

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

November 7, 2023 - 9:03 a.m.
21 South Fruit Street
Suite 10
Concord, NH

RE: DE 23-009

SQUAM RIVER HYDRO, LLC.:

Petition for Reconnection of a
Qualifying Facility, Payment of
Avoided Cost, and Payment of
Lost Revenues.

*(Hearing to receive oral
arguments.)*

PRESENT: Cmsr. Carleton B. Simpson, *Presiding*
Cmsr. Pradip K. Chattopadhyay

F. Anne Ross, Esq./PUC Legal Advisor

Tracey Russo, Clerk

APPEARANCES: Reptg. Squam River Hydro, LLC.:

Douglas L. Patch, Esq. *(Orr & Reno)*
Lynnette V. Macomber, Esq. *(Orr & Reno)*
Andrew P. Lane

Reptg. the Town of Ashland:

Viggo C. Fish, Esq. *(McLane Middleton)*
Thomas B. Getz, Esq. *(McLane Middleton)*
Thomas Colantuono, Esq. *(Ward Law Group)*

Reptg. New Hampshire Dept. of Energy:

Suzanne G. Amidon, Esq.
Elizabeth Nixon, Director/Electric Div.
(Regulatory Support Division)

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

I N D E X

PAGE NO.

PRELIMINARY ISSUES BY:

Mr. Fish 7

INITIAL STATEMENTS BY:

Mr. Fish 8

Mr. Patch 23

Ms. Amidon 32

REBUTTAL STATEMENTS BY:

Mr. Fish 33

Mr. Patch 41

QUESTIONS BY CMSR. CHATTOPADHYAY 44
(To Squam River Hydro)

ISSUE: *Why the PPA was terminated* 44

ISSUE: *Renegotiation of PPA* 46

ISSUE: *Recover anything from RECs* 47, 50, 88

ISSUE: *Connecting to the grid* 48

ISSUE: *Contracting with others* 49

ISSUE: *Two facilities are QFs under PURPA* 51

I N D E X

PAGE NO.

QUESTIONS BY CMSR. SIMPSON

53

(To Squam River Hydro)

ISSUE: Request Re: listed by FERC as a QF 53

ISSUE: If petitioned PUC to set PURPA rates 54

ISSUE: If SRH only sold to Ashland 54

ISSUE: PUC setting PURPA rates 55

QUESTIONS BY CMSR. CHATTOPADHYAY

56

(To the Town of Ashland)

ISSUE: Petitioned PUC to set PURPA rates 56

ISSUE: If Ashland serves customers
outside of municipal boundaries 57

ISSUE: Why terminate PPA with SRH 60

ISSUE: Renegotiating the PPA with SRH 62

QUESTIONS BY CMSR. SIMPSON

65

(To the Town of Ashland)

ISSUE: Ashland's obligation under PURPA 65, 82

ISSUE: Pulling fuses/disconnecting from grid 67

ISSUE: Who would set the avoided cost rate 68

ISSUE: Process at FERC to determine the rate 68

ISSUE: Consultation with other
municipalities re: PURPA 69

I N D E X (Continued)

	PAGE NO.
FURTHER QUESTIONS BY CMSR. CHATTOPADHYAY	70
ISSUE: <i>Consideration of whether a QF or not when contract was signed</i>	70
ISSUE: <i>Ashland customers & competitive supply of electricity</i>	74
ISSUE: <i>Whether customers in Ashland interested in buying power from SRH</i>	75
FURTHER QUESTIONS BY CMSR. SIMPSON <i>(To the Town of Ashland)</i>	76
ISSUE: <i>Applicability of PURPA to Ashland</i>	76
ISSUE: <i>Bright lines with respect to PURPA to exclude Ashland</i>	78
ISSUE: <i>Wholesale electricity market via ISO-New England</i>	81
ISSUE: <i>Net energy metering to customer-generators within Ashland</i>	82
ISSUE: <i>How does Ashland set rates</i>	82
ISSUE: <i>Ashland's perspective on the authority that the PUC has within Ashland's corporate limits</i>	83
ISSUE: <i>Who owns fuses that were disconnected</i>	84
ISSUE: <i>Wheeling Agreement</i>	88
ISSUE: <i>Small-scale rooftop solar in Ashland</i>	92

I N D E X (continued)

	PAGE NO.
QUESTIONS BY CMSR. SIMPSON <i>(To the NH DOE)</i>	84
ISSUE: <i>REC Issues that have arisen, municipalities participating in RPS, etc.</i>	84
ISSUE: <i>Whether there is an obligation for renewable facilities to be connected to the state's electric grid</i>	86
FOLLOW-UP STATEMENT BY MS. AMIDON	91
* * *	
Summary by Cmsr. Simpson of Requests made of the Parties	95
STATEMENTS RE: SUMMARY OF REQUESTS BY:	
Mr. Fish	95, 97, 98
Mr. Patch	97

P R O C E E D I N G

CMSR. SIMPSON: On the record. Good morning, everyone. I'm Commissioner Simpson. I'm joined by Commissioner Chattopadhyay. We're here this morning for oral argument in Docket DE 23-009, Petition for Reconnection of a Qualifying Facility, Payment of Avoided Costs, and Payment of Lost Revenues.

We'll consider oral arguments on legal briefs in this matter to determine whether and to what extent the Commission has jurisdiction over this dispute between Squam River Hydro and the Town of Ashland.

First, we'll take appearances, starting with Squam River Hydro.

MR. PATCH: Good morning, Commissioners. Doug Patch, from the law firm of Orr & Reno. And with me at counsel table, to the furthest left, is our client, Andrew Lane; and then also Attorney Lynn Macomber, from Orr & Reno.

CMSR. SIMPSON: Thank you. Town of Ashland?

MR. FISH: Yes. Good morning,

1 Commissioners. My name is Viggo Fish, with the
2 law firm McLane Middleton, here today on behalf
3 of the Town of Ashland, Respondent in this
4 matter. I'm joined today by Attorney Tom Getz,
5 also from McLane Middleton; and Attorney Tom
6 Colantuono, of the Ward Law Group, has also been
7 assisting the Town of Ashland in this matter.

8 CMSR. SIMPSON: Thank you. New
9 Hampshire Department of Energy?

10 MS. AMIDON: Good morning. Suzanne
11 Amidon, from the Department of Energy. And with
12 me today is Liz Nixon, who is the Director of the
13 Electric Division.

14 Thank you.

15 CMSR. SIMPSON: Thank you. I don't
16 believe we have any other members of the public
17 here today?

18 *[No indication given.]*

19 CMSR. SIMPSON: Okay. So, we'll start
20 with preliminary issues, if there are any for
21 some of the parties to raise?

22 Attorney Fish.

23 MR. FISH: Just one matter. Attorney
24 Patch and I discussed this before we started

1 here. And, because the issue here is more akin
2 to a motion to dismiss for lack of jurisdiction,
3 Town of Ashland, as essentially the movant in
4 this matter, we decided should go first.

5 I know it's typical, under the -- and
6 under the PUC rules, that the Petitioner would go
7 first. But, as we are, in a sense, essentially
8 in a position of the movant, it makes sense for
9 the Town of Ashland to go first.

10 CMSR. SIMPSON: Okay. No problem for
11 me. Are there any objections?

12 MR. PATCH: No objections.

13 CMSR. SIMPSON: Okay. Then, I'll
14 recognize the Town. We will first have the
15 Petitioner go -- or, excuse me, we'll have the
16 Town go first, and we'll reserve some time for
17 rebuttal argument at the end.

18 So, I guess, if each party could
19 provide a summary of the facts, in addition to
20 the legal precedent that you're relying on, that
21 would be helpful for the Commission as we
22 consider this matter.

23 So, I'll recognize the Town then.

24 MR. FISH: Thank you, Commissioner.

1 The question before the Commission is
2 whether it may assert jurisdiction over a
3 municipal utility, over the Town of Ashland and a
4 municipal electric utility, in the absence of any
5 express or even implied delegation of authority
6 that would authorize it to do so? And, in fact,
7 where the Legislature has expressly exempted
8 municipal utilities from the Commission's
9 jurisdiction with limited exceptions that do not
10 apply here.

11 Our position on this matter is that,
12 because the PUC only has the authority that is
13 delegated to it by the Legislature, the answer to
14 this question, as a matter of law, must be "no."
15 The Commission lacks jurisdiction over the Town
16 of Ashland.

17 Now, the issues presented in Squam
18 River Hydro's Petition involve an assemblage of
19 both state statute, namely, RSA 362-A, the
20 Limited Electrical Energy Producers Act, and,
21 under federal law, the Public Utility Regulatory
22 Policies Act, or "PURPA", which is, in many ways,
23 a federal complement to state -- to LEEPA, RSA
24 362-A.

1 However, when construed, both in
2 isolation, by themselves, and together, neither
3 of these laws include an express or implicit
4 delegation of authority that would give the
5 Commission a basis to really ignore the
6 Legislature's clear intent in exempting municipal
7 utilities. And, certainly, Squam River Hydro has
8 not identified any authority, no statute, no
9 regulation, no case law, that would provide an
10 alternative basis for the PUC to assert
11 jurisdiction over a municipal utility here.

12 And this absence of delegated
13 authority, frankly, is fatal to Squam River
14 Hydro's Petition. And, as a result, the law
15 requires that the PUC dismiss the Petition in its
16 entirety.

17 A core purpose, really, in undertaking
18 any statutory analysis is to glean the
19 Legislature's intent as expressed in the language
20 of the law. And, so, to frame the issue, I want
21 to start by examining the state statutory scheme
22 that's at issue in Squam River Hydro's Petition.
23 And that analysis will show two things. First,
24 again, that the Legislature has expressly

1 exempted municipal utilities from the PUC's
2 jurisdiction. And, second, that, under state
3 law, 362-A, LEEPA, that that law only applies to
4 public utilities, in other words, LEEPA does not
5 provide an alternative basis for an alternative
6 conveyance of authority here, nor does any other
7 state statute cited in Squam River Hydro's
8 Petition.

9 So, beginning with the legal principle
10 I noted in my introduction, that the Commission
11 only has the authority that is expressly
12 delegated to it by the Legislature, and that
13 delegation is broadly stated in RSA 374:3, titled
14 "Extent of Power", and I'm going to resist
15 quoting the statutes, because I know all of us
16 have them in front of us or have them available.
17 But I do want to note this one, that the statute
18 grants the PUC the authority, "the general
19 supervision of all public utilities and the
20 plants owned, operated [and] controlled by the
21 same". So, we start with the notion that the PUC
22 is endowed with authority over public utilities,
23 broad regulatory authority over the operation of
24 public utilities.

1 And the statute RSA 362:2, as we've
2 cited in our Brief, and as I believe Squam River
3 Hydro has conceded, 362:2, which is the
4 definition of "public utilities", expressly
5 exempts municipal utilities operating within
6 their corporate boundaries from the definition of
7 "public utilities", and, therefore, from the
8 PUC's general jurisdiction.

9 And, as I said, Squam River does not
10 appear to dispute this. They state, and they
11 essentially concede this, at Page 3, Paragraph 3,
12 of the Petition.

13 And the New Hampshire Supreme Court has
14 interpreted this statute, consistent with the
15 interpretation I just offered, in *New Ipswich*
16 *Electric Lighting Department v. Greenville*
17 *Electric Lighting Co.*, which is a 1967 case,
18 which we included in our Brief. The New
19 Hampshire Supreme Court identifies this
20 distinction between public utilities that are
21 regulated by the PUC, subject to PUC
22 jurisdiction, and municipal utilities that are
23 not. The Court there said: "As a public
24 utility", citing 362:2, "the Greenville Electric

1 Lighting Company is subject to the jurisdiction
2 of the Commission, and may not extend its lines
3 beyond its franchise territory without Commission
4 approval." Goes on to say: "The Lighting
5 Department of the Town of New Ipswich, on the
6 contrary, is not a public utility", again, citing
7 362:2, "and not subject to the jurisdiction of
8 the Commission as to operations within the
9 corporate limits of the Town."

10 There's other cases we cited, *Blair v.*
11 *Manchester Water Works*, a 1961 case, had a
12 similar holding; *In re Pennichuck Works -- Water*
13 *Works, Incorporated*, is a 2010 case, where,
14 again, the Court held that municipal corporations
15 that operate solely within their corporate limits
16 are not public utilities subject to the PUC's
17 jurisdiction.

18 So, the question now is, having
19 established that municipal utilities are, by
20 statute, exempted from PUC jurisdiction, the
21 question then is whether the Legislature has
22 carved out any exception to this rule that would
23 provide an alternative basis for jurisdiction
24 here. And, as my remarks will show, the answer

1 to this question is "no."

2 Turning to RSA 362-A, again, the
3 language of LEEPA is also clear that it applies
4 only to public utilities. And, again, I'm going
5 to try to resist quoting directly from the
6 statutes, but I do want to highlight a few. RSA
7 362-A:3 is titled "Purchase of Output of Limited
8 Electrical Energy Producers by Public Utilities".
9 And it requires that an electric public
10 utility -- it requires an "electric public
11 utility", that's the language in the statute, to
12 purchase the electrical output of qualifying
13 facilities, or limited electrical energy
14 producers, under the state statute.

15 RSA 362-A:4 similar requires that
16 public utilities purchase the output at the
17 avoided cost rate.

18 And 362-A:8, titled "Payment
19 Obligations by Public Utilities" which, you know,
20 Squam River Hydro cites Subsection II of this
21 statutory provision in its Petition and in its
22 Briefs, but ignores the limiting provisions in
23 Section I, which limits the applicability of that
24 provision only to public utilities. And

1 Section I states: "The purpose of this section
2 is to codify existing law on regulatory
3 obligations of public utilities for the purchase,
4 pursuant to applicable federal and state law and
5 commission orders."

6 So, by examining the plain language of
7 these statutes, it's clear that LEEPA, the state
8 laws on this issue, in particular, LEEPA, are
9 clear that the Legislature intended these
10 requirements, these purchase obligations only to
11 fall on public utilities, and not municipal
12 utilities, consistent with the exception -- the
13 exemption from PUC jurisdiction in 362:2. And,
14 certainly, Squam River Hydro has not identified
15 any statute or regulation that could give this
16 Commission cause to question this clear intent of
17 the Legislature.

18 I'm going to -- from here, I want to
19 move to discuss "PURPA", but I am going to touch
20 on -- I am going to touch on RSA 38 as well,
21 which is -- which Squam River Hydro discusses in
22 its Brief.

23 So, PURPA -- similarly, there's no --
24 PURPA similarly lacks any delegation of authority

1 that would give this Commission a basis to assert
2 jurisdiction over Ashland. And really, having
3 established that LEEPA doesn't convey that
4 authority, that there is no purchase obligation
5 against -- for Ashland and municipal utilities
6 under LEEPA, the only way the Commission could
7 have jurisdiction is if there is a separate
8 delegation of federal authority that could apply
9 here; and, again, that is not the case.

10 The PURPA definitional scheme
11 recognizes a clear distinction between what it
12 calls "state regulated electric utilities" and
13 "nonregulated electric utilities". And Ashland
14 doesn't dispute that it is a "electric utility",
15 as that term is defined under PURPA. And Squam
16 River Hydro -- Squam River Hydro's position is,
17 essentially, that, because they are an electric
18 utility under PURPA, they are subject to PURPA's
19 purchase obligations and this Commission's
20 jurisdiction. But that position ignores the
21 definitional scheme under PURPA that
22 distinguishes "state regulated utilities" from
23 "nonregulated utilities".

24 A "state regulated electric utility",

1 under PURPA, means "Any electric utility with
2 respect to which a state regulatory authority has
3 ratemaking authority." So, the relevant inquiry
4 here is not whether the PUC has some modicum of
5 supervisor authority over some aspect of a
6 municipal utility's -- or, an electric utility's
7 operations at some point in time, it's whether
8 the Public Utilities Commission has ratemaking
9 authority. And "ratemaking authority" is also
10 conveniently defined in PURPA. It means "The
11 authority to fix, modify, approve, or disapprove
12 rates." And, clearly, as, you know, consistent
13 with the statutes I've just gone through, the PUC
14 does not have ratemaking authority over the Town
15 of Ashland. It is, therefore, a nonregulated
16 electric utility, which means "any electric
17 utility other than a state regulated electric
18 utility."

19 And this is important, because Squam
20 River Hydro asserts in its Petition and Brief
21 that, pursuant to 16 U.S.C. Section 824a-3, that
22 that statute confers jurisdiction to the PUC to
23 implement PURPA with respect to Ashland, because,
24 as I stated, they assert Ashland is an electric

1 utility, which we do not dispute. However, the
2 language of 824a-3 directs state commissions, the
3 public utilities commissions, to "implement PURPA
4 only for each electric utility for which it has
5 ratemaking authority." That's a quote, that's
6 the language of the statute.

7 So, the only relevant inquiry here is
8 whether the PUC has ratemaking authority over the
9 Town of Ashland. And the answer to that question
10 is "no."

11 And I note that one of the cases Squam
12 River Hydro cites in its Brief is *Allco Renewable*
13 *Energy Limited v. Massachusetts Electric Company*,
14 and there the Court identifies the statute, 16
15 U.S.C. -- or, regulation, rather, 16 U.S.C.
16 Section 824a-3(f)(1), stating that "state
17 regulatory commissions, in turn, are directed by
18 Section 210 under PURPA to implement FERC's
19 rules." Again, this statute -- this provision
20 only applies for state regulated utilities, the
21 delegation of authority under PURPA only
22 authorizes public utilities commissions to
23 implement PURPA and to enforce PURPA against
24 utilities for which it has ratemaking authority,

1 which is not the case here.

2 This is also consistent with the manner
3 in which PURPA is enforced, and the regulations
4 dictating how PURPA is enforced, as a
5 nonregulated electric utility, and the law
6 requires that any petition with respect to
7 whether and the extent to which municipal
8 utilities -- or, nonregulated utilities have a
9 purchase obligation pursuant to PURPA must be
10 brought -- must be made before FERC in the first
11 instance. And that's 16 U.S.C. Section
12 824a-3(h), requires that -- that claimants bring
13 petitions before FERC. It's what the law
14 requires. And, therefore, Squam River Hydro has
15 no other option but to bring such a petition
16 before FERC.

17 This is also consistent with the
18 Court's holding in *FERC v. Mississippi*, which
19 Squam River Hydro cites in its Brief. It states
20 that "16 U.S.C. 824a-3(h) authorizes FERC to
21 enforce this requirement in federal court against
22 any state authority or nonregulated utility."

23 So, in summary, like the state
24 statutory scheme, the PURPA regulations make no

1 delegation of authority to this Commission to
2 implement and enforce PURPA against nonregulated
3 electric utilities, like Ashland. And this lack
4 of any express authority is fatal to Squam River
5 Hydro's PUC Petition. The law requires that, to
6 the extent they have grievances against the Town
7 of Ashland, those have to be raised before FERC
8 in the first instance.

9 I want to briefly address RSA 38.
10 Which, from the outset, only applies where -- in
11 circumstances where a municipality is
12 establishing, taking, purchasing, or otherwise
13 acquiring electrical plant, and electrical plant
14 or plants for the manufacture and distribution on
15 electricity. In those cases, the New Hampshire
16 Supreme Court has held that municipalities --
17 municipal utilities come under the jurisdiction
18 of the Public Utilities Commission, but only with
19 respect to the expressed delegated supervisory
20 authority that the PUC has pursuant to that
21 statute. Namely, with respect to finding that
22 the acquisition or the taking of these plants is
23 in the public interest.

24 It doesn't mean that, if a public

1 utility -- if a municipal utility, rather, comes
2 before the PUC subject to its jurisdiction under
3 RSA 38, that that makes a municipal utility now a
4 public utility subject to the PUC's public
5 utility jurisdiction.

6 And, frankly, our position is that RSA
7 38 doesn't apply here at all. But, to the extent
8 that it has any relevance, it relevant to make
9 two points.

10 First, that were the Legislature --
11 where they intended to carve out exceptions to
12 the exemption for municipal utilities under RSA
13 362, they did so expressly. And that's clear in
14 the language of RSA 38, where they specifically
15 identify authority and the public utilities
16 commission's responsibilities with respect to
17 approving the acquisition of electric plants.

18 Second, I think it's useful to
19 reinforce the well-established legal principle
20 that, which is set forth in the case *Appeal of*
21 *Ashland Electric Department*, which is a 1996
22 case, that Squam River Hydro also cites in its
23 briefing. That, when interpreting two statutes
24 that deal with similar subject matter, courts or

1 tribunals should construe them so that they do
2 not contradict each other, and so that they will
3 effectuate the legislative purpose of the
4 statute.

5 And, as I, you know, my remarks just
6 went through, the only way to reconcile and to
7 read RSA 362-A and 362 together is to -- is to
8 interpret them as exempting, again, municipal
9 utilities from LEEPA and from this Commission's
10 ratemaking authority.

11 So, to conclude my opening remarks,
12 applying this statutory analysis leads to only
13 one conclusion, which is that the Legislature
14 intentionally and expressly exempted municipal
15 utilities, operating within town boundaries, from
16 the PUC's jurisdiction, and, in particular, from
17 the PUC's ratemaking authority. And, because
18 federal law directs the PUC to implement PURPA
19 only with respect to electrical utilities over
20 which it has ratemaking authority, there is no
21 basis under law for the PUC to assert
22 jurisdiction over Ashland here.

23 Squam River Hydro has not identified
24 any statute, any regulation, any case law, any

1 legal authority whatsoever that would give this
2 Commission an alternative basis to assert
3 jurisdiction. And, for these reasons, as I've
4 stated, that the law requires that the PUC
5 dismiss the Petition in its entirety.

6 I understand I'll have time to respond
7 to Mr. Patch's remarks. And I'm open to any
8 questions. But that concludes my initial
9 remarks.

10 CMSR. SIMPSON: Thank you, Attorney
11 Fish. I'll recognize Attorney Patch.

12 MR. PATCH: Thank you.

13 You had asked for a brief summary of
14 the facts. And, so, I guess I would refer you to
15 the Petition that we filed back in January, but
16 just to give a brief overview.

17 Our client owns two hydropower electric
18 generating facilities in Ashland. One is a 0.21
19 megawatt facility and one is a 0.039 megawatt
20 facility. And, so, they're quite small
21 qualifying facilities.

22 They did have a Purchase Power
23 Agreement with the Town, which the Town
24 terminated. And, then, subsequent to that, the

1 Town also shut them off from the grid. And, so,
2 as a result of that, they have not been able to
3 obtain renewable energy credits, which they were
4 obtaining. And, in addition to that, not being
5 connected to the grid, they have also been denied
6 their rights under PURPA.

7 What we are asking you to do today is
8 to take jurisdiction over a dispute between a
9 small New Hampshire electric utility and a small
10 New Hampshire qualified facility. Not to make
11 the parties go to FERC to resolve their issues.

12 We strongly believe, based on the cases
13 that we have cited in both our original Brief,
14 and also in our Reply Brief, based on federal and
15 state law, and we have found one additional case
16 from another state PUC that we will mention that
17 we think supports our argument. We believe you
18 have clear jurisdiction to take over this case,
19 and respectfully request that you do that, and
20 set up a procedural schedule as soon as possible.

21 As we indicated in our filing in
22 January of this year, the damages to our client,
23 under federal and state law and regulation, the
24 revenues which it has lost, as a result of

1 Ashland's what we contend are unlawful actions,
2 keep accumulating as this case goes unresolved.
3 And the small hydropower facilities remain
4 unconnected to the grid.

5 PURPA makes it clear that electric
6 utilities, including municipal utilities, like
7 Ashland Electric, are required to purchase the
8 power from qualifying facilities. We don't
9 believe that Ashland disputes that basic fact or
10 that basic finding under law.

11 In a 1988 case, *Appeal of PSNH*, cited
12 in our brief, our State Supreme Court recognized
13 that PURPA directed FERC to promulgate rules for
14 implementation by state regulatory commissions.
15 In a 2016 case, the *Allco* case mentioned by
16 Mr. Fish, a Massachusetts Federal District Court
17 said that "The states play the primary role in
18 calculating avoided costs and in overseeing the
19 contractual relationship between QFs and
20 utilities operating under the regulations
21 promulgated by FERC", the "primary role".

22 That Court also said that "States play
23 the primary role in overseeing the relationship
24 between QFs and utilities, and their role is to

1 resolve disputes on a case-by-case basis."

2 That's what this is.

3 The Commission has recognized the
4 authority it has under federal law to adjudicate
5 such disputes on a number of occasions. There's
6 a 1981 order in Docket DE 80-246, where the
7 Commission specifically talked about resolving
8 disputes between QFs and utilities, as well as in
9 other cases over the years. There are cases that
10 we have cited from 1979, 2015, and 2016, on
11 Page 5 of our Initial Brief.

12 Now, Ashland has argued that the PUC
13 does not have jurisdiction, because the Ashland
14 electric utility is not regulated by the PUC. As
15 we have pointed out, however, federal law is
16 clear that Ashland is an electric utility for
17 purposes of PURPA. Secondly, the PUC does have
18 authority over Ashland for a number of purposes,
19 including RSA 125-O, Regional Greenhouse Gas
20 Initiative; RSA 364, which is cited in that
21 *Ashland* Supreme Court case; as well as RSA 38,
22 which is the subject of that 1996 case, where
23 Ashland tried to contend that the PUC had no
24 authority over it; and the Supreme Court rejected

1 that.

2 RSA 38, as we pointed out in our Reply
3 Brief, has a section, which is quoted
4 specifically there, but which essentially says
5 that municipal utilities may contract to supply
6 electricity, but that these contracts need to be
7 authorized by the PUC.

8 We have also found a 2002 order issued
9 by the Texas Public Utility Commission, and we
10 have copies to provide to the Commission, to save
11 you from having to research it, we can provide
12 them after, afterwards, in which it rejected
13 arguments like those made by Ashland in this
14 case, which is essentially asking you to adopt a
15 very narrow interpretation of "ratemaking
16 authority".

17 In that particular case, the Public
18 Utilities Commission in Texas had rejected such
19 an argument, and made it clear that it felt that
20 ratemaking authority isn't limited to, meaning
21 "traditional ratemaking authority" or
22 "traditional cost of service ratemaking". And,
23 so, we think that case supports our argument
24 here.

1 The other thing I guess I would like to
2 point out, on Page -- Mr. Fish had walked through
3 an analysis of federal law. And, on Page 4 of
4 our Reply Brief, we had pointed out the
5 definition of "rate", under 16 U.S.C. Section
6 2602(10), you know, "rate" means "any price,
7 rate, charge, or classification made, demanded,
8 observed, or received with respect to sale of
9 electric energy by an electric utility to an
10 electric consumer." Again, "electric utility",
11 under federal law, includes Ashland. Also, "any
12 rule, regulation, or practice respecting any such
13 rate, charge, or classification." And, then,
14 "(C) any contract pertaining to the sale of
15 electric energy to an electric consumer." So,
16 the definition of "rate", we believe, under
17 federal law, is very broad.

18 There are also, as the facts show, and
19 I don't see that Ashland can dispute this, there
20 was such a contract between our client and
21 Ashland. You know, which, to me, is essentially
22 an admission under that particular provision, an
23 admission that -- that Ashland actually had
24 obligations to our client, the small qualifying

1 facilities.

2 I would also like to point out that, in
3 a 2009 order, cited on Page 10 and 11 of our
4 Initial Brief, there's a FERC decision which
5 indicates that, while a QF may sell all or part
6 of its output to an electric utility under a
7 contract, if the utility refuses to sign a
8 contract or, presumably, if it terminates the
9 contract, the QF may seek state regulatory
10 assistance to enforce the PURPA-imposed
11 obligation on the utility to purchase from the
12 QF.

13 So, even though Ashland terminated the
14 purchased power contract it had with SRH, that
15 did not, and, in fact, could not terminate its
16 obligations under PURPA.

17 There's also the statement, which
18 Mr. Fish mentioned in 362-A:8, II(a), which we
19 have cited, we believe that statement stands on
20 its own, that essentially says that "The rates
21 established by orders of the Commission for
22 purchase of energy or capacity from QFs under
23 federal law firm are deemed to be state approved
24 legally enforceable obligations."

1 We think it's important to highlight
2 the 9th Circuit case that we cited on Page 6 of
3 our Reply Brief, *Winding Creek Solar*. Where the
4 Court said that "PURPA aims to eliminate...the
5 financial burdens imposed upon alternative energy
6 sources by state and federal utility
7 authorities." If you were to deny jurisdiction,
8 it would impose that kind of financial burden on
9 our client, a small State of New Hampshire QF, in
10 a dispute with a small State of New Hampshire
11 electric utility, by requiring that it go to
12 FERC. Filing this case has already been such a
13 burden to our client of paying legal fees to
14 bring this action forward. Requiring that this
15 matter now go to FERC would only exacerbate that
16 financial burden.

17 New Hampshire statutes contain many
18 statements about the importance of renewable
19 energy, and small hydropower in particular. RSA
20 362-F:1 says "It's in the public interest to
21 stimulate investment in low emission renewable
22 energy technologies..., in New Hampshire, in
23 particular, whether at new or existing
24 facilities."

1 362-A:1 says "It is in the public
2 interest to provide for small scale and
3 diversified sources of supplemental electrical
4 power to lessen the state's dependence on other
5 sources that...may be uncertain."

6 And, then, RSA 481:1-a, 481:1-a, says
7 "there is a special public need for dams...and
8 hydro-energy production facilities", and
9 emphasizes the need "to promote the state's
10 industrial and economic welfare by enhancing and
11 utilizing the present and potential water power
12 along the rivers and streams."

13 Granting Ashland's request, and kicking
14 this to the Feds, to FERC, would ignore those
15 policies that were enumerated very clearly by our
16 Legislature.

17 Lastly, we ask that you recognize that
18 part of the claim that Squam River Hydro has is
19 for lost renewable energy credits, under RSA
20 362-F, over which this Commission, not FERC, has
21 jurisdiction. By shutting SRH off from the grid,
22 Ashland denied its ability to qualify for the
23 benefit of RECs. That is clearly a state matter,
24 under state law, not a federal matter.

1 As a matter of administrative
2 efficiency, this Commission should exercise the
3 jurisdiction it clearly has and adjudicate this
4 matter. Ashland has a legally enforceable
5 obligation under PURPA to pay avoided costs to
6 our client. State law says it's a legally
7 enforceable obligation, as does federal law. We
8 urge you to carry out this Commission's clear
9 PURPA responsibilities, and not to frustrate in
10 any way the federal purpose embodied in PURPA.

11 Thank you.

12 CMSR. SIMPSON: Thank you, Attorney
13 Patch.

14 Attorney Amidon, for the Department, do
15 you have any statement you'd like to make at this
16 time?

17 MS. AMIDON: No, we don't have a
18 statement.

19 As you know, from a prior filing, we're
20 not taking a position on this. There is adequate
21 argument on both sides presented by the
22 Petitioner and the Respondent. And there's no
23 significant policy issue that we need to assist
24 the Commission with to complete the record.

1 CMSR. SIMPSON: Okay. Thank you. So,
2 just a moment.

3 *[Cmsr. Simpson and Cmsr. Chattopadhyay*
4 *conferring.]*

5 CMSR. SIMPSON: Okay. We're going to
6 take a brief break. We will come back at 9:50,
7 so thirteen minutes. And, then, we will hear
8 from the Town, with respect to a reply, and then
9 I'll recognize Squam River.

10 Off the record. Thank you.

11 *(Recess taken at 9:37 a.m., and the*
12 *hearing resumed at 10:01 a.m.)*

13 CMSR. SIMPSON: On the record.

14 So, I'll now recognize the Town of
15 Ashland for rebuttal.

16 MR. FISH: Thank you, Commissioner. I
17 do have a few points I want to address.

18 First, and foremost, this is not a
19 question of "taking jurisdiction", "whether the
20 PUC can take jurisdiction over the Town of
21 Ashland?" And Mr. Patch raised a number of
22 policy and other equitable considerations that he
23 asked the PUC to take under consideration. But
24 this is not an issue or a question of PUC

1 discretion. The question is "whether" -- "does
2 the PUC have jurisdiction over the Town of
3 Ashland with respect to the allegations and the
4 claims raised in the Petition?"

5 And that issue is determined based on
6 whether or not the PUC has ratemaking authority
7 over the Town of Ashland. The PUC does not set
8 the Town of Ashland's rates. The PUC has never
9 set the Town of Ashland's rates. And, therefore,
10 the PUC does not have ratemaking authority over
11 the Town of Ashland.

12 Mr. Patch has identified this statute,
13 RSA 38:17, to suggest that the PUC does have some
14 ratemaking authority over the Town of Ashland.
15 But that interpretation ignores canons of
16 statutory interpretation and the broader purposes
17 and operation of RSA 38 in its entirety, which,
18 again, only deals -- it only involves the Public
19 Utilities Commission to the extent municipalities
20 establishing, taking, purchasing, or otherwise
21 acquiring, maintaining, and operating a plant.

22 So, RSA 38:17 has to be considered in
23 the context of the broader statutory purpose and
24 objectives of RSA 38. So, construed in the

1 context of the statute, there are two
2 interpretations, neither of which changes the
3 result here.

4 First, because the statute only deals
5 with acquisition or taking of electric plants,
6 the reference to "supply contracts", and rates
7 pursuant to those contracts, can only mean
8 "contracts for the supply of power from
9 electrical plants that are owned and operated by
10 the Town of Ashland." Applies to circumstances
11 where the town has acquired electrical plants and
12 is selling power outside of town boundaries
13 generated from those plants.

14 And I just jumped into my second point,
15 which is that, to the extent it encompasses
16 contracts, all contracts by the Town to supply
17 power, it must be construed in the context of the
18 broader overall scheme, in which the PUC only has
19 jurisdiction over municipalities to the extent
20 that they are operating outside of town
21 boundaries.

22 So, first, it only applies where a
23 municipality has acquired electrical plants and
24 is contracting for the sale of power generated

1 from those plants, and only to the extent those
2 sales are taking place outside of town
3 boundaries, in which case the municipality may
4 come under the jurisdiction of the PUC.

5 As I said, either interpretation,
6 either application, doesn't change the result
7 here. And Mr. Patch's suggestion that the
8 reference to "rates" in RSA 38:17 somehow means
9 that "the PUC has ratemaking authority over the
10 Town of Ashland", as that term is encompassed
11 under the federal regulations, is plainly wrong.

12 I also wanted to address some of the
13 facts Mr. Patch raised. There was a power
14 purchase agreement, which was voluntarily entered
15 into between the Town of Ashland and Squam River
16 Hydro. That power purchase agreement included a
17 voluntary termination provision that required no
18 more than notice, I think it was 30 days notice.
19 The Town of Ashland acted on its rights to
20 lawfully terminate that contract pursuant to the
21 agreed-upon terms. And they were well within
22 their rights to do so. There's no language in
23 that power purchase agreement identifying any
24 intention by Squam River Hydro to contract

1 pursuant to PURPA, or to any other obligatory
2 purchase obligation. And Mr. Patch said --
3 stated that "the PPA should be construed as an
4 admission of that purchase obligation." And I
5 think it should be construed as the exact
6 opposite, as an admission by the parties that
7 they did not intend to contract pursuant to
8 PURPA, because certainly the rate set in that
9 contract, which is 8 and a half cents, far
10 exceeds what Squam River Hydro would have been
11 able to get as a qualifying facility under PURPA,
12 the avoided cost rate.

13 Further, Mr. Patch, going back to RSA
14 38:17, I'm sorry, building off of my earlier
15 point about ratemaking authority, that the PPA,
16 to my mind, is entirely irrelevant here, aside
17 for the comments I just made, because Ashland has
18 the authority to enter into wholesale contracts.
19 And its authority to do so doesn't mean that it's
20 subject to PUC ratemaking authority.

21 One moment, Commissioners.

22 *[Short pause.]*

23 MR. FISH: The other piece I want to
24 address is Mr. Patch's explanation of this

1 Commission's authority to implement PURPA and
2 LEEPA, in particular, PURPA. I, frankly, I agree
3 with everything he said with respect to how this
4 Commission -- the authority of this Commission
5 has to implement PURPA, and to adjudicate PURPA
6 on a case-by-case basis, but only as that -- as
7 those regulations apply to public utilities.

8 The two cases that Squam River Hydro
9 cites, including the PSNH case, to stand for the
10 principle that the PUC has a primary role for
11 implementing PURPA, those cases involved public
12 utilities. And Ashland doesn't dispute that the
13 PUC does have jurisdiction to implement and
14 enforce and adjudicate PURPA against public
15 utilities. We don't dispute that. The law is
16 clear on that.

17 With the distinction again, that Squam
18 River Hydro misses, is that, under federal law,
19 where a public utility -- where a utility is not
20 regulated, where the PUC does not have ratemaking
21 authority over an electric utility, the PUC does
22 not have the authority to implement PURPA against
23 it.

24 So, the PSNH case, the Granite State

1 Electric case that they cite, are entirely
2 irrelevant here, and, really, to the extent they
3 are relevant, support our argument that the PUC
4 only has jurisdiction to implement PURPA with
5 respect to regulated public utilities.

6 Briefly, I want to mention a few
7 additional facts. Mr. Patch represented that
8 Town of Ashland had disconnected Squam River
9 Hydro without notice. There was adequate notice
10 that they intended to disconnect Squam River
11 Hydro, following -- after an appropriate time,
12 following termination of the power purchase
13 agreement.

14 There's opportunities -- and I'll
15 resist getting into the facts here at all,
16 because they're really not relevant to the
17 question of jurisdiction that is before you
18 today. But there were opportunities and offers
19 to re-connect Squam River Hydro, in the event
20 they were able to demonstrate that they had
21 acquired -- contracted for the sale of their
22 power.

23 And, further, following termination,
24 there's a series of communications, some of which

1 are included in our briefing, that evidence
2 that the -- that Squam River Hydro was not
3 seeking, even following termination of the PPA,
4 to enter into a contract as a qualifying
5 facility, the words "qualifying facility",
6 reference to "PURPA" or "LEEPA" are no where in
7 the communications between the Town and Squam
8 River Hydro.

9 And, to the contrary, those
10 communications indicate that Squam River Hydro
11 was actively seeking to sell its facilities and
12 to contract with a separate buyer of its power,
13 and the conditions around interconnection were
14 centered on that. Whether or not Squam River
15 Hydro could demonstrate that it had a buyer for
16 the power it was generating.

17 The last thing, there are -- Mr. Patch
18 has introduced this Texas order from 2002. It's
19 26 pages long, single-space, and I, frankly, have
20 not had time to review it in detail. Although, a
21 cursory skim has not revealed the relevance of it
22 to the matters before you today.

23 My position is that it wasn't included
24 in the briefing, and should not be considered at

1 all. But, to the extent the Commission is --
2 intends to consider it, we would ask to have the
3 opportunity to review it in more detail and be
4 able to respond.

5 That is all I have. Thank you.

6 CMSR. SIMPSON: Thank you, Attorney
7 Fish.

8 Attorney Patch.

9 MR. PATCH: Thank you, Commissioners.
10 Just a few things that I would like to mention.

11 In our Reply Brief, on Page 3, in
12 Footnote 3, we had identified a potential factual
13 issue with regard to Ashland, whether or not
14 Ashland, in fact, operates within its corporate
15 limits. So, we think there's a factual issue
16 there still.

17 You know, Mr. Fish made a point of
18 saying that he "didn't want to get into the
19 facts", but then he did. And I guess what I
20 would say is that, you know, we would dispute a
21 number of things that he said. And we think that
22 would be the purpose of this Commission
23 proceeding with a procedural schedule, allowing
24 for discovery that would uncover a number of

1 those facts, including the fact of whether or not
2 they're operating outside of their corporate
3 limits.

4 We think that it's important to
5 remember, in terms of the PPA and the
6 termination, something that we cited in our
7 original Petition, and that was a letter from the
8 Superintendent of the Ashland Electric
9 Department, in 2011, in which he stated: "It is
10 our wish, intention and goal to contract and buy
11 all power produced within the confines of
12 Ashland. This includes the Squam River Hydro
13 Grist Mill upon completion."

14 We also think there are facts that
15 would be uncovered as part of discovery to the
16 effect that the contract that they have for the
17 supply of power to the Town from the Vermont
18 organization, Vermont Electric Power Supply
19 Authority, is something that they had actually
20 offered to do to supplement the power, presumably
21 understanding that the Town had an obligation to
22 buy the power from the QFs to begin with. And,
23 then, to the extent they needed more power, they
24 could get that from Vermont. But the Town, for

1 whatever reasons, and, again, that would be
2 uncovered more as part of discovery, made the
3 decision to just cut off the hydropower
4 facilities.

5 There's also another hydropower
6 facility that went through something similar with
7 the Town of Ashland. So, again, those are facts
8 that would be uncovered as part of discovery, and
9 we think they are important ones.

10 You know, there -- arguably, there may
11 not be express authority because of this unique
12 situation with regard to Wolfeboro [Ashland?].
13 But we think, when you put together all of the
14 arguments that we made in the cases we've cited,
15 there is clearly implied authority that this
16 Commission has to take jurisdiction here.

17 And the "administrative efficiency"
18 argument we think is a very strong one. Which
19 is, if you send it to FERC, then it will end up
20 coming back here. Presumably, FERC is going to
21 find that there is an obligation. We think
22 that's very clear under the law. And, so, then
23 you have to come back to this Commission to
24 determine renewable energy credit issues. So,

1 again, from an administrative efficiency
2 perspective, we think the best thing is for you
3 to take jurisdiction.

4 Thank you.

5 CMSR. SIMPSON: Okay. Thank you.
6 Anything from the Department at this time?

7 MS. AMIDON: No. Thank you.

8 CMSR. SIMPSON: Okay. Thank you. So,
9 I'll turn to Commissioner Chattopadhyay for some
10 questions.

11 CMSR. CHATTOPADHYAY: Good morning.
12 I'm just going to first ask questions to Squam
13 River Hydro.

14 Do you know why the Town of Ashland --
15 why Town of Ashland terminated the PPA?

16 MR. PATCH: I don't know if you want a
17 statement from my client about why he thinks it
18 was terminated?

19 CMSR. CHATTOPADHYAY: That should work.

20 MR. FISH: Commissioner, I could answer
21 that question, if I may? I could offer the
22 Town's position as to why they terminated the
23 PPA.

24 MR. LANE: I think I'd like to --

1 CMSR. SIMPSON: Let's hear from --

2 CMSR. CHATTOPADHYAY: I was going to go
3 there this morning, too.

4 CMSR. SIMPSON: I'll just say, you're
5 not under oath, but you have a duty of candor to
6 the Commission, Attorney Patch.

7 CMSR. CHATTOPADHYAY: My question was
8 "Do you know why the Town of Ashland terminated
9 the PPA?" I'm just --

10 MR. LANE: So, I -- is this on? Is
11 this on now?

12 CMSR. CHATTOPADHYAY: Yes.

13 MR. LANE: Yes. Okay. So, there's a
14 Board of Selectmen's meeting that said they were
15 going to save \$100,000 if they terminated the
16 contract. And I dispute that.

17 CMSR. CHATTOPADHYAY: Okay.

18 MR. PATCH: I mean, I would also like
19 to point out something, which we had said in our
20 original Petition. And that is that, and I think
21 it's an important fact, to the extent you start
22 to get into facts, and that is that the Town also
23 tripled the assessment, tripled the assessment,
24 the property tax assessment on our client around

1 that time. So, -- and then went on to disconnect
2 them.

3 CMSR. CHATTOPADHYAY: Has Squam River
4 Hydro, and I'm going to use the abbreviated "SRH"
5 from here on, if I'm mentioning it again, did you
6 try to renegotiate the PPA with the Town at all,
7 after the, you know, termination?

8 MR. LANE: Yes. And, in fact, I
9 continued to supply them power for a year for
10 free, just so that I could get the renewable
11 energy credits.

12 CMSR. CHATTOPADHYAY: And can you tell
13 me what that period was?

14 MR. LANE: So, we got a letter saying
15 that "We are going to terminate you within 90
16 days", that's the contract on the PPA, and that
17 was around November, I think. So, they actually
18 terminated me around January 6 of 2019, I
19 believe, or '20, something like that. So, then,
20 I continued -- I continued to supply power and
21 invoice them, even though they went unpaid, at
22 what I thought was the avoided cost, which was
23 four and a half cents, and that was based on
24 information I got from the hydro down below,

1 Northwoods, because --

2 [Court reporter interruption.]

3 MR. LANE: Oh, sorry. Yes. The hydro
4 downstream from me. So, I had two hydros, and
5 two dams, and then the one below me, downriver,
6 was Northwoods, and they were running -- going
7 through the same thing, they had their contract
8 terminated, and their taxes increased by 300
9 percent. So, they went out of business and
10 settled with the Town, is my understanding.

11 CMSR. CHATTOPADHYAY: During that one
12 year that you provided free power, were you able
13 to recover anything through RECs?

14 MR. LANE: Yes. So, I continued to get
15 the RECs based on the meter readings of what we
16 were producing. And, then, initially, the Town
17 just pulled the fuses, and I thought it was an
18 accident. So, we had two generators. So, they
19 pulled the fuses on the things. I just called
20 the utility, I said "Hey, what's going on?"
21 Because they were working on a roof of an
22 adjoining building, so I just assumed that that
23 was what it was. And, you know, "Hey, you forgot
24 to put them back in." So, then, the Town of

1 Ashland said "You need to talk to the select" --
2 "You need to talk to the Town Administrator."
3 And the Town Administrator then followed up, I
4 guess, saying that "we think it's" -- "you
5 shouldn't be supplying power when we don't have a
6 contract", is what his argument was, basically.

7 And, then, subsequent to that, they
8 didn't realize that we had the two generators.
9 Apparently, the new Town Administrator didn't
10 realize we had two generators. So, then, the
11 second generator, we did get a letter saying
12 "We're going to disconnect the fuses from that
13 one, too." And that was, like, I don't know,
14 three or four months later.

15 CMSR. CHATTOPADHYAY: In terms of your
16 ability to connect to the grid, is that the only
17 way that you can, --

18 MR. LANE: Yes.

19 CMSR. CHATTOPADHYAY: -- you have to go
20 through Ashland?

21 MR. LANE: I've tried everything. I've
22 talked to, you know, could I wheel it to New
23 Hampshire Co-op? Could I do -- could I get
24 Eversource involved? No one will do anything.

1 The only way to do it is to sell it to
2 Ashland, and then sell it on. But, if Ashland
3 won't connect me, I can't sell it on to anybody
4 else. I mean, people would buy it. We can
5 produce power cheap, you know.

6 CMSR. CHATTOPADHYAY: Since you
7 mentioned that you were "selling power for a year
8 free", can you explain whether, during that time,
9 you could have had some contract with somebody
10 else, not necessarily Ashland municipality, and
11 you would be paid by them? So, is there any
12 technical limitation on even reaching out to
13 other customers?

14 MR. LANE: So, unless Ashland buys it
15 from me initially, no one will buy it from me.
16 You know, I hired lawyers, I hired people who
17 knew a lot more about hydro than I did to consult
18 with me. And, basically, we were screwed;
19 there's nothing I can do.

20 CMSR. CHATTOPADHYAY: Electrons go in
21 there, you know, electrons are, like, you
22 probably know that, when it's -- so, if you're
23 connected to the grid in that fashion, I still
24 don't understand how you have to go through

1 Ashland to be able to reach somebody else?

2 So, that's just -- I mean, you don't
3 need to answer, but I'm still sort of confused.
4 Because, you know, once you produce something,
5 the electrons are going to be in the grid
6 regardless, okay.

7 MR. LANE: Yes. I have to have an
8 interconnection agreement with Ashland,
9 because, --

10 CMSR. CHATTOPADHYAY: Okay.

11 MR. LANE: -- you know, I have all the
12 fuses, that will shut it off in, you know,
13 high/low speed, all these things, I have all the
14 safety equipment on there. So, someone has to
15 supervise that I have it, I guess, and that would
16 be Ashland, because they have people that said
17 you need all this stuff to get connected
18 initially.

19 CMSR. CHATTOPADHYAY: So, during that
20 year or so, you did -- you were able to benefit
21 from RECs?

22 MR. LANE: Correct.

23 CMSR. SIMPSON: I'm just confirming
24 that again, --

1 MR. LANE: Yes.

2 CMSR. CHATTOPADHYAY: -- because I
3 asked it. Okay.

4 Are the two facilities qualified
5 facilities under PURPA?

6 MR. LANE: Yes, they are. And it's a
7 voluntary -- it's a voluntary qualification
8 process, because we're below 5 megawatts, or
9 whatever it is. So, you just say "I'd like to be
10 listed as a qualified facility", and they do it.

11 CMSR. CHATTOPADHYAY: Who do you, like,
12 who do say "I'd like to be a qualified facility"?

13 MR. LANE: I think it was on the FERC
14 website. Yes.

15 CMSR. CHATTOPADHYAY: So, when did you
16 do that?

17 MR. LANE: I did that after we were cut
18 off, because I didn't know -- well, I didn't need
19 it. So, initially, the Town of Ashland was very
20 pro, you know, and we've got that letter, Lee
21 Nichols was in charge, very pro getting the
22 Ashland connection. So, it was -- you know, it
23 was initially a handshake, "Hey, you buy this,
24 you get this working. You put electricity on the

1 thing and I'll buy everything that you can make.
2 You know, all the renewable power you can make,
3 I'll buy it."

4 And, then -- and, initially, we were
5 getting half, we were getting 11 cents, because
6 we were getting a half a cent less than what he
7 paid Vermont Power, and that was, you know, back
8 in 2019 or something. So, then, he changed the
9 contract when Vermont Power renegotiated, and
10 that's when we got 8 and a half cents. So, we
11 had two PPAs.

12 CMSR. CHATTOPADHYAY: So, until then,
13 however, you had not -- I don't know exactly what
14 the process is, but you had not reached out to
15 FERC, even if it's a voluntary selection, you
16 never reached out to FERC to say that you're a
17 qualified facility?

18 MR. LANE: So, --

19 CMSR. CHATTOPADHYAY: Until, like, you
20 were basically disconnected?

21 MR. LANE: Yes. So, basically, because
22 my connection was pre the invention of FERC or
23 the establishment --

24 *[Court reporter interruption.]*

1 MR. LANE: I'm sorry. Yes. So, my
2 connection was pre the establishment of FERC.
3 So, FERC had no jurisdiction on my facility at
4 the time. And I don't have to have a FERC
5 license. And, when I applied for renewable
6 energy credits, I just had to say that I was
7 "pre-FERC". So, the dam went in in 1909.
8 Ashland's had electricity supplied since 1880
9 from hydro.

10 So, that was my understanding. I may
11 be wrong. I'm not a --

12 MR. PATCH: I would just like to point
13 out, Commissioner, too, that I think there's a
14 presumption under federal regulations at least,
15 if not statutes, that a QF of the kind that
16 Mr. Lane is describing is a QF, without even
17 having to notify them.

18 MR. LANE: Yes. That's my
19 understanding, too.

20 CMSR. CHATTOPADHYAY: Okay.

21 CMSR. SIMPSON: Would you be able to
22 file the record that your client mentioned, with
23 respect to it being listed by FERC as a
24 qualifying facility?

1 MR. LANE: I have something, I can.

2 Yes, I can.

3 CMSR. SIMPSON: You can file that with
4 the Commission, Attorney Patch?

5 MR. PATCH: Okay.

6 CMSR. SIMPSON: Thank you.

7 CMSR. CHATTOPADHYAY: I'm going to ask
8 the same question to the Town. But, because I
9 don't know what the process is for this, for the
10 PUC to set PURPA rates, because I've never been
11 involved in that, but -- so, the question is, has
12 SRH ever petitioned the New Hampshire PUC to set
13 PURPA rates?

14 MR. PATCH: No. But we would contend
15 that the Commission has an obligation to do so.
16 But, no, we have not.

17 CMSR. CHATTOPADHYAY: If my question
18 was specific enough, the answer would be "no"?

19 MR. PATCH: Yes. Yes.

20 CMSR. CHATTOPADHYAY: So, when you were
21 operating, did you only sell to Ashland?

22 MR. LANE: Yes, that's correct.

23 CMSR. CHATTOPADHYAY: That is correct.

24 Okay.

1 MR. PATCH: I think, can I just say one
2 more thing on your question, Commissioner?

3 CMSR. CHATTOPADHYAY: Sure.

4 MR. PATCH: And that is that we --

5 CMSR. CHATTOPADHYAY: Feel free to,
6 yes.

7 MR. PATCH: I think part of our
8 Petition to the Commission is essentially, if not
9 expressly, impliedly asking the Commission to set
10 those rates, because we're essentially asking you
11 to determine what the avoided costs would have
12 been as of the time that they got shut off and
13 going forward.

14 And, so, -- so, I think it amounts to
15 the same thing.

16 CMSR. CHATTOPADHYAY: Whenever such an
17 endeavor is taken up, meaning the New Hampshire
18 PUC has to set the PURPA rate, isn't it, like, in
19 a particular docket, specific docket? I'm just
20 curious.

21 MR. PATCH: Well, I think --

22 CMSR. CHATTOPADHYAY: To the best of
23 your knowledge. I mean, you may not have --

24 MR. PATCH: Yes. I believe there was

1 an avoided cost rate that was part of the
2 settlement that PSNH had with Granite State
3 Hydropower Association. So, I think -- I think
4 it's been done in different contexts over the
5 years.

6 CMSR. CHATTOPADHYAY: I think I'm going
7 to move on to the Town.

8 So, let me first go back to the last
9 question, so that I don't, you know, miss asking
10 that. So, not knowing how the process is, has
11 the Town ever petitioned the New Hampshire PUC to
12 set, you know, PURPA rates for the generators
13 that you may be working with?

14 MR. FISH: No. And, to be clear, I'm
15 essentially making an offer of proof here as an
16 attorney, but, no. And there would never be any
17 need for the Town of Ashland to do so, because
18 the PUC doesn't have jurisdiction over the Town
19 of Ashland with respect to the rates that is set
20 pursuant to PURPA or otherwise.

21 CMSR. CHATTOPADHYAY: Understood. I
22 understand your position. I'm just trying,
23 historically, whether anything like that has
24 happened, okay.

1 Do you serve any customers outside
2 Ashland municipal boundaries, as an electric
3 utility?

4 MR. FISH: As I understand it, the
5 answer is "no." I'm happy to follow up with my
6 client and confirm that with the Commission.
7 But, from the conversations I've had with my
8 client, the answer is "no". They only serve
9 residents within the Town of Ashland. And, in
10 fact, that *Appeal of Ashland Electric Department*
11 case, the New Hampshire Supreme Court states, and
12 it's 1996, so, we're going back in time quite a
13 bit, but the New Hampshire Supreme Court there
14 said that "they serve only a portion of the
15 residents in the Town of Ashland." In that case,
16 the New Hampshire Electric Co-op was serving
17 their franchise area, included a portion of the
18 Town of Ashland.

19 So, I'm not saying that's dispositive,
20 but I will confirm with my client that they do
21 not serve customers outside of town boundaries.

22 CMSR. CHATTOPADHYAY: And that would be
23 helpful. You know, as common sense would tell
24 me, because you're an electric utility, you're

1 serving customers, you will know which customers
2 you're serving. So, you should be able to
3 compute whether those customers are within the
4 Ashland boundaries or outside.

5 MR. FISH: Yes. I expect we can do
6 that. And one other point, which is important
7 here, is that, with respect to the statutes, and
8 when electric -- municipal electric companies are
9 public utilities, even if they are serving
10 customers outside of town boundaries, they only
11 become public utilities, and this is RSA 362:4-a,
12 in the event -- in the event that they're
13 charging customers a higher rate than those
14 charged to its customers within the municipality.

15 So, you know, even if they are serving
16 outside, which my understanding is they do not,
17 the inquiry would then be whether they're
18 charging them a different rate or otherwise
19 treating those customers differently than
20 residents of the Town of Ashland.

21 MR. PATCH: Could I just be heard
22 briefly on that question?

23 CMSR. CHATTOPADHYAY: Please do.

24 MR. PATCH: I think it would be

1 important for Ashland to respond to what we put
2 in Footnote 3, on Page 3 of our Reply Brief,
3 about that docket, 14-048, which seems to
4 indicate that what Ashland was doing, at least at
5 that time, whether they still are or not, I don't
6 know, but it was turning around and selling power
7 that they purchased from Vermont Electric Power
8 Supply Authority to the Village Precinct in the
9 Town of New Hampton.

10 And, so, I just think, again, that
11 seemed to be what was being done at that point in
12 time, which is, admittedly, eight or nine years
13 ago, but whether they still are or not, I don't
14 know.

15 But I think -- I think, if you're going
16 ask it for information on that, it would be
17 important that that include a response to the
18 factual information that's in that Footnote 3.

19 CMSR. CHATTOPADHYAY: Thank you for
20 that.

21 So, any response from the Town on what
22 Attorney Patch just shared?

23 MR. FISH: I'm happy to follow up on
24 that and include that as our response. But it

1 seems to me, and I have not admittedly reviewed
2 that docket in detail, but what was happening
3 then was they were essentially buying power at a
4 wholesale rate, and then transferring that power
5 to the New Hampton Village Precinct.

6 But I'm happy to follow up on that and
7 include that in our response.

8 CMSR. CHATTOPADHYAY: Changing topics
9 slightly. Why did you terminate the Purchase
10 Power Agreement with Squam River Hydro?

11 I am going back to the question that I
12 had previously.

13 MR. FISH: Yes, Commissioner, I'm happy
14 to answer your question. I do want to say that
15 this is -- seems to be getting into the merits of
16 their Petition, which, you know, really should
17 avoid doing until this matter of jurisdiction has
18 been resolved.

19 But the Town of Ashland did an audit of
20 their electrical needs, and found that they were
21 purchasing well in excess of what they needed to
22 meet the needs of their customers. They were
23 expending roughly \$100,000 over what they needed
24 to to supply electricity. And, so, as I

1 mentioned, they acted on the termination
2 provision in the contract to terminate it.

3 CMSR. CHATTOPADHYAY: And did that also
4 require, like, you had to disconnect the
5 facilities from your -- from the municipal
6 electrical systems?

7 MR. FISH: So, the facts, as I
8 understand them, around that were, that with the
9 contract terminated, there were some issues with
10 respect to when Squam River received notice of
11 the Town of Ashland's termination, and the Town
12 agreed to extend the date at which the
13 termination would become effective by several
14 months, I don't know the exact period, but to
15 accommodate that delay in Squam River receiving
16 notice. There was some period thereafter where
17 Squam River Hydro continued to generate power,
18 despite not having a purchase -- a purchaser for
19 its electricity. The Town of Ashland was
20 operating on their distribution lines, found that
21 those lines were generated, and, at that point,
22 notified Squam River Hydro that, unless they
23 could demonstrate that they had an off-taker for
24 their power, it was Ashland's intention to

1 disconnect Squam River Hydro from their
2 distribution grid.

3 So, I don't have the timeframe in front
4 of me, but it was some time after the Power
5 Purchase Agreement termination became effective
6 that, and following, frankly, notice to Squam
7 River Hydro that they intended to do so, that
8 Ashland made that disconnection of Squam River
9 Hydro's interconnection to the grid.

10 And, as I understand it, it was a
11 safety issue. Those lines were energized, and
12 Ashland wasn't aware that they were.

13 CMSR. CHATTOPADHYAY: Did the Town
14 consider renegotiating a PPA?

15 And let me qualify my question a little
16 bit. And, clearly, whatever your demand is, you
17 can purchase electricity to meet the demand. And
18 there may be abilities to optimize the cost of
19 electricity by purchasing power from different
20 entities to get to, you know, to the optimal
21 portfolio.

22 And what I understood the reason behind
23 why the contract was terminated was because, you
24 know, somebody did some calculations, they

1 figured that it's -- they're paying 100,000 too
2 much they really don't need to pay.

3 But did you try to solve that problem
4 by thinking about signing a different PPA with
5 Squam River Hydro?

6 MR. FISH: I don't believe that -- that
7 Ashland considered entering into a separate
8 contract with Squam River Hydro, a PPA or
9 otherwise.

10 I can represent that the Town of
11 Ashland made offers to wheel power, subject to
12 Squam River Hydro satisfying certain conditions,
13 namely, that they had an off-taker for their
14 power. Squam River Hydro, as we understand it,
15 was struggling to find a off-taker for their
16 power. And, you know, I don't know where those
17 conversations were at the time this Petition was
18 filed. But, certainly, filing this Petition
19 ended any further conversations about offers to
20 wheel power or otherwise contract with Squam
21 River Hydro.

22 MR. PATCH: And if I could just be
23 heard on that briefly?

24 Our position is that the Town of

1 Ashland had an obligation under PURPA. Our
2 client didn't have to go and find another buyer
3 outside of there. The first obligation was
4 imposed on Ashland, under PURPA, to purchase the
5 power that the QFs produced.

6 MR. FISH: And if I could respond?

7 Squam River Hydro never made any
8 request, demand, notice, otherwise, that they
9 intended to contract as a QF pursuant to PURPA.
10 As I stated, the communications back and forth
11 was that Squam River Hydro was seeking an
12 alternative buyer, and actually had gotten to it
13 at a pretty late stage in contract negotiations
14 with a separate buyer to purchase their power.

15 So, there was never any point in which
16 Ashland would have had notice, following
17 termination of the PPA, that Squam River Hydro
18 was seeking to contract as a qualifying facility,
19 subject to PURPA. And, of course, we dispute
20 that Ashland has that obligation at all.

21 MR. PATCH: Well, and I would just like
22 to respond to that.

23 We made a demand in the Fall of 2022 of
24 the Town, before we filed with the Commission.

1 It was at least two or three months before that.
2 So, there was clearly, at least as of that point
3 in time, even if you would ignore what I think is
4 a basic legal argument, that the Town, as an
5 electric utility, was obligated under PURPA to
6 purchase the power. But there was a demand
7 letter made in the Fall of '22.

8 CMSR. SIMPSON: Can Attorney Fish speak
9 to the obligation under PURPA? Is your position
10 that Ashland has no obligation to purchase under
11 PURPA?

12 MR. FISH: Well, it's an interesting
13 issue. Let me first say that, to the extent
14 Ashland has any obligation to purchase, that is a
15 federal FERC PURPA obligation that has to be
16 taken up with FERC. It's clear, as I've laid
17 out, that there is no state -- the state PUC
18 doesn't have authority to implement PURPA against
19 Ashland.

20 So, to the extent, and this is our
21 position all along, is to the extent that Squam
22 River Hydro has a claim against Ashland as an
23 electric utility, a nonregulated electric
24 utility, they are obligated by law to bring that

1 grievance, to file a petition, with FERC.

2 Now, I think there are real questions
3 as to whether, even though Ashland is an electric
4 utility under PURPA, they have a purchase
5 obligation. I understand that there are certain
6 thresholds with respect to how much power a
7 electric utility has to transfer to come under
8 the coverage of PURPA. And there's practical
9 reasons for that. I don't know what the Town's
10 total demand is, but, certainly, it doesn't make
11 sense to require a small municipal utility to
12 purchase the output of a 20-megawatt wind farm,
13 for example, where it far exceeds the town's
14 demand.

15 So, I think there are factual questions
16 about whether or not there is a purchase
17 obligation under PURPA. But, in the first
18 instance, that issue must be taken up with FERC,
19 not this PUC.

20 CMSR. SIMPSON: So, Ashland doesn't
21 know whether PURPA applies?

22 MR. FISH: Ashland has never had cause
23 to undertake that analysis, is how I would answer
24 that question. They have never been called on,

1 until now, to assess whether they have a PURPA
2 purchase obligation. And, as I said, I think
3 there are factual inquiries and reasons that they
4 may not be.

5 We will concede that, as an electric
6 utility, they meet the definition of "electric
7 utility" under PURPA, and are generally subject
8 to PURPA requirements. But I do think that,
9 should a petition be filed at FERC, there are
10 factual questions as to whether a small municipal
11 utility is actually subject to those purchase
12 obligations.

13 CMSR. SIMPSON: So, if that question
14 remains, can you explain the Town's decision to
15 pull fuses and disconnect the facility from the
16 electrical grid?

17 MR. FISH: I would ask for the
18 opportunity to respond in more detail. But my
19 understanding is that it was primarily a safety
20 concern. Because Ashland was working on their
21 lines, didn't know that the lines were energized,
22 and disconnected them, until Squam River Hydro
23 could demonstrate that they had an off-taker for
24 the power that they were generating.

1 MR. PATCH: If I could just be heard on
2 that?

3 If the Commission is inclined to allow
4 the Town of Ashland to provide some factual basis
5 as to why they did this, then I wish that we
6 would be given an opportunity to respond to that.
7 Because, I think, now we're going down the road
8 of getting into some of the factual issues that
9 clearly would be uncovered as part of discovery
10 and part of a procedure going forward.

11 But I don't want the Commission to rely
12 on facts, as stated by Ashland, to the extent
13 that we might have a dispute over that.

14 CMSR. SIMPSON: Understood. I think
15 the next question I'd like to ask, if Squam River
16 petitioned FERC, and FERC determined that Ashland
17 has an obligation to purchase, who would set the
18 avoided cost rate?

19 MR. FISH: FERC.

20 CMSR. SIMPSON: And you believe that
21 they would do that independent of this
22 Commission?

23 MR. FISH: I do.

24 CMSR. SIMPSON: Okay. And do you have

1 a perspective on the process that FERC would use
2 to determine the purchase rate?

3 MR. FISH: Well, I don't have clear
4 insight at the moment. Although, it would be --
5 it would be the Town of Ashland Electric
6 Department's avoided cost rate, consistent with
7 the PURPA regulations.

8 CMSR. SIMPSON: And did Ashland consult
9 with any other municipal utilities, either in
10 this state or in other states, to determine its
11 responsibilities under PURPA?

12 MR. FISH: I don't know. I don't have
13 an answer to that.

14 CMSR. SIMPSON: Okay. I took some of
15 Commissioner Chattopadhyay's --

16 MR. FISH: But my expectation is,
17 again, that they have not, because other
18 similarly situated municipalities would take the
19 same position I'm articulating today, which is
20 that they are not subject to these PURPA
21 obligations.

22 CMSR. CHATTOPADHYAY: Commissioner
23 Simpson did ask some of the questions that I was
24 going to get into, but I still have two more, I

1 think.

2 The first one is, whenever the contract
3 was signed and, you know, it was made effective,
4 did -- at that time was there any consideration
5 of whether this is a QF or not?

6 And I understand that some of it is
7 touching upon factials, but I'm not -- I
8 understand your position that that's not -- I'm
9 still curious as to what was understood when the
10 contract was signed? Like, did you understand it
11 was a QF at that time? Or does it even show up
12 in the contract in that matter?

13 MR. FISH: Until the demand letter
14 issued by Attorney Patch in the Fall of '22,
15 there is no mention of "PURPA" or for "qualifying
16 facilities". There is no expression of intent to
17 contract as a qualifying facility. As already
18 stated, that the rate that was set in that PPA,
19 at first 11 and a half cents in the first
20 iteration of the contract, when it was reissued,
21 the PPA was reissued at 8 and a half cents, those
22 are still far in excess of what, you know, what
23 the avoided cost rate would be. And, really,
24 which I understand, and, Commissioner Simpson,

1 this is kind of getting back to your question you
2 asked before about what that rate would be, it's
3 my understanding that it would be the ISO-New
4 England market clearing price, or what's
5 sometimes referred to as the "short-term" rate".
6 That is how PSNH, for example, sets its avoided
7 cost rate subject to PURPA.

8 MR. PATCH: Could I just be heard on a
9 couple of things related to that?

10 Number one, it seems like Ashland is
11 now being asked to be treated like other
12 utilities in the state, when they talk about
13 avoided costs. Clearly, the avoided cost to them
14 right now are what they are paying the Vermont
15 Authority. And, so, that's really their avoided
16 cost right now. But we could get into all of
17 that, you know, as we get into the case.

18 Secondly, with regard to -- it seems
19 like Ashland is trying to indicate that, because
20 they had an ignorance of their obligations under
21 PURPA, therefore, they're not liable. Well,
22 clearly, if you're running an electric utility in
23 this day and age, you should be familiar with
24 what your obligations are under state and federal

1 law. Presumably, they're a member of -- there's
2 a National Association of Municipal Utilities.
3 And part of discovery that we would do would be
4 to see whether they had any correspondence from
5 that National Association that would have
6 indicated that. But, again, just because they
7 were ignorant of their responsibilities, doesn't
8 mean that they're relieved of them.

9 And, then, thirdly, as we pointed out,
10 there was another QF that was terminated by them.
11 And it's my understanding, as part of the
12 settlement that they made, there was clear
13 correspondence exchanged with regard to the
14 obligation that Ashland had under PURPA.

15 So, it's hard for me to believe, number
16 one, that they're actually claiming that they
17 didn't know about PURPA. And, number two, if
18 you're a responsible utility, you should know
19 what your obligations are under state and federal
20 law.

21 MR. FISH: Can I just respond to that
22 briefly?

23 CMSR. CHATTOPADHYAY: Okay.

24 MR. FISH: Ignorance of the law has

1 nothing to do with it. I mean, if a
2 municipality -- a municipal utility, a public
3 utility, cannot be expected to pay avoided cost
4 rates to pay without -- in the absence of a
5 contract or an expression, notice of intent, or
6 otherwise request to enter into a contract as a
7 qualifying facility pursuant to PURPA, there's no
8 obligation on a utility to pay those costs, to
9 pay those rates. Typically, under PURPA, there
10 are contracts that are entered into, there's
11 avoided cost rates that are set. The facts are,
12 and I dispute that these facts are even relevant
13 here, but there was no -- for the jurisdictional
14 questions that we're grappling with now, there is
15 no request or notice by Squam River Hydro, I
16 expect that they didn't even know that the PURPA
17 obligation existed, that they met the definition
18 of a "QF".

19 And, so, you talk about "ignorance of
20 the law", there was never a request by the
21 Company to contract with the Town of Ashland as a
22 qualifying facility. You can't expect a utility
23 to enter into a contract that they were never
24 asked to enter into.

1 CMSR. CHATTOPADHYAY: Okay. Not
2 knowing fully how municipal electric utilities
3 operate, I just -- do the customers in your
4 jurisdiction avail competitive supplies, like,
5 you know, to buy electricity? Do you know?

6 MR. FISH: What I know is that the Town
7 of Ashland contracts wholesale with the Vermont
8 Public Power Supply Authority for 100 percent of
9 the electricity that they need to meet their
10 needs.

11 CMSR. CHATTOPADHYAY: Okay.

12 MR. FISH: I'm not sure if that's
13 entirely responsive to your question.

14 CMSR. CHATTOPADHYAY: It's not. But it
15 also, I mean, it's probably because you don't
16 know for sure what's happening in Ashland.

17 My question, I'm just curious, whether
18 there are customers in Ashland that avail
19 competitive supplies, rather than buying it
20 from --

21 MR. FISH: Whether they purchase power
22 from a third party?

23 CMSR. CHATTOPADHYAY: Yes.

24 MR. FISH: That option certainly is

1 available to them. Whether or not they do, I am
2 not sure.

3 CMSR. CHATTOPADHYAY: Okay. So, and
4 this is a question for SRH, if you were finding
5 customers that are interested in competitive
6 supply, and they can interact with you, would you
7 be willing to provide them?

8 I know it's, you know, it's kind of not
9 necessarily related, but I'm just curious.
10 Whether you could find customers in the Ashland
11 jurisdiction that will be interested in buying
12 power from you?

13 MR. PATCH: So, just so I understand
14 the question, is that with regard to the
15 provision in LEEPA that allows you to sell to
16 three other customers? I think there's a
17 provision in there that allows you to do that
18 without being subject to the Commission's
19 jurisdiction, or something to that effect. I
20 haven't looked at that in a long time, but I
21 believe -- is that what you're --

22 CMSR. CHATTOPADHYAY: My question was
23 more general. If you a generating capacity, can
24 you sell your power to customers --

1 MR. PATCH: Directly?

2 CMSR. CHATTOPADHYAY: -- directly?

3 MR. PATCH: Without going through --

4 CMSR. CHATTOPADHYAY: Yes, in Ashland?

5 MR. PATCH: Yes. I don't know exactly.

6 I would think that it could be done. But, again,
7 our position is that, you know, the starting
8 point is that Ashland has an obligation under
9 federal law that it had not followed.

10 CMSR. CHATTOPADHYAY: Okay. That's all
11 I have.

12 CMSR. SIMPSON: Okay. Thanks.

13 I'll return to Attorney Fish. So, I
14 want to just return to the question of the
15 applicability of PURPA to the Town of Ashland.

16 To reiterate, your perspective is that
17 it's not clear whether PURPA applies to the Town
18 of Ashland, correct?

19 MR. FISH: Yes. Let me put some color
20 on that.

21 We concede that the Town of Ashland
22 Electric Department operates an electric utility
23 that meets the definition of "electric utility".
24 This is an issue, I frankly concede, I'm not an

1 expert it, but I understand that there are
2 limitations under PURPA on how much the sale,
3 kilowatt-hour -- number of kilowatt-hour sales
4 that utilities need to make in order to be
5 subject to the PURPA obligations. And there's a
6 question as to whether the Town of Ashland would
7 meet those thresholds and come under the PURPA
8 jurisdiction.

9 I don't have an answer to that question
10 today. But it's a factual issue that would have
11 to be resolved at FERC, should Squam River Hydro
12 petition it.

13 *[Atty. Fish and Atty. Getz conferring.]*

14 MR. FISH: So, my colleague, Attorney
15 Getz, reminded me that the question really is
16 whether there's not an obligation to purchase,
17 there's still an obligation to wheel, by Ashland
18 to wheel that power through their distribution
19 system, and we agree that Ashland would have that
20 obligation to wheel, and that, as I've said
21 before, made those offers to Squam River Hydro.

22 CMSR. SIMPSON: Okay.

23 MR. PATCH: Could I just respond to
24 that?

1 I mean, those offers were made in a
2 context that related to other issues. And, so, I
3 don't think it's appropriate to get into
4 settlement offers that might have been made, but
5 it's more than just what you're saying it is. It
6 isn't -- it isn't like the Town just said "Oh,
7 we'd be happy to wheel your power through."
8 There are a number of other things associated
9 with that, that were part of the settlement
10 offer. So, I don't think we should get into the
11 details of that.

12 MR. FISH: Well, to be clear, I wasn't
13 referring to the settlement offer. The Town of
14 Ashland itself had made offers to wheel power
15 before this Petition was filed, and that's what I
16 was referring to.

17 CMSR. SIMPSON: Okay. So, you
18 mentioned that there are some bright lines with
19 respect to PURPA that may provide avenues that
20 exclude Ashland from obligations under the
21 federal statute. Are you able to articulate
22 those to us?

23 MR. FISH: So, the bright line, under
24 the federal regulations, refer to state -- "state

1 regulated electric utilities" and "nonregulated
2 electric utilities". And, as I said earlier,
3 that distinction turns on whether or not the PUC
4 has ratemaking authority against the Town of
5 Ashland. So, if the PUC has ratemaking authority
6 over the Town of Ashland, PURPA directs the PUC
7 to implement FERC's rules against electric --
8 state regulated electric utilities. The first
9 distinction, the bright line test, is that
10 Ashland is not a state regulated electric
11 utility, it is a nonregulated electric utility,
12 which means that it comes under the jurisdiction
13 of FERC. That authority is not delegated by
14 PURPA to the PUC. So, in the first instance,
15 Squam River has to raise its claims with FERC.

16 And that, once we're there, as I said,
17 and I don't have a basis to confirm this as I sit
18 here today, is whether or not they're -- despite,
19 while Ashland meets the definition of "electric
20 utility", and specifically a "nonregulated
21 electric utility", whether there are other
22 disqualifying factors that would apply that would
23 preclude -- preclude FERC from making a finding
24 that Ashland has purchase obligations under that

1 law.

2 CMSR. SIMPSON: So, within the context
3 of PURPA, your perspective is that your client is
4 a "nonregulated electric utility", outside of the
5 ratemaking authority of this Commission, correct?

6 MR. FISH: Correct.

7 CMSR. SIMPSON: Would you agree that
8 PURPA requires nonregulated utilities to consider
9 and determine certain ratemaking standards
10 outside of a regulatory authority?

11 MR. FISH: Correct. So, the way that
12 the statute -- the regulations work, is that the
13 PUC implements FERC's rules for state regulated
14 utilities. It directs nonregulated utilities to
15 implement those rules themselves.

16 CMSR. SIMPSON: Uh-huh.

17 MR. FISH: So, the question I expect
18 you're going to ask is "Has Ashland done that?"
19 And the answer, as I understand it, is "no."
20 But, to the extent Squam River Hydro seeks to
21 enforce that requirement, our position is that
22 they have to do so at FERC.

23 And I'll note that there's -- there's
24 the ability, since 2005, there's the ability

1 under PURPA for utilities to apply for exemptions
2 from these purchase obligations. There's a
3 presumption, a rebuttable presumption, for
4 facilities over 5 megawatts, that they have, I'm
5 going to -- I might botch this, but it's "open
6 and nondiscriminatory access to wholesale
7 markets." And ISO-New England, in particular, is
8 one of those markets that's been identified as --
9 by FERC as providing open and nondiscriminatory
10 access to the markets.

11 So, a utility, like PSNH, could file a
12 petition with FERC for an exemption that, if
13 granted, would disqualify them from purchase
14 obligations for any facility over 5 megawatts or
15 above. That presumption reverses, if you're
16 under 5 megawatts, which Squam River Hydro
17 clearly is, there's a rebuttable presumption that
18 they don't have access to such markets, and --
19 but there is still the ability for Town of
20 Ashland or other similarly situated utilities to
21 petition FERC for an exemption. It's a
22 rebuttable presumption. It doesn't mean that
23 they don't have the ability to do so.

24 CMSR. SIMPSON: Okay. So, I don't see

1 the wholesale market considerations at issue
2 here, unless I'm missing something. Is the
3 Petitioner attempting to receive revenues from
4 the wholesale electricity market via ISO-New
5 England?

6 MR. LANE: It's not available to us.

7 MR. PATCH: No.

8 CMSR. SIMPSON: Okay. So, your client
9 has not considered the obligations to consider
10 and determine under PURPA at this point, to the
11 best of your knowledge?

12 MR. FISH: Correct.

13 CMSR. SIMPSON: Okay. Does Ashland
14 offer net energy metering to customer-generators
15 within the bounds of your municipality?

16 MR. FISH: I don't believe they do, no.

17 CMSR. SIMPSON: Okay. How does Ashland
18 set rates?

19 MR. FISH: Ashland passes through the
20 rate that it's a -- they contract wholesale for
21 the supply of their power, and they pass those
22 rates through to their customers.

23 CMSR. SIMPSON: What about fixed
24 charges and distribution/transmission? Can you

1 explain that for us?

2 MR. FISH: As I sit here today, I
3 can't --

4 CMSR. SIMPSON: Okay.

5 MR. FISH: -- answer that question.

6 CMSR. SIMPSON: Does Ashland have a
7 perspective on the authority that this Commission
8 possesses under New Hampshire law to regulate
9 electric municipal utilities operating within
10 their corporate limits?

11 You've told us what authority we don't
12 have. Do you have a perspective on the authority
13 that we do have?

14 MR. FISH: Sure. This Commission has
15 jurisdiction with respect to the taking,
16 purchase, or otherwise acquisition of electrical
17 plants by municipalities, pursuant to RSA 38.
18 And that's in keeping with the Supreme Court's
19 holding in *In Re: Pennichuck*, which we cited. In
20 that case, the Court found that, while municipal
21 utilities enjoy exemption from PUC jurisdiction,
22 they do come under the PUC's jurisdiction with
23 respect to matters involving RSA 38. And that's
24 consistent with the former *Appeal of Ashland's*

1 case from 1996 as well.

2 CMSR. SIMPSON: And would you say that
3 that authority leads to plenary ratemaking
4 authority?

5 MR. FISH: I would not. And it, in
6 particular, with the Town of Ashland, as I said,
7 the only place the term "rate" appears in that
8 statutes is in RSA 38:17. And, as I said, that
9 applied -- construed in the context of the
10 statute, it only applies to rates that would be
11 set in the event that the Town of Ashland had
12 acquired an electrical plant, a generating plant,
13 and was selling power generated from that plant
14 to customers, which isn't the case here. They
15 don't own or operate any electrical generating
16 plants. And, so, that provision doesn't apply
17 here.

18 CMSR. SIMPSON: Who owns the fuses that
19 were disconnected?

20 MR. FISH: My suspicion is it's the
21 Town of Ashland's. And I can follow up on that,
22 if needed.

23 CMSR. SIMPSON: Okay. Thank you.

24 I guess I'd like to ask the Department

1 a question with respect to the REC issues that
2 have arisen, and discussion that's arisen.

3 MS. AMIDON: Pardon me.

4 CMSR. SIMPSON: No problem.

5 MS. AMIDON: Would you repeat the
6 question please?

7 CMSR. SIMPSON: We've heard from the
8 Petitioner that they have lost revenues from
9 participation in the state's Renewable Portfolio
10 Standard that's administered by the Department of
11 Energy. And I wondered whether there had been
12 any proceeding commenced at the Department
13 pertaining to that specific issue? And if the
14 Department had any perspective on municipal
15 utilities' participation within the RPS? And if
16 there is any requirements that may stem from
17 those statutory obligations to the Town of
18 Ashland?

19 MS. AMIDON: I believe the statute, I
20 haven't looked at it recently, but I believe the
21 statute exempts municipal electric utilities from
22 the requirement that they purchase RECs.
23 However, in order to qualify for the creation of
24 a REC, which is done through the GIS, which is

1 operated at the New England Power Pool, it has to
2 relate to the flow of some kind of electrons that
3 are actually being sold somewhere.

4 So, if Ashland purchased the power,
5 they would have the requirement to purchase the
6 RECs. However, the RECs could be sold elsewhere,
7 to a different purchaser.

8 I know that -- did that answer all of
9 your question? I think I kind of focused on the
10 RECs at that point.

11 CMSR. SIMPSON: That's quite helpful.
12 What I'm wondering, and you may not know this
13 here today, is whether there is an obligation for
14 renewable facilities to be connected to the
15 state's electrical grid, whether owned by a
16 municipal utility or an electric regulated --
17 rate-regulated utility?

18 Because it would seem that the state
19 policy is aiming to support the proliferation of
20 renewable electrical resources within the state.
21 And we have a situation here where there are two
22 renewable facilities that are no longer able to
23 connect to the distribution system, and therefore
24 can't provide renewable energy to the state.

1 MS. AMIDON: Excuse me for one second,
2 but I will get back to the question.

3 CMSR. SIMPSON: Uh-huh. Yes. Take
4 your time.

5 *[Atty. Amidon and Dir. Nixon*
6 *conferring.]*

7 CMSR. SIMPSON: Attorney Amidon.

8 MS. AMIDON: Thank you. As I said, the
9 energy that's associated with those renewable
10 energy credits, or certificates, has to be sold
11 in the NEPOOL stream to qualify for recognition
12 by the Generation Information System. But
13 there's nothing in the statute that, and I can
14 check this again, but there's nothing in the
15 statute that would require a utility to connect a
16 renewable energy source in order to allow those
17 RECs to be used. I'm not familiar with that at
18 all.

19 CMSR. SIMPSON: Okay.

20 MS. AMIDON: Let me just take -- I'm
21 going to take a look at the statutes.

22 CMSR. SIMPSON: Yes.

23 MS. AMIDON: And, if I find something
24 different, I will bring it to your attention.

1 CMSR. SIMPSON: Thank you. I'll come
2 back to you after we finish up. Commissioner
3 Chattopadhyay has a follow-up. I just have one
4 more for the Town.

5 You mentioned "wheeling". Do you have
6 a wheeling agreement on file at FERC?

7 MR. FISH: Not that I'm aware of.

8 CMSR. SIMPSON: Okay.

9 MR. FISH: But, just to build on
10 earlier conversations, the Town is prepared to
11 wheel Squam River Hydro's power. I just want to
12 make that clear. That the Town has made that
13 clear to SRH, that they are willing to wheel
14 their power, provided that they can demonstrate
15 that they have a buyer for the power that they're
16 generating.

17 CMSR. SIMPSON: The Town just doesn't
18 want to buy it?

19 MR. FISH: The Town does not want to
20 buy it, correct.

21 CMSR. SIMPSON: Okay. Commissioner
22 Chattopadhyay.

23 CMSR. CHATTOPADHYAY: A follow-up for
24 SRH.

1 Recall the discussion that I was having
2 about, during the period that you provided power
3 for free, you still were able to benefit from the
4 RECs?

5 MR. LANE: Yes, that's correct. So,
6 basically, the REC application is through the New
7 England Pool GIS, and it just required the meter
8 reading. So, the meter reading says how many
9 electrons we put on that month, and then that's
10 how they figure out the REC.

11 CMSR. CHATTOPADHYAY: So, it has
12 nothing to do with ensure -- making sure that
13 that power is connected to the grid?

14 MR. LANE: Well, you couldn't get it
15 unless you were connected to the grid.

16 CMSR. CHATTOPADHYAY: Okay.

17 MR. LANE: Because --

18 CMSR. CHATTOPADHYAY: Okay. So, and
19 that is how it was even before the contract was
20 terminated? So, you were able to --

21 MR. LANE: Yes. I got RECs for -- and
22 I continued to get RECs until they pulled the
23 fuses, and then there's no electrons going
24 anywhere. So, we couldn't get any more RECs.

1 So, we were putting power into the Ashland grid,
2 right?

3 CMSR. CHATTOPADHYAY: Yes.

4 MR. LANE: We were getting paid -- you
5 know, --

6 CMSR. CHATTOPADHYAY: I'm being a
7 little bit technical, I'm just not clear about
8 how the process works. So, now that they have
9 disconnected you, --

10 MR. LANE: Then, we shut everything
11 down, which is bad for the hydros. The
12 generators are stationary now. So, it was in my
13 interest to let it run and give them the
14 electricity for free, --

15 CMSR. CHATTOPADHYAY: Yes.

16 MR. LANE: -- because that's better for
17 the hydro units than to sit idle, and maybe rust
18 or whatever. Yes.

19 CMSR. CHATTOPADHYAY: Okay. So, it's
20 like, because you're now disconnected, --

21 MR. LANE: Right.

22 CMSR. CHATTOPADHYAY: If you run it,
23 it's going to cost you more than keeping it idle,
24 essentially?

1 MR. LANE: Yes. It's going to require
2 a cost to --

3 CMSR. CHATTOPADHYAY: Thank you. I
4 just wanted to make sure, yes. Thanks.

5 CMSR. SIMPSON: Okay. I promised
6 Attorney Amidon I would come back to her.

7 MS. AMIDON: Thank you. I mean, it's
8 an interesting question that you posed.

9 But, specifically, municipal utilities,
10 as I indicated, are disallowed by statute, they
11 don't have to purchase RECs. So, while it has to
12 be behind the retail meter, in other words, it
13 has to be a situation where it has the ability to
14 flow into the ocean of electrons, I don't believe
15 that any -- we have dealt with any situation
16 where a renewable energy facility has demanded or
17 had asserted the right to be connected to the
18 grid. I do not believe -- I don't understand
19 that to be part of the statute. And I have been
20 involved in a lot of dockets involving the
21 eligibility of renewable energy facilities for
22 their requirement for RECs, and that has never
23 been an issue that the Commission has been asked
24 to look at.

1 But, so, it would be, as a matter of
2 fact, I would say it's not under the statute, not
3 provided clearly under the statute as a right of
4 that renewable energy facility.

5 CMSR. SIMPSON: Thank you. Within
6 Ashland, are there any customers that have
7 small-scale rooftop solar?

8 MR. FISH: I would have to pull out
9 Google Maps and take a look. I can't answer that
10 today.

11 CMSR. SIMPSON: So, you're not aware of
12 any customer-generators within the municipal
13 utility's service territory?

14 MR. FISH: Under the net meter -- under
15 the net metering?

16 CMSR. SIMPSON: Not net metering, just
17 rooftop solar customer-generators?

18 MR. FISH: I don't know.

19 CMSR. SIMPSON: I guess I would wonder
20 whether there are any, and how they receive
21 service by Ashland? If there are terms through
22 which they are paid for excess output or whether
23 their bill has any offset?

24 Because it would seem to me that there

1 would be at least a customer. So, I'd be curious
2 to hear how the utility manages that type of
3 customer.

4 And I'll note that, for rate-regulated
5 utilities, as you both I'm sure know, the bright
6 lines are fairly low in New Hampshire, you know.
7 Small customer-generators up to 100 kilowatts,
8 with a megawatt bright line, and then some higher
9 for municipal installations.

10 So, we're on the order of magnitude
11 within net metering facilities for this
12 particular customer. So, it seems that it's
13 likely that you would have at least a
14 customer-generator within your service territory.
15 And I'd be interested in how the terms of service
16 accommodate that customer.

17 Do you have anything else, Commissioner
18 Chattopadhyay?

19 CMSR. CHATTOPADHYAY: No, I don't.
20 Thank you.

21 CMSR. SIMPSON: Okay. All right. Is
22 there anything else?

23 MR. PATCH: Commissioner, I don't know
24 if it would be helpful to impose some sort of

1 deadline for the responses to some of the
2 questions you've asked? I know we had at least
3 one question we were supposed to respond to, and
4 I think the Town had some others.

5 And, then, in addition to that, to the
6 extent that there was something provided on
7 behalf of the Town that we disputed or had an
8 issue with, --

9 CMSR. SIMPSON: Uh-huh.

10 MR. PATCH: -- you know, some period of
11 time after that by which we could, and similarly
12 with them, obviously, if we submitted something
13 that they wanted to respond to.

14 CMSR. SIMPSON: Okay. Why don't we do
15 this. We're going to take another ten-minute
16 break. And we will reconvene here, discuss the
17 deadlines, and future process here. We'll return
18 at 11:25. Off the record.

19 *(Recess taken at 11:15 a.m., and the*
20 *hearing resumed at 11:37 a.m.)*

21 CMSR. SIMPSON: Back on the record.

22 So, Commissioner Chattopadhyay and I
23 asked a few questions. So, I'm just going to
24 reiterate the requests that we made.

1 So, we made a request to Squam River
2 for their QF records demonstrating that they're a
3 qualifying facility via FERC records.

4 We made a request of the Department to
5 confirm whether there are any obligations that
6 exist for Ashland under the Renewable Portfolio
7 Standard. If they would respectfully provide
8 that information to us, we would appreciate it.

9 And, then, to the Town of Ashland, we
10 asked for the written interconnection policy;
11 whether there are any customer-generators that
12 exist in Ashland; whether there's a wheeling
13 agreement on file at FERC; and whether Ashland
14 serves customers outside of their municipal
15 borders, such as in the Town of New Hampton?

16 We'd like to request that these
17 responses be filed in ten business days. Are
18 there any objections to that?

19 MR. FISH: Could I actually be heard on
20 this issue briefly?

21 CMSR. SIMPSON: Sure.

22 MR. FISH: It's our position that any
23 schedule, including deadlines for discovery,
24 should be limited only to discovery that's

1 necessary for this Commission to resolve the
2 question of jurisdiction that's before it. It's
3 our position that discovery schedule should
4 include data requests needed to answer that
5 question of jurisdiction, and an order on the
6 matter of jurisdiction, and then we can
7 reconvene, if needed, to set a procedural
8 schedule thereafter.

9 It's our position that data requests,
10 and any, you know, proceeding in any manner that
11 gets into the merits of this case, before we
12 decide or determine whether or not the PUC even
13 has jurisdiction over the Town of Ashland,
14 meaning whether the Town of Ashland should be
15 here in the first place, would be clear
16 reversible error that we'd like to avoid.

17 CMSR. SIMPSON: So, are you objecting
18 to providing responses to the questions that
19 we've asked?

20 MR. FISH: We're not objecting to
21 providing responses. I guess our position is
22 that the responses that don't go to the merits of
23 the jurisdictional question must be held in
24 abeyance until the question of jurisdiction has

1 been resolved. Getting into the merits of the
2 case, before it's been determined whether or not
3 the PUC has jurisdiction over my client, is
4 unlawful.

5 CMSR. SIMPSON: The jurisdictional
6 question is what we're trying to resolve, and
7 that's the spirit of the requests that we've
8 asked.

9 Okay. Is there anything else that
10 folks would like to raise today?

11 MR. PATCH: I think we had asked for an
12 opportunity, particularly on the issue of whether
13 they're operating outside of their borders, but
14 maybe on the other ones, too, an opportunity to
15 respond to what they may file, and they may also
16 want that opportunity to respond to what we file.
17 So, I don't know if the Commission would be
18 willing to entertain that, and I think that could
19 be a shorter turnaround time than the ten days.

20 CMSR. SIMPSON: Would the Town like to
21 be heard on responses?

22 MR. FISH: At minimum, I guess we'd
23 reserve the ability to respond, if there's
24 anything we see. As I sit here today, I don't

1 know if there would be such a need. But --

2 CMSR. SIMPSON: Okay. I'm amenable to
3 that. Does the Department have a perspective on
4 that?

5 MS. AMIDON: No, that's fine. I really
6 think it's more for Squam River and the Town of
7 Ashland to address. Thank you.

8 CMSR. SIMPSON: Okay. Then, I would
9 propose -- I would change slightly, I said "ten
10 days", would the parties be amenable to providing
11 responses within a week, have the deadline for
12 the 14th?

13 MR. FISH: Yes. I would ask for the
14 full ten days, only because the Town of Ashland
15 is a small town, --

16 CMSR. SIMPSON: Okay.

17 MR. FISH: -- and I'm not sure, I know
18 that the Administrator had planned to be here
19 today, but was pulled away for budget reasons.

20 CMSR. SIMPSON: Okay.

21 MR. FISH: So, I'm just not sure about
22 the time they would have available, I would ask
23 for the whole ten days.

24 CMSR. SIMPSON: Would November 17th be

1 amenable to the parties to provide additional
2 responses?

3 MR. PATCH: Yes.

4 MR. FISH: Yes.

5 CMSR. SIMPSON: Okay. And, then, I
6 will afford an opportunity to reply. The
7 following week there's some holidays. So, why
8 don't we set November 30th as the reply date to
9 the initial set of requests.

10 MR. PATCH: Thank you.

11 MR. FISH: Thank you.

12 CMSR. SIMPSON: Okay. We'll take the
13 matters under advisement and issue an order.
14 We're adjourned. Thank you.

15 ***(Whereupon the hearing was adjourned***
16 ***at 11:43 a.m.)***