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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

June 27, 2008 - 10:12 a.m.
Concord, New Hampshire

RE: DE 08-077
PUBLIC SERVICE OF NEW HAMPSHIRE:
Petition for Approval of a Power
Purchase Agreement and Renewable
Energy Certificate Option Agreement
with Lempster Wind. (Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Jennifer Ducharme, Clerk

APPEARANCES: Reptg. Public Service of New Hampshire:
Gerald M. Eaton, Esq.

Reptg. Constellation NewEnergy and
Constellation Energy Commodities Group:
Thomas Bessette, Esq.

Reptg. Lempster Wind, L.L.C.:
Susan S. Geiger, Esq. (Orr & Reno)

Reptg. Residential Ratepayers:
Meredith Hatfield, Esq., Consumer Advocate
Kenneth E. Traum, Asst. Consumer Advocate
Office of Consumer Advocate

Reptg. PUC Staff:
Suzanne G. Amidon, Esq.

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

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

2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the prehearing conference in docket
4 DE 08-077. On May 29, 2008 Public Service Company of New
5 Hampshire filed a petition for approval of a Purchased
6 Power Agreement and Renewable Energy Certificate Option
7 Agreement between PSNH and Lempster Wind. Pursuant to the
8 terms of the agreement, PSNH will purchase 100 percent of
9 the energy capacity in New Hampshire RECs from Lempster
10 Wind, with Lempster Wind having the option to repurchase a
11 certain percentage of the RECs from PSNH at a price that
12 includes a premium above the price originally paid by
13 PSNH. Both agreements are multi-year agreements with
14 terms of up to 15 years, beginning with the in-service
15 date of the facility, which is currently anticipated on or
16 prior to December 31, 2008. Order of notice was issued on
17 June 5 setting the prehearing conference for today.

18 I'll note that we have a Notice of
19 Participation from the Consumer Advocate. The affidavit
20 of publication has been filed. And, we have petitions to
21 intervene from Constellation NewEnergy and Freedom Energy,
22 as well as a notice of a limited appearance on behalf of
23 Lempster Wind.

24 Can we take appearances please, before
{DE 08-077} [Prehearing conference] (06-27-08)

1 we address the petitions and hear a statement of the
2 positions.

3 MR. EATON: Good morning. My name is
4 Gerald M. Eaton. I'm representing Public Service Company
5 of New Hampshire.

6 CMSR. BELOW: Good morning.

7 CMSR. MORRISON: Good morning.

8 CHAIRMAN GETZ: Good morning.

9 MR. BESSETTE: Good morning,
10 Commissioners. My name is Tom Bessette. I represent
11 Constellation NewEnergy and Constellation Energy
12 Commodities Group.

13 CHAIRMAN GETZ: Good morning.

14 CMSR. MORRISON: Good morning.

15 CMSR. BELOW: Good morning.

16 MS. HATFIELD: Good morning,
17 Commissioners. Meredith Hatfield, on behalf of the Office
18 of Consumer Advocate. Along with me today is Ken Traum,
19 Assistant Consumer Advocate.

20 CHAIRMAN GETZ: Good morning.

21 CMSR. MORRISON: Good morning.

22 CMSR. BELOW: Good morning.

23 MS. GEIGER: Good morning, Mr. Chairman,
24 Commissioner Below, Commissioner Morrison. I'm Susan

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1 Geiger, from the law firm of Orr & Reno, and I represent
2 Lempster Wind, L.L.C.

3 CHAIRMAN GETZ: Good morning.

4 CMSR. MORRISON: Good morning.

5 CMSR. BELOW: Good morning.

6 MS. AMIDON: Good morning. I'm Suzanne
7 Amidon. And, I'm here on behalf of Commission Staff. To
8 my left is Steve Mullen, who is the Assistant Director of
9 the Electric Division, and to his immediate left is
10 Al-Azad Iqbal, who is a Utility Analyst in the Electric
11 Division.

12 CHAIRMAN GETZ: Good morning.

13 CMSR. MORRISON: Good morning.

14 CMSR. BELOW: Good morning.

15 (Chairman and Commissioners conferring.)

16 CHAIRMAN GETZ: Before we address the
17 procedural issues and the Petitions to Intervene, let's
18 get the statement of the positions of the parties on the
19 record. That may help us in addressing some of the
20 procedural disputes that appear to be coming forward. So,
21 Mr. Eaton.

22 MR. EATON: Thank you, Mr. Chairman. We
23 consider this to be a proceeding under RSA 362-F:9, part
24 of the Renewable Portfolio Standard. And, we presented

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1 the Commission with an agreement for purchased power from
2 Lempster Wind and Renewable Energy Certificate Option
3 Agreement with that party. And, the interventions have
4 come from two parties who also purchase Renewable Energy
5 Certificates and power, and we will be objecting to the
6 intervention of Constellation NewEnergy and Constellation
7 Commodity Services. And, we also were initially going to
8 object to the intervention of Freedom Energy, but Mr.
9 Rodier and I came to an agreement yesterday, which I'll
10 read into the record.

11 CHAIRMAN GETZ: Okay. Well, why don't
12 we regroup then. I thought maybe bifurcating the issues
13 might be helpful, but it sounds like we might not be able
14 to do that. So, why don't you continue with what you're
15 doing and give us your position on the Petitions to
16 Intervene and whatever agreement you may have reached.

17 MR. EATON: That's what I thought you
18 were looking for. I'm sorry.

19 CHAIRMAN GETZ: No, I thought there
20 might be a chance to deal with the case and what the
21 issues in the case were, and then deal with the
22 interventions separately. But never mind.

23 MR. EATON: All right. Mr. Rodier
24 agreed to limit the intervention of Freedom to the

1 following issues: The issues related to Renewable Energy
2 Certificates and the REC market. He agreed to ask no more
3 than 12 data requests. That Freedom Energy would submit
4 no direct testimony. He'd limit his cross-examination of
5 PSNH witness to no more than 45 minutes. And, Freedom
6 Energy will not seek access to information for which PSNH
7 seeks confidential treatment, unless such information
8 becomes public.

9 So, between PSNH and Freedom Energy,
10 that position is acceptable to us, and we will not object
11 to the intervention of Freedom Energy. Because they have
12 agreed to limit their intervention, and under RSA
13 541-A:32, I(b), the -- I'm sorry, from 541-A:32, III, the
14 Commission has the authority to limit the intervention of
15 a party.

16 With respect to Constellation, we
17 believe that Constellation has not presented facts which
18 show they have a substantial interest in the rights,
19 duties, and privileges, immunities would be affected by
20 this proceeding. They are a competitor for Renewable
21 Energy Certificates. And, they have demonstrated by their
22 objection to PSNH's Motion for Protective Treatment that
23 they want access to the confidential pricing terms and
24 conditions of both the Power Purchase Agreement and the

1 REC Option Purchase Agreement. Motions for Protective
2 Order are routinely granted with respect to confidential
3 pricing terms and supplier contracts, and that's what our
4 motion was designed to protect.

5 The significant issues that
6 Constellation put in its motion for -- or, it's Petition
7 for Intervention were not laid out, and we do not know
8 what they are. They speak about, at Paragraph 6, "the
9 costs and risks to be borne by PSNH customers". They
10 don't represent PSNH customers. The Consumer Advocate
11 represents residential customers, and the Staff acts in
12 the role of an arbiter between the interests of consumers
13 and utility stockholders. They're required to purchase
14 energy certificates on their own, because they supply
15 retail load in New Hampshire. They compete directly with
16 PSNH for the procurement of RECs. And, we believe they
17 have no substantial interest in this proceeding.

18 If you allow intervention, we ask that
19 you limit the intervention by granting the Motion for
20 Protective Order, so that our competitors for the purchase
21 of RECs don't have -- don't have the confidential terms
22 that we have in those documents. The reasons for that and
23 why it's in the public interest that you do that is the
24 chilling effect it may have on other entities willing to

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1 sell Renewable Energy Certificates or purchased power to
2 Public Service Company, if they know that their terms are
3 going to be made public simply because PSNH is a regulated
4 utility and must come before this Commission.

5 There's also an interest, which Attorney
6 Geiger will speak to directly, as to what the supplier
7 wants to protect in these, in these agreements, and not
8 have their information made public. They may want to
9 continue to develop other projects in this area and do not
10 want this information made public. It will result in
11 probably higher bills for Public Service Company if we can
12 even negotiate with other suppliers of power and RECs in
13 the future.

14 And, finally, if the Commission does not
15 limit the intervention of Constellation, we would like to
16 be put on a level playing field with Constellation. They
17 profess to be players in the competitive market and are
18 required to purchase RECs. We would want to have the
19 rights of discovery that are in the Commission's rules at
20 New Hampshire Code of Administrative Rules, Section
21 203.09. In that it's clear that any person covered by
22 that rule has the rights to serve upon any party data
23 requests, which may consist of written interrogatories or
24 requests for production of documents. In past cases,

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1 Constellation has made it clear that they will not answer
2 data requests under some decision the Commission made
3 concerning whether they supply testimony. But a case can
4 be made through cross-examination, through discovery, by
5 entering those discovery responses into the record and by
6 making a final statement, you could certainly make a case,
7 as an intervenor, I had experience doing that in the many
8 years that I was with Community Action Program, and we
9 don't believe that an intervenor has any right to refuse
10 to participate in discovery, as long as they're
11 participating in discovery and participating as a full
12 party without any limitation.

13 So, that's a long-winded way of both
14 arguing all the issues, of both the intervention as well
15 as supporting our motion for protective order. We would
16 not object to the intervention if it's limited, so that
17 Constellation does not have access to confidential
18 information, and the Motion for Protective Order was
19 granted.

20 CHAIRMAN GETZ: Let me make sure I
21 understand any distinctions that there are between Freedom
22 and Constellation, other than the agreement. I think you
23 indicated at the beginning both are competitors for RECs.
24 In the absence of the agreement with Freedom, would the

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1 objection to their participation be the same as it is
2 vis-a-vis Constellation?

3 MR. EATON: Yes, it would. In their
4 petition, they allege they're a retail broker of Renewable
5 Energy Certificates, and, therefore, we would object. But
6 the most important part of our agreement is they agreed
7 not to seek access to the confidential information.

8 CHAIRMAN GETZ: Well, let me do this
9 first. I'll turn to Mr. Bessette. I think, in some
10 respects, it makes -- I should turn to Ms. Geiger, as she
11 has the same interests as you. But let me just ask the
12 simple question, Mr. Bessette. Are you inclined to accept
13 the same conditions that Freedom has agreed to?

14 MR. BESSETTE: No, we are not.

15 CHAIRMAN GETZ: Okay. Well, then, let's
16 hear from Ms. Geiger on these issues, and then we'll go to
17 Mr. Bessette, and to the Consumer Advocate and Staff.

18 MS. GEIGER: Thank you, Mr. Chairman.
19 Lempster Wind, LLC is not seeking intervenor status in
20 this docket. I appear today for the limited purpose of
21 arguing in support of PSNH's Motion for a Protective Order
22 and in opposition to the objection that was filed by
23 Constellation. As the Commission is aware, both the PPA,
24 the Power Purchase Agreement, and the Renewable Energy

1 Credit or REC Option Agreement contain confidentiality
2 provisions. Section 16 of the PPA sets forth
3 confidentiality provisions and Section 11 of the REC
4 Option Agreement has similar provisions. Thus, by the
5 terms of those agreements, both PSNH and Lempster Wind
6 negotiated for the confidentiality of these agreements.
7 However, as you will note, within those provisions, there
8 are specific exceptions or limitations on the disclosure
9 of the information, for example, to regulators, such as in
10 the instant case.

11 Both of these agreements are the product
12 of negotiations relating to the purchase of power and
13 Renewable Energy Credits from New Hampshire's first
14 commercial wind energy facility. These are the first of
15 their kind in New Hampshire, but hopefully not the last.
16 It's clear that these contracts constitute confidential,
17 commercial, and financial information within the meaning
18 of RSA 91-A:5, IV, which lists all of the different types
19 of information that are exempt from the disclosure
20 provisions of the Right to Know Law.

21 The question for the Commission then
22 becomes whether or not the public's interest in seeing
23 that information disclosed outweigh Lempster Wind's and
24 PSNH's interest in keeping that confidential information

1 confidential.

2 We believe that ample precedent exists
3 for issuing the protective order that Mr. Eaton seeks, as
4 well as preventing Constellation, and to the extent that
5 Freedom Energy is in a similar position, from obtaining
6 that information. For example, the Commission has held
7 that information regarding bidders' responses to a
8 distribution company's RFP for Default Service is clearly
9 commercially sensitive in a competitive environment and
10 therefore should be protected. And, this was stated by
11 the Commission in its order on Granite State Electric's
12 Default Service docket, DE 04-189, and the Order Number is
13 24,412.

14 In addition, the Commission has found
15 that disclosure of terms relating to PSNH's REC rates or
16 REC sales "would compromise both PSNH and the contractors'
17 ability to negotiate the purchase price of RECs in the
18 future." This statement was made by the Commission in
19 Order Number 24,579, issued January 20th, 2006, in DE
20 05-164, which was PSNH's petition to establish energy
21 rates.

22 The Commission went onto say in that
23 order that it found "this information is commercially
24 sensitive", and that "the public's interest in review of

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1 this commercially sensitive information is not outweighed
2 by PSNH's interest in maintaining its confidentiality". In
3 noting that, the Commission found that "the parties had
4 taken measures to avoid disclosure of the contract
5 information to the public." Clearly, that situation
6 exists here, where both of these contracts contain
7 confidentiality provisions.

8 Given the competitive nature of the
9 regional generation market and the nascent RPS market or
10 REC market, both PSNH and Lempster Wind would be
11 disadvantaged by disclosure of the redacted confidential
12 financial information in these agreements. Lempster Wind
13 and its parent company, Iberdrola Renewables USA, are
14 interested in negotiating similar arrangements in the
15 region and throughout the United States. Should the
16 information that has been redacted from the PPA and the
17 REC Option Agreement become publicly available, especially
18 available to competitors or competitive suppliers, and
19 even other distribution companies, with whom Lempster or
20 Iberdrola seeks to do business in the future, Lempster and
21 Iberdrola would be significantly impaired and would be
22 disadvantaged.

23 I think Mr. Eaton said it very well. We
24 have not talked about this, but I agree with him. Such a

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1 disclosure may very well have a chilling effect with
2 respect to other wind developers' willingness to do
3 business with New Hampshire utilities, if they know that
4 their competitively sensitive commercial information,
5 which they worked very hard to negotiate and protect by
6 the terms of their agreements, would be released to the
7 public and to competitors.

8 Lastly, we do not believe that
9 Constellation needs to have access to this information to
10 protect its interests. Constellation has said in its
11 objection to PSNH's Motion for Protective Order that the
12 overriding issue in this proceeding is likely to be the
13 cost-effectiveness of the PPA and the REC Agreement,
14 including the potential for the creation of new
15 above-market generation-related costs that could be borne
16 by PSNH's customers.

17 As Mr. Eaton pointed out, Constellation
18 does not represent the interests of PSNH's customers.
19 This argument has to fail, in light of the fact that in
20 other dockets the Commission has indicated that, when the
21 Office of Consumer Advocate and perhaps Staff, who are not
22 participants in a competitive market, are involved in a
23 docket, that they can play that role. That other
24 competitors do not need to have access to competitively

1 sensitive information in order to participate in a docket
2 in which they have some sort of interest, but -- in which
3 their rights, duties, and privileges under 541-A are not
4 affected.

5 The Commission has refused in the past
6 to allow a competitor to have access to competitively
7 sensitive information, when other parties, like the OCA,
8 are in the docket. The Commission need look no further
9 than its order in the TDS case, DT 07-027, for this
10 precedent, in Order 24,802, which was issued on
11 November 2nd, 2007, the Commission did not allow a
12 competitive telecommunications provider to have access
13 that had been developed by other telecommunications
14 providers for purposes of participating in that docket.

15 So, in closing, Lempster Wind, LLC,
16 would respectfully ask that the Commission grant the
17 Motion for Protective Order to prevent public disclosure
18 of the redacted information, and to allow only Staff and
19 the OCA to review the information, subject to a protective
20 order. Again, our interest extends beyond just public
21 disclosure to folks that come in and ask under the Right
22 to Know Law for access to this information. We're
23 specifically interested in protecting it from disclosure
24 to competitors, the sensitive commercial information that

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1 PSNH is seeking to protect. Thank you.

2 CHAIRMAN GETZ: Thank you. Mr.
3 Bessette.

4 MR. BESSETTE: Sure. Good morning, Mr.
5 Chairman, Commissioners. Do you want me to -- we've heard
6 something of a preliminary statement by Mr. Eaton, and
7 then we've heard the motions for intervention argued and
8 protective order. Do you want me to jump right into the
9 interventions and the protective order, and then wait for
10 the --

11 CHAIRMAN GETZ: Yes, let's do that.
12 Well, if, in the context of why you're going to argue that
13 you should be allowed to intervene, you need to address
14 the merits of this case to bolster that argument, then go
15 ahead. Let me just ask you to address as part of this,
16 and I'm looking at the Petition to Intervene, it speaks to
17 "Constellation having an interest in the development of an
18 efficient competitive electric market in New Hampshire",
19 which, if you can address how that coincides with the
20 requirement of the 541-A:32, that the Petitioner
21 demonstrate a substantial interest that may be affected by
22 the proceeding, I'd like to hear you address those issues.

23 MR. BESSETTE: Okay. I'm happy to do
24 that. I think the way this is going, I think the best

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1 thing for me to do would be to do what I consider to be my
2 preliminary statement, and then to move into the actual
3 intervention motion.

4 CHAIRMAN GETZ: That's fine.

5 MR. BESSETTE: And, so, it may take a
6 little while doing it that way, but, clearly, the
7 preliminary statement lays the groundwork for the
8 arguments of the other two motions.

9 First of all, let me just add to my
10 appearance. We are represented by outside counsel, Steve
11 Camerino of the McLane law firm. He's out of town this
12 week, but he will be representing us as outside legal
13 counsel in this proceeding. We did seek a -- just for the
14 record, we did seek a continuance of this hearing so that
15 he could represent us, and that was not granted.

16 CHAIRMAN GETZ: Well, that's the first
17 I'm hearing of it. You submitted a Motion for
18 Continuance?

19 MR. BESSETTE: No. My understanding was
20 that Mr. Camerino contacted Staff attorney and asked for a
21 continuance, so that he could be here.

22 CHAIRMAN GETZ: Well, that's not quite
23 the way it works. But go ahead with your preliminary
24 statement.

1 MR. BESSETTE: Well, and that's probably
2 reflective of why maybe I shouldn't be sitting here
3 arguing this, but I'm still happy to do it. A little bit
4 about Constellation NewEnergy and CCG, because it
5 obviously impacts on our Motion for Intervention.
6 NewEnergy is the largest retail supplier of electricity to
7 C&I customers in the country, and we serve scores of
8 customers in the State of New Hampshire. CCG is a large
9 wholesale supplier of electricity to utilities and
10 municipalities across the country. And, we have often
11 served, and do serve today, the Default Service load of
12 both Unitil, pieces of it, and National Grid. So, we're
13 significant players in the State of New Hampshire.

14 Our preliminary statement is basically
15 that Constellation is concerned that, by entering into a
16 15-year agreement to purchase capacity, energy, and
17 renewable certificates from the Lempster Project, PSNH is
18 creating a significant risk that its customers will bear
19 above-market costs in the future. We believe that, in
20 adopting RSA 374-F that created the structure for a
21 competitive electricity market in New Hampshire, as you
22 know, the Legislature intended to protect customers from
23 such risks and place them on the competitive market, not
24 on the captive ratepayers of utilities. Therefore, we

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1 believe that, while the restructuring legislation and the
2 purchased power piece of the electric portfolio standard,
3 may grant PSNH the authority to enter into long-term
4 contracts for renewable energy, it does not allow them to
5 recover a new round of stranded costs in the future.

6 Now, we believe it's unclear from the
7 filing who will bear the risk of above-market generation
8 and REC costs, and whether any above-market costs will be
9 recovered in the Default Service charge or in the SCRC.
10 How that question is answered will have a direct impact on
11 retail suppliers, including us, Constellation NewEnergy,
12 as we compete against the Default Service charge.

13 We also intend to explore why PSNH did
14 not employ an RFP process to obtain RECs and energy, and
15 whether a bilateral transaction with a developer is
16 consistent with RSA 362-F:9, the Purchased Power Agreement
17 section of the ERPS that I spoke of earlier, and, in
18 particular, whether it "promotes market-driven competitive
19 innovations and solutions", and further whether it's
20 consistent with 362-F:9, III, which states that "The
21 commission may authorize one or more distribution
22 companies to coordinate or delegate procurement processes
23 under this section." As a supplier and purchaser of power
24 and RECs, Constellation Energy Commodities Group is

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1 directly affected by the answers to these questions.

2 We'll also explore the terms and
3 conditions of the agreement with the NHEC, New Hampshire
4 Electricity Cooperative, where PSNH agrees to reconstruct
5 and maintain joint facilities at its expense, but that
6 NHEC will own them. Is Lempster reimbursing PSNH for
7 these particular costs? Is PSNH paying costs for
8 interconnection that other generators would normally have
9 to pay themselves? Once again, CCG, as a purchaser of
10 renewable power all across New England and in New
11 Hampshire, has an interest in these answers, as it and
12 other suppliers could be placed at a competitive
13 disadvantage to the utility. We don't believe that was
14 the intent of the electric restructuring act.

15 We'll further explore why PSNH agreed to
16 allow Lempster to repurchase a portion of the RECs, if
17 PSNH's goal in entering into an arrangement with Lempster
18 was to obtain the RECs necessary to satisfy the
19 requirements of the RPS.

20 So, we believe that, in order to
21 determine whether PSNH's contract with Lempster is in the
22 public interest, which is the Commission's duty, the
23 Commission will need to examine, among other things,
24 PSNH's projections of its energy service load over the 15

1 year term of the contracts, their projections of the
2 market costs of RECs over that same time period, and also
3 capacity and energy, and how those anticipated contract
4 prices compete with those projections. Through discovery,
5 we will explore the Company's basis for believing why the
6 contract with Lempster is more cost-effective than other
7 available options in the market.

8 Now, we've been a constructive
9 participant in a number of dockets before this Commission
10 involving PSNH's provision of energy service, and we would
11 hope to be the same constructive participant in this
12 docket, working with Staff, the OCA, and with the Company.

13 Now, moving specifically to the Motion
14 for Intervention, which is obviously critical here. We do
15 seek full intervenor status in this providing. Once
16 again, our status as a player in New Hampshire comes into
17 play in a motion for intervention. We are significant
18 players. As I stated in my opening, retail suppliers, we
19 have scores of contracts with customers here. And, we
20 supply a default service load to NGrid and Unitil, and
21 have been doing that, doing this now for many, many years.
22 So, we are significant players and should not really be
23 shunted aside.

24 We do have a strong interest in
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1 developing a fully functioning and efficient competitive
2 electricity marketplace, as envisioned by RSA 374-F. We
3 believe that the restructuring bargain that was struck in
4 New Hampshire, as was struck in many states in New England
5 and across the country, was that utilities would be
6 allowed their stranded cost recovery, but they would have
7 to sell their generation and not be allowed to incur
8 future stranded costs. Now, two utilities in New
9 Hampshire followed through on this, but, due to later
10 legislation, PSNH did not sell their generation, as you
11 well know. Nonetheless, Constellation believes that the
12 restructuring act does not allow the incurrence of future
13 stranded costs, something that the Lempster contract could
14 clearly result in.

15 So, we're concerned that the 15 year
16 contract to purchase capacity, energy and RECs creates a
17 significant risk to PSNH customers. We intend to argue to
18 the Commission that the act may allow entrance into
19 long-term contracts, but it does not allow the recovery of
20 any future above-market generation or REC costs. And, as
21 an early player in restructuring and a wholesale and
22 retail competitor of PSNH, Constellation has a significant
23 interest in the outcome of the proceeding.

24 Now, specifically, in my opening
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1 statement, I gave three examples, and I'm sure there are
2 many others, of our specific issues to you on the retail
3 and on the wholesale side. The first was CNE competes
4 against PSNH's Default Service rates. Therefore, whether
5 or not any over or under recovery of above-market
6 generation or REC costs is included in the Energy Service
7 rate or in the SCRC, or is not allowed at all, is critical
8 to the retail side of the business. It will change the
9 Default Service price against which we compete.

10 Second, the price paid by PSNH for the
11 output of the Lempster facility is critical to the
12 wholesale business. Why, I asked, didn't PSNH employ an
13 RFP to assure the lowest cost? As a wholesale purchaser
14 and seller of power and RECs, CCG is a competitor to PSNH
15 for the Lempster output. Is PSNH paying more for the
16 energy and RECs than the market will bear, thereby
17 freezing out other purchasers, knowing that their costs
18 will be recovered from ratepayers? If so, they're putting
19 wholesale suppliers and purchasers at a competitive
20 disadvantage by employing the captive utility rate base.

21 Third, is PSNH paying costs for the
22 interconnection of Lempster to the electricity grid that
23 other generators would have to pay in the normal course
24 and are they getting subsidized by the ratepayers to do

1 so? If so, they're putting other developers at a
2 disadvantage, as well as other wholesale suppliers seeking
3 to purchase that output.

4 Now, we don't pretend to know the
5 answers to these questions, and that's why we want to be
6 in this case. We certainly want to argue that we don't
7 believe future stranded costs is allowed, and we'll work
8 very hard to get the Commission to agree with us on that.
9 But, also, we have all of the other above interests in the
10 proceeding. And, without being an active participant in
11 the proceeding, a full participant, we won't be able to
12 determine these things.

13 Now, considering all of the above, we
14 believe that -- we strongly believe that we've met the
15 test of RSA 541-A:32 that deals with intervention in
16 administrative proceedings. All we need to show under
17 that statute is that Constellation's "rights, duties,
18 privileges, immunities or other substantial interests may
19 be affected by the proceeding." The word "may be
20 affected" is there for a reason. This is a fairly low
21 threshold. Further, we believe that there's no other
22 party certainly here, and Freedom Energy wouldn't be able
23 to do this either, presently in the proceeding that can
24 adequately represent or protect our interests. So, for

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1 all the foregoing, we would respectfully ask for full
2 intervention status in this proceeding.

3 Shall I go to the protective order?

4 CHAIRMAN GETZ: Please.

5 MR. BESSETTE: Okay. Regarding the
6 protective order, we do oppose the motion. And, our
7 rationale is as follows: It seems to me the central
8 purpose of this proceeding is to determine whether the
9 costs for the facility, the Lempster facility, are in the
10 public interest, and whether PSNH can therefore pass the
11 costs of the agreements onto its customers. That's what
12 this is all about. That's what the petition asks for.

13 Therefore, the cost-effectiveness of the
14 PPA and the REC Agreement, including the potential for a
15 new round of above-market generation-related costs,
16 becomes the central issue. It seems to me one can only
17 assess the cost-effectiveness of the agreements relative
18 to other options available in the market. Therefore, any
19 meaningful analysis of the critical issues in this
20 proceeding is simply not possible without access to the
21 pricing terms of the PPA and the REC Agreement.

22 Now, Constellation is one of the few
23 market players that has demonstrated through the years a
24 willingness to commit the time, effort, and resources to

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1 participate in proceedings at the New Hampshire PUC, and,
2 in particular, PSNH proceedings.

3 CHAIRMAN GETZ: Are you taking the
4 position, let me make sure I understand, the difference
5 between, if you were granted intervention, that you should
6 be allowed to see the document or are you objecting in
7 total to protection of any of this information from anyone
8 in the public domain?

9 MR. BESSETTE: In one minute, sir, that
10 answer will become clear, because I'm going to offer that
11 up. But let me just run through it.

12 CHAIRMAN GETZ: Okay.

13 MR. BESSETTE: But that's --

14 CHAIRMAN GETZ: I can't wait.

15 MR. BESSETTE: I'm almost there, I'm
16 sorry. So, without access to the information, it's
17 impossible for us to be full participants. And, you know,
18 the balancing test, Ms. Geiger pointed it out. So, having
19 said all that, if the Department were to determine that
20 the information is proprietary and it should not be
21 disclosed to the public, we would suggest that the
22 Department should allow disclosure of the redacted
23 information to all parties, simply pursuant to
24 non-disclosure agreements. It seems to me, in this manner

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1 all parties can weigh in on the cost-effectiveness of the
2 agreements, which is no doubt the central issue in the
3 case, without public disclosure of the actual prices to
4 the public at large. Seems to me this is the way it's
5 typically handled in other jurisdictions that I'm familiar
6 with. Gives us the information that we need to properly
7 present our case. And, it keeps that information from the
8 public at large, thereby obviating the legal concerns of
9 Mr. Eaton and Ms. Geiger that they expressed earlier about
10 chilling affects of their information being made public.
11 And, also further, Ms. Geiger points out that, even though
12 the agreements do say that the information shouldn't be
13 made public, clearly there's typically information clauses
14 in contracts of that type that allow this information to
15 be disclosed pursuant to state law in a regulatory
16 proceeding.

17 So, we are amenable, to directly answer
18 your question, Mr. Chairman, to accept the information via
19 a non-disclosure agreement, without having the public at
20 large have access to it.

21 CHAIRMAN GETZ: If you were to get that
22 information, does that give your company a competitive
23 advantage by being privy to information that other
24 competitors aren't privy to?

1 MR. BESSETTE: You know, I don't see it
2 that way. We have originators out in the field who are
3 negotiating contracts with prospective renewable
4 developers and renewable developments that are about to
5 come on line all the time. They clearly know what, you
6 know, what we're willing to pay for RECs and energy. So,
7 I don't see why having the information about the Lempster
8 project gives us any sort of competitive advantage of the
9 marketplace. We have all sorts of knowledge in-house on
10 that kind of thing already.

11 CMSR. BELOW: Yes. In your petition or
12 objection to motion for protective order, in the second
13 item you conclude by arguing that one of the critical
14 issues is the need to compare the "anticipated costs of
15 the agreements to other options available in the market."
16 If you were granted access to this confidential
17 information, would you, in turn, be willing to respond to
18 data requests and questions about other options available
19 in the market, presumably what prices you're paying for
20 RECs or power under purchased power agreements?

21 MR. BESSETTE: It seems to me that this
22 is PSNH's case, and it's their agreement that's at issue
23 here. What's not at issue is the kind of information that
24 you'd be asking for in discovery. It sounds to me almost

1 as though it's something that PSNH is putting out there as
2 something of a threat that, if we want full intervenor
3 status, then we're going to have to give up information
4 that's really not, it seems to me, perhaps pertinent to
5 what's going on here.

6 That's not necessarily a "yes" or "no"
7 question, but my initial inclination is that would be
8 "no". I'd want to speak with outside counsel on what
9 position we have taken in the past on that, because Mr.
10 Eaton indicated that we have objected to that in the past.

11 CMSR. BELOW: In the fourth point, you
12 conclude by saying "without access to the information that
13 PSNH seeks to maintain in confidence, such participation
14 is not possible." Are you saying that "any meaningful
15 participation is not possible without access to the
16 confidential information" or could you elaborate on
17 exactly what you're saying?

18 MR. BESSETTE: Yes, I think that's what
19 we're saying. And, I actually used that phrase in the
20 oral testimony I just gave. I mean, any meaningful
21 analysis of the critical issues is simply not possible
22 without access to the pricing terms in the PP and the REC
23 Agreement.

24 CMSR. BELOW: So, would there be any

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1 point to your participation if you weren't granted access
2 to that information?

3 MR. BESSETTE: Well, I'm almost hesitant
4 to answer the question, because it gives you something to
5 give us half a loaf on. But I will answer the question.
6 We would still -- I mean, we think this is critical to
7 have. But I don't think that would prevent us from making
8 the legal argument that the existing statutes in the State
9 of New Hampshire probably allow utilities to enter into
10 long-term contracts, but we would argue do not allow them
11 to impose any future stranded costs on customers. And, if
12 that was a winning legal argument, then I think, you know,
13 the utility will have to reconsider whether or not to
14 enter into that contract. If they were willing to take
15 the burden of that risk onto themselves, as opposed to
16 placing them to ratepayers, then we don't have that sort
17 of competitive market imbalance that I was speaking of
18 earlier.

19 CMSR. BELOW: Okay. Thank you.

20 CHAIRMAN GETZ: Ms. Hatfield.

21 MS. HATFIELD: Thank you, Mr. Chairman.
22 Mr. Bessette raises many important questions and issues,
23 and actually many of which are things that the OCA is
24 preparing for discovery in this case. We think that the

1 participation of Constellation in this case is important,
2 especially if you look at RSA 362-F:9, II, which requires,
3 in determining the public interest, that the Commission
4 look at "the efficient and cost-effective realization of
5 the purposes and goals of the chapter", which you'll
6 remember the overall chapter is intended to promote the
7 generation of renewable energy in New Hampshire. And,
8 also, Paragraph II requires the Commission to look at "the
9 extent to which such procurement is conducted in a manner
10 that is administratively efficient and promotes
11 market-driven competitive innovations and solutions."
12 And, also, I think importantly, it requires the Commission
13 to consider "the restructuring policy principles in RSA
14 374-F:3."

15 So, we do support the participation of
16 Constellation in this docket. However, we also do agree
17 with PSNH, and with Attorney Geiger, that there is ample
18 precedent for the Commission protecting certain important
19 information, such as the examples Ms. Geiger gave with
20 respect to bidders' responses for Energy Service for the
21 distribution companies. And, we do think that this -- the
22 information that PSNH seeks to protect in the Purchased
23 Power Agreement and in the Renewable Energy Certificate
24 Option Agreement does fall within that protected area.

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1 And, we also agree that divulging that information to a
2 competitor could have a negative impact on PSNH customers
3 in the future. And, specifically, I think one example is
4 that, if, in the course of this proceeding, the Commission
5 decides not to approve the proposed contracts, then the
6 information would have been disclosed to a party who might
7 potentially want to make those purchases, and PSNH
8 customers would then be going back to the market and
9 trying to meet the RPS requirements for next year.

10 So, we think that, again, that
11 Constellation, their Petition for Intervention should be
12 granted, but that also PSNH's Motion for Protective Order
13 also should be granted. And, we do think that many of the
14 questions that Constellation raised are things that we
15 don't see as being covered by the Motion for Protective
16 Order that's pending before you right now. And, I would
17 imagine that there would be discovery disputes as
18 Constellation seeks to gain additional information, but I
19 think that we could resolve those types of discovery
20 disputes as we have in the past. And, perhaps there is
21 some confidential information in this docket that
22 Constellation actually could have access to that would
23 help them more fully participate.

24 Thank you for the opportunity to discuss

1 those issues. And, generally, in terms of the proposal,
2 the OCA does not have a position at this time, but we will
3 be working with the Staff and the parties through the
4 discovery process to review all of the items that are
5 listed in the statute that the Commission has to consider
6 in looking at these contracts. Thank you.

7 CHAIRMAN GETZ: Let me see if I
8 understand your position. In some respects, it seems like
9 you're saying that Constellation's expertise would be
10 helpful in the Commission's review of the topics that are
11 part of what we're required to consider under 362-F:9, II.
12 So, basically, they would be a useful presence here,
13 because of their expertise?

14 MS. HATFIELD: I think that that is
15 correct, but I think I would add that, you know, different
16 speakers this morning have talked about the roles of the
17 different parties here and who they represent. And, while
18 the OCA, you know, certainly understands that RSA 374-F is
19 in effect in this state, it's not our overarching goal to
20 try to bring that to the Commission's attention and to
21 argue for policies and for Commission decisions that
22 support competition and equal access. And, I think
23 Constellation is uniquely positioned to provide that type
24 of advocacy before the Commission, where there really

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1 isn't another party that is specifically charged with that
2 particular duty.

3 CHAIRMAN GETZ: And, then, with respect
4 to you support the Motion for Protective Treatment, but
5 does that mean you were in favor of Mr. Eaton's
6 alternative treatment that -- that basically Constellation
7 be treated like Freedom, that they could be a party, but
8 they wouldn't have access to the confidential materials?
9 Or, that we would have to somehow have to go through each
10 piece of confidential data on a case-by-case basis? I
11 wasn't quite clear what you --

12 MS. HATFIELD: Well, my understanding is
13 that I think what Freedom has agreed to is -- we don't
14 have a position on that, you know, it's between two
15 parties, and if they came to that agreement, we don't
16 object to it. But, with respect to the motion, I believe
17 the motion was just on the Purchased Power Agreement and
18 the REC Option Agreement, and we support those documents,
19 that confidential aspect of those documents being
20 protected.

21 What I was referring to was that,
22 through the discovery process, Constellation raised other
23 issues, such as "why didn't PSNH do an RFP to try to seek
24 other bidders for these contracts?" We think that they

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1 could ask other questions like that, and which PSNH may,
2 in the process of responding, may say "this includes
3 confidential information", but I think they would -- that
4 would not be covered under this motion. And that could
5 be, if there was a confidentiality issue, that could be
6 addressed through the discovery process. So that, in
7 fact, I don't think there needs to be a blanket decision
8 that Constellation can't have access to any confidential
9 information in this docket at this time.

10 CHAIRMAN GETZ: Okay. Ms. Amidon.

11 MS. AMIDON: Thank you. First of all,
12 Staff will address our position with respect to the
13 filing. We have already discussed and proposed to begin
14 discovery in the technical session that follows this
15 prehearing conference. And, some of the issues that Mr.
16 Bessette addressed and additional issues have been
17 identified by Staff, including the issue about whether or
18 not PSNH customers will be carrying any additional
19 stranded costs, you know, the terms of the contract, and
20 the interconnection agreement, which is a piece of this as
21 well with the New Hampshire Electric Co-op. So, we expect
22 that the discovery will be thorough. And, we intend to
23 use the statutory guidelines in determining what
24 recommendation we finally reach.

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1 Insofar as the Motions to Intervene
2 filed by Freedom and Constellation, we take no position.
3 However, with respect to the Motion for Confidential
4 Treatment, without repeating what has been said here
5 principally by Attorney Geiger, we would say that we
6 support PSNH's Motion for Confidential Treatment, and
7 believe it's consistent with what the Commission has found
8 in other cases with respect to releasing confidential
9 information to competitors and generally being able to
10 preserve the negotiating positions of parties in future
11 contracts. That concludes our statement.

12 CHAIRMAN GETZ: Mr. Eaton, an
13 opportunity to respond.

14 MR. EATON: Well, what I can offer is
15 something that was in a similar case in Massachusetts.
16 And, it was Petition of Norstar Electric, it was DPU 07 --
17 NSTAR, I'm sorry, NSTAR Electric, in DPU 07-64, and a
18 decision was on January 16th, 2008, a similar type of
19 situation of intervention. And, in that case, the Mass.
20 DPU set up some rather draconian issues of disclosure to
21 only outside counsel, and we don't support that. What we
22 support is what was in the dissent by Commissioner
23 Keating. And, in that dissent, he said "why couldn't the
24 intervenors use a range of pricing data, as opposed to

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1 specific pricing data, to conduct a hypothetical analysis
2 that could serve to advise and inform the Department, if
3 price contracts within those ranges would not be in the
4 public interest?"

5 Mr. Bessette talked about their
6 expertise and their knowledge of the market. If they're
7 going to be helpful to the Commission, they could present
8 that, and then you could compare our contract with what
9 they present, without having -- without having them access
10 to the specific contract. That might serve some sort of
11 useful role, as to contracts within these parameters would
12 not be in the public interest, because they're above
13 market and creating stranded costs.

14 We believe that Constellation wants this
15 information for its own competitive purposes. It's on a
16 fishing mission. It's looking for whatever cost
17 information it can get as to the market. And, I can just
18 imagine what our next Energy Service case will be, when
19 many coal suppliers are there, many oil suppliers are
20 there, natural gas marketers, all wanting to know what the
21 price of our fuels are. And, I don't see any difference
22 between that and in this case. And, therefore, the
23 confidential information, this, and whatever else comes
24 up, should not be disclosed to another participant in the

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1 very same market. And, I don't -- I don't want our
2 arguments to mean that there's a blanket prohibition.
3 We're only talking about we redacted out of our
4 agreements. And, whatever comes up in the future may not
5 be -- may be confidential, but may also be shared with the
6 intervenors, if it doesn't raise the same concerns that
7 this particular data does.

8 CHAIRMAN GETZ: Okay. Do I take it, in
9 terms of what would normally go on after this prehearing
10 conference, in a tech session, that it would be useful for
11 us to make a decision today on this matter?

12 MS. AMIDON: We would, Staff would think
13 it would make things easier, because we're looking to
14 develop a procedural schedule. And, we would like to
15 begin to conduct discovery, without worrying about whether
16 or not we have to involve all the parties or not. In
17 other words, it's always complicated when we have an
18 intervenor. So, your decision today would be helpful to
19 the Staff.

20 CHAIRMAN GETZ: Okay. Then, I think
21 what we'll do is take a recess and consider the Petitions
22 to Intervene and the Motion for Confidential Treatment.
23 And, I will not describe it in terms of briefness or time,
24 but just that it's a recess.

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1 (Whereupon a recess was taken at 11:05
2 a.m. and the prehearing conference
3 reconvened at 11:25 a.m.)

4 CHAIRMAN GETZ: Okay. We're back on the
5 record in docket DE 08-077 and we'll be addressing the
6 Petitions to Intervene and the Motion for Confidential
7 Treatment. First, we'll grant the Motion for Limited
8 Appearance on behalf of Lempster Wind. We will grant the
9 Petition to Intervene by Freedom Energy, subject to the
10 conditions agreed to between Freedom and Public Service
11 Company of New Hampshire. We will grant the Petition to
12 Intervene of Constellation, subject to the condition that
13 it will not be permitted access to the confidential
14 information that was redacted as part of the Company's
15 filing. And, we will grant the Motion for Protective
16 Treatment filed by PSNH. And, just note the additional
17 issue that, to the extent that other confidential
18 information arises during the conduct of the proceeding,
19 we'll deal with those issues as they arise.

20 Anything else we need to address this
21 morning?

22 (No verbal response)

23 CHAIRMAN GETZ: Okay. Hearing nothing,
24 then we will close the prehearing conference and wait for

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1 a recommendation on a procedural schedule. Thank you.

2 (Whereupon the prehearing conference
3 ended at 11:27 a.m. and the parties and
4 Staff conducted a technical session
5 thereafter.)

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