

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

June 24, 2011 - 10:09 a.m.
Concord, New Hampshire

NHPUC JUL05'11 PM 3:33

RE: DE 11-105
UNITIL ENERGY SYSTEMS:
Petition for Declaratory Ruling and
Approval of Adjustment to certain
Account Balances.
(Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Clifton C. Below
Commissioner Amy L. Ignatius

Sandy Deno, Clerk

APPEARANCES: Reptg. Unitil Energy Systems, Inc.:
Gary M. Epler, Esq.
Lawrence Edelman, Esq. (Pierce Atwood)

Reptg. RiverWoods Company:
Christopher H. M. Carter, Esq. (Hinckley...)
Suzan Lehmann, Esq. (Hinckley Allen & Snyder)

Reptg. Residential Ratepayers:
Meredith Hatfield, Esq., Consumer Advocate
Stephen Eckberg
Office of Consumer Advocate

Reptg. PUC Staff:
Edward N. Damon, Esq.
Amanda Noonan, Director/Consumer Affairs Div.
Steven Mullen, Asst. Dir./Electric Division
Grant Siwinski, Electric Division

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

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I N D E X

PAGE NO.

STATEMENTS OF PRELIMINARY POSITION BY:

Mr. Epler	5, 17, 60
Mr. Carter	29, 50
Ms. Hatfield	43, 52
Mr. Damon	43, 52
Mr. Edelman	53

QUESTIONS BY:

Chairman Getz	6, 19, 25, 33, 42, 45, 55
Cmsr. Ignatius	7, 10, 36
Cmsr. Below	13, 24, 41
Statement by Mr. Furino to question by Cmsr. Below	13

STATEMENTS RE: MOTION FOR CONFIDENTIALITY BY:

Ms. Hatfield	60
Mr. Epler	60

JAN 19 10

P R O C E E D I N G

CHAIRMAN GETZ: Okay. Good morning, everyone. We'll open the prehearing conference in Docket DE 11-105. On May 13, 2011, Unitil Energy Systems filed a Petition for Declaratory Ruling and Approval of Adjustments to Certain Account Balances. Unitil states that it learned on February 7, 2011 that the electricity consumption of one of its larger customers had been incorrectly billed since September 10, 2004, when an erroneously labeled current transformer was installed, causing the Company to overcharge the customer by approximately \$1.8 million.

We issued an order of notice on June 7 setting the prehearing conference for this morning. I also note that we have a Notice of Participation by the Office of Consumer Advocate, and a Petition to Intervene by RiverWoods, the customer in question. And, I also note for the record that we have the affidavit of publication filed by the Company.

I'm going to start with appearances. But, in your appearance, also, Mr. Epler, if you could note whether there's any objection to the Petition to Intervene.

MR. EPLER: Thank you, Mr. Chairman and

1 Commissioner. Gary Epler, Chief Regulatory Counsel of
2 Unitil Corporation, on behalf of Unitil Energy Systems,
3 Inc. With me is Attorney Larry Edelman, of the firm
4 Pierce Atwood. And, also here from the Company are Cindy
5 Carroll, the Director of Business Development; Karen
6 Asbury, Director of Regulatory Services; Mike
7 Deschambeault, who is a Energy Measurement & Control
8 Specialist; and Rob Furino, Director of Energy Contracts.

9 With respect to the Motion to Intervene,
10 the Company has no objections.

11 CHAIRMAN GETZ: Okay. Thank you. Other
12 appearances? On behalf --

13 MR. CARTER: Good morning. My name is
14 Chris Carter. I'm here -- I'm with the law firm of
15 Hinckley, Allen & Snyder, here with my colleague, Suzan
16 Lehmann, and we represent RiverWoods.

17 CHAIRMAN GETZ: Okay. Good morning.

18 MR. CARTER: Good morning.

19 MS. HATFIELD: Good morning,
20 Commissioners. Meredith Hatfield, for the Office of
21 Consumer Advocate, on behalf of residential ratepayers.
22 And, with me for the Office is Steve Eckberg. And, we
23 support the Petition to Intervene.

24 CHAIRMAN GETZ: Thank you.

1 MR. DAMON: Good morning, Commissioners.
2 Edward Damon, for the Staff. And, with me this morning
3 are Amanda Noonan, Steven Mullen, and Grant Siwinski.

4 CHAIRMAN GETZ: Okay. Good morning.
5 And, then, the first order of business, we'll grant the
6 Petition to Intervene, recognizing that RiverWoods Company
7 has demonstrated a right, duty, interest that would be
8 affected by this proceeding.

9 So, with that, we'll begin with the
10 Applicant and the Petitioner. Mr. Epler, if you want to
11 state the Company's position in this docket.

12 MR. EPLER: Yes. Thank you, Mr.
13 Chairman and Commissioners. As, Mr. Chairman, as you
14 stated, on February 7th, the Company learned that the
15 electricity consumption at RiverWoods had been incorrectly
16 billed since September 2004, and that this incorrect
17 billing was the result of an incorrectly labeled current
18 transformer, or CT. Now, the CT, as we explained in the
19 testimony that accompanies the Petition, it is not a meter
20 or part of the meter. It's purpose is to transform large
21 currents, so that the meter can read the current and
22 measure the output.

23 In order to determine billable usage,
24 the metered values are multiplied by a ratio that the CT

1 applies. And, the metered values are multiplied by the
2 ratio to calculate the actual energy consumption.

3 Now, as a result, an incorrect ratio
4 that the -- the manufacturer mislabeled the CT, and an
5 incorrect ratio was applied to the meter. In effect, the
6 Company was then charged double the amount of actual
7 kilowatt-hours that it used.

8 CHAIRMAN GETZ: So, the equipment was
9 not defective itself, it was an issue of --

10 MR. EPLER: Of mislabeling, that's
11 correct. The CT has no moving parts. It's a coil that
12 steps down the current so that the meter can read it. The
13 meter was not faulty, the meter accurately read the
14 consumption. But, then, the ratio that was given to that
15 consumption by the CT, that was the incorrect amount, and
16 that multiplied that to come up with a level of
17 consumption, and that consumption was actually twice as
18 much throughout the period of time from when that CT was
19 installed.

20 Now, the meter, during this time frame,
21 the meter was actually changed out twice; once during the
22 Company's installation of its AMI, it's Automated Metering
23 Infrastructure, and another time when the customer
24 requested a certain type of pulse metering equipment. So,

1 the meter was changed out twice. The meter was also
2 tested a number of times. I don't have the exact number,
3 but there were several tests done on the meter, and each
4 time the meter tested accurately. And, it was only
5 subsequently, when there was -- when I believe the
6 customer had hired an energy efficiency consulting firm to
7 assist them with trying to install energy efficiency
8 measures, that a particular type of testing was done on
9 the panel, which indicated, separate from the meter, that
10 the consumption was half of what we were registering at
11 the meter. Subsequent tests revealed that it was a faulty
12 labeling on the CT that we had applied the incorrect
13 ratio. So, that's the result.

14 CMSR. IGNATIUS: And, when you say "we
15 had applied the wrong ratio", --

16 MR. EPLER: Uh-huh.

17 CMSR. IGNATIUS: -- how does the ratio
18 get into the system? How does it -- you keep calling it
19 "labeled", but is that something that starts at the
20 manufacturer's end?

21 MR. EPLER: Yes.

22 CMSR. IGNATIUS: Is that something that
23 the Company applies to a particular CT?

24 MR. EPLER: The labeling is done by the

1 manufacturer. And, commonly, the companies rely on the --
2 the manufacturer performs a test on the CT, to see that
3 it's functioning accurately. And, we rely on the
4 labeling, the ratio, to then take that ratio and
5 basically, I mean, from my understanding, and if you'd
6 like we can ask our expert here to verify it, but it's
7 basically taking that ratio and then multiplying it by the
8 output of the meter to get a consumption number.

9 CMSR. IGNATIUS: And, so, when this was
10 first installed, was that in 2004?

11 MR. EPLER: Yes.

12 CMSR. IGNATIUS: Did you notice the
13 consumption increase, effectively double from what it had
14 been before?

15 MR. EPLER: This was a new facility.
16 So, there was no history of prior consumption. Now, there
17 was -- this was, I believe, the second facility at
18 RiverWoods. The first facility, however, was individually
19 metered; this was master metered. There was also,
20 apparently, some differences in some of the appliances
21 that were in the two facilities. So, it was thought that
22 that accounted for differences in overall consumption at
23 the two facilities. That you had individual metering and
24 perhaps, because of that, people were using their -- were

1 consuming differently based on the feedback they were
2 getting from their own personal bills, as opposed to the
3 master metering. But, in any event, this discrepancy,
4 this error was not definitively determined until February
5 of this year.

6 The total amount of the overpayment has
7 been calculated by the Company to be approximately
8 \$1.8 million. Now, there are several statutory provisions
9 that are implicated by the overcharge. RSA 378:10
10 provides that "No public utility shall make or give any
11 undue or unreasonable preference or advantage to any
12 person or corporation, or to any locality, or to any
13 particular description of service in any respect whatever
14 or subject any particular person or corporation or
15 locality to any particular description of service or to
16 any undue or reasonable prejudice or disadvantage."

17 RSA 378:14 provides that "No public
18 utility shall grant any free service, nor charge or
19 receive a greater or lesser or different compensation for
20 any service rendered to any person, firm or corporation
21 than the compensation [that's] fixed for such service by
22 the schedules on file with the Commission."

23 The effect of the error resulted -- the
24 effect of the error resulted in charging the customer

1 twice as much per kilowatt-hour as usage as provided for
2 in the Company's tariffs. Additionally, as a result of
3 the overcharge to this customer, other customers were
4 charged less than the approved tariff rates per
5 kilowatt-hour. This is because the system is consuming a
6 certain amount of electricity each month. And, as a
7 result of the reconciling nature of the supply charges and
8 delivery costs, if one customer has paid too much per
9 kilowatt-hour, the other customers have paid less than
10 they should have. Accordingly, the Company recognizes
11 that the overcharges and the receipt of the overcharges
12 and the undercharges are in violation of 378:10 and
13 378:14.

14 In addition, the overcharges for the
15 period are in breach of the Company's tariffs, as the
16 State -- the New Hampshire Supreme Court has stated,
17 tariffs and rate schedules "have the force and effect of
18 law and bind both the utility and its customers." And,
19 the Court has also stated that "[A] tariff has the same
20 force and effect as a statute."

21 CMSR. IGNATIUS: Mr. Epler?

22 MR. EPLER: Yes.

23 CMSR. IGNATIUS: Could you walk through
24 more slowly how the overcharge to RiverWoods results in

1 undercharges to other ratepayers?

2 MR. EPLER: Yes. I can perhaps give you
3 a simple example. Assuming that the -- that the system
4 consumes a thousand kilowatt-hours in a month, and there
5 are ten customers, and each one of them is consuming 100
6 kilowatt-hours of that -- of that energy. If they're all
7 paying an equal charge, they all should be paying
8 one-tenth of the total charges. If one of them is paying
9 twice as much, then the remaining nine customers are only
10 paying 80 percent of the charges, as opposed to their
11 appropriate 90 percent of the charges. And, this is
12 because of the reconciling nature of those account
13 balances, particularly of the Default Service charges, the
14 External Delivery charges, and the other Delivery charges
15 that are all reconciling accounts.

16 CMSR. IGNATIUS: But, when you talk
17 about percentages, that's one analysis. If you're just
18 looking at the straight usage, if all ten of your
19 customers are using 100 kilowatt-hours, but one of them is
20 being billed for 200 kilowatt-hours, how are those
21 remaining --

22 MR. EPLER: They're still -- I'm sorry.

23 CMSR. IGNATIUS: Well, how are those
24 remaining nine customers under paying? If they're still

1 paying for their 100 kilowatt-hours at the tariff rate,
2 how does your one customer, who's erroneously billed at
3 200, result in the other nine under paying for their
4 usage?

5 MR. EPLER: Because you're, on a regular
6 basis, you're resetting the Default Service Charge. So,
7 you're -- and, when you set the Default Service Charge,
8 you're reflecting the balances that are in the Default
9 Service account. So, if you've gotten an excess amount
10 from one customer, and you reset the charges based on that
11 overpayment, that overpayment is going to reduce the
12 amount that you've got to collect from other customers to
13 keep the account as close to zero as possible. The
14 Default Service account is always going to have either --
15 you're either going to be overcollected or undercollected.
16 You're always trying to keep it in balance. So, each
17 year, when you do -- each time you reset Default Service
18 charges going forward, and each time you reset your
19 delivery charges, based on your annual reconciliation,
20 you're always truing them up, based on the amounts of
21 revenues that you received over time, and based on your
22 estimate of projections for consumption going forward.
23 And, so, if you've collected too much, the charge is going
24 to be smaller going forward.

1 CMSR. BELOW: Mr. Epler, is it possible,
2 besides the reconciliation function, where we've got a
3 certain revenue target to cover the charges that the
4 competitive supplier -- the default service supplier is
5 being paid, based on their wholesale, is it possible that
6 this also affects your -- affected your calculation of the
7 line losses? In other words, you thought, if you'd
8 correctly metered it, you would have calculated a somewhat
9 higher line loss relative to the true-up between retail
10 and wholesale consumption?

11 MR. EPLER: I would have to defer that
12 question to one of my associates.

13 CMSR. BELOW: Okay. Well, maybe that's
14 something to look into as we get further into this case.

15 MR. EPLER: It's your preference. We
16 could comment on that now, if you'd prefer?

17 CMSR. BELOW: I think it might help to
18 understand the nature of the problem.

19 MR. EPLER: Okay.

20 MR. FURINO: Sure.

21 MR. EPLER: This is Rob Furino,
22 previously introduced as the Director of Energy Contracts.

23 MR. FURINO: Right. Just to explain
24 what happens here, is there are, essentially, two sets of

1 recorded data. Retail meters are measured and recorded,
2 and that represents the consumption at the customer's
3 facility. So, it could be at RiverWoods' facility, it
4 could be at any house of any customer in the system.
5 Separately, the Company meters and records all of the
6 power flowing into its entire system and all the power
7 flowing out of its system, including generation that is
8 produced within the system. And, for every hour, the
9 wholesale markets clear on an hourly basis. For every
10 hour, the system -- the Company has to keep the system in
11 balance.

12 So, what happens is, in the case, as Mr.
13 Epler was explaining, in the case as when one customer is
14 overreported, as RiverWoods had been, in that hour, there
15 are -- all customers who do not have an interval meter are
16 subject to what we call "residual load". So, the excess
17 load that was reported to -- on behalf of RiverWoods'
18 account is systematically under reported on behalf of all
19 the non-interval metered customers. So that we can
20 maintain, in every hour, a balance of the inflows and
21 outflows powering the system. And, Commissioner Bell
22 [Below?], you're exactly right, that this error manifests
23 itself as a lower distribution loss factor as a result of
24 this error.

1 So that the way that the system is set
2 up, to properly allocate the load obligations of every
3 wholesale supplier in the system, so the Company is
4 providing default service supply to its Default Service
5 customers. Separately, over a dozen competitive marketers
6 are providing supply to their retail customers within the
7 Company's system. And, the load allocation process is set
8 up to properly allocate those wholesale obligations
9 associated with the retail reads.

10 So, at the end of the day, what happens
11 is the wholesale load obligation, on behalf of RiverWoods,
12 was double as it was reported to ISO-New England. And,
13 the amount of that incremental reporting for RiverWoods'
14 account, which went to its supplier, was under reported on
15 behalf of the Company's Default Service customers.
16 Essentially, any customer that did not have an interval
17 meter account.

18 And, so, there are two types of
19 customers on the system. Customers with interval meters,
20 like RiverWoods. Every hour, the Company has a read and
21 can report. What we do is we add the tariff based
22 distribution loss factor to that consumption and report it
23 to ISO-New England. All other customers, well, they're
24 only read once a month. So, we have algorithms that apply

1 historical load profiles by customer rate class and time
2 period. And, we use those to establish the basis of what
3 each customer's loads are in every hour. And, like I
4 said, subject to residual load, an initial calculation is
5 done, and then an iterative process is followed to
6 allocate that residual load to all of these non-interval
7 customers, the ones that are only read once a month.
8 Those are the customers who essentially benefited, in
9 terms of supply costs, from the meter -- the metering
10 error.

11 CMSR. BELOW: Okay.

12 CHAIRMAN GETZ: And, let me just point
13 out one thing, especially if, Mr. Carter, if you're
14 concerned about what just occurred. The comments by the
15 analyst for the Company is not going to be treated as
16 sworn testimony. And, let me point out what we're going
17 to try to accomplish today is what we want to do is get a
18 feeling for the scope of the issues of fact and the types
19 of things that we're going to have to explore through a
20 proceeding, and also to deal with the issues of questions
21 of law, and understand that you're going to make a motion,
22 as I read it from your papers, to stay this proceeding
23 while the Superior Court proceeding plays out. But what
24 we want to do is get an understanding of all the factual

1 issues that are in play. So, that's the purpose of
2 hearing from the Company.

3 MR. CARTER: Thank you very much. It's
4 helpful for RiverWoods to hear Unitil's present factual
5 explanation. And, it might helpful if we can offer our
6 observations after we've heard what they have to say
7 today.

8 CHAIRMAN GETZ: And, you'll have that
9 opportunity, and as well the opportunity for a technical
10 session, to the extent you want to follow up afterwards
11 with the beginning of discovery. So, with that, turn back
12 to Mr. Epler. Do you have other issues?

13 MR. EPLER: Yes, Mr. Chairman. Thank
14 you. Turning to the effect of the overcharges. RSA
15 365:29 provides that where there's been an "illegal or
16 unjustly discriminatory rate, fare, charge, or price
17 collected for any service, the Commission may order the
18 utility which collected [that rate] to make reparation to
19 the [customer] who paid, with interest from the date of
20 the payment. [The] order for reparation shall cover only
21 payments made within two years before the earlier date of
22 the Commission's notice of hearing or the filing of the
23 petition for reparation."

24 The New Hampshire Supreme Court, in

1 Granite State Gas Transmission v. State, 105 New Hampshire
2 454, stated that "RSA 378:10 together with RSA 365:29
3 gives the Commission authority to prevent unreasonable
4 prejudice or disadvantage to customers." The Court stated
5 that: "We reject the plaintiff's first contention that
6 the Public Utilities Commission has no statutory authority
7 to order a refund. While it's true, the Commission has
8 been given no express statutory authority to order
9 refunds, we entertain no doubt of its power to do so in
10 proper circumstances, referring to RSA 365:29. The
11 Commission has the authority to act upon its own motion or
12 upon complaint in behalf of the public in any situation
13 where service or rates may be directly affected by its
14 order."

15 Now, by the Company's Petition, the
16 Company is seeking a determination from the Commission as
17 to the proper period to be applied for the calculation of
18 reparations or the refund. The Company believes that
19 365:29 and the two-year limitation on that applies. The
20 Commission has previously determined, in Docket DE 01-023,
21 in Order Number 23,734, and again in DT 01-006, in Order
22 Number 23,940, that its reparations authority under 365:29
23 is limited to ordering the return of payments made within
24 the preceding two years.

1 The only other refund provision which
2 could apply is found at Puc Rule 305.05(c). The Company
3 does not believe that this particular rule applies to this
4 circumstance or that the result would be any different.
5 First, the rule must be read to comport with the statutory
6 authority granted to the Commission in 365:29, as the
7 Commission cannot extend its authority by rule. So,
8 365:29 provides a two-year limitation. Any rule with
9 respect to refunds must comport with that limitation as
10 well.

11 CHAIRMAN GETZ: Well, Mr. Epler, let me
12 ask you this --

13 MR. EPLER: Sure.

14 CHAIRMAN GETZ: -- about this line of
15 reasoning.

16 MR. EPLER: Uh-huh.

17 CHAIRMAN GETZ: I haven't recently read
18 the Granite State case or the two orders that you've
19 mentioned. But, when you look at 378:10, preferences, and
20 378:14, free service, and 365:29, orders for reparation,
21 of course, these are all statutes going back to 1911,
22 1913, and 1917. And, it's my recollection of the history
23 of these things, were intended to deal with effectively
24 intentional acts by the railroads to give preferences.

1 But is there a distinction to be drawn
2 -- let me back up. You seem to be making an argument the
3 effect of the rate is -- creates an undue preference,
4 results in free service, or equates to illegal or an
5 unjustly discriminatory rate. Does intent play a role at
6 all in any of this, where it was because of some error
7 that the rate was -- the charge was higher? And, do any
8 of these cases you've cited, either ours or the Supreme
9 Court cases, address directly this issue or have similar
10 fact patterns?

11 MR. EPLER: Well, first, I think the
12 plain language of the statutes, for example, 378:14, does
13 not require intent. It says "No utility shall grant any
14 free service, nor charge or receive a greater or lesser or
15 different compensation." There's no intent required in
16 that statute.

17 I think, similarly, I mean, with a meter
18 error, and the limitation on reparations I think was a
19 balance struck by the Legislature between the interests of
20 the utilities and limiting their financial exposure and
21 the public and getting some refund and some reparations
22 for an overcharge.

23 CMSR. IGNATIUS: Let me ask you a
24 question about that.

1 MR. EPLER: Uh-huh.

2 CMSR. IGNATIUS: It sounds as though
3 you're reading 365:29 to prohibit any payment for an
4 overcharge if it's earlier than three years -- going back
5 earlier than two years, excuse me. And, can't you also
6 read that statute to say that "the Commission isn't
7 authorized to order any payment going back greater than
8 two years", but that doesn't necessarily mean that there's
9 a prohibition on the utility voluntarily making a refund
10 that goes back further, isn't that correct?

11 MR. EPLER: Absolutely. And, that's the
12 direction I was about to and the argument I was about to
13 make. Just to get back to the Chairman's point, if I
14 could just briefly. With respect to intent, the case that
15 I referred to earlier, DT 01-006, was a Verizon New
16 Hampshire case, and it had to do with performance
17 assurance plans, and what kind of remedies would be
18 available under the plans. And, so, no intent was
19 necessary under those plans.

20 And, to pick up on Commissioner
21 Ignatius's point, what the Commission determined in that
22 case was that it could not impose a remedy greater than
23 two years, but it could accept a voluntary arrangement or
24 an offer by the company to go beyond the two-year period.

1 And, the Company is willing to do that.
2 We are willing to provide a refund to the customer for the
3 entire period during which the overcharge occurred, refund
4 the entire \$1.8 million, and we're willing to tender that
5 immediately, or, effectively, as soon as the Commission
6 would issue an order. And, we think that, pursuant to
7 365:3, which addresses reparations, the Commission could
8 approve a voluntary refund plan that goes beyond the
9 two-year limitation. And, the Commission referenced that
10 statute in the Verizon order.

11 Now, the Company's offer for a refund --
12 for a full refund is contingent upon receipt of approval
13 from the Commission to adjust the Default Service Charge
14 balance and the delivery service account balances to
15 reflect the fact that, by overcharging this one customer,
16 as we stated earlier, the other customers were
17 undercharged. And, the amounts that are in question, if
18 you can, if you have the Petition in front of you, at Page
19 11 of the testimony accompanying the Petition, there's a
20 breakdown of the various charges and the accounts that
21 they went to. I'll just give you a moment, if you have
22 that.

23 So, if you look at, on Page 11, this is
24 the testimony, if you look at Lines 8 through 9, that's a

1 breakdown of the \$1.8 million as calculated by the
2 Company. Distribution charge of \$185,000, delivery
3 charges of 299,000, and supply charges of \$1.3 million.

4 Now, of those amounts, the distribution
5 charge, \$185,000, that's money that the Company profited
6 from. In effect, that's a double collection of our
7 distribution charge. And, we recognize that that's the
8 responsibility of the Company, and we are not seeking to
9 collect that from other customers. The \$299,000, the
10 delivery service charges, those are further broken down
11 below, on Lines 16 through 27. And, it shows, for
12 example, the Restructuring Surcharge, Rate Case Surcharge,
13 Systems Benefit Charge collections, the Stranded Cost
14 Charge, the Fuel and Purchased Power Adjustment Charge,
15 External Delivery Charges, and so on.

16 Those are charges that we do seek to
17 have those account balances adjusted, so that we can
18 collect those, the under payments for those amounts from
19 other customers. Now, that's true, except with respect to
20 the Systems Benefits Charge. Other customers were not
21 undercharged for the Systems Benefits Charge, because
22 that's a per kWh charge that went directly into those
23 accounts, either the low income account or the energy
24 efficiency charge.

1 However, because we double collected
2 that amount from RiverWoods, the amount that they should
3 have paid, the account balances and the Systems Benefits
4 Charge for energy efficiency and for low income are higher
5 than they should have been, given the amount we should
6 have collected from all our customers on a per
7 kilowatt-hour basis. And, since those amounts are set by
8 statute, if we refund the amounts -- the Company refunds
9 the amounts to RiverWoods, those account balances are
10 higher than they should be. And, so, we propose
11 adjustments to take them down, so that during this period
12 the appropriate amount of the Systems Benefits Charge was
13 collected from all customers.

14 CMSR. BELOW: Before you go on, what
15 about the Consumption Tax? Because the other customers,
16 that's like the Systems Benefits Charge that would have
17 been levied on their metered retail consumption, and yet
18 we can't adjust that account balance, because it's paid to
19 the state.

20 MR. EPLER: If I can consult for a
21 moment?

22 (Atty. Epler conferring with Company
23 representatives.)

24 MR. EPLER: My understanding, and I

1 guess this is a matter that we'd have to explore more
2 fully with respect to Consumption Tax, but my
3 understanding is, if we refund -- if we refund the
4 amounts, that that amount -- that the Consumption Tax will
5 be adjusted based on the refund.

6 CMSR. BELOW: So, you could either amend
7 past returns or show the correction in the current return,
8 you believe?

9 MR. EPLER: Yes.

10 CMSR. BELOW: Okay. Thanks.

11 CHAIRMAN GETZ: Mr. Epler, have you made
12 demands of the CT manufacturer or installer?

13 MR. EPLER: Yes. We have issued a
14 demand letter to the CT manufacturer. There has been an
15 exchange of papers at this point. The initial demand
16 letter contained an error, there was a miscommunication
17 between us and our attorney who was handling that, and
18 indicated to the manufacturer that the Commission had
19 ordered a refund. And, we've clarified that with the CT,
20 with both the manufacturer and the distributor, the status
21 of the proceedings here. And, we provided copies of that.
22 The Staff issued some discovery requests, and we provided
23 copies of the papers that's been exchanged so far.

24 There have been questions, referring to

1 the Staff discovery, that the Staff did raise questions as
2 to whether or not the account balance adjustments that
3 we're proposing amount to either single issue ratemaking
4 or retroactive ratemaking. We believe that neither of
5 those concepts apply. "Single issue ratemaking" is
6 usually understood to mean the adjustment of the base rate
7 element outside of a base rate proceeding, where other
8 costs and revenues are not taken into account.

9 But, in this case, all the accounts we
10 seek to adjust are outside of base rates. They're all
11 reconciling accounts, with the exception of the Systems
12 Benefits Charge, as I discussed. And, they are not
13 affected by any changes and any costs or revenues. So,
14 this is not an instance of single issue ratemaking.

15 With respect to "retroactive
16 ratemaking", that's generally understood to mean imposing
17 a new obligation with respect to a past transaction. And,
18 ordinarily, retroactive ratemaking is impermissible
19 because customers of a utility have a right to rely on the
20 rates which are in effect at the time that they consume
21 the services provided by the utility, at least until such
22 time as the utility applies for a change.

23 There's a distinction between the
24 request to change the rates that the customers are

1 required to pay per unit of power, which the Company is
2 not requesting, and seeking to adjust the account balances
3 to correctly reflect the amount of energy consumed, and
4 for which the customer is obligated to pay the duly
5 established price. That is not retroactive ratemaking.

6 As the Commissioners state -- the
7 Commission stated, in docket DT 06-067, Order Number
8 24,866, "if a utility collects charges that are not
9 authorized by and in fact are inconsistent with its
10 tariff, any monetary relief awarded to aggrieved customers
11 amount to rate enforcement rather than ratemaking."
12 Accordingly, we believe that, by adjusting the account
13 balances, what we're asking for is rate enforcement of the
14 rates that were in effect during this period of time.

15 And, finally, there's also -- there
16 maybe questioning in terms of what's sometimes referred to
17 as "intergenerational" issues, in terms of asking current
18 customers to pay for matters that occurred in the past.
19 Ratemaking often involves requiring that. To ask
20 customers to pay charges for services or investment which
21 they may not have profited from or used because of when
22 they became customers.

23 For example, in the rate proceeding for
24 Unutil that was just settled and approved by the

1 Commission, the wind storm costs that were incurred in
2 February 2010 are going to be recovered over approximately
3 a seven-year period. Now, customers who benefited from
4 the restoration, but who leave the system, will escape
5 paying for those charges. But new customers, who begin
6 service after the storm and receive no benefit from those
7 restoration charges, will be paying for those charges.

8 So, it's inherent in the rate-setting
9 process that you set rates on a going-forward basis. Some
10 of those rates are for prospective charges; some of them
11 are looking back retrospectively to collect for charges
12 that were incurred in the past.

13 And, so, with respect to the reconciling
14 clauses, you're always reconciling them on a regular basis
15 to true up to the amounts, so that customers are paying
16 what they should be paying based on the approved tariff
17 rates. And, that's what we're asking in this proceeding.

18 So, in summary, we are asking -- we do
19 believe that the statute presents a limitation as to what
20 the Commission could order the Company to refund to this
21 customer. But, to be as clear as we can be, the Company
22 is completely willing to pay to the customer the full
23 amount of the overcharge. We're not seeking to invoke the
24 two-year limitation. What we do say is that, in offering

1 to make the full payment, we would like to, at the same
2 time, adjust these account balances to recover the amounts
3 that were undercharged to remaining customers.

4 And, that the total amounts, so you can
5 see what we're actually asking to recover, if you turn to
6 the last page of the testimony, that would be Page 19, of
7 the \$1.8 million, we would seek to adjust the Default
8 Service Charge by 1.1 million, and other delivery charges
9 by a total of 299,000. So, it's approximately
10 \$1.45 million of the 1.8. And, the Company would be
11 responsible for the difference of approximately 350,000.

12 CHAIRMAN GETZ: Thank you. Of course,
13 we're going to go around the room and take positions from
14 everyone. And, as our rules permit, the Petitioner will
15 have a chance to go last. I am interested in your
16 position on the Motion to Stay and issues of jurisdiction
17 between us and the Superior Court, especially as it
18 applies to 358-A.

19 But, I think, if there's no other
20 questions from the Bench, I would turn to Mr. Carter now,
21 and we'll give you an opportunity to respond to that issue
22 later. Is that agreeable, Mr. Carter?

23 MR. CARTER: That's fine. If you don't
24 mind, it's more comfortable for me to stand. Thank you

1 for the opportunity to address the PUC.

2 (Court reporter interruption.)

3 MR. CARTER: I will speak as loud as I
4 can. Thank you.

5 In the first instance, RiverWoods does
6 not have an interest, we don't believe we have standing to
7 contest Unitil's ability to recover against other
8 customers for benefits they may or may not have received
9 as a result of the defective meter that Unitil installed
10 at RiverWoods in 2004. Our interest is very narrow.
11 Which is to recover the balance of the \$1.8 million that
12 we overpaid as a direct consequence of Unitil's mistake.

13 I believe the first question from the
14 Commission was "whether this was a defect or something
15 else?" And, I think it's probably, in layman terms,
16 probably a "defect" is the most apt way of characterizing
17 this. I note that that's how Unitil's own counsel
18 characterized the issue in its April 7, 2011 letter, in
19 which they demanded recovery of \$1.8 million from the
20 manufacturer of the meter and CT equipment. They
21 described, "in February 2011, Unitil discovered that the
22 CT ratio markers are defective", and that's exactly what
23 we have here. That's an important distinction, because
24 none of the cases or the PUC orders of which we're aware

1 that Unitil is today offering in support of its position,
2 deal with a defective piece of equipment.

3 We're not here because RiverWoods was
4 subjected to an illegal or discriminatory rate. It's here
5 today because of a defective piece of equipment, which
6 RiverWoods was not responsible for, it was not responsible
7 for maintaining. And, it had no ability to know of the
8 existence of the defect for the six-year period that the
9 meter was in place, until it was brought to our attention
10 finally in February 2011 by Unitil.

11 The statute which, to put this in some
12 context, we -- RiverWoods was alerted to the existence of
13 this problem some weeks after it appears that Unitil
14 discovered or some days we were alerted there was a
15 problem, and then there was a further delay while Unitil
16 disclosed to us the financial impact of the defective
17 meter. We originally were told "We will pay you full
18 restitution. Give us more time while we quantify the
19 effect of that problem." And, my client and its elderly
20 citizens, residents assumed that we were all dealing in
21 good faith.

22 We then came to learn that Unitil was
23 approaching the PUC regarding the payment of restitution.
24 We were again assured that the Company stood by its

1 responsibility to the RiverWoods residents and would pay
2 everything that was owed.

3 I note that, in April 2011, Unitil was
4 demanding 1.8 million from the manufacturer. Not raising
5 a two-year limitations argument or any of the things that
6 we're hearing about today. And, I submit that, if the
7 manufacturer had not pushed back, we wouldn't be here
8 today. In other words, if the manufacturer had agreed
9 with Unitil's counsel and readily tendered the
10 \$1.8 million that my client overpaid, we would not be here
11 this morning.

12 We were then told that they would pay my
13 client, RiverWoods, the \$300,000 plus or minus, which,
14 according to the data that we've gone through this
15 morning, represents arguably what Unitil benefited from.
16 And, they declined at that juncture to pay us anything
17 more. We understandably said "That's not acceptable. You
18 said you owe us 1.8, please pay it. You know, this is a
19 zero-sum game for our residents. They were out-of-pocket
20 on an average of \$3,000 each. Stand by your word." They
21 then came back sometime later and said "well, there's a
22 two-year limitation period under a statute", which we've
23 heard about this morning, RSA 365:29 [365:29?], "which
24 limits our ability to repay you. So, we can't pay you, as

1 a matter of law, until we get PUC approval."

2 And, so, that finally prompted us, when
3 we asked Unitil, "well, are you asking for approval to
4 repay us or are you going to be taking the position that
5 you can only repay us for two years?" They equivocated.
6 So, we were facing the unenviable position of either
7 allowing Unitil to speak for the RiverWoods' residents,
8 and argue, as they have today, that the two-year
9 limitation applies and limit their liability to
10 RiverWoods, or to initiate action in Superior Court, which
11 we finally -- which we did reluctantly, but that suit is
12 now pending.

13 CHAIRMAN GETZ: Well, I'd like to
14 address that issue and try to understand whether you're
15 arguing in the alternative or what exactly action you're
16 asking of us today. On the one hand, there's the 365:29,
17 to the extent it speaks of a limitation on reparation for
18 illegal or unjustly discriminatory rate, fare, charges or
19 prices, does not apply to this situation? And/or we don't
20 have the jurisdiction in any event, and this should be
21 resolved in Superior Court? So, is it one or the other or
22 are you arguing in the alternative?

23 MR. CARTER: I think both principles are
24 accurate, sir. I think, one, the statute on its face does

1 not apply. I think the Commission raised some apt
2 questions about that. And, I would like to take a minute
3 to provide our analysis. But, further, as we will lay --
4 set forth in further detail, the Commission's own orders
5 recognize that, in the context of a claim for damages,
6 which arise from a defect, equipment defect, like what we
7 have here, that the resolution of that is in the Superior
8 Court.

9 So, there is no -- this case, and from
10 RiverWoods -- excuse me. This case, as it relates to
11 RiverWoods, is not about discriminatory rates, illegal
12 charges. As to RiverWoods, it's not about the extent to
13 which Unitil can make itself whole against others who may
14 or may not have benefited. It's only about accepting,
15 honoring its legal responsibility for its negligence or
16 breach of its contractual obligations to RiverWoods.

17 And, Unitil has, because it has invoked
18 this two-year statute, as a limit to its obligation to
19 RiverWoods, we have been required to take a step to seek
20 to intervene. And, we will promptly move to stay or
21 dismiss this action only as it relates to RiverWoods. But
22 I am comfortable representing today, in response to your
23 request for an overview of our position, our observation
24 that RSA 325.29 [365:29?] does not apply. That statute

1 does find in its roots discriminatory or legal charges by
2 railroads. The Granite State case that Mr. Epler cites
3 talks about "the statute's goal is to prevent unreasonable
4 prejudice or disadvantage to its customers." It doesn't
5 deal in any respect with the consequences of an equipment
6 defect, such as what we have here.

7 This rule that was brought -- Mr. Epler
8 was asked about, 305.05, is on point. That says,
9 unequivocally, that when a utility has overcharged a
10 customer by more than 2 percent, as a result of a
11 watt-hour meter error, it -- the word that the rule -- the
12 word the rule uses is "shall, "it shall repay the
13 customer". There's no conflict between the statute that
14 Unitil now relies on and the rule. They're dealing with
15 two fundamentally different issues. On the one hand, the
16 statute is talking about the Commission's ability to order
17 reparations, going back in time as a result of an illegal
18 or discriminatory rate or charge. And, this rule, which
19 unquestionably applies to an error, which is what we have
20 here.

21 That is our position with respect to the
22 legal issues, with respect to the statute and the rules
23 that have been raised by Unitil. Again, RiverWoods has a
24 very limited interest here. We believe that, whether

1 Unitil can make itself whole against the manufacturer or
2 whether Unitil can make itself whole against other
3 customers are not issues as to which RiverWoods has an
4 interest or standing to argue about.

5 CMSR. IGNATIUS: Mr. Carter, it sounds
6 like, in your view, the best result then is to have two
7 separate proceedings, either in parallel or sequentially,
8 one in the Superior Court on the issues of payment to
9 RiverWoods, and one at the Public Utilities Commission on
10 any rate reconciliation matters. Is that right?

11 MR. CARTER: Yes, ma'am. And, just to
12 -- to the extent that I'm not being as clear as I'd like
13 to this morning. We have no objection to this proceeding,
14 this administrative proceeding going forward, addressing
15 the issues as to whether, under these circumstances,
16 Unitil can go back in time and recover against others, as
17 a result of its liability to Unitil -- RiverWoods.

18 CMSR. IGNATIUS: Isn't there something
19 inefficient about that, though, of having two separate
20 proceedings that are, albeit taking different aspects of
21 one problem, one transaction that occurred, why is it
22 better to have that done in two forums?

23 MR. CARTER: I'm glad you asked that,
24 and I will be able to address it briefly this morning in

1 more detail when we addressed this point in our subsequent
2 filing. The question of whether or not Unitil can benefit
3 from that two-year limitation is a very narrow, legal
4 issue. It doesn't involve any technical expertise of the
5 kind that courts are inclined to defer to administrative
6 agencies. It's a narrow legal interpretation of the
7 statute. And, companion with that, what is the meaning of
8 the Administrative Rule 305.05?

9 It's RiverWoods' position that Unitil
10 can fully exercise it's -- the scope of its jurisdiction
11 by addressing the impact of this liability vis-a-vis
12 Unitil's ability to assess a charge or a recoupment
13 against -- for an alleged benefit that others have
14 received.

15 But, the narrow question of whether that
16 liability, which is undisputed and it's been conceded both
17 in the -- to my client and to the PUC, whether they can be
18 compensated or recoup from others is not an issue which we
19 believe is appropriate before the Commission. And, having
20 the Superior Court decide those questions, in terms of
21 what damages Unitil should pay RiverWoods, will not hinder
22 this proceeding in any respect, because you will be able
23 to go on and address the arguments that Mr. Epler has made
24 and that Unitil has made regarding whether it can

1 appropriately go back in time and recover as to the other
2 customers. It may be that, as to the other customers,
3 this Commission has to decide whether there's a two-year
4 limitation in terms of the extent to which it can reach
5 back and recover as a result of a preferential rate that
6 others received.

7 But, as to Unitil, we're not talking
8 about rates. This is really akin to -- suppose that
9 Unitil's billing department had a malfunction. And, so,
10 instead of saying "we used X kilowatts per month", we used
11 2X, which is what we have here. That's not a
12 discriminatory or illegal charge. That's simply
13 negligence or breach of contract. If they had -- you can
14 envision any number of scenarios, where there would be an
15 equipment error or something that didn't deal at all with
16 rates or charges, but was just simply a broken piece of
17 equipment or a negligently calibrated piece of equipment
18 --

19 CHAIRMAN GETZ: And, your position is
20 that the Superior Court would, if they accepted that
21 formulation, that they would make the decision, the
22 Superior Court would make the decision, and not send it
23 back to us, to say "you make that decision about whether
24 they are conducting their billing in an appropriate way"?

1 MR. CARTER: I beg you pardon. Could
2 you just ask that question again.

3 CHAIRMAN GETZ: Well, it sounds like
4 what your position is, is the Superior Court should make
5 that decision about whether -- where the defect is?

6 MR. CARTER: There's no question about
7 where the defect is, sir. It's been acknowledged and
8 described in the filing. It's a defective meter. So,
9 then, really, only the question for the Superior Court is,
10 "what damages does Unitil Energy Systems owe a customer as
11 a result of that defect?" We've asserted claims for
12 negligence, unjust -- breach of contract, unjust
13 enrichment in RSA 358-A.

14 So, one, those are issues, legal issues,
15 which are appropriately resolved by a Court, given that
16 they involve the narrow question of an interpretation of a
17 statute and an administrative rule.

18 From RiverWoods' point of view,
19 liability and damages are undisputed. The only question
20 is whether Unitil can prevail in its attempt to limit its
21 liability or exposure by invoking this statute.

22 CHAIRMAN GETZ: And, your position is
23 that the exemption under 358-A:3 doesn't apply to this
24 situation? The 358-A:3, "Exempt Transactions", that "the

1 following transactions [are] exempt from the provisions of
2 the chapter", and "trade or commerce subject to the
3 jurisdiction", among other things, "the Public Utilities
4 Commission."

5 MR. CARTER: We don't feel that the
6 problem here that, Unitil's conduct towards us in dealing
7 with this problem, either disclosing it, it's
8 representations after disclosure, are areas that fall
9 within the purview of the PUC. But, again, the primary
10 question of the defense that Unitil is raising, again,
11 turns on a very narrow legal issue. And, unquestionably,
12 the Superior Court has jurisdiction with the PUC on that
13 issue.

14 We submit that it would be, under the
15 circumstances, appropriate to let the Superior Court
16 resolve that legal issue. And, let this Commission
17 proceed to do the second half of the analysis, which is
18 what about Unitil's ability to recoup from others.

19 CHAIRMAN GETZ: So, depending on
20 whatever the Superior Court decided, in terms of whether
21 there is or is not liability, and what the extent of that
22 liability is, in terms of dollars, then, it would come
23 back to us to apply?

24 MR. CARTER: Yes. Yes, sir.

1 CMSR. BELOW: One other question.
2 You've said repeatedly, I think, that "RiverWoods doesn't
3 have an interest in the question of Unitil recouping any
4 amounts from other customers." But, I think, as I read
5 the Petition and the supporting prefiled testimony, what
6 they're proposing is to adjust account balances, meaning
7 undercollections for certain accounts, which would
8 actually apply going forward to all customers. So, in
9 fact, to the extent they were allowed to -- the Commission
10 were to allow them to adjust account balances, it wouldn't
11 be just other customers, RiverWood would also pick up it's
12 share of potentially some of these costs on a
13 going-forward basis.

14 MR. CARTER: Mr. Below, I have not -- to
15 the extent that that's what Unitil has in mind, and I hear
16 what you're saying in regards to the words in their
17 Petition and their testimony, I submit it would be
18 somewhat perverse to require RiverWoods to pay more to
19 Unitil going forward, to pay restitution for a wrong
20 perpetrated against RiverWoods in the past. The way that
21 this issue has been framed in discussions with Unitil and
22 its counsel and RiverWoods, and the way we, therefore,
23 interpreted its Petition in this case is, if they pay
24 restitution to RiverWoods as a result of their defective

1 equipment, can they recover against other customers for
2 the benefit that those other customers gained as a result
3 of the overpayments by RiverWoods? So, RiverWoods did not
4 realize any benefit from what's happened to this point.
5 It realized a \$1.8 million loss. And, I hear Mr. Epler
6 explaining this morning that their ability to go back
7 would affect customers who received a benefit for the
8 overpayments by RiverWoods.

9 CHAIRMAN GETZ: Though, I take what
10 Commissioner Below is saying is, at least if the Company's
11 theory is a correct one, and full restitution were made,
12 that a reallocation among all other customers would be
13 appropriate. That is their theory. And that, as one of
14 those customers, that you would be affected in some
15 proportionate way. So, effectively, I guess it would be
16 an offset of some, I would say, I expect small level
17 against the \$1.8 million.

18 MR. CARTER: To the extent that they are
19 taking that position, which I suggest would be illogical
20 and perverse under the circumstances, given that we're the
21 customer who lost out in the first instance, we shouldn't
22 have to be paying Unitil to pay them restitution for
23 paying damages to RiverWoods. But, to the extent that
24 that's a position that they are advocating, we object.

1 And, we would -- and, to the extent that that issue would
2 need to be resolved with RiverWoods' input, we would seek
3 to stay the entire PUC proceeding pending a judicial
4 resolution of the threshold question of "does the two-year
5 statute apply?"

6 CMSR. BELOW: Thank you.

7 MR. CARTER: Thank you very much.

8 CHAIRMAN GETZ: Thank you.

9 Ms. Hatfield.

10 MS. HATFIELD: Thank you, Mr. Chairman.
11 The OCA is still reviewing the Company's filing and is
12 also reviewing the Company's responses to Staff's first
13 set of discovery. We've heard new information today, both
14 on questions of law, as well as some of the factual
15 issues. And, we will work with the Parties and Staff to
16 develop a procedural schedule and to conduct discovery to
17 try to come to a position in the case.

18 CHAIRMAN GETZ: Thank you. Mr. Damon.

19 MR. DAMON: Thank you. As has been
20 indicated, Staff has issued a set of data requests, and
21 the Company has been cooperative in responding in a timely
22 manner. And, Staff is still currently reviewing and
23 assessing these responses. As I think has been made clear
24 by the comments already made today, there do appear to be

1 several legal or procedural issues that will have to be
2 sorted out, either now or at some point in the proceeding.

3 UES's Petition makes two basic and
4 actually separate requests. One is a declaratory ruling
5 under Puc 207.01 and RSA 365:29, for a determination of
6 what I will loosely refer to as a "statute of limitations"
7 for calculating reparations to a customer for an
8 overbilling.

9 In the Petition, UES also refers to Puc
10 305.05(c), regarding refunds for overbilling due to a
11 faulty watt-hour meter. I think I heard the Company state
12 this morning that they're not relying on that so much.
13 But, to the extent that they are. There is a question as
14 to whether that rule applies to this malfunction involving
15 the CT equipment or if, and it's unclear to Staff at the
16 moment, whether the Company used that rule to calculate
17 the amount of the refund paid to the customer.

18 And, in addition, there is a question as
19 to whether a refund under the PUC rule is subject to the
20 statute of limitations specified in 365:29.

21 A declaratory ruling, under Puc 207.01,
22 is allowed with respect to any matter within the
23 jurisdiction of the Commission, as long as the petition is
24 not dismissible under the conditions specified in Puc

1 207.01(c). I think there are three subsections to that,
2 which I won't read.

3 It seems to Staff that there is a
4 question as to whether this is a matter that is properly
5 the subject of a declaratory ruling that has been sought.
6 Let me explain that a little bit more. I mean, the -- I
7 believe the Petition to Intervene filed by the customer
8 states that the adjudication of the Company's "liability
9 for [overbilling] and damages...is not within the
10 Commission's jurisdiction." But, in Staff's preliminary
11 analysis, which is a separate one, the authority of the
12 Commission to order reparations under RSA 365:29 is
13 premised on the initiation of the proceeding, either on
14 the Commission's own initiative or, two, the filing of a
15 petition for reparation with the Commission.

16 Now, the customer hasn't filed a
17 petition for reparation with the Commission, and the
18 Commission hasn't initiated its own proceeding. And, I
19 don't believe that the Commission is being requested by
20 the Company to order reparation. And, under those
21 circumstances, that would seem to beg the question of
22 "whether a declaratory ruling proceeding is an appropriate
23 way to proceed?"

24 CHAIRMAN GETZ: But isn't it true that,

1 with a declaratory ruling, I mean, it could be dismissed
2 if, for the -- the three criteria that are set forth,
3 including the factual allegations, are not definite or
4 concrete or it's a hypothetical. But, if we didn't
5 dismiss, then it would proceed to an adjudicative
6 proceeding. If there were a petition for reparation or
7 either filed by the Company or on our own motion, it would
8 become an adjudicative proceeding. I mean, don't you get
9 to the same result in either case?

10 MR. DAMON: I think what the Company is
11 doing is finding this two-year "statute of limitations" in
12 365:29, and saying that that applies, even if there is no
13 request or a petition for a reparation. And, the
14 Commission has not initiated one. And, I at least don't
15 understand, in that circumstance then, why a declaratory
16 ruling would be an appropriate way to go. Unless you want
17 to make a ruling as to whether the issue on the merits of
18 that is correct or not.

19 CHAIRMAN GETZ: So, effectively, treat
20 what they have filed as a petition for reparation then?

21 MR. DAMON: Yes. And, to go on and
22 decide the question of "does this 2-year statute of
23 limitations apply to any overbilling situation or any
24 illegal, fare or charge situation.

1 CHAIRMAN GETZ: Of course, the overlay
2 to all that is the RiverWoods arguing that we don't have
3 jurisdiction to do this in any event.

4 MR. DAMON: Right. That's another,
5 obviously, another legal issue, and it's a little
6 different than what I've been discussing just now.

7 CHAIRMAN GETZ: Okay.

8 MR. DAMON: And, you know, I won't go
9 on. But, clearly, although there's been no -- I don't
10 think there's any question the customer was overbilled.
11 There is a question, which the customer has raised, as to
12 whether any illegal or unjustly discriminatory rate, fare,
13 charge or price have been collected within the meaning of
14 the statute 365:29.

15 The other request the Company makes is
16 for approval to adjust the account balances as set forth
17 in the filing. And, the Company has indicated in
18 discovery responses that the Commission's approval is
19 within the Commission's ratemaking authority. It is not
20 seeking a declaratory ruling as to that, nor, apparently,
21 a request for an accounting order, at least as the Staff
22 understands the position of the Company.

23 And, I think the remarks of the customer
24 had raised this question as to "whether it is appropriate

1 for the Commission to proceed immediately to adjudication
2 in this docket, given the recent lawsuit filed in Superior
3 Court. And, as well, the fact that the Company is at an
4 early stage of its attempt to obtain recovery from the
5 equipment manufacturer or installer and insurers. In
6 discovery, the Company has stated that "it has no
7 insurance for the overbilling" as such. But it may be --
8 it's not clear to Staff why the Company's commercial
9 liability policy of its own would not now be available to
10 make the Company whole, in the event that damages are
11 suffered in Superior -- or, are ordered in Superior Court.

12 So, the question is, "does the
13 Commission want to proceed now to determine whether the
14 account balances should be adjusted, and, if so, by how
15 much, when other sources for making the Company whole may
16 exist?" And, that's, obviously, in your discretion to
17 decide that.

18 There are two potential issues related
19 to the merits of the request for approval of the account
20 adjustments. First, to the extent that these proposed
21 adjustments result from the Company's failure to act
22 prudently, assuming, that is, that it failed to do so, and
23 that's an issue on which the Staff takes no position
24 today. But, failure to act prudently in testing the

1 equipment, can or should the Commission order those
2 adjustments to be made? And, second, although the Company
3 believes that these policy doctrines of single issue or
4 retroactive ratemaking do not apply, there is that
5 question, particularly with respect to the ability to
6 recover through a ratemaking proceeding the amounts that
7 it says that these other customers have benefited by.
8 Thank you.

9 CHAIRMAN GETZ: Well, before I turn back
10 to give the Company an opportunity to go last, I want to
11 talk a minute about our procedural options. And,
12 obviously, there's critical issues of fact and a number of
13 issues of law that would have to be decided. But we've
14 scheduled this prehearing conference. And, consistent
15 with our Rule 203.15 and 541-A, it provides that "in order
16 to facilitate proceedings and encourage informal
17 disposition, we may, upon motion of any party or on our
18 own motion, schedule one or more prehearing conferences."
19 And, obviously, that's what we did today scheduling this
20 prehearing conference. And, I did hear a proposal from
21 the Company for some settlement or informal disposition
22 that I think should be -- there's an opportunity for the
23 parties to discuss.

24 But, I guess, turning to you, Mr.

1 Carter, we have the -- and to the others afterwards, does
2 it make sense to go ahead with the technical session,
3 begin the discovery process to talk about the proposal by
4 the Company? Or, is it your position that we shouldn't go
5 down that path because we should just focus on the
6 jurisdictional argument that you've made?

7 Because let me just say this, before you
8 respond. It seems to me that it would make some sense for
9 the parties to get together and to talk through some of
10 these issues, and then report back to us whether there's
11 -- that you're still in the same position, that you think
12 we should stay this proceeding while the Superior Court
13 proceeding goes ahead, or, if there's a dispute among the
14 parties, that that be laid out in some writing to us, or
15 if there's -- some progress is made in the technical
16 session. So, with that background, if you can help?

17 MR. CARTER: First, RiverWoods has, from
18 the beginning, not only been open to discussions
19 informally with Unitil to resolve this, it has requested a
20 resolution, and it is here, and it's appeared in court as
21 a last resort. So, it would certainly welcome the
22 opportunity to hear from Unitil outside of the formality
23 of an administrative or legal proceeding about how we can
24 resolve this matter.

1 And, I hear the Company today saying
2 they want to "make RiverWoods whole". So, if they are
3 willing to stand by their word and they're willing to
4 speak with us, I can represent to you that my client would
5 be wholly in favor of that.

6 In terms of the technical session, as a
7 matter of efficiency, I would tend to agree with what I,
8 Commissioner, I think I heard you suggest, that perhaps it
9 might be premature, given the legal issues that have been
10 raised here. And, I would, in that regard, note our
11 agreement with our observation that it would not appear
12 that the Petition for Declaratory Judgment filed by Unitil
13 would even fit within the parameters of RSA 365:29. So,
14 that's a legal issue that would need to be resolved as
15 well. I hope that answers your question.

16 CHAIRMAN GETZ: I think it does for the
17 most part, except I didn't intend to suggest that it was
18 premature to have some conversations in a technical
19 session, whether it's about settlement or discovery or to
20 get better informed about whether there's settlement
21 between the two of you on the underlying issue, or if
22 there's any agreement also with the OCA or Staff about
23 some of the adjustment of the balances, which is a
24 different issue.

1 But, Ms. Hatfield, do you have any
2 position on the efficacy of moving into a technical
3 session to try to address some of these issues?

4 MS. HATFIELD: It does seem as though it
5 would be a good use of our time to explore some of the
6 legal questions among the parties. I think, with respect
7 to discovery, it might be more appropriate if we proceed
8 in the case to pursue that in writing, because we'll
9 eventually need to do that. But we would certainly be
10 open to meeting after this hearing closes.

11 CHAIRMAN GETZ: Okay. And, I
12 understand, from the conversation today, that apparently
13 some data requests have been propounded and answers have
14 been made. Of course, we don't see those until a hearing.
15 But I take it you have had -- that they have been shared
16 with the OCA and with RiverWoods?

17 MS. HATFIELD: Yes.

18 CHAIRMAN GETZ: And, do you have those
19 as well?

20 MR. CARTER: Yes, sir.

21 CHAIRMAN GETZ: Okay. Mr. Damon, do you
22 have anything on that issue, about best way to proceed in
23 terms of using the opportunity for a technical session?

24 MR. DAMON: Yes. I certainly think one

1 is warranted. I think there are a couple of follow-up
2 discovery matters that probably would be worthwhile, just
3 to -- and those relate primarily to factual issues, that
4 we would like to get a little clarity on some of the
5 responses. Although, we would be willing to talk about
6 whether that should be done in writing, as the OCA
7 suggested. And, perhaps something could come out of a
8 legal discussion.

9 I think the idea of a settlement
10 discussion today is premature. And, I don't see any
11 interest.

12 CHAIRMAN GETZ: As between Unitil and
13 RiverWood or going to the other issues about the
14 adjustments to the -- or both?

15 MR. DAMON: The issues in this docket.

16 CHAIRMAN GETZ: Mr. Epler, do you have
17 anything? This is an opportunity for the Company.

18 MR. EPLER: Yes, sir. Attorney Edelman
19 will respond. Thank you.

20 MR. EDELMAN: I'd just like to very
21 briefly respond to the remarks by counsel for RiverWoods.

22 CMSR. BELOW: Maybe you could bring that
23 microphone closer.

24 MR. EDELMAN: Sure. First of all, aside

1 from the legal issue, I do find it unusual that RiverWoods
2 is asserting a lack of jurisdiction, particularly given
3 that the court would not be in a position to preside over
4 a settlement that's been proposed that would allow for a
5 six-year reparation with corresponding adjustment of
6 accounts. That said, if one reviews the arguments set
7 forth in the intervention motion, which are really at
8 Paragraph 10, the suggestion is made that "this is not a
9 matter of an overcharge, but a matter of an equipment
10 defect." In other words, RiverWoods is attempting to take
11 this out of RSA 365:29 by asserting that this isn't a case
12 for an overcharge, it's simply an equipment defect case.

13 Well, RSA 365:29 doesn't specify the
14 reason why there may have been an overcharge. It could
15 happen by virtue of malfunctioning equipment, like a
16 malfunctioning meter. It could happen by virtue of other
17 reasons. Nor is RSA 365:29 limited to unsavory activities
18 by railroad owners. Nor does RSA 365:29 require
19 malintent. And, there's no issue of malintent here. And,
20 there is no issue of malintent in the Granite State Gas
21 case, which I'd be happy to hand up. Which specifically
22 states, as Mr. Epler mentioned in his presentation, that
23 the Commission is vested with authority under 365:29 to
24 order and preside over refunds.

1 The issue of whether this is an "illegal
2 or unjustly discriminatory rate", again, we look at the
3 statute. By its plain and ordinary meaning, we look to
4 the language of the statute. We don't need to go into the
5 legislative history of the statute, if it's plain and
6 unambiguous. And, here, it plainly and unambiguously
7 states that "the Commission has authority to order refunds
8 where", as in this case, "there has been a set of charges
9 that are contrary to three statutes", including the
10 tariff, which is deemed under the law to be a statute.
11 So, there's no question to our mind that RSA 365,
12 Section 29, does apply.

13 CHAIRMAN GETZ: You seem to make a
14 distinction among "rate, fare, charge or price". So, when
15 you say "charge", you're talking about the entire bill, as
16 distinguished from the "rate" or the "price", which I
17 think was the argument that I heard from Mr. Carter?

18 MR. EDELMAN: Well, the statute is very
19 broadly worded, and it applies to all of those. And, it
20 is more than likely a fare or charge that we're dealing
21 with, rather than a rate or a price. Or, perhaps it
22 embraces price, I'm not sure. But, clearly, a refund of
23 an overcharge is embraced by words that include "rate,
24 fare, charge or price".

1 CMSR. IGNATIUS: Well, I guess I'm
2 wondering how you're reading that section. Does, by your
3 reading, does the phrase the "illegal or unjustly
4 discriminatory" qualify only the word "rate", and that,
5 from then on, "fare, charge or price" are not so
6 qualified?

7 MR. EDELMAN: No. No. I'm talking
8 about all of those, because it modifies "rate, fare,
9 charge or price".

10 CMSR. IGNATIUS: All right. So, the
11 Commission would have to make a finding that what you're
12 calling an "overcharge" is as a result of an "illegal or
13 unjustly discriminatory fare, charge or price"?

14 MR. EDELMAN: Right. And, Mr. Epler
15 discussed the statutes in play, and including the tariff,
16 again, which is deemed a statute. And, when one violates
17 a statute, it's illegal. And, we look at the words
18 according to their common and ordinary meaning. And, I
19 think there's little doubt that the statute therefore
20 applies.

21 CMSR. IGNATIUS: Well, we may be going
22 in circles. Maybe we've already covered this. But it
23 seems to me, if the tariff rate was what was applied, it
24 doesn't sound like there's any dispute about that.

1 There's a tariff on file, that is the tariff rate that was
2 applied. However, the CT kicked in a ratio that was
3 improper and falsely identified an amount of usage. Do
4 we, in fact, have an "illegal or unjustly discriminatory
5 rate, fare, charge or price"?

6 MR. EDELMAN: The effect was an
7 overcharge, however. And, therefore, it's an illegal
8 charge. And, again, if one goes beyond the rate and to
9 embrace the charge, it says, in RSA 378:14, "No public
10 utility shall grant any free service, nor charge or
11 receive a greater or lesser or different compensation for
12 any service", which is what happened.

13 CMSR. IGNATIUS: Well, we're going in
14 circles. I think there's two ways to read all of that.
15 And, I guess that's part of the issues to be addressed in
16 either this forum or the Superior Court.

17 MR. EDELMAN: All right. I guess I'm
18 not following why -- I want to answer your question, and
19 I'm not following why you see it as "going in circles". I
20 don't want to --

21 CMSR. IGNATIUS: I'm not quarreling with
22 you. I think there are two fair readings of the statute.

23 MR. EDELMAN: Okay.

24 CMSR. IGNATIUS: You said you think that

1 the "plain meaning of the statute makes it quite clear."
2 As I look at it and know that one of the things that we
3 would do taking this case is, in order to order a refund,
4 would have to make a finding that something here is an
5 "illegal or unjustly discriminatory rate, fare, charge or
6 price".

7 MR. EDELMAN: Right.

8 CMSR. IGNATIUS: And, I'm not sure
9 that's quite a straightforward an issue as you say it is.
10 But we're still in the early stages.

11 MR. EDELMAN: All right. Right. Now,
12 the -- see if I've addressed all those issues. So, in
13 other words, our position is that one can't semantically
14 take the jurisdiction of the court -- excuse me, of the
15 PUC away and impose it in the court. The statute clearly
16 invests the Commission with authority. The Granite State
17 Gas case, reviewing that statute, invests the PUC with
18 authority.

19 The Chairman referred, of course, to
20 that portion of the complaint in this case in court, that
21 is substantially questionable by virtue of the exemption
22 under RSA 358-A, Section 3. But, more to the point, the
23 RSA 365:29 does set forth a two-year limitation. And, the
24 Legislature is generally deemed not to enact legislation

1 that would have an unlikely or absurd result. And, the
2 unlikely or absurd result here would be that the
3 Commission issues an order for the first two years, and
4 the customer goes to court for the remaining amount.

5 Here, I would suggest that the matter is
6 not properly before the court at all. That this is
7 properly before the Commission. And, that the two-year
8 statute would apply, unless we could, within the structure
9 of the PUC, allow the PUC to preside over a settlement
10 that would make the customer whole, while not unduly
11 burdening the utility.

12 CHAIRMAN GETZ: Is that all?

13 MR. EDELMAN: That's all. Thank you.

14 CHAIRMAN GETZ: Well, at this point, I
15 think what we'd like to do is close the hearing, the
16 prehearing conference, to give you the opportunity to
17 speak in a technical session. If there's any progress, to
18 report that; if there's no progress, to report that. And,
19 of course, there's a number of legal issues that we might
20 have to resolve, including whether we have jurisdiction or
21 not. But I think the better use of everyone's time is to
22 see if some progress can be made in a technical session,
23 and then I'd ask Staff to report in writing back to us on
24 behalf of the parties, you know, what the positions are at

1 the end of the day and where we should proceed from there.

2 So, with that, --

3 (Chairman and Commissioners conferring.)

4 CHAIRMAN GETZ: And, I'll also point out
5 that, I mean, there is a -- a motion for confidentiality
6 has been filed. We haven't examined that. But, of
7 course, pursuant to our rules, pending a decision on the
8 motion for confidentiality, all confidential materials
9 should be treated as confidential. Ms. Hatfield.

10 MS. HATFIELD: Thank you, Mr. Chairman.
11 Just on that point, my understanding is that the Company
12 asked for both the name of the customer to be treated
13 confidential, as well as specific information related to
14 their usage and their bills to be confidential. And, it
15 seems to us that, since the customer has intervened, that
16 at least a portion of that motion is moot. And, I thought
17 it might be helpful just to address that now, so that the
18 rest of us aren't under an obligation to keep the name
19 confidential, now that it's public.

20 CHAIRMAN GETZ: Any response?

21 MR. EPLER: Yes. The motion only seeks
22 the confidential treatment to the customer usage and
23 financial information that we provided in Schedule UES-1.
24 The name -- we did not disclose the name in our Petition.

1 Our interest was in protecting confidentiality of a
2 customer. The customer has voluntarily indicated publicly
3 what its name is, and so there should be no question
4 there. And, the same thing with the usage. We did this
5 for the benefit of the customer. If the customer is
6 unconcerned about having the usage history disclosed, then
7 we would withdraw the motion for protective treatment.
8 The Company has no particular interest in keeping this
9 protected, only on behalf of the customer.

10 CHAIRMAN GETZ: Mr. Carter, do you have
11 anything on that, any concern? Or one way we could handle
12 this, you could address this further in the technical
13 session.

14 MR. CARTER: Sure.

15 CHAIRMAN GETZ: And, to the extent that
16 there's something we've overlooked or overstated, report
17 back to us what the agreement is on the breadth of any
18 confidentiality that should be accorded. Okay. Anything
19 further?

20 (No verbal response)

21 CHAIRMAN GETZ: Hearing nothing, then
22 we'll close the prehearing conference and take the matter
23 under advisement. Thank you, everyone.

24 (Prehearing conference ended at 11:44 a.m)