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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

January 16, 2009 - 9:14 a.m.
Concord, New Hampshire

RE: DE 08-145
FREEDOM LOGISTICS, LLC, AND
HALIFAX-AMERICAN ENERGY COMPANY:
Investigation into modifications to
Merrimack Station.
(Prehearing conference)

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

Sandy Deno, Clerk

APPEARANCES: Reptg. Freedom Logistics, LLC, and
Halifax-American Energy Company:
N. Jonathan Peress, Esq. (Downs, Rachlin...)
James T. Rodier, Esq.

Reptg. Public Service Co. of New Hampshire:
Robert A. Bersak, Esq.
Gerald M. Eaton, Esq.

Reptg. the Conservation Law Foundation:
Melissa Hoffer, Esq.

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

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APPEARANCES: (C o n t i n u e d)

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.

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I N D E X

3

PAGE NO.

4 STATEMENTS BY:

5

Mr. Rodier

6, 42, 56

6

Mr. Peress

9, 45, 57

7

Ms. Hoffer

20, 50

8

Mr. Bersak

23, 51

9

Ms. Hatfield

36, 55

10

Ms. Amidon

39, 55

11

12

13 QUESTIONS BY:

14

Chairman Getz

43

15

Commissioner Below

49

16

17

18

19

20

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22

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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 08-145. On November 13, 2008, Freedom Logistics and
5 Halifax-American Energy filed a petition seeking a
6 determination whether certain actions by Public Service
7 Company of New Hampshire at Merrimack Station constitute
8 modifications to PSNH's generation assets that require a
9 public interest finding by the Commission. On
10 November 24, 2008, PSNH filed a Motion to Dismiss the
11 petition, and other subsequent pleadings were filed. The
12 Commission issued the order of notice on January 5 setting
13 the prehearing conference for this morning.

14 I'll note that it appears the affidavit
15 of publication has been filed as required by the order of
16 notice. This morning, first, we'll take appearances, and
17 then, after we take appearances, I would like to hear
18 preliminary statements. There's been a lot of argument in
19 writing already about the issues, but I would like to get
20 a summary of the positions, any positions with respect to
21 the Petitions to Intervene, if there are objections, and
22 also if there are any positions on what procedures we
23 should employ for dealing with the petition in this case.

24 So, let's just go around and take

{DE 08-145} [Prehearing conference] {01-16-09}

1 appearances first.

2 MR. PERESS: Jonathan Peress, Downs,
3 Rachlin & Martin, PLLC, on behalf of Petitioners Freedom
4 Energy and Halifax-American Energy Company.

5 CMSR. BELOW: Good morning.

6 MR. RODIER: Good morning, Mr. Chairman
7 and Commissioners. Jim Rodier, of Portsmouth, New
8 Hampshire, for the Petitioners.

9 CHAIRMAN GETZ: Good morning.

10 MS. HOFFER: Good morning, Mr. Chairman
11 and Commissioners. Melissa Hoffer, on behalf of the
12 Conservation Law Foundation. We moved on the 13th of this
13 month to intervene.

14 CHAIRMAN GETZ: Good morning.

15 CMSR. MORRISON: Good morning.

16 CMSR. BELOW: Good morning.

17 MR. BERSAK: Good morning, Mr. Chairman
18 and Commissioners. Robert Bersak and Gerald Eaton here
19 for Public Service Company of New Hampshire, accompanied
20 by our ace witness, Mr. Steve Hall.

21 CMSR. BELOW: Good morning.

22 CMSR. MORRISON: Good morning.

23 CHAIRMAN GETZ: Good morning.

24 MS. HATFIELD: Good morning,

{DE 08-145} [Prehearing conference] {01-16-09}

1 Commissioners. Meredith Hatfield, for the Office of
2 Consumer Advocate, on behalf of residential ratepayers.

3 CMSR. BELOW: Good morning.

4 CMSR. MORRISON: Good morning.

5 CHAIRMAN GETZ: Good morning.

6 MS. AMIDON: Good morning. Suzanne
7 Amidon, for Commission Staff. And, with me today, to my
8 immediate left, is Tom Frantz, who is the Director of the
9 Electric Division, and to his left is Steve Mullen, the
10 Assistant Director of the Electric Division.

11 CHAIRMAN GETZ: Good morning.

12 CMSR. MORRISON: Good morning.

13 CMSR. BELOW: Good morning.

14 CHAIRMAN GETZ: Okay. Let's start with
15 the Petitioner, Mr. Peress or --

16 MR. RODIER: Yes. Mr. Chairman, what
17 I'd like to do is to address the issue of standing briefly
18 first, and then defer to Mr. Peress to make his comments
19 on actually what underlies the petition.

20 With respect to the issue of standing,
21 there's two Petitioners here. There's Freedom Logistics,
22 which is a New Hampshire LLC, and then there's
23 Halifax-American Energy Company, which is a New Hampshire
24 LLC. Freedom Logistics, well, the objection to standing

{DE 08-145} [Prehearing conference] {01-16-09}

1 largely is pinned on the suggestion or the claim that the
2 Petitioners are not licensed competitive electricity
3 providers, and that's correct. Freedom Logistics is a
4 management -- basically provides management services to
5 customers that join NEPOOL and get their electric service
6 directly out of the New England Power Pool. This is -- As
7 a matter of fact, it was the principals of Freedom
8 Logistics that were responsible for changing the NEPOOL
9 rules so that an end-user could do that. And, the
10 Commission may well recall that it was a decision in a
11 Luminescent Systems case that for the first time, on a
12 state regulatory level, allowed an end-user to take
13 service from NEPOOL.

14 So, it's end-users that want to do this
15 would typically retain Freedom Logistics to manage their
16 interface and their drawing of power out of the wholesale
17 market, because it's, obviously, it's a very complex
18 market. So, that's Freedom Logistics, not a competitive
19 supplier.

20 HAEC is the -- has got an agreement with
21 South Jersey Energy. South Jersey Energy is a subsidiary
22 of South Jersey Industries. South Jersey Energy is a
23 licensed competitive supplier. But HAEC is the exclusive
24 rep. in New England for marketing and sales and management

{DE 08-145} [Prehearing conference] {01-16-09}

1 of the retail book.

2 So, the question then is "are they
3 affected by this proceeding?" I think the Commission has
4 found on a number of cases that people that are involved
5 like this in the electric industry are affected by these
6 issues that pertain to Seabrook Station. But, beyond
7 this, is the Commission is well aware, there is a what I
8 call the "public interest prong" of the test for
9 intervention, which is the Commission can let anybody
10 intervene if it finds that the participation will not
11 impair the orderly conduct of the proceeding and if it's
12 in the public interest. And, I think this is one of those
13 cases. And, I think, after Mr. Peress gets through
14 speaking, you will find that, with the retention of
15 Mr. Peress, that these companies not only have some
16 technical expertise, but they have really got the
17 expertise in all of these environmental laws to be of
18 great service to the Commission.

19 And, finally, what I want to say is, we
20 raised, in the recent 08-113, PSNH Energy Service
21 proceeding, we indicated that we are very interested in
22 the issue of whether the turbine upgrade is going to be
23 used and useful. That's (a). And, (b), in the Least Cost
24 Planning proceeding, we were the ones that argued that the

{DE 08-145} [Prehearing conference] {01-16-09}

1 Commission should find that retirement or continued
2 operation of Merrimack Station, the Commission has the
3 authority to evaluate that.

4 So, we're not -- this is not just a
5 rogue type of petition. There's a lot of interest over
6 many, many years in these issues. So, thank you very
7 much. And, having said that, I'll ask Mr. Peress to
8 continue, if it's okay with the Commissioners.

9 CHAIRMAN GETZ: Thank you, Mr. Rodier.
10 Mr. Peress.

11 MR. PERESS: Would you prefer that I go
12 with the microphone or --

13 CHAIRMAN GETZ: Whatever helps our
14 stenographer.

15 MR. PERESS: Okay. Thank you, Mr.
16 Chairman. Jonathan Peress, on behalf of Freedom Logistics
17 and Halifax-American Energy Company. As you are aware, we
18 filed a petition pursuant to RSA 369-B:3-a, which
19 essentially requires the Commission to make a public
20 interest determination prior to PSNH modifying any of its
21 generation assets.

22 In terms of our position here, excuse
23 me, if I may, what I was hoping to do was lay out what are
24 first the factual questions that are at issue here, and

{DE 08-145} [Prehearing conference] {01-16-09}

1 then get into a recommendation with respect to the process
2 that we might maintain in terms of moving forward with
3 this docket.

4 There were basically three factual areas
5 of inquiry that we were looking at in the context of
6 filing the petition. And, that was, first, the nature of
7 the project that would be undertaken at Merrimack Station
8 to increase/restore the capacity; the size of the capacity
9 restoration; and the cost of the capacity restoration.
10 We, frankly, were not aware at the time that we filed the
11 petition that PSNH had already undertaken the changes in
12 order to restore that capacity. Freedom Energy's interest
13 in the petition was primarily, but not exclusively, to
14 determine whether the cost, the nature, and the size of
15 that capacity restoration were something that could be
16 provided by the market and in a way that was -- better
17 served the ratepayers' interests. We were surprised to
18 find out that the changes had already been made, and we
19 were a bit surprised to receive two motions from PSNH that
20 were seeking to preclude there being a factual inquiry in
21 this issue.

22 And, I'm relatively new before this
23 Commission, and I want to apologize for the tone of the
24 discourse thus far. But I can't take responsibility for

{DE 08-145} [Prehearing conference] {01-16-09}

1 PSNH characterizing the petition as being -- using a
2 metaphor of it "being equivalent to a game of Three-Card
3 Monte". I do feel that we need to respond in kind to
4 those sorts of metaphors. And, frankly, it's a metaphor
5 that we're not wholly uncomfortable with, for a number of
6 reasons.

7 The first question relates to the
8 nature, and there seems to be a very significant question
9 about whether this capacity restoration/increase project
10 is part of the scrubber installation project under RSA
11 125-0 or is not part of it. PSNH has stated in their
12 motions that it is part of it, and, therefore, no public
13 interest determination is necessary pursuant to your prior
14 public investigation docket.

15 We looked through the response of PSNH
16 in the scrubber investigation docket, DE 08-108 [08-103?],
17 where PSNH assiduously, and you asked them to go through
18 the status of the scrubber installation project, they made
19 a detailed filing relating to what had transpired with
20 respect to that project, including all of the construction
21 and project that had -- that they had undertaken in 2008
22 at the time that they apparently restored the capacity.
23 There's no mention in that response from PSNH of the
24 turbine restoration and the generator -- I'm sorry, the
 {DE 08-145} [Prehearing conference] {01-16-09}

1 turbine rebuild and the generator rebuild, notwithstanding
2 PSNH's assertion in this motion that those projects were
3 covered by and are part of the Scrubber Law and scrubber
4 projects. So, we think that there are some significant
5 factual issues with respect to whether or not this project
6 is covered under the Scrubber Law and what the nature of
7 the project is.

8 In addition, we note that PSNH filed an
9 air application seeking all of the approvals necessary for
10 it to move forward with its scrubber project and all of
11 the elements of its scrubber project, and did not include
12 in that application any reference to the turbine upgrades
13 or the generator upgrades, notwithstanding the fact that
14 the Clean Air Act requires that when you're applying for a
15 permit to authorize a project, you need to include all of
16 the project elements in that, in that application. So,
17 that's with respect to the nature of the changes that we
18 seek inquiry on under RSA 369-B:3-a in our petition.

19 With respect to the cost of the
20 restoration/increase in capacity apparently resulting from
21 the upgrade to the turbines and the generation -- and the
22 generator, PSNH's motions in this proceeding, while
23 seeking to dismiss our petition, they assiduously avoid
24 any discussion of the turbine upgrade elements themselves,

{DE 08-145} [Prehearing conference] {01-16-09}

1 including the cost. And, our suggestion ultimately is
2 that we need to have a factual inquiry in this docket in
3 order to develop the facts that relate to these issues.
4 Because, in PSNH's September 2nd filing to this
5 Commission, in response to docket -- to your request to
6 them in docket 08-103, they stated that they had spent,
7 through 2008, \$10 million, in terms of implementing the
8 scrubber project, which they assert the turbine upgrade
9 and generator upgrade are a part of.

10 But, yet, in information that they
11 provided to DES, in both 2006 and 2008, they indicated to
12 DES that the cost of the scrubber project was
13 approximately \$15 million, and subsequently have increased
14 that to as much as \$17 million. Which means that, if it
15 is part of the scrubber project, it somehow was omitted
16 from their filing in docket 08-103.

17 With respect to the size of the increase
18 in capacity, we note that PSNH's motion here assiduously
19 avoids any discussion relating to how much capacity they
20 would be restoring by rebuilding their turbine and
21 rebuilding their generator. In fact, PSNH's motion says,
22 and I'll quote "PSNH is unaware of any references
23 indicating that the full pre-scrubber capacity will be
24 restored."

{DE 08-145} [Prehearing conference] {01-16-09}

1 It should be noted, and, of course, this
2 isn't in the record, but these are clear references that
3 we -- Freedom Energy had to spend money for me to go
4 uncover, that, in a letter to DES, PSNH indicated that
5 they expected approximately a 6.5 megawatt diminishment
6 from the scrubber project, and that the turbine upgrade
7 will increase the output of -- the turbine and generator
8 upgrade would increase the output of Unit 2 by
9 13 megawatts. These are issues that clearly need to be
10 developed from a factual standpoint.

11 In addition, in a January 28th, 2008
12 letter to DES, PSNH stated that the winter capacity of
13 Unit 2, prior to the turbine and generator upgrades, was
14 321 megawatts. Nonetheless, they made a filing to ISO-New
15 England in April of 2008, which stated that the "after
16 change" capacity, winter capacity of Unit 2 would be
17 337 megawatts, in other words, an increase in winter
18 capacity of 16 megawatts. This is an issue that we
19 believe further factual inquiry would be appropriate in
20 this docket.

21 I just want to return for a moment to
22 the nature of the project, because in PSNH's Motion to
23 Dismiss there are what I would consider to be some
24 linguistic gymnastics. Where they state that they have

{DE 08-145} [Prehearing conference] {01-16-09}

1 "completed all of the improvements that they intend to
2 make to increase the station's net capability." They go
3 on to state, however, that "the projects completed during
4 the 2008 outage were routine maintenance, which did not
5 materially increase the capacity of Merrimack Station Unit
6 2."

7 However, in their filings to DES, PSNH
8 acknowledged that, and, in fact, stated, that their
9 project to reconstruct the turbine and reconstruct the
10 generator are not routine maintenance. They availed
11 themselves of an expedited permitting process that is only
12 available for projects that are not routine maintenance.
13 They provided details of the project, stating that it is
14 very similar in nature to projects that were reviewed by
15 EPA and other regulatory agencies, including one conducted
16 by Detroit Edison. And, in that review, EPA did a very
17 lengthy review to determine whether or not those sorts of
18 upgrades are routine either in the industry or the
19 facility, and EPA unequivocally determined that rebuilding
20 turbines to increase capacity and rebuilding generators to
21 increase capacity are not routine projects and are not
22 routine maintenance that are regularly conducted. We
23 would suggest that there needs to be factual inquiry into
24 whether or not this project is routine. One area of

{DE 08-145} [Prehearing conference] {01-16-09}

1 factual inquiry that we would be interested in in support
2 of apparently PSNH's assertion is whether or not they have
3 done this sort of turbine upgrade, as they claim, on a
4 routine basis at the Merrimack Station.

5 I can go on here. I think there are a
6 couple of legal issues that have been addressed in the
7 motions. One of them that I think is worth mentioning is
8 that PSNH has essentially said that there's no need for a
9 public interest determination, because the projects will
10 be subject to a prudency review under the "used and
11 useful" test. We note that not too many years ago, in
12 PSNH's Schiller filings, they expressly distinguished the
13 need for a prudency review from the need to undertake a
14 public interest determination before undertaking a project
15 and before seeking a prudency review.

16 Also, just as a summary of the positions
17 with respect to the legal issues, PSNH has sought to
18 assert that the turbine upgrade is covered by the public
19 interest determination that's embodied in RSA 125-0, as
20 this Commission determined in its order on RSA 125-0.
21 Essentially, what RSA 125-0 does is it makes a public
22 interest determination that the installation of scrubbers
23 are in the public interest. And, it mandates, as this
24 Commission pointed out, PSNH to install those scrubbers.

{DE 08-145} [Prehearing conference] {01-16-09}

1 That public interest determination, neither by its express
2 terms or implication, extends to the turbine upgrade and
3 generator upgrade projects. And, the RSA 125-0 provisions
4 make those provisions permissive and not mandatory. So,
5 the Commission's logic in its determination under DE
6 08-103 really is not analogous to the circumstances in
7 this case.

8 A last legal point, just as a summary of
9 the positions, is that, excuse me, PSNH has asserted that
10 our reading of the statute would render that provision of
11 RSA 125-0, which allows them permissively to make the
12 turbine upgrade, to be superfluous. In other words,
13 they're saying that to require them to have a public
14 interest determination would render that provision
15 superfluous.

16 As the Commission and PSNH are likely
17 aware, in PSNH's 2006 Least Cost IRP proceeding, this
18 Commission unequivocally stated that PSNH lacks any
19 legislative authority and would require new legislative
20 authority to spend ratepayer money to add or obtain
21 capacity in any way, shape, or form. So, if they are
22 saying that that provision is superfluous, apparently they
23 are saying that they lack the authority to add capacity.
24 Clearly, that provision is not -- not superfluous.

{DE 08-145} [Prehearing conference] {01-16-09}

1 I think the ultimate point here is that
2 PSNH has assiduously avoided providing facts necessary to
3 determine its motions in this proceeding. And, those are
4 the same facts that are necessary for this Commission to
5 render a public interest determination.

6 In our view, those facts ought to be
7 developed in a proceeding, I think, for three very
8 compelling reasons. The first reason is, from the
9 standpoint of the ratepayers' interests, we think it's
10 very important that the facts be laid out on the table
11 with respect to the cost of these turbine upgrades, and
12 whether or not that capacity could be obtained in a way
13 that better suits the public interest, from the market,
14 rather than from the unstated cost of this unspecified
15 project, at least accordingly to PSNH's filings in this
16 docket.

17 From a market development standpoint, we
18 believe that it would be appropriate to look into these
19 costs and size issues in order to make sure that PSNH's
20 actions in obtaining new capacity and spending ratepayer
21 money to obtain new capacity do not impair the development
22 and functioning of the competitive markets as are embodied
23 in the enabling statutes for the Commission. And, lastly,
24 and I'm a former regulator for five years, we think that

{DE 08-145} [Prehearing conference] {01-16-09}

1 the integrity of the regulatory process needs to be
2 maintained in a way that, when petitioners/applicants seek
3 to spend ratepayer money, that all of the relevant
4 information is provided in the record in a full, honest
5 and complete way. And, we think that that is a very
6 important policy aspect of this provision. As you are
7 aware, the Commission has plenary authority to supervise
8 any and all activities for which the ratepayers will
9 ultimately bear responsibility, and the Commission has
10 plenary authority to review any and all modifications that
11 are made to ratepayer-funded assets prior to those assets
12 being made.

13 So, that is, I think, a summary of our
14 substantive position. With respect to the procedure that
15 we would recommend here, we would suggest that it is
16 necessary to have this factual inquiry before the issues
17 raised in PSNH's motions and attempts to dismiss this
18 petition can be addressed, because they're so
19 fact-dependent. And that, basically, PSNH is in exclusive
20 control of those facts, except for the fact -- the reality
21 that we had to go and dig some of those facts out from
22 other sources. So, we would, from a process standpoint,
23 request that we undertake discovery, that there be
24 prefiled testimony, that there be an opportunity to

{DE 08-145} [Prehearing conference] {01-16-09}

1 cross-examine witnesses with respect to that prefiled
2 testimony, that there be briefing on some of the legal
3 issues that we just discussed and that PSNH has raised
4 after that discovery and after the facts are clear, and
5 then the process for the Commission's decision go forward.

6 Thank you very much, Mr. Chair.

7 CHAIRMAN GETZ: Mr. Peress, do you have
8 any objection to the Petition to Intervene from the
9 Conservation Law Foundation?

10 MR. PERESS: No, we have no objection to
11 the Petition to Intervene.

12 CHAIRMAN GETZ: Ms. Hoffer.

13 MS. HOFFER: Yes. Thank you. CLF
14 interests, as I think the Commission knows, are
15 substantially environmental interests. And, there are
16 significant environmental impacts associated with the
17 modifications to MK2 that already occurred back in April
18 of 2008. The modifications are projected by the Company
19 to result in increased emissions in this calendar year,
20 2009, over a 2006 and 2000 [2007?] baseline in the
21 following amounts: 527 tons per year post-modification
22 increase in NOX; a 1,166 tons per year post-modification
23 increase in sulphur dioxide emissions; a four tons per
24 year post-modification increase in carbon monoxide

{DE 08-145} [Prehearing conference] {01-16-09}

1 emissions; a three tons per year post-modification
2 increase in particulate matter emissions; and a one ton
3 per year post-modification increase in VOC emissions.
4 And, these data are derived from the Company's filings
5 before the Department of Environmental Services.

6 The modifications were performed, as I
7 mentioned, in April of 2008, and that was before the
8 Company obtained the required pre-construction permits
9 under the Clean Air Act from the Department of
10 Environmental Services. At this point, as counsel for
11 Freedom Logistics has pointed out, the pending application
12 for the flu gas desulphurization scrubber system with the
13 Department of Environmental Services does not include the
14 modifications that were made to MK2 and that the Company
15 has represented are necessary for purposes of addressing
16 parasitic load of the scrubber system. That's important,
17 because it doesn't really allow for us to get a full
18 picture of what the whole emissions impact is of this work
19 that's been done to both restore capacity and prepare to
20 install the scrubber system.

21 The MK2 modifications are going to
22 increase PSNH's power production capability beyond that it
23 appears required by the scrubber. In some June 7th, 2006
24 correspondence from the Company's principal engineer

{DE 08-145} [Prehearing conference] {01-16-09}

1 that's been working on these matters, Mr. Bill Smagula, to
2 Director Scott at DES, the Company represented that the
3 scrubber requirements are going to be as much as six --
4 six to eight megawatts. And, PSNH has represented that
5 the range of the MK2 output post-modification is going to
6 be an additional 6 to 13 megawatts. The unit has a
7 contract guarantee of 6.5 megawatts. So, we really need
8 to understand what the precise power requirements of the
9 scrubber are and what the precise post-modification
10 capacity of the modified generation asset is going to be,
11 and right now we just don't have those numbers. I think
12 this process might afford us a means to understand those
13 information, again, that's important from an environmental
14 standpoint.

15 I think that the final point that I
16 wanted to make is that it would be very useful, both from
17 an environmental and a ratepayer standpoint, to have a
18 better understanding of the total costs that are
19 associated with this project. Because there currently
20 exists mercury control technologies that actually would
21 achieve a much greater reduction in mercury emissions from
22 the facility for a fraction of the cost. Some of those
23 include activated carbon injection, which is projected to
24 reduce mercury emissions somewhere on the order of 90

1 percent, and costs, as far as capital installation, in a
2 range of one to five million dollars, with approximately
3 that same amount per year for operating costs. So, it's a
4 much, much greater environmental benefit, with much less
5 ratepayer impact. And, that type of technology is
6 actually used now at similar -- similarly sized and
7 similar coal-fired power plants around the United States.
8 And, I did just want to give you one cite for that. The
9 Institute of Clean Air Act Companies has reported that 100
10 full scale ACI systems have been ordered by coal-fired
11 power plants since the Spring of 2008.

12 So, again, I think it would be very
13 helpful for us to have the opportunity to have a more
14 wholesome process here that would afford the opportunity
15 for the parties to file prefiled testimony and that would
16 also afford the opportunity for examination of witnesses.
17 And, appreciate the Commission entertaining our motion.

18 CHAIRMAN GETZ: Thank you. Mr. Bersak.

19 MR. BERSAK: Thank you, Mr. Chairman and
20 Commissioners. I appreciate this opportunity to address
21 the Commission. The purpose of the petition in this
22 docket was a request by Freedom Logistics and Halifax to
23 have a investigation under RSA 369-B:3-a, as to whether
24 certain capital improvements at Merrimack Station that

{DE 08-145} [Prehearing conference] {01-16-09}

1 were intended to increase the net generating capability of
2 that plant were in the public interest of PSNH's retail
3 customers. This is not a proceeding to determine whether
4 or not certain technology or what technology should be
5 installed to reduce either sulphur oxide emissions or
6 mercury emissions from Merrimack Station or from other
7 generating stations in PSNH's fleet.

8 The determination of what technology
9 will be put in to reduce those emissions has been made by
10 the Legislature, and that's the subject of another docket,
11 DE 08-103 before this Commission. So, a lot of the
12 information that we just heard from Attorney Hoffer is
13 really not relevant to today's proceeding.

14 We can represent today that the only
15 investment planned at Merrimack Station that would
16 increase its net generating capacity is the replacement of
17 the turbine at Merrimack Unit 2. That project was done
18 during the routine five year extended maintenance outage
19 that is conducted at Unit 2. During maintenance outages,
20 we replace lots of parts. Things wear out; things need to
21 be replaced. When we do a maintenance outage, there are
22 determinations made routinely, as to whether it's better
23 to fix, replace in kind, or replace with something better
24 a part that is necessary to keep those plants operating.

{DE 08-145} [Prehearing conference] {01-16-09}

1 This is really, maybe on a larger scale, but you can
2 imagine a situation where the plant is operating and a
3 pump breaks, for whatever reason, the plant goes down. We
4 call the pump manufacturer and say "We've got a Number 123
5 pump. We need a brand new one. Do you have one?" They
6 say "Yes, we do. But let us tell you about our new 123A,
7 that has different metallurgy and different seals and is
8 more efficient. We can sell you that one and we think it
9 would do a great job for you and be beneficial to the
10 company and to its customers." If we were to replace that
11 pump with that better pump, is that a modification? Where
12 we say "That's a great idea. Let's send a petition to the
13 Commission. Let's get an order of notice. Let's have a
14 publication in the newspaper. And, let's have a hearing
15 like we have today in order to do something that's
16 beneficial to customers."

17 Clearly, there are things that are
18 major, material modifications to a plant, where we need to
19 come to this Commission to get pre-approval under
20 369-B:3-a, and the Schiller Project was clearly an example
21 of that. And, this turbine replacement is not.

22 Let me clarify one thing that seems to
23 be of some confusion today is, is the turbine replacement
24 part of the scrubber project? The answer is "no, it is

{DE 08-145} [Prehearing conference] {01-16-09}

1 not." We don't need a new turbine to put the scrubber in.
2 The scrubber will work just fine with the old turbine.
3 Are they related? Yes, they're both being done at
4 Merrimack Station, and provisions of the Scrubber Law
5 apply to the installation of the new turbine, but it's not
6 part of that scrubber project. Mr. Peress is correct that
7 the Legislature did not mandate the installation of a new
8 turbine. But the Legislature did give us permission to
9 install or make capital investments at the station that
10 would reclaim some of the lost generating capability that
11 will be caused by the parasitic load of the scrubber. So,
12 although it's not part of the scrubber project, the
13 turbine clearly is covered by the Scrubber Law.

14 The fact that this is a separate project
15 is kind of indicated by the fact that we've notified this
16 Commission, this Commission has been aware from filings
17 for about at least two years that we would be doing a high
18 pressure/intermediate pressure turbine replacement at
19 Merrimack Station. Every year the Company files its
20 capital construction projects, including that for the
21 generation segment of our business. In February of 2007,
22 we filed a capital budget, which clearly has a line item
23 for replacement of the HP/IP turbine at Merrimack Number
24 2. And, it had a number associated with it of five plus
{DE 08-145} [Prehearing conference] {01-16-09}

1 million dollars. In 2008, we put in the capital budget
2 for 2008, again there was another line item for the same
3 project, the HP/IP turbine replacement at Merrimack
4 Station Unit 2. It was another increment, one -- the
5 initial increment was for design and construction, the
6 other one was for replacement. So, there are numbers
7 before the Commission regarding this project. And, they
8 are separate and apart from the scrubber project. They
9 are not included within the numbers for the scrubber
10 project.

11 Even if the Commission was to accept the
12 representation by Petitioners that this is not a routine
13 maintenance item at our plant, that is subject to normal
14 prudence reviews before the Commission. We don't have a
15 free pass. We never asked for a free pass. Clearly,
16 whatever we do is going to be investigated by this
17 Commission to determine whether it was the prudent thing
18 to do and in the best interest of the Company's customers.
19 But, even if that was not accepted by the Commission, this
20 is -- this project is clearly covered by the Scrubber Law.

21 There is no basis for the Commission to
22 assert the authority or to instigate the investigation
23 that the Petitioners request. For the same reasons that
24 this Commission found in its order in docket 08-103, the
 {DE 08-145} [Prehearing conference] {01-16-09}

1 Scrubber Law eliminates any need for a preliminary public
2 interest determination under 369-B:3-a for capital
3 improvements at Merrimack Station that are intended to
4 regain some of the net capability that will be lost to the
5 scrubber project.

6 125-0:13, IV provides that, "If the net
7 power output (as measured in megawatts) from Merrimack
8 Station is reduced, due to power consumption requirements
9 or operational inefficiencies of the installed scrubber
10 technology, the owner may invest in capital improvements
11 at Merrimack Station that increase its net capability,
12 within the requirements and regulations of programs
13 enforceable by the state or federal government, or both."
14 That's what this turbine project is all about. The
15 Petitioners, in their petition, acknowledged that the
16 scrubber will reduce the net power output from Merrimack
17 Station. They had put in an attachment to describe how
18 parasitic load from scrubber and other things will reduce
19 the output from the scrubber. How much will it be
20 reduced? People can make estimates and determinations,
21 but, ultimately, that will have to be a determination
22 after the scrubber is put in.

23 Likewise, how much will the turbine
24 increase generating capacity at the plant? Ms. Hoffer is

{DE 08-145} [Prehearing conference] {01-16-09}

1 correct, Attorney Hoffer is correct, that we do have
2 certain guarantees from the manufacturer and installer of
3 the turbine. But, as this Commission is aware, there was
4 a catastrophic event that occurred upon start-up of the
5 new turbine, which is preventing us from doing final
6 testing and which will require repair or replacement of
7 the existing new turbine. Those tests will be performed
8 subsequent to the repair or replacement to determine
9 exactly what efficiencies we get from that new turbine.

10 If you accepted the Petitioners'
11 assertion that there is a requirement for a public
12 interest determination regarding the public interest of
13 our customers for the installation of the turbine, then
14 RSA 125-0:13, IV, actually is superfluous. What does that
15 statute give us, if we have to come to this Commission
16 before we make a capital investment to increase the
17 generating capacity at Merrimack Station? We don't need
18 that statute, if we have to come to the Commission under
19 RSA 369-B:3-a. I think that the Supreme Court makes it
20 clear that, when they try to look at these differing
21 statutes, they try to interpret the statutes in a way so
22 that one is not rendered superfluous.

23 If we had to come to this Commission
24 under RSA 369-B:3-a for a preliminary approval and

{DE 08-145} [Prehearing conference] {01-16-09}

1 determination of the public interest, there's no need for
2 the 125-0 section that was put into law. That section,
3 under 125-0, says that we may make these types of capital
4 improvements. And, that's just what we did.

5 The Petitioners are party intervenors in
6 docket 08-113, PSNH's recent Default Energy Service rate
7 proceeding. Both Freedom Partners and Halifax-American
8 Energy Company separately filed intervention petitions,
9 which were granted by the Commission. The Merrimack
10 Station turbine replacement project was a significant
11 topic in that docket. And, in that docket, there was
12 opportunity for, in fact, there was significant direct and
13 cross-examination regarding the turbine project. The
14 Commission has already discussed the turbine replacement
15 in Pages 5, 6 and 8 of the order issued in that docket,
16 and held in that order that says "We agree with Staff that
17 the outage will be a subject for review in PSNH's
18 reconciliation of ES and stranded cost charges for 2008,
19 and therefore will allow the estimated net outage-related
20 costs as calculated by PSNH to be included in the 2009 ES
21 rate, subject to that later review."

22 PSNH has, in docket 08-113, and will in
23 the subsequent reconciliation and prudence review, present
24 all the information regarding this project that is

{DE 08-145} [Prehearing conference] {01-16-09}

1 necessary to determine whether it was a reasonable and
2 proper thing to do. We certainly are not trying to do
3 things in the shadows or do things that will not be
4 investigated by this Commission. But there is no need to
5 have a separate proceeding to do that.

6 Even the Petitioners recognize that this
7 matter, the turbine replacement, will be investigated in
8 the 2009 Energy Cost Reconciliation docket. Although the
9 Petitioner did not appear at the December 4th hearing in
10 the Energy Service rate proceeding, that's 08-113, the
11 Petitioners' concerns were relayed to the Commission at
12 the hearing by the Office of Consumer Advocate. And, the
13 OCA properly indicated that they recommended that Attorney
14 Rodier, on behalf of Freedom Logistics and
15 Halifax-American, should put his concerns in writing,
16 which he ultimately did. In a letter to the Commission
17 that was filed with the PUC here on December 8th, the
18 Petitioners raised the issue of the Merrimack turbine
19 project, and concluded by saying: "We do understand that
20 full consideration by the Commission on these matters will
21 be taken in the mid year reconciliation for 2009 energy
22 cost recovery. We look forward to participating in that
23 proceeding." As do we. That is the proper place for
24 these questions and these issues to be raised. There is

{DE 08-145} [Prehearing conference] {01-16-09}

1 not any need, nor is it proper, nor is there any legal
2 necessity or authority to having a proceeding before the
3 Commission based upon the petition of the Petitioners
4 today.

5 The Petitioners, as parties to that
6 other docket, 08-113, did raise issues concerning the
7 turbine project. They had ample opportunity to present
8 testimony, to cross-examine the Company's witnesses.
9 Their failure to participate in that proceeding, where
10 they were full parties, and instead to open up -- seek to
11 open up a new docket here by petition, is just wrong, it's
12 wasteful, and should be denied.

13 Mr. Rodier earlier raised the question
14 of standing. The Company maintains that the Petitioners
15 do not have standing to receive the relief that they have
16 requested. As Mr. Rodier confirmed, neither
17 Halifax-American Energy Company, nor Freedom Logistics,
18 are registered competitive suppliers. They just happen to
19 be involved, to some degree, in some measure, in the
20 electric industry, and that could be no different than a
21 C&LM provider or perhaps an electrician who puts meter
22 sockets on the side of a house. That's very interesting,
23 we support them. We hope they do very well. But that
24 does not give them standing. There is nothing in the

1 petition that demonstrates that their rights, duties,
2 privileges, immunities or other substantial interests will
3 be affected by the matter presented.

4 Halifax-American Energy Company is a
5 little bit even more interesting. They claim that,
6 although they're not a registered competitive supplier,
7 they act as agent for an entity that is. But nowhere do
8 they say that that other entity, the registered supplier,
9 is actually the principal in the petition. I've seen no
10 representations from Halifax-American Operating Company,
11 which is the New Hampshire trade name for South Jersey
12 Energy Company, that they are actually before this
13 Commission. The petition, as it did -- as it omitted for
14 Freedom Logistics, also omits anything demonstrating that
15 the rights, duties, privileges, immunities, or other
16 substantial interests of Halifax-American Energy Company,
17 LLC may be affected by this matter.

18 If this was to go forward, if this
19 docket was to go forward, and we don't think it should,
20 there needs to be clarification as to whether South Jersey
21 Energy Company is, in fact, a party in this proceeding
22 that will be subject to the Commission's rules and
23 regulations, including discovery and other administrative
24 requirements.

{DE 08-145} [Prehearing conference] {01-16-09}

1 It's interesting to note that, when you
2 talk about "standing", what the petition is asking this
3 Commission to do. It's asking for a proceeding under RSA
4 369-B:3-a. The standard in RSA 369-B:3-a is whether a
5 modification to one of our generating assets is in the
6 public interest of PSNH's retail customers. There is no
7 allegation that either petitioner is a retail customer of
8 PSNH. A search of our Customer Information Service --
9 Customer Information System does not reveal any accounts
10 for either of these Petitioners. So, not only are they
11 not competitive energy suppliers within New Hampshire,
12 they're not even retail customers.

13 Finally, given their status in the
14 energy market as described this morning by Mr. Rodier,
15 where do these Petitioners benefit or how are they hurt by
16 the turbine project? There seem to be claims from both
17 the Petitioners and from Conservation Law Foundation that
18 this project could hurt the customers, because we don't
19 know what it's going to do and what the costs are going to
20 be, and we need to know that to determine whether it's in
21 the public interest. Well, frankly, to the extent that
22 customers are hurt because PSNH's Default Energy Service
23 costs rise, aren't Petitioners benefiting as being
24 competitive suppliers out there trying to sell to

{DE 08-145} [Prehearing conference] {01-16-09}

1 customers to take some kind of service other than Default
2 Energy Service? Their interests are not aligned with
3 retail customers. They're actually opposite of retail
4 customers. They don't have any standing under 369-B:3-a.

5 The Commission has before it also a
6 motion to strike Petitioners' objection to our Motion to
7 Dismiss, as it was untimely filed. And, we want to make
8 sure that that situation is not forgotten. They did not
9 comply with the time limits for this Commission. And,
10 their objection to our motion, being untimely filed,
11 should not be considered. And, therefore, our motion
12 really lies unopposed to dismiss.

13 Just as in docket DE 08-103, the
14 Commission should find that the Scrubber Law takes
15 priority over 369-B:3-a. That the authority given to the
16 Company under 125-0:13 to install capital improvements at
17 Merrimack Station to regain some of the lost generating
18 capability, that is the controlling statute, not
19 369-B:3-a. Because of the fact that 369-B:3-a does not
20 apply, because the Petitioners do not have standing,
21 because they failed to timely object to our Motion to
22 Dismiss, the Company once again asks this Commission to
23 reject the petition and to close this docket without
24 hearing.

{DE 08-145} [Prehearing conference] {01-16-09}

1 Thank you very much.

2 CHAIRMAN GETZ: Thank you. Ms.
3 Hatfield.

4 MS. HATFIELD: Thank you, Mr. Chairman.
5 In looking at RSA 369-B:3-a, there clearly is language
6 that states "Prior to any divestiture of its generation
7 assets, PSNH may modify or retire such generation assets
8 if the Commission finds that it is in the public interest
9 of retail customers of PSNH to do so, and provides for the
10 cost recovery of such modification or retirement." It
11 seems clear to the OCA that that language saying that "if
12 the Commission finds that it is in the public interest of
13 retail customers" does require a finding by this
14 Commission as to whether or not it is in the interest of
15 customers.

16 Unfortunately, in this case, I think,
17 because the project has already been completed and the
18 Commission issued its order in the recent Energy Service
19 docket, the Commission has done the latter half of that
20 determination in providing for the cost recovery. But I
21 don't believe it has actually made a finding that it is in
22 the public interest of retail customers.

23 MR. BACKUS: Could Ms. Hatfield turn on
24 her microphone?

{DE 08-145} [Prehearing conference] {01-16-09}

1 MS. HATFIELD: Sure. Is it on now?

2 MR. BACKUS: Yes. That's much better.

3 MS. HATFIELD: Okay. Thank you. Sorry.

4 I think some of the issues that have been raised today
5 raise more questions in the OCA's mind, and we do think
6 that the Commission should proceed with this
7 investigation, whether or not it believes that the
8 Petitioners have standing. It is also troubling to the
9 OCA, in part due to our own limitations and our inability
10 to practice before DES as well as before the Commission,
11 that, according to representations made today, it appears
12 that the Company has made different filings and different
13 representations to two different State agencies with
14 jurisdiction over these projects, both the scrubber and
15 the turbine upgrade. And, it seems to us, at a minimum,
16 that we should engage in some factual inquiry to make
17 clear what permits PSNH does have for these projects,
18 whether they're under PUC jurisdiction or not, in order --
19 I mean, obviously, we are going to have a reconciliation
20 docket looking back at 2008. The language that Mr. Bersak
21 read from the Commission's order deals with the outage
22 related -- outage and costs related to the problem that
23 PSNH has had with that new turbine. I don't necessarily
24 agree with him that we should wait until the

{DE 08-145} [Prehearing conference] {01-16-09}

1 reconciliation to engage in this inquiry. I don't see any
2 reason not to proceed now. I think some of the things we
3 would learn in this docket would assist the Commission in
4 determining whether what PSNH has done was prudent during
5 the reconciliation. But I do think time is of the essence
6 and we should not wait until that reconciliation docket.

7 I also think, in looking at RSA 125-0,
8 it does say that, "if the net power output from the plant
9 is reduced, the owner may invest in capital improvements
10 at Merrimack Station." That section does not reference
11 369-B:3-a. So, in my view, that -- even 125-0 does
12 contemplate that PSNH, when it does increase the net
13 capability of the plant, if it chooses to do so, that it
14 would still have to do that within the regulatory schemes
15 that apply to that plant, whether they be environmental or
16 related to cost recovery. And, it seems to me that PSNH
17 really wants it both ways. They want this, in some
18 settings, to be a part of the scrubber project, but, then,
19 in other areas, I think they're arguing that it's not part
20 of the scrubber.

21 So, I'm -- not only do I think that some
22 factual inquiry would benefit all of the parties,
23 including ratepayers, I also think that some of the legal
24 issues that have been raised would warrant either briefing

1 or just further discussion by the parties.

2 In terms of standing, you know, PSNH has
3 -- and the Petitioners have both discussed the Petitioners
4 previous participation in several dockets here at the
5 Commission. And, I don't recall the Company objecting
6 during those prior dockets to their participation in those
7 dockets. So, I don't know why the Commission would not
8 allow these parties to participate in this docket or to
9 bring it forward to the Commission.

10 Thank you very much.

11 CHAIRMAN GETZ: Ms. Amidon.

12 MS. AMIDON: Thank you. At the outset,
13 I just want to make it clear for the record that Staff
14 does not have any position on the issues of standing or
15 any of the Motions to Intervene. But Staff also agrees
16 that there needs to be some kind of findings of facts in
17 this docket. It's clear, under Section 125-0:13, that it
18 was contemplated by the Legislature that Merrimack
19 Station's power would be reduced, and therefore they said
20 "the owner may invest in capital improvements that
21 increase its net capability", and the condition for that
22 is "within the requirements and regulations of programs
23 enforceable by the state or federal government or both."
24 So, that's the condition on it. The issue then is "what

{DE 08-145} [Prehearing conference] {01-16-09}

1 are" -- "what is the scope of those modifications?" I
2 think that's one issue that needs to be looked at. What
3 was contemplated by the Legislature at "an investment in
4 capital improvement" related to RSA 125-0:13.

5 RSA 369-B:3-a I think is a higher level
6 of inquiry. When the Legislature enacted RSA 125-0, it
7 understood that this other legislation existed, that this
8 other statute existed. They did not condition the
9 approval of any investment in capital improvements at
10 Merrimack 2 to take into account the operational
11 inefficiencies of the scrubber as something that needed to
12 be subject to the approval under RSA 369-B:3-a.
13 Otherwise, in my opinion, they would have cross-referenced
14 that and directed the Company to come to the Commission
15 with a public interest finding.

16 So, I think another inquiry, another
17 factual inquiry or discussion that may help the Commission
18 insofar as this issue before you today is "what were the
19 kinds of modifications that the Legislature indicated
20 would have to be subject to a public interest finding
21 under RSA 369-B:3-a?" And, at this point, I'm inclined to
22 think that PSNH may be correct, in that it was a wholesale
23 renovation of a facility, such as the renovation that went
24 on with Schiller, which converted the plant to allow for a

1 wood-burning capability at that plant.

2 Finally, I think that it is clear that
3 the Commission has always required utilities, and, in this
4 case, it's only PSNH, because only PSNH owns generation in
5 this state, to conduct appropriate maintenance on its
6 facilities on a basis that is reasonable and consistent
7 with engineering criteria, which is why, in those annual
8 reconciliations, the Commission Staff engages the services
9 of an engineering consultant to determine whether or not
10 the outages and other activities conducted by PSNH in the
11 operation of those plants is prudent.

12 So, my feeling is that the Commission
13 would be aided by trying to, by having the parties conduct
14 some factual inquiry into what is the routine maintenance
15 that would be allowed, and whether this is indeed routine
16 substitution of a piece of equipment that was aging. What
17 the Legislature intended as RSA 125-0, when it said that
18 "the owner of Merrimack could install capital improvements
19 to take care of the operational inefficiencies of the
20 scrubber". And, finally, RSA 369-B:3, which, as my
21 understanding of the legislative history, is contemplated
22 to take care of something of a larger nature than a
23 replacement of equipment, but an overhaul comparable to
24 Schiller.

{DE 08-145} [Prehearing conference] {01-16-09}

1 So, procedurally, by recommendation
2 would be, we can probably conduct some discovery, to try
3 to understand what the facts are that parties here have
4 raised. And, I think we should try to develop stipulated
5 facts that we all can agree to. In other words, the cost
6 of the turbine replacement was X. Then, I think it would
7 be subject to legal briefing, whether the parties think
8 that that modification cost constitutes the type of
9 overhaul that I think the Legislature intended to
10 encompass in RSA 369-B:3-a or a modification within the
11 statute of RSA 125-0, or even routine maintenance. So,
12 that's my suggestion on how we proceed here. I don't -- I
13 don't think that it would be advisable, given the nature
14 of the continuing work that PSNH is doing, that we go to
15 testimony and a full hearing on this.

16 Thank you.

17 CHAIRMAN GETZ: Okay. Thank you, Ms.
18 Amidon.

19 MR. RODIER: Mr. Chairman, I got just
20 one brief thing to add. May I? I'll make it real quick.
21 Thank you. Mr. Bersak mentioned the hearing on
22 December 4th, he said "they didn't show up." Well, as I
23 pointed out in a subsequent letter to the Commission
24 around December 26 or 27, found out at like 8:30 that

{DE 08-145} [Prehearing conference] {01-16-09}

1 morning that it was going to be a closed hearing. And, I
2 explained to the Commission in the letter that I
3 subsequently wrote, that's why we didn't come. We had a
4 representative here who had to leave the room. But I have
5 made the point that if we're not going to be allowed to
6 participate in the hearing on Merrimack Station, if we're
7 not going to get, even willing to sign a confidentiality
8 agreement, get any of the information, I'm not going to
9 waste my time to go.

10 Now, fortunately, Mr. Bersak raised the
11 first part of it. But, you know, he says he wants to put
12 all his cards on the table, perhaps he should have
13 mentioned the second part of that story. Thank you.

14 CHAIRMAN GETZ: Okay. Mr. Peress, let
15 me ask this question, make sure I understand the
16 arguments. Would this be a fair formulation of your
17 position, that the actions that PSNH has taken with
18 respect to replacing the turbine and the other actions
19 it's taken at Merrimack Station, you would argue they rise
20 to the level of a modification under 369-B:3-a. Is that
21 fair to say?

22 MR. PERESS: That appears to be the
23 case. But, in light of -- and that certainly is what we
24 suspect in terms of our petition. But, in light of the

{DE 08-145} [Prehearing conference] {01-16-09}

1 various different explanations that we've heard from PSNH,
2 including a new explanation here today, I think it's not
3 abundantly clear to me exactly what this -- this next
4 factual issue is what the purpose of this turbine
5 replacement was. As PSNH just --

6 CHAIRMAN GETZ: Well, just -- I
7 understand that part of the argument. I just wanted to
8 see if I can get agreement on the first part. And, your
9 legal position then would be that, if it is a
10 modification, if we concluded that it was a modification
11 under the statute, that it would not be permitted by RSA
12 125-0, without the PUC having concluded that it was in the
13 public interest?

14 MR. PERESS: Yes.

15 CHAIRMAN GETZ: Okay. Mr. Burack --
16 Bersak, and I take your position is that the replacement
17 of the turbine does not rise to the level of a
18 modification. That it is a normal, ongoing type of
19 maintenance activity that PSNH can do without
20 pre-approval. Is that correct?

21 MR. BERSAK: That's correct. And, even
22 if it did surpass that threshold --

23 CHAIRMAN GETZ: Well, let me get -- And,
24 then, the second part is, that even if it rose to the

{DE 08-145} [Prehearing conference] {01-16-09}

1 level of modification, that 125-0 gives the Company
2 permission to do it without pre-approval?

3 MR. BERSAK: That's correct. But
4 subject to traditional prudence standards after the fact.

5 CHAIRMAN GETZ: And, well, I guess,
6 turning to some of what Ms. Amidon stated, I guess it's
7 not clear to me why a set of stipulated facts couldn't be
8 agreed to here, that would form the basis for written
9 arguments on the issues. It seems to me it's not so much
10 what happened and not so much a debate about what the
11 facts were that can't be -- an agreement can't be arrived
12 at. It's more issues of how we should interpret those
13 facts. And, in the one instance, whether those facts rise
14 to the level of a modification that we are required to
15 provide a public interest finding with regard to, in the
16 first instance. And, the related legal issue of, if it is
17 a modification, whether the Company has permission to
18 undertake those modifications even without PUC
19 pre-approval. Is there any real debate about that framing
20 of the issues?

21 MR. PERESS: If I may address, Mr.
22 Chairman?

23 CHAIRMAN GETZ: Sure.

24 MR. PERESS: Thank you. Freedom

1 Logistics would not -- doesn't object or disagree in
2 concept with the notion that there should be a set of
3 facts that we can all agree on. The problem that we
4 foresee, and have actually experienced in the context of
5 getting information with respect to the nature, purpose,
6 cost, and size of the modification, is that PSNH has put
7 out various different interpretations with respect to all
8 of that information. In fact, we just heard a new one
9 today, because the analogy of the project was made to, I
10 believe, to when a car breaks down -- or, I'm sorry, a
11 situation if a pump breaks. So, perhaps now what we're
12 hearing from PSNH is that the turbine was no longer
13 operative at the time that they made these changes and
14 that it needed to be repaired. Because what's noteworthy
15 about the statements that we've heard today here today are
16 two things. Number one, PSNH just stated that they did
17 not know how much capacity -- do not know how much
18 capacity will be consumed by the scrubber project. But,
19 yet, nonetheless, they chose to go forward with a
20 \$17 million project without coming to this Commission for
21 any guidance before determining how much capacity would be
22 lost to the scrubber project. They clearly, under the
23 statute, could have waited to put on the scrubber,
24 determined what that amount of capacity was, come to this

{DE 08-145} [Prehearing conference] {01-16-09}

1 Commission with respect to that amount of capacity, and
2 moved forward. They elected not to do that.

3 I should also note that, even here at
4 this hearing, we're getting the same "it is part of the
5 scrubber project", "it's not part of the scrubber
6 project", "it is covered by the Scrubber Law", "it's not
7 covered by the Scrubber Law". You know, there's a letter
8 in the file, and none of the statements that I've made
9 PSNH suggested they could refute in any way with respect
10 to the various different interpretations they have put in
11 separate regulatory records here. There's a letter from
12 PSNH to DES that unequivocally states that, in their view,
13 "replacing the turbine is part of the scrubber project".
14 So, they have basically maintained their options to say to
15 whichever agency suits their needs whether or not this is
16 part of the scrubber project. Which suggests to me that
17 coming up with a stipulation will be a rather difficult
18 process, and that subjecting some -- subjecting some of
19 these issues to sworn discovery and testimony will help
20 develop those facts.

21 CHAIRMAN GETZ: It seems to me what
22 you're saying is, it's more about what the intent that
23 there may be a distinction with respect to it. I assume
24 that the facts are going to be clear on what they did,

{DE 08-145} [Prehearing conference] {01-16-09}

1 correct?

2 MR. PERESS: I have -- Your Honor, we
3 have not raised intent. We would agree with you. It's
4 PSNH that appears to be trying to explain away that this
5 is not a modification by saying that there apparently was
6 some sort of repairs and a breakdown, and that they needed
7 to replace the turbine at the time. They're the ones who
8 have addressed this intent issue. We think that the
9 statute is clear on its face. They should have put the
10 scrubbers on. They should have determined what the
11 parasitic load was. They should have come before this
12 board after they determined what the parasitic load was,
13 with the proposal, with the cost and issues related to
14 what it would take to restore the load. And, then, they
15 should have sought your approval. They elected not to do
16 that.

17 While we will endeavor, we will
18 absolutely endeavor to agree on a set of facts, if that's
19 what this Commission would prefer. Based on what I have
20 seen, from a factual inquiry across several levels of
21 regulatory agencies with jurisdiction over this, I think
22 that's going to be a very difficult task, in light of the
23 fact that PSNH has proffered different theories to
24 different agencies with respect to the nature of this

{DE 08-145} [Prehearing conference] {01-16-09}

1 project.

2 CMSR. BELOW: Yes. Thank you, Mr.
3 Chairman. It does seem that a basic question is whether,
4 sort of based on facts and the law, whether PSNH's capital
5 investments at Merrimack Station constituted a
6 modification within the meaning of RSA 369-B:3-a, as we
7 stated in our order of notice. And, I would just like to
8 call the parties' attention to another recently closed
9 proceeding that may have -- may or may not have some
10 bearing on this question as to what is sort of expected in
11 the normal course of business of operating a fossil fuel
12 generation plant. And, that's docket DE 06-061, which was
13 an investigation into the implementation of standards in
14 the Energy Policy Act of 2005.

15 In the Order Number 24,893 concluding
16 that investigation issued on September 15th of 2008,
17 addressed, among other things, the Fossil Fuel Generation
18 Efficiency Standard that was added to the Public Utilities
19 Regulatory Policy Act as part of the Energy Policy Act of
20 2005. And, that policy, which was sort of a federal
21 policy that asked all the states to consider whether to
22 adopt it at the state level, stated that "Each electric
23 utility should develop and implement a ten year plan to
24 increase the efficiency of its fossil fuel generation.

{DE 08-145} [Prehearing conference] {01-16-09}

1 And, our order in that case concluded that -- we had a
2 discussion of what we did as current practice and what was
3 expected in terms of prudent operation of fossil fuel
4 plants, and concluded that our current practice
5 constituted implementation of the Fossil Fuel Generation
6 Efficiency Standard, and therefore we didn't need to
7 further consider the actual federal standard.

8 And, so, I just ask -- would ask the
9 parties to keep that in mind as to considering that in
10 light of what expectations are for improving efficiency of
11 fossil plants within the sort of regular operations, and
12 whether -- and how that relates to the question of what
13 constitutes a modification under RSA 369-B:3-a. That's
14 all.

15 CHAIRMAN GETZ: Well, one more chance
16 for brief comments on any of the issues that have come up
17 already. Well, we'll let you go last, Mr. Peress, as the
18 Petitioner. Anything else, Ms. Hoffer?

19 MS. HOFFER: Just briefly, I would say,
20 respectfully, that the Clean Power Act really was not a
21 blank check for the types of capacity expansions that have
22 occurred. There was a public interest finding built in
23 the Act specifically to the wet flu gas desulphurization
24 system, that does not apply to any other work that might

1 be done to address the parasitic load. And, just to point
2 the Commission to two pieces of correspondence.
3 Mr. Bersak stated this morning unequivocally that the
4 "turbine replacement is not part of the scrubber project".
5 There's a correspondence from June 7th, 2006 and
6 January 31st of 2008, from Mr. Smagula to Director Scott,
7 in which the Company takes the position that it
8 unequivocally is a part of the scrubber project. Mr.
9 Bersak did say this morning the two projects are related.
10 That is, in fact, the precise standard that is applied by
11 the Environmental Protection Agency requiring that these
12 types of projects be aggregated for purposes of the Clean
13 Air Act pre-construction permitting. Thank you.

14 CHAIRMAN GETZ: Thank you. Mr. Bersak.

15 MR. BERSAK: There seems to be a lot of
16 discussion about whether the turbine replacement is part
17 of the scrubber replacement -- scrubber installation
18 project or not. I don't think that really makes much
19 difference to this Commission or to the public interest of
20 our customers. But it's interesting to note that, to the
21 extent that Petitioners and CLF are arguing that it's one
22 big project, then this Commission's determination in
23 08-103 would apply, and the Commission should abstain, as
24 it found under that position, from doing anything with

{DE 08-145} [Prehearing conference] {01-16-09}

1 respect to the turbine project.

2 However, if our position is taken, that
3 it is a separate project, certainly, we have nothing to
4 hide. But, as a matter of administrative efficiency, I'm
5 not sure whether going through the academic exercise of
6 trying to figure out "Is it a modification?" "Is it
7 something that falls under 125-0?" "Is it a 369-B:3-a
8 thing?" That doesn't really make much difference.
9 Ultimately, there will be a prudence investigation. And,
10 all of these things that touch upon the interest of
11 customers, including the matters that Commissioner Below
12 brought up from the Energy Policy Act docket, all that
13 will be part of that proceeding. I don't see a need to go
14 through the academic exercise of trying to figure out
15 which one of these boxes does it fall into, when
16 ultimately the prudence determination is what's really
17 going to control whether the actions that the Company took
18 were reasonable, proper, efficient, and in the public
19 interest, and whether customers benefit or whether they're
20 harmed by what we did.

21 We feel that the proper way of going,
22 given the facts that are out there, is to go through the
23 normal process of doing the Energy Service reconciliation,
24 and having the prudence reviews of our capital investments

{DE 08-145} [Prehearing conference] {01-16-09}

1 at the plant. And, every party that has standing will be
2 allowed to participate in that and to get all the
3 information to challenge whether what we did helps or
4 hinders the interests of our customers.

5 CHAIRMAN GETZ: Well, Mr. Bersak, it
6 seems to me it can be more than academic, depending on the
7 decision tree that's followed. If the actions constitute
8 a modification, and if those actions were not permitted
9 under 125-0:4, then it seems there's an argument that the
10 Company should have come here in the first instance for
11 pre-approval. Now, there's a couple of important decision
12 points along those lines. But it seems to me it's
13 something more than academic.

14 MR. BERSAK: Well, sure. And, let's
15 think about what happens. Supposed that the determination
16 is "yes, the Company should have come", we don't say
17 that's the case, but let's suppose as you stated, that
18 there's a decision that this is subject to 369-B:3-a. We
19 should have come to the Commission. What are the
20 consequences of that? Ultimately, if the --

21 CHAIRMAN GETZ: I guess that's for us to
22 determine.

23 MR. BERSAK: I know. But, ultimately,
24 if the project is found to be beneficial to customers and

1 provides value to customers and their interests, I assume
2 that the Company will recover the costs and the customers
3 will get the benefits of this project.

4 If it turns out that what we did was not
5 prudent, was unreasonable, was not in their public
6 interest, we wouldn't have the luxury and the protection
7 that the finding from this Commission under 369-B:3-a
8 would have given us. So, we have some risk. We
9 understand that we are subject to the prudence
10 determination, and we understand that this Commission
11 ultimately will be the arbiters of the interests between
12 the Company and customers, and to ensure that the
13 decisions that the Company made were prudent and
14 beneficial to customers.

15 So, that's why I said it was "academic".
16 Because, ultimately, what 369-B:3-a would have given us
17 was the pre-approval seal of approval. If we put this
18 thing in according to what we said as we were going to do,
19 and, if it didn't turn out right, no fault of our own,
20 customers still pay, because it got pre-approval.
21 Instead, we have the risk, as a prudence determination,
22 that, if it doesn't work, doesn't provide benefits, we
23 don't have the Commission's pre-approval, you know, stamp
24 of approval. And, that's something which ultimately will

{DE 08-145} [Prehearing conference] {01-16-09}

1 be part of that prudence determination as to who bears the
2 cost and who gets benefits.

3 CHAIRMAN GETZ: Okay. Thank you.
4 Ms. Hatfield.

5 MS. HATFIELD: Thank you, Mr. Chairman.
6 I disagree with Mr. Bersak that this inquiry would be
7 merely academic. I also think that trying to do a
8 look-back on this question only during reconciliation
9 dockets is not a good idea for many reasons, including how
10 difficult it is to look back and try to do an analysis
11 after the fact of whether something is in customers'
12 interests. And, it really undermines 369-B:3-a, which
13 says "prior to any modifications". So, I do -- I support
14 what Staff has suggested, in terms of proceeding and
15 making our best attempt to come up with stipulated facts,
16 so then we could get to the legal inquiries in the case.
17 Thank you.

18 CHAIRMAN GETZ: Thank you. Ms. Amidon.

19 MS. AMIDON: Yes. And, just one final
20 note. Contrary to what Attorney Peress said, Staff is
21 confident that working with the parties we can develop a
22 set of stipulated facts and proceed as we suggested.
23 Thank you.

24 CMSR. BELOW: There's one other thing

{DE 08-145} [Prehearing conference] {01-16-09}

1 I'd like to clarify. I think Mr. Rodier stated earlier
2 that he was under the impression that the hearing that the
3 Commission held or was to hold in DE 08-113 concerning the
4 Energy Service rate back in December was going to be a
5 "closed hearing". And, that was, in fact, a public
6 hearing, open to the public. There is a short portion of
7 that record that is being held as "confidential" on the
8 request by the Company under the Right to Know Law that's
9 it's confidential commercial information subject to
10 protection. But, to my knowledge, no party in that docket
11 or a member of the public has made a request, under a
12 nondisclosure agreement or otherwise, to access that
13 information. And, we would certainly entertain that on
14 its own merits pursuant to conformance with the Right to
15 Know Law. But I don't think that's exactly the case.

16 MR. RODIER: If I could just respond. I
17 mean, I totally agree with that clarification. I did
18 write a letter to the Commission expressing my concern.
19 But in view of what I know the Commission's burdens are at
20 this point, I did not and probably will not file that
21 request for that information. And, that's why I haven't
22 done it, because I know you don't need any more burdens on
23 you.

24 CMSR. BELOW: Thank you.

{DE 08-145} [Prehearing conference] {01-16-09}

1 CHAIRMAN GETZ: Well, that's very
2 helpful. Thank you, Mr. Rodier.

3 MR. RODIER: You're welcome.

4 CHAIRMAN GETZ: Mr. Peress.

5 MR. PERESS: Thank you, Mr. Chair. I
6 guess, first addressing the need for this set of facts and
7 the factual inquiry, I did, while, Commissioner Below, I
8 apologize, I'm not familiar with the order that you're
9 referencing, but I am fairly certain that, unlike the
10 Legislature, the Commission did not give PSNH carte
11 blanche to spend any amount of money that it feels is in
12 the public interest in order to pursue efficiency
13 projects. And, in that vein, I think the need to develop
14 these facts in a public benefit RSA 369-B:3-a context can
15 not be overlooked in favor of a prudency determination.
16 Because, as we have asserted in her our briefs, the public
17 interest determination under RSA 369-B:3-a is a condition
18 precedent to PSNH coming in and seeking cost recovery for
19 modifications. And, should PSNH move forward, they will
20 be subject to a motion to dismiss any claim for cost
21 recovery in that reconciliation docket, because it would
22 be a modification that is subject to that condition
23 precedent. Which all goes to the point that, Mr. Chair,
24 of course, your sense regarding the need to determine

{DE 08-145} [Prehearing conference] {01-16-09}

1 whether or not this is a modification is necessary before
2 we can move forward. Otherwise, this issue will clearly
3 rear its head again, and in -- perhaps in other dockets.
4 I think that also addresses the issues raised in PSNH's
5 motion to strike to some extent. As Mr. Bersak is aware,
6 he received our filing within the time frame that it was
7 required to be filed. And, there would be no prejudice to
8 any party, notwithstanding the fact that he has moved to
9 strike our response to the Motion to Dismiss, which we,
10 again, suggest is another obvious attempt by PSNH to
11 prevent the factual inquiry into what it has spent in the
12 past already, without the public interest determination,
13 without the Commission's review.

14 So, we are more than happy to work with
15 the parties to seek some agreement in facts, with the
16 recognition that, in order to seek that agreement, there
17 will need to be a significant amount of reconciliation of
18 disjointed and perhaps inconsistent facts that have been
19 placed into the record by PSNH in various proceedings.
20 And, that's why I think we ultimately suggested that a
21 good safeguard under those circumstances would be the
22 potential that their -- that facts submitted by PSNH be
23 subject to cross-examination. And, we would suggest, if
24 the Commission is inclined to seek stipulated facts, that

{DE 08-145} [Prehearing conference] {01-16-09}

1 we first undergo discovery, perhaps two rounds of
2 discovery, and then seek to find if there can be a
3 stipulated agreement amongst the parties with respect to
4 the facts.

5 CHAIRMAN GETZ: Okay. Well, let me, I
6 guess, say this. I'm not persuaded that extensive
7 discovery is required in the first instance. We would
8 like to address these issues in the most efficient way
9 possible. We're going to take under advisement the issue
10 of standing. We're going to take under advisement the
11 Petition to Intervene, and as well the motion to strike.
12 What I would like the parties to do, in the technical
13 session following this prehearing conference this morning,
14 is start the process of arriving at a stipulated set of
15 facts. I think that's the soundest way for us to proceed.

16 I assume all the parties agree that they
17 would like us to try to come to a resolution of this issue
18 in the quickest, most efficient way possible. And, so, I
19 would like to see a good faith effort by all the parties
20 to come to some stipulated set of facts. If there are
21 characterizations about what those facts mean, then that's
22 going to be something that we can deal with through
23 written submissions.

24 And, I think my earlier formulation is

{DE 08-145} [Prehearing conference] {01-16-09}

1 the better way to proceed, in terms of "do these facts
2 indicate that the actions of the Company rise to the level
3 of a modification that would fall within the parameters of
4 369-B:3-a?" And "with respect to 125-0:13, IV, even if it
5 is a modification, is the Company permitted to undertake
6 those actions without our approval?" If there's some
7 other issues that the parties think should be part of
8 that, of those written submissions, then I would like you
9 to consider that in the technical session. I'm hopeful we
10 can get a joint proposal on how to proceed. But, as
11 always, if there's some dispute about how we proceed,
12 we'll review any opposing positions.

13 All right. Is there anything else we
14 need to address this morning?

15 (No verbal response)

16 CHAIRMAN GETZ: Okay. Hearing nothing,
17 then we'll close the prehearing conference. We'll take
18 under advisement the issues as I've described them. And
19 we'll await a recommendation from the parties on the next
20 steps in terms of procedure. Thank you.

21 (Whereupon the prehearing conference
22 ended at 10:37 a.m.)

23

24