do you, as Chair, know?

19 CHAIRMAN BURACK: I have a ballpark
20 sense of the number, but I don't know the specific numbers
21 that were provided by counsel and our stenographer. My
22 ballpark since is that taken together these costs are
23 probably not in excess of \$20,000, perhaps \$25,000, but I

24 would n' t expect they would be greater than \$25,000 in the
{SEC 2009-01} [Day 3] {07-07-09}

95

1 aggregate. That's my sense of it right now. Again,
2 assuming that there are no additional hearings or other
3 proceedings involved in this matter, and that more than
4 the usual amount of effort to craft a written decision and
5 go through the final approval process of a written
6 decision is again consistent with what we normally do.
7 So, it's probably a cost somewhere in that range, 20 to
8 \$25,000 total.

9 MR. HARRINGTON: You know, this is not
10 an easy question to answer, because I think you have a
11 couple of things where the statute is -- clearly didn't
12 envision that someone other than the applicant would
13 request a declaratory judgment. And, of course, in this
14 case, if the Committee or any case ruled in favor of
15 whoever requested a declaratory judgment or ruled that it
16 was jurisdictional, then that would create an applicant
17 and the question goes away. Because then we would clearly
18 have an applicant, and they would pay for the costs from
19 the inception till the completion. But, in this case, it
20 looks as though we're not going to go that direction, and
21 so we don't really have a defined applicant. So, if we
22 ruled that Public Service paid it, as they stated, that's
23 just going to be passed onto the ratepayers. So, then,
24 you have the thing of "well, they had no choice but to

{SEC 2009-01} [Day 3] {07-07-09}

96

1 come here. It wasn't their option." So, should, because
2 somebody chose to file a filing here, should they then be

3 able to basically run up charges on the ratepayers because
4 they wanted to file?

5 On the other hand, as Mr. Patch said,
6 there is the problem with, if you make it so that you're
7 going to face a fairly large bill, and \$25,000 may not be
8 a lot to some of the companies involved here, but, if it
9 was a small nonprofit or something, they may find that a
10 chilling amount, and they decide that that's enough, the
11 threat of possibly paying that, is too much for them to
12 take on that liability. So, I don't think it's really
13 straightforward.

14 I mean, the fact that we -- it looks
15 like we're going to rule that there was not a sizeable
16 addition, makes it kind of difficult to turn around and
17 say, "well, Public Service, you were correct in not
18 filing, because there was no sizeable addition, but now
19 you've got to pay the bill for us to have determined that.
20 That just kind of -- I just have a tough time making that
21 jump of logic there.

22 CHAIRMAN BURACK: Others? I'd just
23 point out, in reading through the statute, I'm looking in
24 RSA 162-H, Section 4, II, I'll just read the language

{SEC 2009-01} [Day 3] {07-07-09}

97

1 here: "The Committee shall hold hearings as required by
2 this chapter and such additional hearings as it deems
3 necessary and appropriate." And, I think one could take
4 the position that, effectively, that's what we have been
5 doing in this instance. We have been acting under those
6 powers or authorities, which I think necessarily have to
7 convey or I should say include the powers to be able to

8 assess costs for those hearings, as necessary and
9 appropriate, consistent with other language in the statute
10 in 162-H:10.

11 So, I think that there is a basis in the
12 statute for us to assert that we have the responsibility
13 or the authority to hold hearings as we deem necessary and
14 appropriate. And, I think inherent in that is the
15 authority to assess fees, not necessarily solely against
16 the applicant.

17 So, having said that, is there anyone
18 who would like to offer any further views or would anyone
19 like to suggest an approach on which we might take a straw
20 vote?

21 CMSR. BELOW: I'd just add my two cents,
22 I guess. I think, unfortunately, this statute doesn't
23 really contemplate this. And, I think that, as a
24 practical matter, I have to go along with what the Chair

{SEC 2009-01} [Day 3] {07-07-09}

98

1 and the Vice Chair had stated, which is there needs to be
2 some inherent authority for us to operate and to assess
3 costs, reasonable costs. I don't think this was at all
4 clear-cut, you know, going into this, whether this
5 Scrubber Project constituted a sizeable addition or not.

6 And, I think the tradition has been that
7 entities in doubt have come, owners of energy facilities
8 or bulk power facilities, when they're in doubt, have come
9 to the Committee and sought a declaratory ruling to
10 determine whether a particular proposed addition is
11 sizeable. I think the amount of the investment is clearly
12 sizeable. And, to my mind, one of the reasons to conclude

13 it was not a sizeable addition for purpose of this statute
14 was precisely the public interest findings that the
15 Legislature had made in 125-0. And, I think what Mr.
16 Patch was referring to, 125-0:13, Compliance, I, states
17 that, and referring to the fact that PSNH "shall install
18 and have operational scrubber technology at Merrimack
19 Units 1 and 2 no later than July 1, 2013", says "The
20 achievement of this requirement is contingent upon
21 obtaining all necessary permits and approvals from
22 federal, state and local regulatory agencies and bodies;
23 however, all such regulatory agencies and bodies are
24 encouraged to give due consideration to the general

{SEC 2009-01} [Day 3] {07-07-09}

99

1 court's finding that the installation and operation of
2 scrubber technology at Merrimack Station is in the public
3 interest. The owner shall make appropriate initial
4 filings with the department and the Public Utilities
5 Commission, if applicable, within one year of the
6 effective date of this section, and with any other
7 applicable regulatory agency or body in a timely manner."

8 And, you know, sort of reading that as a
9 whole, I really think that PSNH should have come to this
10 body, as a state regulatory body, that might, you know,
11 have jurisdiction over this and have made a filing,
12 consistent with the statute. And, I think they probably
13 should have done it within one year of the effective date
14 of the statute, which was June of 2006. And, I think, and
15 in light of the general court's statement that such bodies
16 as this should give "consideration", "due consideration"
17 to their finding that it "is in the public interest", I

18 think that statement, to my mind, helped obviate the need
19 to review this as a sizeable addition pursuant to 162-H.
20 And, so, I'm more inclined to say that PSNH should be
21 covering the cost for us to make that determination.

22 CHAIRMAN BURACK: Other thoughts or
23 views on this? Mr. Stewart.

24 DIR. STEWART: I think, rightly or
{SEC 2009-01} [Day 3] {07-07-09}

100

1 wrongly, you know, PSNH made their determination or made a
2 conclusion that they didn't have to come to EFSEC because
3 of the statutory, you know, framework that they were
4 operating under, in addition to the fact that they had all
5 these other approvals. So, whether they were legally
6 right or not, I think it was an honest attempt to comply
7 with the statutes. So, that's one point.

8 On the other side, I'm sensitive of the
9 "chilling effect" issue. But a number of the Petitioners
10 are competitors, and there's -- they're not just abutters
11 to the property or something who are concerned about this
12 expansion. And, so, there's probably, you know,
13 potentially an economic advantage to, you know, that could
14 be gleaned by a successful petition. So, I'm also
15 sensitive to Commissioner Below's argument.

16 Where I'm going with this is I think we
17 ought to just split it down the middle. I think that
18 that's a reasonable approach, because it's very ambiguous.

19 CHAIRMAN BURACK: Let's -- Mr. Scott.

20 DIR. SCOTT: I concur with my fellow
21 director. A couple reasons is, one, we've heard the
22 argument on the "chilling effect", and I agree with that.

23 However, when I look around the table here, when we talk
24 expenses, the state incurs a very significant expense when

{SEC 2009-01} [Day 3] {07-07-09}

101

1 we have -- we convene these meetings, in terms of time of
2 commissioners and directors within the state. So, within
3 that context, I don't feel it's inappropriate that people
4 coming, movants in this case, should feel a little bit
5 chilly coming in to ask this, if you will.

6 But, having said that, I think perhaps I
7 agree that the fairest thing may be to split the costs.
8 When I reviewed the letter, the response letter of May
9 15th from Mr. Patch, I believe. This may not be his
10 intent, but he noticed -- he mentions, at the end of the
11 first paragraph, that they "should not bear the entire
12 cost of the Committee's legal counsel." And, that would
13 suggest to me that even there they contemplated, at the
14 time of this letter, perhaps that they would pay a
15 portion.

16 CHAIRMAN BURACK: Thank you. Why don't
17 we get a -- because we have a specific proposal on the
18 table, why don't we get a show of hands as to how many,
19 again, this is not binding at this point, how many would
20 support an even or 50/50 split between the Moving Parties,
21 to divide among them however they may choose, and PSNH,
22 the costs for legal counsel and for the stenographer? How
23 many would support that approach?

24 (Show of hands.)

{SEC 2009-01} [Day 3] {07-07-09}

102

1 CHAIRMAN BURACK: Okay. We see one,
2 two, three, four, five, it appears that we have five
3 supporting that approach. Would the other four support an
4 approach that puts the entire cost on the Moving Parties
5 or --

6 MR. HARRINGTON: I'm still in betwixt
7 and between here.

8 CHAIRMAN BURACK: Okay.

9 DIR. NORMANDEAU: That's my position.

10 CHAIRMAN BURACK: Okay. It appears that
11 we have a majority then, when we come to a final motion,
12 that would divide this cost up 50/50 between the parties.

13 MR. HARRINGTON: Just a --

14 CHAIRMAN BURACK: Yes.

15 MR. HARRINGTON: -- question, maybe for
16 Chairman Getz. The statement was made by PSNH counsel
17 that, if they were to be given the bill, that the
18 ratepayers would pay. Am I correct in assuming that that
19 would be considered a legitimate expense, because they had
20 no choice but to come here, and if the Committee rules
21 that they pay the bill, that it would typically be
22 included in the rates, and, in fact, it won't be Public
23 Service who's paying, but actually the electric
24 ratepayers?

{SEC 2009-01} [Day 3] {07-07-09}

103

1 VICE CHAIRMAN GETZ: Well, two pieces.
2 One, theoretically, that's correct. But, when you're --
3 any particular expense, when you're talking about rate
4 setting, you know, in the existing rates or in a rate
5 case, will any particular expense be included as time goes

6 on? An expense charged now is not going to be identified
7 as a particular surcharge in the actual rate.

8 MR. HARRINGTON: But it will show up
9 somewhere down the line, more than likely?

10 VICE CHAIRMAN GETZ: It will show up in
11 an historical test year of rates that will be charged
12 going forward. And, I'm not sure which of the many rate
13 elements of, actually, of the cases we have that come
14 before us that would actually appear in.

15 MR. HARRINGTON: Well, one thing --

16 VICE CHAIRMAN GETZ: But it was
17 something that they can claim as an expense.

18 MR. HARRINGTON: As we start making our
19 little side list of things we may need to go back to the
20 Legislature on, like sizeable addition, I think this is
21 one of them. I don't think anyone anticipated, when the
22 law was written, there would be a request for declaratory
23 judgment from someone other than the potential applicant.
24 So, that's another area we need to get cleaned up.

{SEC 2009-01} [Day 3] {07-07-09}

104

1 I still -- I just have a concern with
2 this, maybe because of my past experience with Seabrook.
3 But, you know, with people filing and filing and filing,
4 and causing delays and incurring costs, if we do this,
5 does this now set precedent? For example, if we say that,
6 whether it be "Public Service pays all the costs" or they
7 "pay half the costs", does that kind of open the door down
8 the road, if there's no change in the statute, so that
9 someone can say "well, we'll just keep making this
10 expensive. We'll just keep filing things against whatever

11 project." And, you know, I know in this case we have a
12 situation where I think there was -- certainly, it wasn't
13 a -- I didn't start out with the fact that it was an
14 open-and-shut case, you could look at it and say "well,
15 that's a frivolous thing". But I don't think we have any
16 provision, if it was a frivolous filing, to say that
17 "would we have done it differently?" You know, I mean,
18 we'd probably still have the same thing and the same
19 amount of money. And, does that open the door for
20 encouraging people to make filings just for the sake of
21 running up the bills for the other people? That's kind of
22 a concern I have on it, so -- but I'm not sure what a good
23 solution is.

24 CHAIRMAN BURACK: Director Normandeau.

{SEC 2009-01} [Day 3] {07-07-09}

105

1 DIR. NORMANDEAU: And, my view is, the
2 Moving Parties we have here are pretty well known, you
3 know? And, you know, whether or not they're -- whether or
4 not they're not-for-profits, I don't -- doesn't enter my
5 view at all. You have groups here that, you know, their
6 reputation is ahead of them, that they have been around a
7 long time, etcetera, etcetera. And, I agree with that. I
8 mean, when you look at the amount of money we're talking
9 for this, I'm not going to -- I don't buy the "chilling"
10 agreement with serious people who have serious thoughts to
11 bring serious issues. If you say that anyone can bring an
12 issue in here, and cause us to expend all kinds of money
13 and time, and that at least half of the expenses can get
14 dumped on whoever they got in on the other side of the
15 table, I would find that just, I don't know, you know, I

16 mean, maybe it doesn't start that way today, but, you
17 know, you could see it going down for the future. Every
18 time a project somebody doesn't like comes along, it could
19 just get...

20 CHAIRMAN BURACK: Mr. Harrington.

21 MR. HARRINGTON: Just to follow up on
22 that, I have that same concern as well. And, I think, in
23 this case, there are some parties that are not
24 non-profits, they're people that own other facilities in

{SEC 2009-01} [Day 3] {07-07-09}

106

1 New Hampshire. And, clearly, if the Merrimack project was
2 delayed, and then that delay resulted in the closing of
3 the plant, because the scrubber never got installed, it
4 would be of financial interest to them. So, I just -- I
5 find it difficult to allow someone to come in and say "I
6 can make a filing that, if it works out the way I want, I
7 may be able to improve my financial lot a lot. But, if it
8 doesn't work out the way I want, hell, it didn't cost me
9 much anyways."

10 So, I think it's -- I guess I'm going to
11 have to go with Director Normandeau's position on this and
12 say that I think it should be paid by the Moving Parties.

13 CSMR. CAMPBELL: May I, Mr. Chairman?

14 CHAIRMAN BURACK: Please, Commissioner
15 Campbell.

16 CSMR. CAMPBELL: May I comment? And, if
17 it's inappropriate, tell me. But I just -- how do you
18 collect the money from the Moving Parties? I understand
19 collecting it from the utility. But I don't understand,
20 in other words, in your motion, I just -- maybe I'm asking

21 about mechanics, that maybe the PUC does this, you know,
22 when you have filings. I don't know.

23 CHAIRMAN BURACK: Thank you for that
24 question, and I'm glad you asked it. If you look at RSA
{SEC 2009-01} [Day 3] {07-07-09}

107

1 162-H:19, we have the authority, under I, that it reads
2 "The superior court, in term time or in vacation, may
3 enjo in any act in violation of this chapter." In essence,
4 if we were to issue an order to a party or parties saying
5 that they must pay a particular amount of money, if they
6 failed to do so within the terms of the order, we, as the
7 Commi ttee, could ask our counsel to apply to the superior
8 court for an injuncti on ordering that payment be made.

9 CSMR. CAMPBELL: Okay.

10 CHAIRMAN BURACK: That would be the
11 enforcement mechanism by which this would be carried out.

12 MR. HARRINGTON: Just one other question
13 on this, because I think it's a real tough issue. Is
14 there anything that anyone else on the Committee is aware
15 of that would be -- that you could look at and say that,
16 as a moving party, by filing this, that there was at least
17 a chance they would get stuck with the bill? Or is it --
18 I mean, in other words, if you make a decision, and I'm
19 going to take this action, because I'm willing to pay or
20 hire a lawyer to come in and go to the SEC for three or
21 four days or whatever and do some research. But is there
22 anything out there that would have led them to say "but
23 there's also a possibility you're going to have to pay the
24 SEC's legal fees and the stenographer fees on top of that

{SEC 2009-01} [Day 3] {07-07-09}

1 or whatever other related fees there were"? Or, are we
2 just simply on such new territory here that there's
3 nothing that would indicate one way or the other to
4 anybody?

5 VICE CHAIRMAN GETZ: Can I ask -- Is
6 your question, Mr. Harrington, essentially were they on
7 notice that basically that this could be a possibility?

8 MR. HARRINGTON: Well, not that they
9 were on notice. But is there any previous action by this
10 Committee or similar committees that, if you were to file,
11 that there's a possibility you maybe get stuck with some
12 of the costs beyond your own legal expenses?

13 CHAIRMAN BURACK: I'm happy to try to
14 answer that question. But, before I do so, I just want to
15 -- I just want to share with folks, we had a lot of
16 discussion earlier about plain language here. And, it may
17 be helpful for us to simply look at the plain language of
18 the word "apply", which is, well, the first definition
19 would probably not be applicable, which is "to put on,
20 that is to apply paint to a wall."

21 CSMR. CAMPBELL: Or something else.

22 DIR. NORMANDEAU: Tar and feathers.

23 CHAIRMAN BURACK: And, I think probably
24 the most relevant definition would be "to ask or seek aid,

{SEC 2009-01} [Day 3] {07-07-09}

1 employment or admission." And, again, if that were the
2 definition that we were to apply, one could say that the
3 Moving Parties have, in fact, sought aid in this
4 particular instance. So, it may be that that can provide

5 us with some guidance.

6 Commissioner Campbell, coming back to
7 your question, I'm far enough away from daily law
8 practice, let alone litigation practice, to tell you the
9 details of state rules and procedures, let alone federal
10 rules. But I do recall an instance involving federal
11 court in which I was involved in representing a party in a
12 complex litigation matter, in which the party prevailed in
13 the district -- federal district court level. And, then
14 went to -- appeal was taken by the other side, went up to
15 the Federal Circuit Court of Appeals. And, not only did
16 the Federal Circuit Court of Appeals completely reverse
17 the decision resulting in a loss to my client, but, at
18 least under the federal rules, one of the effects of that
19 was that my client had to pay all of the expertise of the
20 opposing party. And, so, yes, that was a risk that my
21 client was certainly aware of, you know, at the outset of
22 litigation --

23 MR. HARRINGTON: It's my question.

24 CSMR. CAMPBELL: It's Mr. Harrington's.

{SEC 2009-01} [Day 3] {07-07-09}

110

1 CHAIRMAN BURACK: I'm sorry, answering
2 Mr. Harrington's question. Is that exactly analogous to
3 this situation? Not necessarily. But, certainly, there
4 are -- it's not unprecedented that a party that initiates
5 an action can find itself actually having to pay some of
6 the costs of, at least in that instance, of the opposing
7 party.

8 MR. HARRINGTON: That answers my
9 question. Thank you. That is helpful.

10 CHAIRMAN BURACK: So, I don't know if
11 this discussion in any way further informs any of us, who
12 would cause any of us to, who had, in the straw vote,
13 expressed a view on the notion of splitting the cost. Is
14 there anyone who might now view this differently?

15 Okay. Well, the final test I suppose
16 will be when we come to the final decisions. I will say
17 that, based on a plain reading of the definition of
18 "apply", to me this definition of "to ask or seek aid"
19 suggests to me that the Moving Parties are the ones who
20 sought aid here. And, on balance, while I think this is a
21 very difficult question, my sense is that, in the first
22 instance, that's probably where the burden needs to rest.
23 Having said that, I think it's probably fair to say that,
24 regardless of the outcome of this particular proceeding,

{SEC 2009-01} [Day 3] {07-07-09}

111

1 there probably are going to be further, I would imagine,
2 further proceedings to follow this. So, there will be
3 opportunities for parties to, if they choose to exercise
4 them, to raise challenges to whatever decisions we make
5 here.

6 Why don't we go back to each of these
7 four questions as we have reviewed them this afternoon,
8 and take on each one of them a separate vote, just to
9 confirm our decisions here today and to provide clear
10 direction to our legal counsel to assist us in drafting a
11 final opinion. And, then, once we've done that, I think
12 we'll need to discuss a final schedule for a draft,
13 certainly give folks a sense of what that schedule might
14 be.

15 So, the first question, give me just a
16 moment here, the first question would be as follows: "Do
17 the Turbine Upgrade Project and the Merrimack Station
18 Scrubber Project constitute a single project for purposes
19 of RSA 162-H:5, I?" So, if you vote "yes" on this, you
20 are saying that the Turbine Project and the Scrubber
21 Project are all together. Are there any who vote "yes" on
22 this?

23 (No response)

24 CHAIRMAN BURACK: How many vote "no"?

{SEC 2009-01} [Day 3] {07-07-09}

112

1 (Unanimous show of hands)

2 CHAIRMAN BURACK: Okay. Thank you.

3 CSMR. CAMPBELL: Mr. Chairman, is that
4 the right way to have the motion? Shouldn't we be putting
5 the motion that "our finding is that" --

6 CHAIRMAN BURACK: That would be helpful.
7 Thank you. Do wish to make that motion?

8 CSMR. CAMPBELL: I would make the motion
9 that the Committee finds that the Scrubber Project and the
10 Turbine Project are not -- what's the words you're using?

11 CHAIRMAN BURACK: "Not a single
12 project".

13 CSMR. CAMPBELL: -- not a single
14 project. I would make that motion.

15 DIR. NORMANDEAU: I'll second it.

16 CHAIRMAN BURACK: Okay. Thank you. So,
17 if you vote "yes" on this motion, you're saying that these
18 are two separate projects. Okay? All in favor of this
19 motion, please say "aye"?

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20 (Multiple members indicating "aye".)

21 CHAIRMAN BURACK: Opposed?

22 (No verbal response)

23 CHAIRMAN BURACK: Okay. Thank you.

24 That vote is unanimous.

{SEC 2009-01} [Day 3] {07-07-09}

113

1 Okay. Would someone like to make a
2 motion then with respect to the turbine project and a
3 finding that we will not issue a declaratory ruling
4 finding that it constitutes a sizeable addition pursuant
5 to RSA 162-H: 5, I?

6 CSMR. CAMPBELL: I move that we have
7 determined -- we determine that the turbine project, under
8 162-H: 1 is not a sizeable project.

9 MR. HARRINGTON: Sizeable addition.

10 CSMR. CAMPBELL: Sizeable addition.

11 MR. HARRINGTON: And, I'll second that.

12 CHAIRMAN BURACK: Okay. Thank you. So,
13 we have a motion and a second. So, if you vote "yes" on
14 this motion, you are saying that this is not a sizeable
15 addition, the turbine project. All in favor, just raise
16 your hands?

17 (Show of hands)

18 CHAIRMAN BURACK: Any opposed?

19 (No verbal response)

20 CHAIRMAN BURACK: Thank you. Okay.

21 That motion carries unanimously as well.

22 Okay. Do we now have a motion relating
23 to the Scrubber Project?

24 CSMR. CAMPBELL: I would move that we
Page 95

1 have determined that -- EFSEC Committee determines that
2 the Scrubber Project -- is it the same statute?

3 CHAIRMAN BURACK: The Scrubber Project
4 is not --

5 CSMR. CAMPBELL: Under 126-H.

6 CHAIRMAN BURACK: I'll give you the --
7 "that it's not a sizeable addition pursuant to RSA
8 162-H: 5, I."

9 CSMR. CAMPBELL: Right.

10 CHAIRMAN BURACK: Okay. And, I think it
11 will be important to correct the record, just to show that
12 on the prior motion that that should be the same citation,
13 it's pursuant to RSA 162-H: 5, I.

14 CSMR. CAMPBELL: Thank you.

15 CHAIRMAN BURACK: Okay. Is there a
16 second to that motion?

17 MR. HARRINGTON: I'll second.

18 CHAIRMAN BURACK: A second by
19 Mr. Harrington. Okay. Thank you. All in favor, please
20 raise your hands?

21 (Show of hands)

22 CHAIRMAN BURACK: Any opposed?

23 (Show of hands)

24 CHAIRMAN BURACK: Okay. Thank you. Let

1 the record reflect that there were eight votes in favor
2 and one vote opposed by Commissioner Getz.

3 Okay. And, then, the last motion here,
4 would someone like to make a motion relating to the legal
5 fees? Before we reach the legal fee issue, would someone
6 like to make a motion that we -- that we not reach the
7 legal issue raised by Public Service of New Hampshire
8 relating to RSA 125-0 obviating the need for the Committee
9 to make declaratory ruling decisions in this matter?

10 VICE CHAIRMAN GETZ: Actually, before we
11 do that, can I go on record with respect to my vote in
12 opposition --

13 CHAIRMAN BURACK: Yes.

14 VICE CHAIRMAN GETZ: -- to the
15 conclusion? I just want to say that, in reading RSA
16 162-H, I think it provides very little in the way of
17 useful guidance regarding the proper application of
18 162-H: 5, I, and the interpretation of the phrase "sizeable
19 addition". I've listened closely to the deliberations and
20 think that my colleagues on the Committee have put forth a
21 number of reasonable arguments and defensible theories as
22 to why the scrubber is not a sizeable addition. And, I
23 think, as often is the case in dealing with statutory
24 language like this, it's difficult to say that there is

{SEC 2009-01} [Day 3] {07-07-09}

116

1 one right answer. But I cannot, however, join in the
2 majority's decision. I read the threshold question here
3 to be a very narrow one of our jurisdiction in the first
4 instance. And, as a result, I don't look to the language
5 of 125-0 or to what might occur in a proceeding with
6 respect to a review of the sizeable addition.

7 But, in that light, I conclude that the

8 dimensions of the scrubber, relative to the existing
9 structure, along with its substantial cost, appear to me
10 to constitute a sizeable addition.

11 CHAIRMAN BURACK: Thank you.

12 VICE CHAIRMAN GETZ: Thank you for your
13 indulgence on that.

14 CHAIRMAN BURACK: Thank you. Let's come
15 back to this question of whether we want to specifically
16 have a motion that we are not going to make any
17 determinations on the legal issue relating to whether the
18 provisions of RSA 125-0:11 through 18 obviate the need for
19 the Committee to make declaratory ruling decisions in this
20 matter?

21 CSMR. CAMPBELL: Mr. Chairman?

22 CHAIRMAN BURACK: Yes.

23 CSMR. CAMPBELL: Might I suggest a way
24 to approach that motion is to make the motion in the

{SEC 2009-01} [Day 3] {07-07-09}

117

1 positive, that we determine, and then you can vote against
2 it. You know, it just seems odd to have in the record
3 that we took no action. In other words, we put the motion
4 forward, then, you know, then we can vote on that motion.
5 It seems to me, procedurally, it's just a little clearer.
6 I know this is a bit Byzantine anyway. But it seems to me
7 that clarity, especially with the Committee, is, you know,
8 what was the motion? What was the vote? So, that's the
9 way I would suggest it, rather than have the record
10 reflect that we took no action. I mean, to reflect that
11 we take no action would just simply be silent. So, --

12 CHAIRMAN BURACK: Mr. Harrington.

13 MR. HARRINGTON: Well, I think that we
14 did take no action. Our vote was to say, "based on the
15 previous vote, the vote saying that we decided that the
16 scrubber does not constitute a sizeable addition, that it
17 wasn't necessary to take action on this question. So, we
18 can't say "put it up and we'll vote against it", because
19 we haven't addressed the legal issue there one way or the
20 other. We're just saying "it's not necessary at this
21 time, because of the previous vote."

22 CSMR. CAMPBELL: Can the record just
23 reflect that, instead of a motion? That it's just not
24 necessary or it's not germane or whatever language you

{SEC 2009-01} [Day 3] {07-07-09}

118

1 would use as an attorney.

2 CHAIRMAN BURACK: Thank you. I think,
3 unless there's any objection, the record could certainly
4 reflect that it was the consensus of the Committee that,
5 based upon the way that we resolved the first three
6 questions before us, that we found it unnecessary to reach
7 this fourth question of the interpretation of the
8 applicability of RSA 125-0, in conjunction with RSA 162-H.

9 CSMR. CAMPBELL: And, going back to the
10 third vote, I didn't know if, you know, I respect Chairman
11 Getz's points, and I'm glad you put those in the record.
12 Do we have to have you, as Chair, put into the record an
13 articulation of the reason, you know, the prevailing side
14 of that vote or is that not necessary?

15 CHAIRMAN BURACK: Well, I think that all
16 of the discussions that we've had today effectively
17 reflect that, and our final written decision will reflect

18 the basis for the majority opinion --

19 CSMR. CAMPBELL: Okay.

20 CHAIRMAN BURACK: -- on that issue.

21 And, I don't think it's necessary for us to put further
22 statements in the record.

23 CSMR. CAMPBELL: As long as the written
24 one will, so that it's not just, you know, the majority --

{SEC 2009-01} [Day 3] {07-07-09}

119

1 the minority vote explain themselves, but not the
2 majority.

3 CHAIRMAN BURACK: No, the written
4 decision of the Committee will set forth the basis for our
5 decision. So, that brings us to the final issue here,
6 which is responsibility for payment of costs. Mr. Scott.

7 DIR. SCOTT: Thank you, Mr. Chair.
8 Earlier I had mentioned my advocacy of "splitting the
9 baby", if you will, and moving the costs 50/50. That was
10 really based on some of the -- me listening to the
11 arguments made by Commissioner Below that, under 125-0:13,
12 perhaps PSNH should have come before us for this
13 determination earlier. However, reading that again, and I
14 think it's reasonable that, if you did not believe you
15 needed this, that this would not be an applicable
16 regulatory agency, if you didn't have the belief to begin
17 with that you needed to come with that. So, based on
18 that, I'd like to move that the Movants pay the legal
19 fees.

20 CHAIRMAN BURACK: Is there a second?

21 MR. HARRINGTON: I'd like to -- I just
22 want to get discussion in, so --

23 CHAIRMAN BURACK: Yes, we can certainly
24 have a discussion of this motion.

{SEC 2009-01} [Day 3] {07-07-09}

120

1 DIR. NORMANDEAU: I'll second the
2 motion.

3 CHAIRMAN BURACK: Mr. Normandeau has
4 seconded the motion by Mr. Scott. Discussion.
5 Mr. Harrington.

6 MR. HARRINGTON: Yes. Two things I
7 wanted to bring up. There was a specific question that
8 was asked on this, as to whether they -- Public Service
9 had previously looked at the previous declaratory
10 judgments by the SEC and made a specific evaluation and
11 subsequent decision not to seek a declaratory judgment in
12 this case, and the answer was "yes". So, this wasn't just
13 an omission on their part, that they looked at it and felt
14 it wasn't necessary. And, you can see that, I suppose, if
15 they thought it wasn't necessary, they were acting in the
16 interest of the ratepayers, because, if they had filed,
17 there's costs, and they might have been -- they would have
18 been probably liable for those costs there.

19 But the other issue I wanted to bring up
20 that I didn't bring up before, and I was just kind of
21 looking at this. This is another one of these data
22 requests that I mentioned earlier. And, this is one of
23 the concerns I have. This is the one that's on the --
24 "provide the work done on Merrimack 2 during the turbine

{SEC 2009-01} [Day 3] {07-07-09}

121

1 outage." And, the first two items, as I said, were the

2 turbine replacement and the generator replacement. But
3 then there was a whole list of other replacements, that
4 I'm not going to name again because I went through them
5 earlier. And, if you go to the next Schiller outage,
6 you're going to find there was something very similar,
7 where there's going to be capital projects that are going
8 to be done. And, specifically with Merrimack, there will
9 be another list of these, whenever their next scheduled
10 outage is.

11 And, if we start saying that they're --
12 you know, we're going to have them pay at least half of
13 the cost associated with a request for a declaratory
14 judgment, you might have one every single outage that kind
15 of sets the precedent. "Okay, what are you going to do
16 next outage?" Well, we're going to replace eight valves.
17 And, we're going to use, you know, slightly better valves,
18 better material that doesn't corrode as much." "So, is
19 that a sizeable addition?" "Well, I don't know, but I'm
20 only going to have to pay half the bill to find out. And,
21 if it slows down Merrimack or cancels Merrimack, it's
22 potentially good for my project, my company, so I'm going
23 to file a declaratory judgment for every outage Merrimack
24 has, on every modification that they make to that plant

{SEC 2009-01} [Day 3] {07-07-09}

122

1 and ask for that question to be resolved." And, I think
2 that opens up the ratepayers to that liability of doing
3 that. So, I mean, I don't have a good answer, but I think
4 you've got to go with, if you want to bring the question
5 up, and you lose, then you get stuck with the bill. So, I
6 would go along with Mr. Scott's motion.

7 CHAIRMAN BURACK: Thank you. Director
8 Normandeau.

9 DIR. NORMANDEAU: Just, you know, I feel
10 like I think there is an argument to be made that possibly
11 PSNH should have come to the Committee a couple of years
12 ago, whenever it was, and asked for a declaratory ruling.
13 But, number one, that's hindsight. It's behind us. And,
14 you can argue on now. But I think that you might even
15 argue that, since hindsight is 20-20, back in the quiet
16 room somewhere they're wishing they had. But the fact is,
17 you know, that's behind us. And, I'm taking at face
18 value, and I think legitimately so, that they felt that
19 they didn't need to, and that that's why they didn't.
20 And, that that, you know, is reasonable.

21 And, therefore, you know, I'm going the
22 way I'm going on this issue.

23 CHAIRMAN BURACK: Is there anyone else
24 who would like to speak to this motion? Mr. Stewart.

{SEC 2009-01} [Day 3] {07-07-09}

123

1 DIR. STEWART: Part of the reason for
2 suggesting that it be split is that the Committee really
3 left this outstanding till the end, and I don't know what
4 the assumptions were on either side of the table here.
5 But it seemed to me that, given that we had put a proposal
6 out, it had been objected to, and then -- from both sides,
7 or objected to, and then PSNH said we don't want to pay
8 either. But it seemed like splitting the cost down the
9 middle is the most reasonable approach for that reason.

10 CHAIRMAN BURACK: Thank you,
11 Mr. Stewart. Mr. Getz.

12 VICE CHAIRMAN GETZ: I think
13 Mr. Harrington raises an issue of what might happen in the
14 future. And, I think, if that were the case here, if it
15 were a frivolous motion, I think it's then a lot easier to
16 say that "an applicant pays the costs."

17 It seems in this case, at least I
18 conclude that it was a good faith argument that was
19 raised. I would not, however, suggest that, you know,
20 PSNH should pay because it should or could have done
21 something earlier, because the Committee has concluded
22 that they were -- their position was the proper one. So,
23 I think, and I guess Mr. Harrington raised that earlier,
24 it seems it would be unfair to say "bear some of the costs

{SEC 2009-01} [Day 3] {07-07-09}

124

1 because you could have done something that you, under the
2 law, really doesn't require you." I guess I have trouble
3 with that formulation.

4 But, I think, as a general exercise of
5 our discretion, given that it was -- a good faith argument
6 was raised, that the parties joined all of the issues
7 equally and made their arguments. I think it's not unfair
8 to do what Director Stewart suggests and allow for a, you
9 know, a 50/50 split of the costs of the proceeding.

10 CHAIRMAN BURACK: Okay. Thank you very
11 much, Chairman Getz. I think, again, it may be helpful,
12 given that the motion we have on the table, just to be
13 very clear here, and again this will be further expressed
14 in the written opinion, what I think would be the
15 statutory construction argument for finding that the
16 Applicants would be -- I'm sorry, that the Moving Parties

17 would be responsible for the fees. And, again, I will
18 simply come back to, if I can find it here again, the
19 definition of "apply" in Webster's New College Dictionary
20 II, we'll all get in the habit of bringing dictionaries
21 with us to these meetings, right? Again, I think that the
22 pertinent definition of "apply" is "to ask or seek aid,
23 employment or admission." And, if we look to the
24 definition of "applicant", it is "one who applies, asks

{SEC 2009-01} [Day 3] {07-07-09}

125

1 for a job or admission", or, evidently, in this case, asks
2 for some form of aid, and the aid that was sought was a
3 determination from this Committee as to whether or not
4 these particular matters, that the turbine and the
5 scrubber constituted sizeable additions. So, that would
6 be, again, a statutory construction.

7 CMSR. BELOW: But, Mr. Chairman, I have
8 a couple problems with that. I presume you're working off
9 of the statutory language from 162-H:10, V, that refers to
10 "the cost of which shall be borne by the applicant in such
11 amount as may be approved by the Committee." If that's
12 what you're referring to, as opposed to sort of an
13 inherent generic authority that's implied by the statute,
14 the problem is the plain meaning of "applicant" in this
15 case is not the dictionary definition, it's the definition
16 we've written into our rules, which have the force and
17 effect of law. The underlying chapter doesn't define
18 "applicant", but our rules do. And, so, I think our
19 definition in the rules would supersede a dictionary
20 definition, because it has the force and effect of law as
21 it applies to the application of this whole chapter.

22 And, what our rules say "applicant" is
23 is Site 102.03. "Applicant" means "any person seeking to
24 construct or operate any energy, renewable energy or bulk
{SEC 2009-01} [Day 3] {07-07-09}

126

1 power supply facilities within the state. And, when you
2 go back to the definitions of those types of facilities,
3 they all refer to both the equipment and associated
4 facilities. So, I don't think the Moving Parties here
5 meet the definition of "applicant". But I think PSNH
6 does, to the extent it's a party that is, in fact,
7 constructing facilities associating with what is defined
8 as a facility that's subject to our jurisdiction.

9 So, I think that's the problem I'm
10 having with the notion of assessing it all to the Moving
11 Parties. I think, you know, the 50/50 split is a
12 reasonable sort of escape with regard to this dilemma that
13 the statute didn't contemplate this situation.

14 CHAIRMAN BURACK: Thank you. And,
15 again, just to clarify, I was making the -- providing the
16 information on definition of "apply" and "applicant",
17 really in the context of looking at what I believe to be
18 inherent authority of the powers that we have as a
19 Committee, pursuant to RSA 162-H:4, II, which again reads
20 "The Committee shall hold hearings as required by this
21 chapter and such additional hearings as it deems necessary
22 and appropriate."

23 Now, perhaps there is some other
24 provision in our enabling statute that we could also cite
{SEC 2009-01} [Day 3] {07-07-09}

127

1 to that gives us the kind of inherent authority and power
2 that I believe we possess, but that's the one that comes
3 to my mind right away. And, I was simply, by analogy,
4 suggesting that, given that we have these inherent powers,
5 we have "applicants" in the formal sense, as you've
6 described, that clearly fall within the definition of the
7 statute and the rules. But, in this case, we also have,
8 under the plain meaning of the term "apply", we also have
9 an applicant, and it was in that context that I was
10 suggesting this interpretation of construction.

11 CMSR. BELOW: Fair enough.

12 CHAIRMAN BURACK: Okay?

13 CMSR. BELOW: Yes. Thanks.

14 CHAIRMAN BURACK: Is there any further
15 discussion on this or shall we -- are we ready for a vote
16 on Director Scott's motion?

17 (No verbal response)

18 CHAIRMAN BURACK: And, his motion, as I
19 recall it -- I'm sorry. Mr. Stewart.

20 DIR. STEWART: Given my 13 year shelf
21 life on this Committee, I think we should put on the
22 record that this is not precedential for subsequent
23 decisions. I mean, we have a total unique, in that length
24 of my tenure here, circumstance. We have the opportunity

{SEC 2009-01} [Day 3] {07-07-09}

128

1 to clarify this going forward. But I don't think it has
2 to be precedential.

3 CMSR. CAMPBELL: Well, I think that --
4 Mr. Chairman?

SEC-0707.txt
CHAIRMAN BURACK: Please.

5
6 CSMR. CAMPBELL: Whether it can be or
7 not be is way above my pay grade. But what I do
8 understand is that, procedurally, where we don't have in
9 the future a clear applicant of what somebody thinks is
10 clearly defined by statute or regulation, that we need to
11 clarify this question first and get the concurrence of
12 whoever the other party is ahead of time, so that there's
13 no confusion. And, that I think, procedurally, we need to
14 do. Whether or not -- you know, we should go to the
15 Legislature and not get any clarity. I've gone to the
16 Legislature, four years in a row my department's gone to
17 the Legislature to try to get driveway permits paid for by
18 big users, and which cost us 600,000 a year. And, the
19 Legislature says "Ah," --

20 MR. HARRINGTON: It can make it more
21 confusing, too.

22 CSMR. CAMPBELL: -- "not our problem."
23 So, the point is --

24 CHAIRMAN BURACK: One at a time please.

{SEC 2009-01} [Day 3] {07-07-09}

129

1 CSMR. CAMPBELL: So, the point, the only
2 point I want to make going forward with Mr. Stewart is, we
3 get it clear in our rules that if it's not, because we
4 could get other cases like this.

5 CHAIRMAN BURACK: Thank you very much,
6 Commissioner Campbell, for those observations. I suspect
7 we all concur that this is an issue that we need to seek
8 to clarify as quickly as we can in our own rules going
9 forward. Whether statutory amendments are necessary or

10 not is another question entirely. But, certainly, from a
11 procedural standpoint, if we should receive filings in the
12 future from parties, other than the parties actually
13 owning or operating a facility, a proposed facility, I
14 think we have all learned that we need to get very clearly
15 up front an understanding of how the costs will be paid,
16 until such time as we have rules that clearly otherwise
17 specify that.

18 So, unless there's any further
19 discussion on this, I'd like to call a vote on Director
20 Scott's motion. Yes. And, the motion was that the costs
21 be assessed to the Moving Parties, and I believe that
22 motion was seconded by Director Normandeau.

23 So, is there any further discussion on
24 this motion?

{SEC 2009-01} [Day 3] {07-07-09}

130

1 (No verbal response)

2 CHAIRMAN BURACK: Okay. So, if you're
3 voting "yes", you're voting that the Moving Parties are
4 responsible for all of the legal fees and the costs of the
5 stenographer and, you know, any other costs, but I don't
6 believe there are any other costs that have been incurred
7 associated with this matter at this time. All in favor?

8 (Show of hands)

9 CHAIRMAN BURACK: Opposed.

10 (Show of hands)

11 CHAIRMAN BURACK: Okay. And abstaining?

12 (No verbal response)

13 CHAIRMAN BURACK: Okay. It appears that
14 we have six voting for and three voting against. Okay.

15 Thank you.

16 So, I believe we have now taken votes on
17 all of the matters that we need to resolve in order for us
18 to be able to draft a decision. In conversations recently
19 with Attorney Iacopino, it was his sense that probably by
20 approximately the 20th of July, assuming that we were to
21 conclude this matter today, as I believe we have, that he
22 would be able to provide us with a draft. So, some time
23 approximately in that time frame we will have a draft that
24 we will review, with a goal of being able to complete our

{SEC 2009-01} [Day 3] {07-07-09}

131

1 review and issue a final signed opinion by the 10th of
2 August.

3 I will just want all the parties to
4 understand that, I think we all know this well, although
5 the weather may not indicate it, but we're in the summer
6 season, and many of us have vacations planned. And, I do
7 not know how easy or difficult it will be for us to obtain
8 all the necessary signatures on a final decision by the
9 10th of August, but we will do everything within our power
10 to do so. And, if it appears that, because of logistical
11 issues and timing issues with people's vacations, it's
12 going to take a little bit longer, we will certainly let
13 you all know and give you a sense of what the final date
14 would likely be. Mr. Harrington?

15 MR. HARRINGTON: Yes, just a question on
16 process. Now, when you say there's a draft that will be
17 sometime 7/20, is that going to be distributed to the
18 Committee or are we're going to sit in here?

19 CHAIRMAN BURACK: The Committee, the way

20 we -- in all likelihood, we would distribute a written
21 draft to the Committee, given the difficulty of being able
22 to assemble everyone, give people a chance to review it,
23 provide comments back, and then we would prepare a final
24 for signatures.

{SEC 2009-01} [Day 3] {07-07-09}

132

1 MR. HARRINGTON: Okay.

2 CSMR. CAMPBELL: If we don't convene as
3 a group, does that mean, on the 20th, that the Movants and
4 the Respondents get to make comment on that draft or is
5 that just our draft?

6 CHAIRMAN BURACK: It is our draft.

7 CSMR. CAMPBELL: It's all internal to
8 us?

9 CHAIRMAN BURACK: Well, it's internal to
10 us at the point that we circulate it to all the Committee
11 members. If somebody asks to see it --

12 CSMR. CAMPBELL: No, I didn't mean it
13 that way. I meant -- I just don't understand
14 procedurally, whether you take input from --

15 MS. RANCOURT: No.

16 CHAIRMAN BURACK: No, we don't.

17 CSMR. CAMPBELL: You don't. That's all
18 I want to know.

19 CHAIRMAN BURACK: We do not take input
20 from someone outside. Commissioner Below.

21 CSMR. BELOW: Mr. Chairman, as I
22 understand the Right To Know Law, a draft of a decision,
23 where the decision has already been made, that the draft
24 is simply to implement and to, you know, provide the

1 agreed upon text for what we've already discussed, is
2 actually a privileged document and not necessarily subject
3 to disclosure, unless we want to. So, until it's in its
4 final form, we can circulate it internally, because we've
5 already voted on our decisions here in a public meeting.

6 CHAIRMAN BURACK: Very well. If that,
7 in fact, is the state of the law, then our decision will
8 remain -- our written decision document will remain an
9 internal document until such time as we have finalized it.

10 Is there anything further from the
11 Committee to come before us today?

12 CSMR. CAMPBELL: Move we adjourn.

13 CHAIRMAN BURACK: Well, thank you. I
14 just want to thank all the Committee members and also want
15 to thank the parties to this proceeding for your
16 cooperation throughout these proceedings. And, so, thank
17 you all very much and we will stand adjourned.

18 (Whereupon the deliberations were
19 adjourned at 4:41 p.m.)

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24