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STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

September 6, 2012 - 9:11 a.m.
Concord, New Hampshire

SESSION 1 of 2
ONLY

In re: **SITE EVALUATION COMMITTEE:**
DOCKET NO. 2012-01: Application
of Antrim Wind, LLC, for a
Certificate of Site and Facility
for a 30 MW Wind Powered Renewable
Energy Facility to be Located in
Antrim, Hillsborough County,
New Hampshire.
*(Hearing for oral arguments on
subdivision request)*

PRESENT: **SITE EVALUATION COMMITTEE:**

Amy L. Ignatius, Chrmn. Public Utilities Commission
(Vice Chairman of SEC)
(Presiding Officer)

Harry T. Stewart, Dir. DES - Water Division
Johanna Lyons, Designee Dept. of Resources & Econ. Dev.
Craig Green, Designee Dept. of Transportation
Brad Simpkins, Dir. DRED - Div. of Forests & Lands
Ed Robinson, Designee Fish & Game Department
Richard Boisvert, Designee Division of Historic Resources
Kate Bailey, Dir./Telecom Public Utilities Commission

COUNSEL FOR THE COMMITTEE: Michael Iacopino, Esq.

COUNSEL FOR THE PUBLIC: Peter C. L. Roth, Esq.
Senior Asst. Atty. General
N.H. Attorney General's Office

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

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APPEARANCES:

Reptg. Antrim Wind, LLC:

Susan S. Geiger, Esq. (Orr & Reno)
Rachel Goldwasser, Esq. (Orr & Reno)
Jack Kenworthy (Antrim Wind)

Reptg. Antrim Board of Selectmen:

Galen Stearns, Town Administrator
John Robinson, Selectman, Town of Antrim

Reptg. the Harris Center for Cons. Edu.:

Stephen Froling, Esq.

Reptg. Antrim Planning Board:

Bernie Waugh, Esq.
Sarah Vanderwende, Member
Martha Pinello, Member
Charles Levesque, Member

Reptg. Audubon Society of New Hampshire:

David M. Howe, Esq.

Reptg. Industrial Wind Action Group:

Lisa Linowes

Reptg. North Branch Group of Intervenors:

Richard Block

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P R O C E E D I N G

CHAIRMAN IGNATIUS: Good morning. I would like to open the proceeding this morning in the Site Evaluation Committee Docket Number 2012-01, which is the Application of Antrim Wind Energy to develop a wind facility in the Town of Antrim. We have had numerous proceedings on this thus far, and we've got some more to come, so I won't go through a full restatement of the Order of Notice. I think that's known to everyone. What we're here for today is a couple of matters, a few procedural things, and then the heart of it is to consider a legal issue that was noticed, and has been responded to by a number of participants with memorandum of law as requested, on interpretation of the authority of the Site Evaluation Committee to undertake a subdivision of land in the Town of Antrim.

Let me first ask all of the Subcommittee members to introduce themselves. My name is Amy Ignatius. I'm a Chairman of the New Hampshire Public Utilities Commission, and am sitting as presiding officer of this Subcommittee. And, if the other members could introduce themselves and the agency that they represent. Let's go around, starting with Mr. Stewart.

DIR. STEWART: Harry Stewart, Department

1 of Environmental Services, Water Division Director.

2 MR. E. ROBINSON: I'm Ed Robinson. I'm
3 a wildlife biologist with the Fish & Game Department.
4 And, I'm sitting in for Director Normandeau.

5 DIR. SIMPKINS: I'm Brad Simpkins, with
6 the Department of Resources and Economic Development,
7 Division of Forests and Lands.

8 MS. BAILEY: Kate Bailey, with the
9 Public Utilities Commission. I'm the Director of
10 Telecommunications.

11 MR. BOISVERT: Richard Boisvert, Deputy
12 -- I'm State Historic Preservation Officer and State
13 Archeologist in the New Hampshire Division of Historic
14 Resources.

15 MR. GREEN: I'm Craig Green, with the
16 Department of Transportation. I'm the Assistant Director
17 of Project Development.

18 MS. LYONS: Johanna Lyons, with the
19 Department of Resources and Economic Development. I'm
20 representing Commissioner Bald.

21 CHAIRMAN IGNATIUS: Thank you. And,
22 welcome, everyone. We have a quorum of the Subcommittee.
23 And, I would also like to take appearances of parties who
24 are here today, beginning with Ms. Geiger.

1 MS. GEIGER: Yes. Good morning. I'm
2 Susan Geiger, from the law firm of Orr & Reno. I
3 represent Antrim Wind Energy, LLC, the Applicant in this
4 proceeding. And, with me today at counsel's table are
5 Attorney Rachel Goldwasser, also from Orr & Reno, and
6 Mr. Jack Kenworthy, from Antrim Wind. Good morning.

7 CHAIRMAN IGNATIUS: Good morning.

8 MR. FROLING: Good morning. My name is
9 Stephen Froling. I'm here representing the Harris Center
10 for Conservation Education, which is an intervenor.

11 CHAIRMAN IGNATIUS: Good morning.

12 MR. STEARNS: Good morning. I'm Galen
13 Stearns, the Town Administrator in Antrim, representing
14 the Board of Selectmen.

15 CHAIRMAN IGNATIUS: Yes, sir?

16 MR. J. ROBINSON: John Robinson. I'm a
17 Selectman in the Town of Antrim.

18 MR. McCABE: Sean McCabe. I'm with the
19 Applicant, Antrim Wind.

20 MR. ROTH: Good morning, madam Chairman.
21 Peter Roth. I'm Counsel for the Public. And, I represent
22 the people of the State of New Hampshire.

23 MS. LINOWES: Good morning. Lisa
24 Linowes representing the Industrial Wind Action Group.

1 CHAIRMAN IGNATIUS: Good morning.

2 MR. BLOCK: Richard Block. And, I'm the
3 spokesperson for the North Branch Group of intervenors.

4 MR. HOWE: Good morning. David Howe,
5 counsel for Audubon Society of New Hampshire, intervenor.

6 MR. WAUGH: I'm Bernie Waugh. I
7 represent the Antrim Planning Board for this limited
8 purpose on this subdivision jurisdiction issue.

9 MS. VANDERWENDE: Sarah Vanderwende.
10 I'm a member of the Antrim Planning Board.

11 MS. PINELLO: Martha Pinello, a member
12 of the Antrim Planning Board.

13 MR. LEVESQUE: Charlie Levesque, Antrim
14 Planning Board.

15 CHAIRMAN IGNATIUS: Good morning. Did
16 we get everyone?

17 MS. BOUCHER: I'm Rebecca Boucher. I'm
18 just observing.

19 CHAIRMAN IGNATIUS: All right. Welcome.
20 Thank you, everyone, for being here this morning. As you
21 know, there is only one docket that's being considered
22 today for the Site Evaluation Committee Subcommittee, and
23 that's the Antrim Wind Energy request for Certificate of
24 Site and Facility. And, I won't recount all of the

1 details of what has been requested, because I think that's
2 known to everyone and clear what the Application is
3 seeking.

4 The specific question, though, that we
5 have today is one that is over the question of whether the
6 Site Evaluation Committee has the authority to create a
7 subdivided lot as part of the Project pursuant to RSA
8 162-H, and specifically 162-H:16, II. The arguments that
9 have been put forth in the briefs and memos of law address
10 that question, and a number of other questions. And, our
11 plan is to allow anyone who submitted a memo of law or
12 brief to address it briefly in a five minute period of
13 letting you explain the overall positions that you take,
14 and then give the Subcommittee members the opportunity to
15 ask questions to clarify and probe your arguments. It
16 won't be questioning by each other, but by members of the
17 Subcommittee. And, at the conclusion -- and, counsel to
18 the Subcommittee may have questions as well. At the
19 conclusion of that, it may be appropriate, because this is
20 a legal determination that we have to make, that we break
21 for consultation with counsel, but we will see how that
22 goes.

23 There are also a couple of procedural
24 matters we'll take up. And, just so that we have --

1 people are aware what's yet to come, although we'll do
2 these at the end of the session, I intend to address the
3 motion to strike the reply brief of the Applicant and the
4 objection filed to that motion. We also have the question
5 of the request to postpone the hearing dates until a later
6 date. They were due to begin on this coming Monday. And,
7 we will go through that, some questions of whether a new
8 date is appropriate given the discovery issues still
9 remaining. And, I think that's it. I was thinking there
10 was one more thing, but I'm looking on my notes and I'm
11 not finding it. So, I think those are the items to take
12 up.

13 And, Mr. Iacopino reminds us -- oh, and
14 you didn't introduce yourself, we'll do that also --
15 reminds us that Industrial Wind Action has filed a motion
16 for reconsideration of some of the discovery rulings order
17 that is still pending for people to file responses to, if
18 they wish. We won't be taking that up today.

19 But, Mr. Iacopino, I meant to ask you to
20 introduce yourself as well.

21 MR. IACOPINO: Thank you. I'm Mike
22 Iacopino, Counsel to the Committee.

23 CHAIRMAN IGNATIUS: All right. So, what
24 I want to do today is to go through the subdivision issue

1 and give everyone, who filed a memo or a brief, a
2 five-minute period max, you don't need to take that long
3 if you don't need to, to present a sort of summary of your
4 arguments, and afterwards let members of the Subcommittee
5 and Mr. Iacopino ask any questions to each of you
6 individually. I think we'll do it in order. The
7 presentation of argument questions, then go to the next
8 party, questions, and so forth.

9 The question of whether or not the
10 Applicant was entitled to or should be prohibited from
11 submission of a reply brief I do want to take up before we
12 begin. The order called for briefs to be submitted on
13 July 24th. And, we received briefs or memos from
14 Industrial Wind Action, from the Antrim Planning Board,
15 from Counsel for the Public, and from the Applicant. The
16 order said nothing about reply briefs or responsive
17 briefs. We did receive one from the Applicant on
18 August 3rd, and then a motion to strike on August 13th
19 from Counsel for the Public, and an objection filed to
20 that by the Applicant.

21 There is no provision in the order, as I
22 said, for reply briefs. It isn't assumed that one always
23 has the opportunity to do so. There is an opportunity to
24 seek by motion the request to have leave to file, and that

1 was not done in this case. It's my determination that the
2 reply brief was not appropriately filed. And, therefore,
3 I will grant the motion to strike the reply.

4 I think that what we're getting into
5 today, in terms of oral argument, makes the whole issue
6 somewhat less meaningful, because we do want to hear from
7 people and their positions, and they each will no doubt
8 respond to what they read in each other's pleadings. You
9 don't have to only restate what was in your legal memo
10 itself. We've all read them, so that's not necessary.
11 And, so, the opportunity to respond to each other is sort
12 of the value in having this oral argument time. So, to
13 the extent that each party wants to respond to things that
14 they have read in each other's by now I think is
15 appropriate. So, in my determination to strike the reply,
16 I don't mean to say that it's to strike any responses to
17 what you've read. It's just that we don't want to get
18 into a situation where, if there is an objection to one
19 party filing more than what was called for in the order,
20 that it being clear that some get an additional
21 opportunity and others do not. Occasionally, it does
22 happen and no one objects, and that's fine. But, in this
23 case, we did have an objection, and so that is my ruling.

24 So, I think the order of presentation

1 would be for the Applicant to go first, as it is their
2 burden to prevail on the question of authority and
3 something they have asked for in their petition for
4 authority for this project overall. Then, the Antrim
5 Planning Board, then Industrial Wind Action, and Counsel
6 for the Public. And, again, because the Applicant has the
7 burden of proof, it may be that I offer the Applicant a
8 final opportunity to respond, depending on whether we get
9 into things that seem appropriate to do so.

10 So, then, let's begin then with the
11 Applicant presentation. And, afterwards, we'll see if
12 there are questions from Subcommittee members and from the
13 counsel.

14 MS. GEIGER: Thank you. Antrim Wind is
15 requesting that the Site Evaluation Committee or this
16 Subcommittee approve a subdivision that is needed for the
17 interconnection yard upon which the substation and step-up
18 facilities associated with the Antrim Project will be
19 located. These facilities are depicted on a map or a plan
20 that was submitted to the Committee as Appendix 19, and
21 that basically shows the subdivision that's being
22 requested. In addition, specs for these facilities have
23 also been filed with the Committee.

24 Now, in the absence of this process

1 under RSA 162-H, the Antrim Planning Board would have
2 authority over subdivisions. However, it's Antrim Wind's
3 position that the authority granted to the Site Evaluation
4 Committee under 162-H preempts any local planning
5 authority, including subdivision approval, over any
6 aspects of this Project. The preemption argument that
7 Antrim Wind submits to this Committee has been laid out
8 starting at Page 3 of our brief. And, at Page 3, we cite
9 to a New Hampshire Supreme Court case of *Bio Energy, LLC*
10 *versus Town of Hopkinton* that lays out the five part test
11 that the New Hampshire Supreme Court has established for
12 determining whether a state agency, such as the SEC,
13 preempts local authority. And, I won't -- I won't read
14 every one of those criteria, but, as I said, they begin on
15 Page 3 of our brief. And, for reasons set forth in our
16 brief, we believe that RSA 162-H meets all of those five
17 criteria laid out by the New Hampshire Supreme Court.

18 As Chairman Ignatius indicated, RSA
19 162-H:16, II, expressly says that a certificate issued by
20 the SEC "shall be conclusive on all questions of siting
21 and land use". Now, the purpose of 162-H is embodied in
22 Section 1 of that statute. And, it says that the
23 Legislature's intent in creating the statute and passing
24 it is to "ensure that construction and operation of energy

1 facilities is treated as a significant aspect of land-use
2 [and] planning in which all environmental, economic, and
3 technical issues are resolved in an integrated fashion."

4 In addition, in the New Hampshire
5 Supreme Court case of *Public Service Company of New*
6 *Hampshire versus Town of Hampton*, the Court said that
7 "facilities covered by 162-H", like the Antrim Wind
8 Project, "are to be determined in an integrated and
9 coordinated procedure by the SEC whose findings are
10 conclusive". And, by doing that, the Legislature has
11 preempted any power that the "towns might have had with
12 respect to facilities that are embraced by the statute."

13 Now, in our brief we've cited some of
14 the legislative history of 162-H and its prior statute,
15 162-F. And, we believe that that legislative history more
16 than amply demonstrates that the Legislature intended to
17 preempt town control over this facility, including
18 subdivision review and authority. And, I won't belabor
19 that conversation here, but the arguments are in our
20 brief.

21 Requiring an applicant, like Antrim, to
22 go back to the Planning Board, after this Committee has
23 certificated the project, including the substation, would
24 lead to piecemeal regulation, which is precisely what

1 162-H is intended to avoid. And, given that the Planning
2 Board's review of an energy facility subdivision plans
3 could cause significant delays in the construction and
4 operation of a project, such review is impermissible and
5 would directly conflict with the purposes of 162-H, that
6 requires that all permitting be conducted in an integrated
7 process.

8 The other thing that's very important
9 for this Committee to take note of is Appendix 17A that
10 was filed by Antrim Wind. This is the Town of Antrim's
11 agreement with Antrim Wind. Paragraph 2.8 of that
12 agreement expressly states that "approval under the Town's
13 ordinances and regulations is not required for any of the
14 site plans, subdivisions, facilities, buildings, roads or
15 other structures that are certificated by the SEC." So,
16 the Town has agreed that it's this Committee that makes
17 those decisions, and the Town has no further role to play
18 in subdivision approval, for example, or in other
19 permitting.

20 Certainly, if the Town felt that it
21 retained authority to review subdivisions and approve
22 them, after a certificated process had been conducted
23 here, they would not have agreed to that condition in the
24 Town of Antrim agreement.

1 Lastly, our brief discusses the
2 statutory construction argument. And, the statutes at
3 play here are really what brings us here today. There is
4 a state statute that says that a register of deeds can't
5 record a subdivision plan, like the one we've submitted in
6 Appendix 19, unless it's signed by the Planning Board.
7 Well, as we all know, the Planning Board did not play a
8 role here. So, it creates a difficulty on the part of an
9 applicant or a developer, who has gone through the
10 permitting process here, the exhaustive process, ten
11 months, sometimes as long as, you know, a year or sixteen
12 months, to then have to go back to a planning board to
13 look at a subdivision in order to record it, so that title
14 can be clear enough so that the developer can get
15 financing for the project.

16 We believe that the Legislature intended
17 162-H to be a one-stop shopping mechanism whereby all land
18 use, planning, environmental, and other considerations are
19 decided by this body, and that the town does not retain
20 any role to play. We believe that principles of statutory
21 construction support our position. And, we also believe
22 that, if there were a different construction of the
23 statutes at play here, then that would totally undercut
24 the Committee's authority and the Legislature's intent

1 under 162-H. It would also add another regulatory hurdle
2 for applicants that we believe is inappropriate in light
3 of the reasons why 162-H were enacted.

4 In addition, I don't know if this is the
5 appropriate time, or if I should wait until after others
6 have spoken to provide some rebuttal, but, you know,
7 certainly we've -- we have seen some of the arguments
8 presented by the Town and Public Counsel. We do not
9 agree, for example, with Public Counsel, who has argued
10 that the Committee doesn't have jurisdiction over the
11 subdivision -- substation facilities. This is precisely
12 contrary to a position that Public Counsel took in the
13 Groton Wind case. So, we believe that the Committee
14 clearly has spoken on that, that it does, in fact, have
15 the authority to look at subdivision -- excuse me, at
16 substation and step-up facilities as part of an associated
17 facility with a wind energy project, which is what the
18 Committee did in the Groton case. So, I realize some of
19 the Committee members did not sit on that case. But, I
20 believe, if you go back and check the order that we have
21 cited in our reply brief, which apparently is not in the
22 record. In any event, if you go back and look at the
23 Groton orders, you will see that, and in the record of
24 that proceeding, you will find that the Public Counsel

1 took precisely the opposite position that he's taking
2 here. And, the Applicant in that docket was required to
3 submit to SEC jurisdiction for purposes of having its
4 substation facilities reviewed. So, we find that argument
5 unpersuasive.

6 In addition, we do not believe that any
7 local land use statute indicated an intent to divest this
8 Committee of its authority to review all of the components
9 of a wind energy project and make the necessary approvals
10 of them.

11 So, in summary, we believe that the
12 Commission does have the authority -- excuse me, the
13 Committee does have the authority to grant subdivision
14 approval as requested by Antrim Wind, and we would
15 respectfully request that it do so. Thank you.

16 CHAIRMAN IGNATIUS: Thank you. Are
17 there questions from Committee -- Subcommittee members?

18 (No verbal response)

19 CHAIRMAN IGNATIUS: I have some. And,
20 if people do have questions, just flag me down and we'll
21 -- we don't have to worry too much about what order people
22 are going in.

23 Ms. Geiger, how is it the Site
24 Evaluation Committee determination would be -- I think you

1 used the phrase "commensurate with a planning board
2 signature". How -- explain further how you move from an
3 order, if this Committee were to approve a subdivision, to
4 giving the Register of Deeds the authority to record a
5 site plan and all of the other statutes that have been
6 raised that require some planning board signature?

7 MS. GEIGER: The argument in support of
8 our position is laid out in our brief at the very end.
9 And, it basically hinges on statutory interpretation and
10 principles of construction that would allow the register
11 of deeds, for example, or anyone else, to read RSA 676:18
12 as authorizing the Site Evaluation Committee to step into
13 the shoes of a planning board when the Site Evaluation
14 Committee's authority has preempted the planning board.

15 And, you know, clearly, we understand
16 what the statute says, and that's what brings us here
17 today. It's an unusual situation. And, I don't think
18 it's one that was directly contemplated by the Legislature
19 in enacting either statutes. So, we do recognize in our
20 brief that there is a gap. And, that we believe that
21 162-H creates plenary authority that supersedes and
22 preempts the Planning Board. But that 676:18 clearly says
23 that "the Register of Deeds must accept a plan that's
24 signed by the planning board." Here the Planning Board

1 doesn't have a role. And, therefore, we don't believe
2 that that statute can be interpreted literally.

3 CHAIRMAN IGNATIUS: Do you know of any
4 instances where something like this has happened, not for
5 the Site Evaluation Committee, but any other regulatory
6 determination that is deemed to be the equivalent of
7 planning board approval, and then gives the register that
8 authority to record?

9 MS. GEIGER: I believe the statutes
10 allow the decision to be made by the superior court that
11 effect property interests to be recorded. In other words,
12 the order of the superior court would allow the register
13 of deeds to record that plat.

14 CHAIRMAN IGNATIUS: Anything involving
15 an administrative body?

16 MS. GEIGER: I'm not aware of any.

17 CHAIRMAN IGNATIUS: You had said, both
18 in the brief and just a moment ago, that, as you interpret
19 the overall purpose of 162-H, there is no role for the
20 planning board, once the Committee takes jurisdiction.
21 Does that mean any, you know, requirements of frontage or
22 setbacks or any local ordinance having to do with planning
23 and zoning have -- cannot enter in, that the boards in the
24 local community are just completely shut down?

1 MS. GEIGER: No. I think 162, as the
2 Committee knows, 162-H:16 does permit this Committee to
3 consider the views of local governing and planning bodies.
4 And, so, I don't believe that there -- maybe I misspoke
5 when I said "there's no role". I don't believe that
6 there's any permitting role for the towns, once this
7 Committee assumes jurisdiction over an energy project.
8 However, there certainly is a role for town planning
9 boards to play before this Committee. They certainly may
10 offer their view, and this Committee is required to
11 consider those views in making its determinations under
12 162-H. So, --

13 CHAIRMAN IGNATIUS: But, if the Town had
14 an ordinance that required a certain width of driveway
15 cuts, --

16 MS. GEIGER: Uh-huh.

17 CHAIRMAN IGNATIUS: -- let's say,
18 something like that. They would not be able to address
19 that. It's only -- it could only be by order of the SEC
20 on those issues?

21 MS. GEIGER: I believe what would happen
22 in that instance, and I think it's happened before in the
23 Lempster case. As you may recall, the Town of Goshen came
24 in and said that it had height restrictions that would

1 have prevented taller utility poles from being installed
2 for the transmission line. In that case, the Committee
3 looked at the Goshen ordinances, and took them into
4 consideration, but were not bound by them. So, certainly,
5 the town's ordinances and town's, you know, master plan,
6 and other regulations that the town have, or has,
7 certainly may be reviewed and considered by this
8 Committee, but the Committee is not bound by them. And, I
9 think that's exactly what the *PSNH* case gets to, the *PSNH*
10 *versus Town of Hampton* case. That has, you know, been out
11 there since 1980. And, basically says that, by enacting
12 the site evaluation statute, and I'll quote for it --
13 quote from it, "the Legislature has preempted any power
14 that the defendant towns", meaning the Town of Hampton,
15 "might have had with respect to transmission lines", in
16 that case, "embraced by the statute. And, any actions by
17 the defendant towns with regard to transmission lines are
18 of no effect."

19 So, we think that the *PSNH* case is at
20 least a very good starting point for the preemption
21 analysis, and the argument that it really is the SEC's
22 authority here with respect to an energy or a renewable
23 energy facility that governs.

24 CHAIRMAN IGNATIUS: And, it's your view

1 that it's a complete preemption? It's not that certain --
2 certain ordinances that might violate or interfere with
3 the scheme set up in 162-H would be preempted and others
4 could survive, but that all of them, everything in a town
5 planning ordinance is preempted?

6 MS. GEIGER: I think that's the only way
7 to logically interpret the Supreme Court decision and to
8 logically interpret the Committee's power, because to do
9 otherwise would require piecemeal regulation, which we
10 think is clearly prohibited. The Legislature did not
11 intend for applicants such as these to have to shop
12 around, if you will, to get various permits. And,
13 enacting 162-H and its predecessor statute, 162-F, the
14 Legislature clearly intended, because of their nature,
15 energy facilities are different, that they should come to
16 the state and they should not have to go to the local
17 permitting authorities for various underlying permits.

18 CHAIRMAN IGNATIUS: Have you read the
19 *Stablex* line of cases?

20 MS. GEIGER: I am not intimately
21 familiar with them.

22 CHAIRMAN IGNATIUS: They're, you know,
23 some of it is spelled out in Counsel for the Public's
24 brief, and so I won't restate his arguments. But it does

1 look at the question of which ordinances may be repugnant
2 to the statutory scheme and which are not, and a certain
3 sort of separating out between those that are
4 impermissible and those that are residual and remain with
5 the municipality. All right. Well, I'm sure we'll hear
6 more about that.

7 Any questions? Ms. Bailey.

8 MS. BAILEY: Yes. Could you address the
9 Public Counsel's argument about the fact that you don't --
10 that the Applicant doesn't own the land, and that the
11 owner of the land is the one who is supposed to ask for a
12 subdivision?

13 MS. GEIGER: Yes. I alluded to that
14 earlier. That was precisely the case in the Groton Wind
15 case. Here we have an option, I believe, to purchase the
16 property. Obviously, the option hasn't been exercised,
17 because the Applicant doesn't know yet whether it will get
18 a permit from this Committee. So, they didn't want to go
19 ahead and actually buy the land outright at this point.

20 However, the fact that the Applicant
21 does not own the land I don't think is dispositive of the
22 question of whether or not the Applicant has standing or
23 whether this Committee has the authority to make decisions
24 with respect to that property. The Applicant does have a

1 right to and an option that it can exercise to purchase
2 that, that land. And, the problem, one of the reasons
3 that we're here, is that PSNH has a policy that it must
4 own the land underlying the substation facilities. And,
5 here, PSNH only wants to own a portion of the land that
6 the Applicant has the right to purchase, and that's why we
7 need a subdivision.

8 This is similar to what happened in
9 Groton, and the Committee asserted jurisdiction over this
10 facility, and we had to come back and supplement our
11 Application, or Groton Wind did, in order that the
12 Committee could review the subdivision's impacts on
13 various issues under 162-H.

14 MS. BAILEY: But the land in Groton, did
15 that have to be subdivided?

16 MS. GEIGER: Ultimately, it did.

17 MS. BAILEY: And, who approved that?

18 MS. GEIGER: Apparent -- in that case, I
19 believe the Applicant, and I was not involved in that, my
20 understanding is that, after, after the Committee granted
21 a certificate, I believe the Applicant in that case went
22 to the Town of Holderness and received approval.

23 MS. BAILEY: Thank you.

24 CHAIRMAN IGNATIUS: Other questions?

1 (No verbal response)

2 CHAIRMAN IGNATIUS: Mr. Iacopino, do you
3 have any questions?

4 MR. IACOPINO: Yes. The first thing I
5 want to address, I take it the Applicant's position is
6 that the switchyard and the substation, and the land on
7 which they will sit, are associated facilities of the
8 Project?

9 MS. GEIGER: That's correct.

10 MR. IACOPINO: And, ultimately, they're
11 going to be owned by Public Service, is that right?

12 MS. GEIGER: That's my understanding.

13 MR. IACOPINO: And, does that include,
14 for instance, the fixtures in the switchyard and the
15 substation itself?

16 MS. GEIGER: Go ahead. I'll let Jack --

17 CHAIRMAN IGNATIUS: Well, I think, since
18 this isn't an evidentiary hearing, I don't know if there
19 are certain facts you want to get in the record just to be
20 clear that we have a common understanding. Maybe if we
21 can do it through --

22 MR. IACOPINO: Let me just ask the next
23 question then, --

24 MS. GEIGER: Sure.

1 MR. IACOPINO: -- because that fact is
2 not all that important. If Public Service owns that land,
3 how does the Site Evaluation Committee enforce any
4 conditions that might be imposed upon the certificate, as
5 a result of things that may occur on that property?

6 MS. GEIGER: I think that the
7 enforcement mechanism really is against the Applicant. I
8 mean, that the facility is certificated, and the -- with
9 the recognition that this is exactly what's going on in
10 the Groton Wind case, PSNH is owning those facilities as
11 well, I believe enforcement would be through the --
12 through conversations with the Applicant on what's going
13 on there.

14 MR. IACOPINO: So that if, ultimately,
15 there was a problem at the substation and switchyard, and
16 that the Site Evaluation Committee found to warrant some
17 kind of sanction, they could suspend the permit, despite
18 the fact that you have no control over what Public Service
19 does?

20 MS. GEIGER: Yes. I mean, I hate to
21 speculate about that situation. I don't think this is any
22 different from the situation where, in Lempster, for
23 example, the interconnection facilities, the line that ran
24 from Lempster to the Newport Substation, was built by

1 Lempster Wind and certificated by Lempster Wind, with the
2 full knowledge of the Committee that the line was going to
3 ultimately be owned by PSNH.

4 So, it's because of the nature of the
5 electrical system in New Hampshire, where certain
6 components, generation components are going to be owned by
7 the Applicant, and the interconnection distribution
8 facilities are owned by the distribution company, you
9 know, the standard operating procedure has been that the
10 certificate is issued to the Applicant, the developer of
11 the facility that is building the generation component, as
12 well as the associated facilities.

13 And, I don't believe that, at least with
14 respect to the wind projects that have been certificated,
15 that PSNH was ever made a necessary party to a proceeding,
16 although I know they have participated, but I don't
17 believe that they were the certificate holder of the
18 facilities that they own -- ultimately owned.

19 MR. IACOPINO: Let me just switch gears,
20 because I have a question about a different thing. The
21 act of subdivision, okay, is really something that is done
22 for the benefit of a municipality, a city or a town. And,
23 it amounts to a number -- it impacts a number of different
24 things, some of which are things that the Site Evaluation

1 Committee is aware of, is charged with, things like the
2 environment. But it also has an impact on things like the
3 tax map of a town and things like that. And, the Planning
4 Board's brief has a very nuanced description of the
5 difference between subdivision regulations and land use
6 regulations. Can you address that argument that is made
7 in that brief? In essence, they make the legal argument
8 that "subdivision regulations are different than land use
9 regulations", and "have been considered to be different by
10 the New Hampshire Supreme Court". Do you have a response
11 to that argument?

12 MS. GEIGER: Well, our response I guess
13 is simply governed by what we believe to be the preemption
14 authority that we've cited in our brief. Basically, that
15 in enacting 162-H, the Legislature intended that the
16 underlying authority of the towns' municipal governing and
17 planning bodies are preempted. And, so, while in the
18 ordinary course, there may be a distinction between those
19 two things, we believe that the Legislature has conferred
20 authority on the SEC, not just on the narrow issue of land
21 use, but also with respect to any necessary approvals that
22 are needed for a project, including subdivision. And,
23 again, here, we have a town, the Town of Antrim has signed
24 an agreement indicating that "no further approvals from

1 the Town are needed, so long as the facilities are
2 certificated by the SEC." So, you know, we believe that
3 the Town's agreement is a very important component of the
4 puzzle, if you will.

5 MR. IACOPINO: Would it be fair to say
6 that you believe that, in RSA 162-H, where it talks about,
7 Section 1, where it talks about that the "operation of
8 energy facilities be treated as a significant aspect of
9 land-use planning", that that definition of "land use"
10 that you believe applies there is broader than the one
11 applied by the Antrim Planning Board, where they make a
12 distinction between "land use" and "subdivision"?

13 MS. GEIGER: Yes. I think that's true.

14 MR. IACOPINO: Let me get to the
15 agreement with the Town. The Town has ordinances in
16 place. Take it out of the aspect of the Site Evaluation
17 Committee for the moment. Is there any other situation
18 where the Town could agree that a developer does not have
19 to abide by land use regulations of the Town?

20 MS. GEIGER: I don't know the answer to
21 that question.

22 MR. IACOPINO: I'm just trying to gauge
23 what -- how much weight the argument that there's an
24 agreement with, really, I guess the Board of Selectmen of

1 the Town -- was this agreement ever -- it was never put to
2 the public at a town meeting or anything, was it?

3 MS. GEIGER: It was not. I've been told
4 it was not put to a meeting, a town meeting vote, but it
5 was voted upon, and I believe executed at a publicly --
6 properly noticed public meeting --

7 MR. IACOPINO: Of the Board of
8 Selectmen?

9 MS. GEIGER: -- of the Board of
10 Selectmen, correct.

11 MR. IACOPINO: So, in essence, the
12 agreement is the Board of Selectmen's agreement,
13 obviously, representing the Town, that the Applicant does
14 not have to comply with existing ordinances pertaining to
15 land use and subdivision?

16 MS. GEIGER: Correct. So long as -- so
17 long as the Project is certificated by the SEC.

18 MR. IACOPINO: And, you don't know of
19 any other area where that could occur?

20 MS. GEIGER: No.

21 MR. IACOPINO: Other than Site
22 Evaluation Committee, is what I was asking. You rely
23 heavily on the *Bio Energy* case. The *Bio Energy* case is
24 really in the line of the cases that began with *Stablex*.

1 They all -- obviously, the *Town of Hampton* case is older
2 than all of them. But you have the *Stablex* decision, you
3 have the *North Country Environmental* decision, and then
4 you have *Bio Energy*. And, all of them have this
5 particular phrase at the end -- well, it's not necessarily
6 at the end of each one of them, but they all have language
7 to this effect: "Of course, any local regulations
8 relating to such matters as traffic and roads, landscaping
9 and building specifications, snow, garbage, and sewage
10 removal, signs and other related subjects, to which any
11 industrial facility would be subjected, and which are
12 administered in good faith and without exclusionary effect
13 may validly be applied to a facility approved by the
14 state."

15 I guess my question is, even in the case
16 that you rely on the most, they recognize this *Stablex*
17 sort of a -- I call it the "veto power rule", that the
18 local boards still has authority to the extent that it
19 doesn't exclude the authority of the state agency.

20 And, I guess my question to you is, what
21 do you make of that language that is contained in each one
22 of those cases? That it begins in *Stablex*, and carried
23 through in *North Country*, and through the *Bio Energy* case
24 as well. And, that's on -- I don't have the page numbers

1 here, sorry. It's just at the end of Section 2 of the *Bio*
2 *Energy* decision, and they specifically cite to *Stablex*.

3 MS. GEIGER: I think -- I think the best
4 way to think about that is that, to the extent that this
5 Committee's authority is commensurate with or coextensive
6 with the permitting authority or the approval authority of
7 the town, in terms of land use, land planning, and those
8 matters, that this Committee's authority preempts the
9 town.

10 To the extent that there are other
11 ordinances or requirements, for example, certain, you
12 know, traffic requirements, obviously, this Committee
13 wouldn't -- or, the facility would be subject to them,
14 just as other citizens are. In other words, just because
15 a facility is certificated doesn't mean that it doesn't
16 need to abide by the types of things that you just
17 mentioned. But we don't believe that subdivision approval
18 is one of them.

19 MR. IACOPINO: Although, most of those
20 types of things are normally included in subdivision
21 approval, are they not, by a town?

22 MS. GEIGER: Pardon?

23 MR. IACOPINO: Most of those issues
24 addressed in the *Stablex* case, traffics, roads,

1 landscaping, building specs, snow/garbage removal, signs,
2 those are, typically, in New Hampshire, dealt with in
3 subdivision regulations, are they not?

4 MS. GEIGER: Perhaps some of them are.
5 I don't know that all of them are.

6 MR. IACOPINO: Well, I guess this gets
7 back to the whole enforcement question then. Let's say,
8 for instance, that the -- I don't know what they would,
9 let's say the Committee required 12-foot trees be planted
10 as a buffer around the switchyard. And, Public Service
11 determined that, on their own, that "we're not going to
12 put anything that goes higher than our fence. We'll have
13 some 2-foot bushes out there." And, you know, it really
14 doesn't involve what the substation is for, which is to
15 get the electricity into the grid. It involves issues
16 that are not really that -- don't really address getting
17 the energy to the grid. What -- is the remedy then or is
18 the sanction then to shut down the project? Or, isn't --
19 or, aren't you actually better off with Public Service
20 being subjected to local subdivision regulations?

21 MS. GEIGER: I don't think so. I think
22 what would happen in that instance, if the Committee were
23 to make specific orders or specific criteria applicable to
24 the switchyard facilities, then, in any negotiations that

1 the Applicant had with PSNH over the acquisition of that
2 property, we would certainly make it a requirement of that
3 transaction, that PSNH agreed to abide by and be held
4 accountable for and -- abide by the regulations or the
5 conditions in the certificate.

6 MR. IACOPINO: But my understanding is
7 that you're not -- is that those negotiations aren't going
8 to happen until you have a certificate in hand, am I
9 correct on that?

10 MS. GEIGER: I think that's probably
11 true.

12 MR. IACOPINO: Okay. So that, then you
13 could come to that point then, Public Service says "no, we
14 need 12-foot high trees. This permit only allowed" -- I'm
15 sorry, "we need 4-foot -- 2-foot high trees, we won't go
16 over 2-foot bushes." And, this requires 12-foot trees.
17 What happens then?

18 MS. GEIGER: I think what happens then,
19 if it's a material -- if there's a material -- a need for
20 a material change in a certificate, the Applicant would
21 come back to the Committee and ask the Committee to grant
22 a waiver or to reconsider its decision in light of those
23 events. But the Applicant would not take matters into its
24 own hand and violate a condition of a certificate.

1 I guess another, just to answer your
2 question a little bit further, is it really PSNH just
3 requires ownership of the land that underlies the
4 switchyard. So, to the extent that the Applicant is
5 required to do landscaping around the facility, the
6 Applicant would own that land, and the Applicant would be
7 able to control everything around the switchyard
8 facilities.

9 MR. IACOPINO: Have you compared the RSA
10 162-H with RSA 147-A and 149-M, I believe it is, the
11 hazardous waste statute and the solid waste statute?

12 MS. GEIGER: No.

13 MR. IACOPINO: They all appear to have a
14 fairly comprehensive regulatory scheme, and I know that's
15 your major -- that is your major point, because the
16 *Stablex*, I believe *Stablex*, and certainly the *Bio Energy*
17 cases are based on those statutes. I want to know if you
18 can point to anything that's different between the Site
19 Evaluation statute and those statutes, that would suggest
20 that there is not a residual -- a residual authority left
21 to the town over things like subdivision regulations that
22 would not have an exclusionary effect? I mean, do you --

23 MS. GEIGER: That's not something I'm
24 prepared to do today. But, if the Committee wants a

1 follow-up memo of law on that, I'd be happy to provide it.

2 CHAIRMAN IGNATIUS: Can you give us
3 those citations again please?

4 MR. IACOPINO: RSA 147-A I believe is
5 the hazardous waste statute, and RSA 149-M is the solid
6 waste statute. And, those are the statutes that are
7 addressed in *Stablex*, *North Country*, and *Bio Energy*, in
8 those cases. And, I guess the question is, is do those --
9 are those statutes substantially different in any way or
10 different enough to make a difference with respect to
11 those residual powers?

12 MS. GEIGER: I'd have to say, without
13 looking at it, that they have to be different. Because
14 *Stablex* and *North Country* and *Bio Energy*, to the extent
15 that they recognize residual authority in the towns, have
16 to be based on those statutes. We've got case law from
17 the Supreme Court dating back to 1980, the *PSNH* case, that
18 recognizes absolutely no residual authority. You know,
19 the quoted language that I gave you earlier says that the
20 towns -- you know, "any authority that the towns may have
21 had over transmission lines is preempted by the Site
22 Evaluation Committee process."

23 So, you know, without reading them,
24 without having an intimate knowledge of what those

1 statutes say, and what the cases say about them, I have to
2 believe that there's a difference in the statutory scheme.

3 MR. IACOPINO: Well, you know, Counsel
4 for the Public, in his brief, takes the position that
5 there's been an evolvement of the law, if you will, that
6 the law has evolved since the *Public Service versus*
7 *Hampton* case. Do you have any response to that particular
8 argument?

9 MS. GEIGER: I think *PSNH versus Hampton*
10 is still good law to my knowledge, and it deals
11 specifically with the authority of this Committee. The
12 other cases that were cited don't deal with Site
13 Evaluation Committee authority. So, I think there's a
14 distinction.

15 CHAIRMAN IGNATIUS: Let me just follow
16 up on that just a moment. In the language you quoted from
17 the *PSNH* case, that "the municipal authority having to do
18 with transmission lines is preempted by the Site
19 Evaluation Committee." You've taken to say, "therefore,
20 all matters within the jurisdiction of the planning board
21 are also preempted." And, I just -- it's a pretty
22 significant leap to go from one to the next. So, if you
23 can just explain again, why authority over a transmission
24 line, which is part and parcel of what the Site Evaluation

1 Committee deals with, being preempted is -- necessarily
2 means that planning issues, which traditionally the Site
3 Evaluation Committee doesn't have much to do with, are
4 preempted as well? Why that case takes you to the
5 conclusion that it takes you, because it's critical to
6 your position and to those of other people here today?

7 MS. GEIGER: I think it's the same.

8 It's siting. That's why we're here. We're siting
9 facilities. This Committee makes decisions about where
10 facilities are supposed to be located. In the case of
11 transmission lines, and any other facility that we bring
12 before you, this Committee decides where -- specifically
13 where the facilities are going to be located, and what the
14 configuration of land looks like in relation to those
15 facilities. And, again, in the *PSNH* case, in another
16 section of the case, the Supreme Court said that "we
17 regard it as inconceivable that the Legislature, after
18 setting up elaborate procedures and requiring
19 consideration of every imaginable interest, intended to
20 leave the regulation of transmission lines siting to the
21 whim of individual towns." So, I think, if you replace
22 the "regulation of transmission lines" to the "regulation
23 of substation facilities", including where they're going
24 to be located, and how the land around them is going to be

1 subdivided or configured, that the *PSNH* case supports our
2 position. We think there's abundant language in that case
3 that's readily transferable and applicable to this
4 situation.

5 CHAIRMAN IGNATIUS: Thank you. All
6 right. Any other questions from Committee members?

7 (No verbal response)

8 CHAIRMAN IGNATIUS: All right. Thank
9 you very much. We then will turn to the Antrim Planning
10 Board for a five minute summary of your --

11 MR. WAUGH: Do you mind if I stand up or
12 is it --

13 CHAIRMAN IGNATIUS: Whichever you're
14 more comfortable with, as long as the mike can pick you
15 up.

16 MR. WAUGH: Okay. Five minutes is not
17 very long. So, I, obviously, am not going to try and
18 repeat everything I said in our legal memorandum. And,
19 I'm wanting to instead give our responses to the
20 Applicant's arguments.

21 And, one of their arguments is that the
22 SEC's authority would be found preemptive under the five
23 part test in the *Bio Energy* case. I guess the only thing
24 I would emphasize there is, we don't disagree with that.

1 We, the Planning Board, certainly agrees that this
2 Committee has preemptive authority over use and siting of
3 the facility. We just think that that does not include
4 subdivision, as we explained in our memo. That the
5 preemption conclusion in -- is derivable from the common
6 law test for preemption as set forth in *Bio Energy*, and
7 not specifically from the language of 162H:16, II, because
8 that really talks about process and finality.

9 That's sort of the other argument there.
10 They say quote -- in their memo, which I guess I can't
11 quote, because you ruled it out of order, but, if the
12 Planning Board can begin a new lengthy process regarding
13 an associated facility of which the Board could require
14 additional noise, light, road and other public safety
15 obligations, but that misrepresents the Planning Board's
16 position.

17 We're not talking about multiplying the
18 proceedings. I think that one thing that 162-H:16, II,
19 does do is to make this an integrated process. But what
20 we're arguing is that the Planning Board's role in that
21 process would be similar, in the case of a subdivision
22 request, would be similar to other permits that the
23 Applicant is subject to, so that they would apply to the
24 Planning Board for the subdivision permit with the same

1 schedule that they would apply to DES for their water
2 permits, *etcetera*.

3 So, I don't think we're talking about
4 multiple -- multiplying procedures. It's just that, if
5 the Committee were to receive -- any time the Committee
6 receives an application that includes a subdivision
7 request, that it would go to the planning board along that
8 same schedule. And, I think that's really what 162-H:16,
9 II, means, because clearly it talks about air and water
10 pollution permits and doesn't intend to preempt those.

11 Let me just talk about this question of
12 "is subdivision fundamentally different?" And, if I could
13 imagine, I don't know how many of you on this Committee
14 are like me and love looking out the window when you go up
15 in an airplane? I do. And, one thing you notice, if
16 you're flying from, say, Manchester to, say, St. Louis or
17 someplace west, is that the patterns of land use and
18 patterns of roads and property lines, in particular, like
19 fence lines, stonewall lines in New England, *etcetera*,
20 *etcetera*, change as you go west, because New England was
21 not under the Jeffersonian system of surveying. And, the
22 point I'm trying to make with all that is subdivision is
23 permanent; subdivision lasts forever.

24 These lines that you're seeing from the

1 airplane were pretty much established during the Colonial
2 Period for the most part. And, that's because ownership
3 is divided. And, when ownership gets divided, it becomes
4 difficult, if not impossible, to undo something. That is
5 why we think the issue of subdivision is different from
6 the issue of use. Virtually none of those lands you see
7 from the airplane are being used for the same thing they
8 were being used for during the Colonial Period. But the
9 question of access and the question of ownership lines are
10 still being controlled by those decisions made early on.
11 In the original primordial purpose of subdivision review,
12 when it was first enacted, back in the '30s, the '20s and
13 '30s, was to make sure every parcel has access that meets
14 the town's regulations.

15 And, so, again, we emphasize, I think,
16 that subdivision is different from the issue of use. And,
17 there's a reason for public policy for treating it
18 differently. And, that's why the Legislature did not
19 include it in the preemptive authority of this Committee.

20 The Applicant's response to the question
21 of "what about the statute that says it's a misdemeanor
22 for the Registry of Deeds to accept a subdivision plan
23 without the Planning Board's approval?" They really
24 haven't responded to it. They admit that there is a

1 "statutory gap" in this regard. They make lots of
2 arguments based on legislative intent, but it's black
3 letter law, folks, that, in construing statutes, both the
4 courts and this Committee, can only consider the intent
5 which is contained in the actual language of the statute.
6 "We interpret legislative intent from the statute as
7 written, and will neither consider what the Legislature
8 might have said, nor add language that the Legislature did
9 not see fit to include." That's from a case called *Spade*
10 -- *State versus Spade*, 161 New Hampshire 248, a 2010 case.
11 But, you know, it's the same doctrine that the Supreme
12 Court always talks about in terms of statutory
13 construction.

14 And, I think it's very telling that, in
15 their brief, the Applicants say "any attempt to read
16 consistent and coherent meaning into every word...may well
17 be a fool's errand." I think that quotation is a sign
18 that they are really trying to read some intent in the
19 statutes that aren't there.

20 And, in particular, as I said in our
21 memo, the laws dealing with subdivision plans and
22 recording thereof, and the penalties for transferring lots
23 when that has not occurred, were not touched when the
24 powers of this Committee were established and when they

1 were recently revamped.

2 CHAIRMAN IGNATIUS: Mr. Waugh, I'm going
3 to have to cut you off there. It's been well over five
4 minutes. So, --

5 MR. WAUGH: Seriously?

6 CHAIRMAN IGNATIUS: I'm afraid so. But
7 there are probably questions that may bring out more of
8 the things that you were planning to get to. Are there
9 questions from the members? Ms. Bailey.

10 MS. BAILEY: Does the Antrim Planning
11 Board, if this Committee decided that we were not going to
12 take -- that this wasn't preemptive, does the Antrim
13 Planning Board have the authority to deny the subdivision?

14 MR. WAUGH: I think the answer is, they
15 would have the authority to deny the subdivision only if
16 it violated those kinds of local regulations which do not
17 address the use, and which address, as Mr. Iacopino quoted
18 from the *Stablex* case, and also in the *Bio Energy* case
19 those local regulations that can be applied in a neutral,
20 non-exclusionary way. If a subdivision lot violated one
21 of those kind of regulations, like lot side I think would
22 be included there, and certainly the frontage question,
23 then I think they could say "no". That's the gist of what
24 we're arguing here.

1 MR. IACOPINO: I'm sorry, could I just
2 follow up? How would that proceed under those
3 circumstances, Mr. Waugh, if you could enlighten us? If,
4 in fact, we issued a certificate, but we indicated that we
5 would not grant the subdivision, we would leave that to
6 the Planning Board. And, the Planning Board either denied
7 the subdivision or, more likely, put some kind of
8 restrictions on it, what's the process for there to be a
9 determination of whether or not the Planning Board's
10 activity is truly included -- is exclusionary or is not?
11 Does it come back to the Site Evaluation Committee? Or,
12 is that something that gets determined by the Superior
13 Court on an appeal? Do you know what that process would
14 be under this plan that you propose?

15 MR. WAUGH: Well, I think, number one
16 is, that this Committee would not make a final
17 determination until that determination had been made. So,
18 it would be sent to the Planning Board before you made
19 your final decision. I mean, this -- you know, they
20 didn't apply in this case. But, if this Committee decides
21 it has no jurisdiction over that, I would think that, in
22 the future, in a similar case, the Applicant would go to
23 the Planning Board, similar to the way it went to the
24 other agencies. And, then, the answer is "yes", it would

1 be appealable under the Planning Board Appeal statute,
2 which is 677:15.

3 MR. IACOPINO: I'm sorry. I know you
4 had more questions. I just wanted to follow up with that.

5 MS. BAILEY: It seems -- I mean, you
6 started out with the position that you agree that the
7 Committee has preemptive authority over use and siting?

8 MR. WAUGH: Correct.

9 MS. BAILEY: And, if the Committee
10 decides that this is a good use of that land, and you
11 decide "they can't use it because the lot size isn't big
12 enough or the frontage isn't" -- I mean, can't you fix the
13 frontage issues with conditions?

14 MR. WAUGH: I think my answer to that
15 is, I don't see how the lot size and frontage requirement
16 could possibly preempt this Project. I mean, no argument
17 has been made on behalf of the Applicant as to why they
18 need this, or as to why they can't comply with the lot
19 size and frontage requirements, other than PSNH -- PSNH
20 has a policy. I mean, are we all ruled by PSNH policies?
21 So, I think the solution is for them to propose a
22 subdivision lot that can be approved. And, it wouldn't
23 affect the use at all.

24 MS. BAILEY: Have they proposed a

1 subdivision lot that can't be approved?

2 MR. WAUGH: Yes.

3 MS. BAILEY: They have?

4 MR. WAUGH: It does not meet the -- the
5 Planning Board has discussed this case, at least to the
6 extent of determining on a preliminary basis that it does
7 not appear to meet the Town's requirements.

8 Madam Chair, could I make one point on
9 the agreement, because I wasn't able to address that?

10 CHAIRMAN IGNATIUS: Well, I think there
11 may be questions on that. So, hold off please.

12 MS. BAILEY: That was actually going to
13 be my next question.

14 CHAIRMAN IGNATIUS: Please. Go ahead.

15 MS. BAILEY: You say that the Applicant
16 should have applied to the Planning Board to get the
17 subdivision done, but they have the agreement from the
18 Town that says they don't need to do anything like that.
19 So, why would you have expected them to seek --

20 MR. WAUGH: That agreement was signed by
21 the Selectmen. The Planning Board had nothing to do with
22 it. And, I would cite you to cases such as *Buxton versus*
23 *Town of Exeter*, 117 New Hampshire 27, and *Town of North*
24 *Hampton versus Sanderson*, 131 New Hampshire 614, that's an

1 '89 decision. The gist of those cases is that the
2 jurisdiction over these particular types of permits, which
3 is given to local boards, cannot be exercised by the Board
4 of Selectmen. It's not within their jurisdiction. And,
5 therefore, if they attempt to make an agreement which
6 purports to be an exercise or a waiver of that authority,
7 that agreement, insofar as it attempts to do that, is
8 *ultra vires*, meaning illegal and unenforceable. The
9 *Buxton* case involved an attempt by the selectmen to make
10 an agreement, a settlement agreement with a landowner,
11 which included the issuance of a variance. The Supreme
12 Court said "only the Zoning Board of Adjustment can issue
13 a variance, the Selectmen have no authority to do that.
14 Therefore, that part of the agreement is not valid."

15 The *Town of North Hampton* case involved
16 an attempt by a board of selectmen to make an agreement
17 which would include the issuance of a gravel pit
18 excavation permit under RSA 155-E. And, the Supreme Court
19 said "only the Planning Board has jurisdiction over that.
20 The Selectmen cannot make an agreement which involves that
21 authority."

22 So, that's -- I think that is -- that
23 applies right here, insofar as, I mean, I'm not sure that
24 this agreement should be interpreted as waiving Planning

1 Board authority. But, insofar as the Applicant has argued
2 that it does, to that extent it is *ultra vires*, meaning
3 illegal and unenforceable.

4 CHAIRMAN IGNATIUS: Well, but don't
5 those cases, as you just described them, they are where
6 the selectmen stepped in and made their own
7 determinations, rather than the planning or zoning boards?
8 Here, don't we have an agreement where the Selectmen
9 aren't making their own determination, they're simply
10 stating that there is no local approval required, that's
11 all in the hands of the Site Evaluation Committee? I
12 mean, how do those -- don't those cases really --

13 MR. WAUGH: I think that's a distinction
14 without a difference, madam Chair. Because they are, by
15 attempting to waive the Planning Board's authority, they
16 are, in fact, attempting to exercise that jurisdiction.

17 CHAIRMAN IGNATIUS: Are you aware of any
18 cases where a town or statutes that give the town the
19 authority to make the sort of waiver of local ordinances
20 agreement that Antrim Selectmen did?

21 MR. WAUGH: No, I'm not. Of course, our
22 office represents several towns. And, I would have -- I
23 would have advised that they do not have that authority.
24 I know that, in years past, boards of selectmen have come

1 to me for advice on a question of "hey, this landowner in
2 our town has a mortgage with an out-of-state bank now, and
3 they're more careful about whether there's zoning
4 compliance. Can we sign an agreement which states that we
5 will never enforce this frontage requirement that they
6 violate by 9 inches? Or, something, you know, that kind
7 of question. And, my answer has been "no, you don't have
8 that authority."

9 CHAIRMAN IGNATIUS: Other questions from
10 Committee members?

11 (No verbal response)

12 CHAIRMAN IGNATIUS: I have a few more.
13 Mr. Waugh, how do you square the suggestion that there
14 should be a subdivision application made to the Planning
15 Board, either during the process, before the process,
16 after the Site Evaluation Committee process, and the idea
17 that the whole point of 162-H is to have everything done
18 in a uniform, integrated fashion?

19 MR. WAUGH: Well, that's what I'm
20 saying, madam Chair. I think the -- I think that it can
21 be worked into the process. The paragraph that the
22 Applicant is relying on talks about this Committee's
23 determination being final, but that happens only after,
24 for example, in the case of the water permits, those

1 reviews have already occurred and been presented to this
2 Committee. And, it doesn't give this Committee the
3 authority to preempt the review of those other state
4 permits. So, I guess I'm saying, envisioning that the
5 Planning Board's authority over a subdivision, if one is
6 included in such permit, would operate the same way.

7 CHAIRMAN IGNATIUS: But, in the Site
8 Evaluation Committee process, we have a statute that sets
9 forth a set of procedures for when people go to the
10 specific state agencies, deadlines for those agencies to
11 report back to the SEC, overall time limit when the entire
12 project has to be voted up or down, so that you're not
13 caught in some sort of open-ended process. There's
14 nothing in there about municipal proceedings interwoven
15 into the Site Evaluation Committee process in the way
16 there is about state regulatory proceedings -- or,
17 considerations. So, isn't this a different situation?

18 MR. WAUGH: Well, I'm not wedded to any
19 particular procedure. I'm just saying, I think it can be
20 done in such a way as to comply with the integration
21 contemplated by the statute. You're certainly correct
22 that it is not specifically mentioned.

23 I mean, I guess I am unclear about how
24 the -- what I was calling the "residual authority" that is

1 mentioned in *Stablex*, and the sentence from *North Country*
2 *Environmental Services*, and also the *Bio Energy* case is to
3 be implemented. And, I know that you asked Ms. Geiger the
4 question of how the statutes differ, and I would be glad
5 to provide something on that as well.

6 CHAIRMAN IGNATIUS: Have you thought
7 about what -- you said it sort of in a general sense,
8 anything that a planning board might want to impose or
9 ordinances a planning board might operate under that would
10 go to the siting and use of the land would be preempted,
11 correct?

12 MR. WAUGH: Correct.

13 CHAIRMAN IGNATIUS: But other planning
14 board ordinances that don't go to siting and use of land
15 would not be preempted?

16 MR. WAUGH: Well, for example, the
17 language that Mr. Iacopino read about -- from *Stablex*
18 talked specifically about traffic issues. And, I think
19 that traffic issues are inherent in the subdivision
20 regulation authority over access and frontage, because
21 that's what you're looking at is traffic. So, I'm sorry
22 if I'm not answering your question.

23 CHAIRMAN IGNATIUS: No, that's all
24 right. I'm just wondering, any other examples you think

1 of or standards one might use to decide which ordinance is
2 on which side of that line? Is it on the preempted side
3 or is it on the residual authority to the municipality's
4 side?

5 MR. WAUGH: The Supreme Court in the
6 *North Country Environmental Services* case actually was
7 faced with the task of drawing that line. And, so, that's
8 the only language I know of that the Committee could use.

9 CHAIRMAN IGNATIUS: All right. Other
10 questions from Committee members?

11 MR. IACOPINO: I have some questions.

12 CHAIRMAN IGNATIUS: Mr. Iacopino.

13 MR. IACOPINO: I'm sorry. I don't know,
14 were there any other Committee members?

15 MS. BAILEY: Can I ask one follow-up
16 question?

17 CHAIRMAN IGNATIUS: Yes. Ms. Bailey.

18 MS. BAILEY: So, if the Committee
19 decided to preempt and do the subdivision, could the
20 Planning Board come and make the case about the traffic
21 issues and the frontage and the size, and could we decide
22 that?

23 MR. WAUGH: I suspect that, if this
24 Committee decided that, I mean, you're asking really about

1 remedies, who could challenge what, when, and I suspect
2 that anyone who wished to challenge this Committee, if it
3 decides that its authority over subdivision is preempted,
4 would have to appeal this Committee's ruling, and, of
5 course, with the rules for appealing other aspects of this
6 Committee's decision, and would not be able to
7 independently exercise that authority. I still don't know
8 what the Register of Deed is going to do, though.

9 CHAIRMAN IGNATIUS: Mr. Iacopino.

10 MR. IACOPINO: Thank you. Mr. Waugh,
11 you make, in your brief, you make the distinction that a
12 regulation of subdivision is not regulation of land use,
13 and that there's a difference between those, and that one
14 does not *ipso facto* include the other. And, I guess my
15 question to you is, how do you square that with the
16 language of the *Public Service versus Town of Hampton* case
17 concerning the authority of the Site Evaluation Committee?

18 MR. WAUGH: Well, I think -- I think I
19 would address that in sort of a combination of ways.
20 Which is, part one is to say that the law has evolved, in
21 much the way that the Counsel for the Public has argued.
22 But the other -- the other way to address that question is
23 to say that the quotations that Ms. Geiger has read, this
24 -- today, during her argument, are consistent with my

1 argument. Because what it says is that the authority over
2 transmission lines is 100 percent preempted. It didn't
3 say things like "traffic" or "subdivision lines".

4 MR. IACOPINO: You seem to suggest that
5 we sort of graft the process onto our statutory process
6 for the Site Evaluation Committee, where we treat a
7 planning board sort of on the same level as a state
8 agency, in the process at least. And, we require that an
9 application be filed with them, and I guess they would
10 provide their decision within our nine month period. If
11 you are consistent, I assume they would be required to
12 report on the same schedule as state agencies. Am I
13 correct in understanding you that way?

14 MR. WAUGH: Yes.

15 MR. IACOPINO: Okay.

16 MR. WAUGH: Although, it's a little late
17 in this case, clearly.

18 MR. IACOPINO: Understood. But I guess
19 my question to you is that, really, what we're talking
20 about is preemption between the state and local
21 government, where the state authority, in this particular
22 case, preempts local authority. So, there is the
23 provision for state agencies to provide their reports and
24 their permits and their draft conditions. But do you see

1 that, if the statute had -- if the Legislature had
2 intended a municipality to have that same role, that there
3 would probably have been a process built into the statute
4 for that to occur?

5 MR. WAUGH: I certainly understand the
6 question. But I would also turn it around and say, if the
7 Legislature had intended there to be an exemption for the
8 recording of plats, they put several exemptions in the
9 definition of "subdivision" for utility purposes, none of
10 which is met by this particular request. So that, you
11 know, it may very well be that, you know, what I'm
12 suggesting, in terms of procedure, is something that is
13 not in the statute, but is --

14 MR. IACOPINO: Well, let me switch gears
15 on you then. We have before us in -- well, it's been
16 filed as prefiled testimony, we have a copy of the
17 subdivision regulations for the Town of Antrim.

18 MR. WAUGH: Yes.

19 MR. IACOPINO: I believe they were
20 attached to either Mr. Levesque's or Ms. Pinello's
21 prefiled testimony. And, I guess I just have a couple of
22 questions about how they would apply. First off, do you
23 know if the subdivision as proposed is a major or minor
24 subdivision under those regulations?

1 MR. WAUGH: You know, I'm not prepared
2 to answer those questions.

3 MR. IACOPINO: Okay.

4 MR. WAUGH: I would respectfully ask you
5 to --

6 MR. IACOPINO: Okay.

7 MR. WAUGH: -- ask you to direct those
8 questions to Mr. Levesque, because I'm not familiar with
9 the -- I mean, I was asked to represent the generic issue
10 of the jurisdiction.

11 MR. IACOPINO: Okay. Well, let me get
12 to the residual issue then, the issue of residual powers.
13 We have, if I can find it, we have a -- we have the list
14 of topics that are included within the subdivision
15 regulations. It's the -- it's actually in the "Table of
16 Contents", Section IX, "General Standards and
17 Requirement". And, that section of the Antrim -- of the
18 Antrim subdivision regulations include a number of things.
19 Starts off with "Lots", "Bounds", "Design and Layout of
20 Buildings", "Sanitary Systems", "Parking Requirements".
21 How is a -- assuming that the Committee were to adopt your
22 argument that the Planning Board retains residual
23 authority, how should this Committee go about deciding
24 which of those are considered to be residual authority and

1 which are considered to be -- are considered to be issues
2 that essentially are excluded?

3 MR. WAUGH: You know, I don't want to be
4 -- I'm not here this morning to be pinned down on which is
5 which. I think the language that you've got to guide you
6 is the language from the cases, which is that "are they
7 types of regulations which would be applied to any similar
8 industrial facility?" And, "can they be applied in good
9 faith without exclusionary effect?"

10 MR. IACOPINO: But, in reality, we have
11 the same quote in all three of the cases that apply, maybe
12 it's four cases, I think it's three, *Stablex*, *North*
13 *Country*, and *Bio Energy*.

14 MR. WAUGH: Yes.

15 MR. IACOPINO: And, basically all quote
16 the throw-away line, for lack of a better term, from
17 *Stablex*. My question though is, how is a board, such as
18 the one I represent, supposed to go about determining
19 what's residual and what's exclusion?

20 MR. WAUGH: Other than what I just said?
21 I mean, I don't know of any, any way. I think you've just
22 got to go through each thing that, if the local planning
23 board says "we don't think" -- participates in the process
24 and says "we think we can validly apply this", such as a

1 frontage requirement, then, first, this board, and then
2 potentially the courts would have to, as the Supreme Court
3 did in the *North Country* case, determine whether that had
4 -- that determination had been made properly or not.

5 MR. IACOPINO: Well, in those cases,
6 didn't the -- the Supreme Court actually remanded for that
7 determination to be made, and we never got a subsequent --

8 MR. WAUGH: That's true.

9 MR. IACOPINO: So, my question is, if we
10 were to -- I mean, I guess what I'm looking at, and if you
11 can give us any help, if we were to adopt that reasoning,
12 and ultimately it would be up to the Site Evaluation --
13 this Subcommittee to determine which of these regulations
14 are residual authority. I mean, I guess the question is,
15 how is this Committee to do that? If you don't know the
16 answer, that's fine.

17 MR. WAUGH: Yes. I don't think --

18 MR. IACOPINO: I'm sure others will
19 chime in.

20 MR. WAUGH: I don't think I have a
21 better answer. But I guess I would respond by saying, I
22 don't think the alternative is to say "there is no
23 residual authority", because those three cases, and
24 they're based not just on one statute, but, as you pointed

1 out, multiple statutes. I mean, we're hearing an argument
2 from the Applicant in this case that that doesn't apply.
3 So, the Applicant in this case is arguing not just
4 preemption, but some kind of super preemption, which the
5 Supreme Court has never found. And, I think that's
6 important.

7 CHAIRMAN IGNATIUS: Mr. Waugh, one other
8 question. In the language that Mr. Iacopino was quoting
9 from the cases, it also talks about that it would be
10 critical that things be taken in good faith in the
11 evaluation under any residual authority, it would have to
12 be considered in good faith. And, as you know, this is a
13 -- has been a contentious proceeding, an application that
14 has split people. We have a Selectboard with one point of
15 view; a Planning Board that's stated its opposition,
16 *etcetera*.

17 MR. WAUGH: Madam Chair, I'm sorry to
18 interrupt. I don't believe the Planning Board has taken a
19 position for or against this Application.

20 CHAIRMAN IGNATIUS: All right.

21 MR. WAUGH: It has taken a position in
22 favor of its subdivision jurisdiction.

23 CHAIRMAN IGNATIUS: Let me restate it
24 then, because I think I probably did overstate it, and I

1 think things have evolved over time as well. But that
2 there is no question that there is a -- that this is
3 highly charged and contentious, this project, this
4 proposal in the Town of Antrim.

5 Given that circumstance, how does one
6 assure things are taken in good faith, and is that
7 ultimately the Site Evaluation Committee's determination
8 or is it a court determination on appeal of a Planning
9 Board determination, if that were the way it went?

10 MR. WAUGH: Madam Chair, I've argued
11 several bad faith allegations against local planning
12 boards. The case law says that local board members are
13 presumed to be acting in good faith. There is also a
14 principle that says that an objection has to be raised, if
15 at all, at the earliest possible time. And, so, if
16 parties do not object to the sitting of particular board
17 members, that those board members -- they can not raise
18 that objection later on an appeal. So, I guess my answer
19 is, it would be decided in the same way as it is in local
20 hearings, which are similarly highly charged often.

21 CHAIRMAN IGNATIUS: And, my apologies
22 for misstating the Planning Board. I think I -- I'm
23 muddling my words, and I don't mean to say that that's a
24 position of the Board, in opposition. Mr. Iacopino.

1 MR. IACOPINO: I'm sorry. I have one
2 other question for you, Mr. Waugh, because it goes back to
3 this area about whether or not there is a residual local
4 regulation. And, I guess you must have some experience
5 with hazardous waste or solid waste facilities in
6 municipalities. And, I'm going to ask you the same
7 question that I asked Ms. Geiger, is, when you compare the
8 hazardous waste statute, when you compare the solid waste
9 statute, and the Site Evaluation Committee statute, do you
10 see them as sort of having the same breadth of regulation
11 imposed by the state?

12 MR. WAUGH: Well, I do. But, again, as
13 did she, I would offer to give a more detailed answer to
14 that question, --

15 MR. IACOPINO: Are you aware of --

16 MR. WAUGH: -- if I'm allowed to do so.

17 MR. IACOPINO: I'm sorry. Are you aware
18 of any language in the solid waste statute or the
19 hazardous waste statute that imposes a responsibility for
20 land-use planning on either the Solid Waste Board or the
21 Hazardous Waste Board?

22 MR. WAUGH: Again, I'm just not prepared
23 to answer that, I'm sorry. Madam Chair, can I just say a
24 couple -- one more thing?

1 CHAIRMAN IGNATIUS: If it's very brief.
2 We're going to take a break. And, so, if it's really very
3 brief.

4 MR. WAUGH: The Planning Board thought
5 that it was important that I tell the Committee that the
6 Planning Board does not necessarily join in all of the
7 arguments made by the Public Counsel in this case. For
8 example, the argument about the switching yard not being
9 under jurisdiction and those kinds of things. So, our
10 argument is much narrower than that.

11 CHAIRMAN IGNATIUS: Okay. Thank you.
12 We are going to take a break for ten minutes, and give the
13 court reporter a chance to rest. And, people feel free to
14 wander, find facilities, all of that. And, we will be
15 back at -- well, let's say at ten minutes of 11:00. Thank
16 you.

17 **(Whereupon a recess was taken at 10:39**
18 **a.m. and ends *Session 1. Session 2***
19 **resumes after the recess and is**
20 **contained under separate cover so**
21 **designated.)**

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23
24