

1 STATE OF NEW HAMPSHIRE
2 SITE EVALUATION COMMITTEE

3 November 25, 2009 - 10:09 a.m.
4 21 South Fruit Street
5 Suite 10, Room 103
Concord, New Hampshire

6 In re: SITE EVALUATION COMMITTEE:
7 DOCKET NO. 2009-01:
8 Motion for Declaratory Ruling by
9 Campaign for Ratepayers' Rights,
10 Conservation Law Foundation,
11 Freedom Logistics, Granite Ridge
12 Energy, Halifax-American Energy,
13 TransCanada Hydro Northeast, and the
Union of Concerned Scientists regarding
modifications to Merrimack Station
Electric Generating Facility.
(Hearing regarding Motions for
Rehearing by the Moving Parties and
Peter Bonanno, et al.)

14 PRESENT: SITE EVALUATION COMMITTEE:
15 Thomas S. Burack, Cmsr. Dept. of Environmental Services
(Chairman of SEC - Presiding Officer)
16 Thomas B. Getz, Chrmn. Public Utilities Commission
(Vice Chairman of SEC)
17 Clifton C. Below, Cmsr. Public Utilities Commission
DES - Water Division
18 Harry T. Stewart, Dir. DES - Air Resources Division
Robert Scott, Dir. N.H. Fish & Game Department
19 Glenn Normandeau, Dir. Dept. of Transportation
George Campbell, Cmsr. Dept. of Health & Human Services
20 Brook Dupee Public Utilities Commission
Michael Harrington

21
22 COUNSEL FOR THE COMMITTEE: Michael Iacopino, Esq.
23 COURT REPORTER: Steven E. Patnaude, LCR No. 52
24

1
2 APPEARANCES: Reptg. TransCanada Hydro Northeast:
3 Douglas L. Patch, Esq. (Orr & Reno)
4 Reptg. Granite Ridge Energy:
Howard M. Moffett, Esq. (Orr & Reno)

5 SEC-1125.txt
 Reptg. Conservation Law Foundation:
 Melissa Hoffer, Esq.
 6
 Reptg. Union of Concerned Scientists:
 7 James Rubens
 8 Reptg. Campaign for Ratepayers' Rights:
 Robert Backus, Esq.
 9
 Reptg. Public Service of New Hampshire:
 10 Christopher J. Allwarden, Esq.
 Barry Needleman, Esq. (McLane, Graf...)
 11
 Reptg. Peter Bonanno, et al.:
 12 Jed Z. Callen, Esq. (Baldwin & Callen)
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1 PROCEEDING

2 CHAIRMAN BURACK: Good morning, ladies

3 and gentlemen. We are here today for a public meeting of

4 the New Hampshire Site Evaluation Committee. The Site

5 Evaluation Committee is established by RSA 162-H. The

6 membership of this Committee includes the commissioners or

7 directors of a number of State agencies, as well as

8 specified key personnel from various State agencies. My

9 name is Tom Burack. I serve as Commissioner of the

10 Department of Environmental Services and also as Chairman

11 of the Site Evaluation Committee.

12 At this point, I would like to ask the

13 other members of the Committee who are present at this

14 meeting and who are sitting on this matter, if they would

15 please introduce themselves, starting to my far right.

16 MR. DUPEE: My name is Brook Dupee,

17 representing the Department of Health & Human Services.

18 DIR. SCOTT: Bob Scott, with the Air

19 Resources Division of the New Hampshire Department of

20 Environmental Services.

21 DIR. STEWART: Harry Stewart, Water

22 Division Director, Department of Environmental Services.

23 CMSR. BELOW: Clifton Below, Public

24 Utilities Commissioner.

1 VICE CHAIRMAN GETZ: Tom Getz, Chairman
2 of the Public Utilities Commission and Vice Chair of this
3 Committee.

4 DIR. NORMANDEAU: Glenn Normandeau,
5 Director of Fish & Game.

6 CSMR. CAMPBELL: George Campbell,
7 Commissioner of Transportation.

8 MR. HARRINGTON: Mike Harrington, New
9 Hampshire PUC.

10 CHAIRMAN BURACK: Seated to my immediate
11 right is Michael Iacopino, who is serving as legal counsel
12 to the Site Evaluation Committee in this proceeding. I
13 also just want to note for the record that sitting here
14 today in this proceeding are only those members of the
15 Site Evaluation Committee who sat on the original
16 proceeding. We have excused from sitting any members who
17 did not sit -- did not sit and did not participate in the
18 earlier aspects of these deliberations in this matter.

19 The agenda for today's public meeting
20 includes one matter. This matter has been docketed as
21 Site Evaluation Committee Number 2009-01, and entitled
22 "Motion of the Campaign for Ratepayers' Rights, et al, for
23 Declaratory Ruling Regarding Modification to Merrimack
24 Station Electric Generating Facility". The Committee has

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1 received two motions for rehearing in this docket. I will
2 open today's consideration of this matter with a brief
3 summary.

4 On March 9, 2009, a pleading entitled
5 "Motion for Declaratory Ruling Regarding Modification to
6 Merrimack Station Electric Generating Facility", referred
7 to as the "Motion", was filed with the Committee. The
8 Motion was filed by the following entities: The Campaign
9 for Ratepayer Rights, Halifax-American Energy Co., LLC,
10 the Conservation Law Foundation, TransCanada Hydro
11 Northeast, Inc., Freedom Logistics, LLC, the Union of
12 Concerned Scientists, and Granite Ridge Energy, LLC. I
13 will refer to these entities as the "Moving Parties".

14 The Motion concerns the construction,
15 installation, and operation of a wet flue gas
16 desulphurization system, known as the "Scrubber System",
17 at the bulk power facility owned by Public Service Company
18 of New Hampshire, known as "PSNH", located in Bow,
19 Merrimack County, New Hampshire, and known as "Merrimack
20 Station". The Moving Parties asserted that they have
21 standing to bring the Motion before the Committee and ask
22 this Committee to make a declaratory ruling determining
23 whether the construction, installation, and operation of
24 the Scrubber System and associated facilities constitute a
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1 sizable addition to Merrimack Station under RSA 162-H: 5,
2 I, and whether the Scrubber System requires a Certificate
3 of Site and Facility. The Moving Parties also ask the
4 Committee to evaluate whether action should be taken
5 against PSNH under RSA 162-H: 19, which provides for
6 penalties for the willful violation of RSA 162-H.

7 On December 1, 2009 -- I'm sorry, on
8 April 1, 2009, PSNH filed a formal objection to the
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9 Motion. In its objection, PSNH asserted that the Moving
10 Parties lacked standing to bring the motion. PSNH also
11 asserted that RSA 125-0: Sections 11 through 18, from 2006
12 New Hampshire Laws 105 or Chapter 105, precludes the
13 authority of the Committee to issue a Certificate of Site
14 and Facility. Finally, in its objection, PSNH also
15 asserts that the Scrubber System and associated facilities
16 do not constitute a "sizeable addition" to Merrimack
17 Station. On April 13, 2009, the Moving Parties filed a
18 response to the objection filed by PSNH.

19 On May 8, 2009, the Committee held an
20 initial public hearing in this matter. At that hearing,
21 after deliberation, the Committee determined that it did
22 have jurisdiction to consider the motion as brought by the
23 Moving Parties. We also determined that we would schedule
24 an evidentiary hearing and noted that we would like the
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1 parties to stipulate to much of the factual record as
2 possible. The May 8, 2009 hearing was recessed until May
3 22, 2009. Thereafter, PSNH filed a Motion to Extend Time
4 and Reschedule. That motion was assented to by all of the
5 parties and the matter was rescheduled for June 25, 2009.
6 The Committee also extended the time frame to issue a
7 decision on the motion until July 8, 2009.

8 On June 25, 2009, the parties filed a
9 stipulation regarding certain factual matters. On
10 June 26, 2009, we held a full day session in which we
11 accepted the stipulation and took testimony from one
12 witness for PSNH. The Moving Parties chose not to call
13 any witnesses. We also received public comment from two

14 individuals and then closed the fact-finding portion of
15 the proceeding, subject to receipt of certain additional
16 information that had been requested of the Moving Parties
17 and PSNH. The requested information was thereafter
18 received.

19 On July 7, 2009, we reconvened to
20 deliberate on the Motion, and we also extended the
21 decision date until August 10, 2009 with the consent of
22 all parties. At the hearing on July 7, 2009, a majority
23 of the Committee voted to deny the Motion for Declaratory
24 Ruling. A majority of the Committee also voted to assess
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1 the cost of the proceeding, including counsel fees, court
2 reporter fees, and secretarial fees to the Moving Parties.
3 On August 10, 2009, we issued a written order
4 memorializing our deliberations and order; Vice Chairman
5 Getz issued a separate written dissent.

6 On September 9, 2009, the Moving Parties
7 filed an Unassented to Motion for Rehearing. Also, on
8 September 9, 2009, the Committee received a pleading
9 entitled "Motion for Rehearing and Petition for Review by
10 Peter Bonanno and others. That pleading contained the
11 signatures of 157 people, all of whom assert that they
12 live in towns that abut Bow, New Hampshire. All of the
13 signatories claim that they will be directly affected by
14 the project because they are PSNH ratepayers, and they
15 assert that the project will cause electric rate
16 increases. In addition, 67 of the signatories assert that
17 they can see the project's smokestack from their own
18 property; 66 of the signatories assert that they use the

19 Merrimack River recreationally, and they are concerned
20 about potential levels of mercury being deposited into the
21 river.

22 On September 16, 2009, PSNH filed a
23 consolidated objection to both motions for rehearing. On
24 September 18, 2009, pursuant to RSA 541:5, acting on
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1 behalf of the Committee, I suspended the order denying the
2 Motion for Declaratory Judgment in order to allow time to
3 review the motions and schedule today's hearing.

4 Today's hearing is a public hearing for
5 deliberation on the pending motions for rehearing. The
6 authority for this hearing stems from our enabling statute
7 RSA 162-H; from RSA 541, governing rehearings and appeals;
8 and, from our administrative rules, Site 202.29. Notice
9 of this hearing was posted on the Committee's website and
10 mailed and e-mailed to all of the parties, including
11 Mr. Bonanno. In our notice we indicated that we would not
12 take testimony, but that we may hear oral argument from
13 the parties.

14 I note that we have a quorum present,
15 and that a majority vote of the members present satisfies
16 the requirements of RSA 162-H. So, here is how I propose
17 to proceed with these deliberations:

18 We will first hear from the Moving
19 Parties through one lawyer. We will then hear from
20 counsel for Mr. Bonanno and others. We will then hear
21 argument from counsel for PSNH.

22 I suggest that we then take up the
23 motions for deliberation one at a time, beginning with the

24 Unassented Motion from the Moving Parties. We will
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1 entertain a motion to grant or deny the requested
2 rehearing. The Committee will then discuss and vote on
3 that motion. We will then turn to the motion filed by
4 Mr. Bonanno and others. We will entertain a motion to
5 either grant or deny that request. The Committee will
6 proceed to discuss that motion and we will take a vote on
7 that motion. Of course, our discussion and the votes
8 taken here will be memorialized in a written order that
9 will be circulated to the Committee members for their
10 signature.

11 So, with that, I will first take
12 appearances, and then we will proceed. Would you like to
13 start, Mr. Patch?

14 MR. PATCH: Good morning, Mr. Chairman
15 and members of the Committee. Doug Patch, from the law
16 firm of Orr & Reno, on behalf of TransCanada Hydro
17 Northeast, Inc.

18 CHAIRMAN BURACK: Thank you. Mr.
19 Callen.

20 MR. CALLEN: Yes. Good morning. My
21 name is Jed Callen, from Baldwin & Callen, and I represent
22 Peter Bonanno and others.

23 CHAIRMAN BURACK: Very good.

24 MR. NEEDLEMAN: Good morning, Mr.
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1 Chairman. Barry Needleman, from McLane, Graf, Raulerson &

2 Middleton, representing Public Service of New Hampshire.
3 CHAIRMAN BURACK: Very good. Thank you.
4 MR. PATCH: Mr. Chairman?
5 CHAIRMAN BURACK: And, again, we would
6 allow each of the counsel to make brief oral argument, if
7 you would.
8 MR. PATCH: Should we take an appearance
9 from the other Moving Parties as well?
10 CHAIRMAN BURACK: Yes. We should take
11 an appearance from the other Moving Parties. Thank you.
12 MS. HOFFER: Good morning, Commissioner.
13 Melissa Hoffer, Conservation Law Foundation.
14 CHAIRMAN BURACK: Thank you.
15 MR. MOFFETT: Howard Moffett, with Orr &
16 Reno, representing Granite Ridge Energy.
17 MR. RUBENS: Jim Rubens, representing
18 the Union of Concerned Scientists.
19 MR. BACKUS: Bob Backus, representing
20 the Campaign for Ratepayers' Rights.
21 MR. PATCH: That's it.
22 CHAIRMAN BURACK: Thank you, Mr. Patch.
23 Please proceed.
24 MR. PATCH: Okay. Thank you, Mr.

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1 Chairman, members of the Committee. I have a brief
2 statement on behalf of the Moving Parties. The Moving --
3 excuse me. The Moving Parties continue to believe very
4 strongly that the modifications that PSNH is making at
5 Merrimack Station constitute a sizable addition under the
6 statute that this Committee must review under RSA 162-H.

7 The Moving Parties also believe very strongly, and this is
8 supported by the language in the statute, the Committee's
9 rules and the case law that we cited in our Motion for
10 Rehearing, that the Committee has no authority to impose
11 the costs of this proceeding on the Moving Parties. We
12 have made both positions clear through various filings
13 made with the Committee, statements made to the Committee,
14 and arguments before this Committee, as well as in our
15 Motion for Rehearing. So, we see no need to restate those
16 arguments to the Committee today. We would also
17 recommend, as we did in the Motion for Rehearing, that the
18 Committee visit the site.

19 So, with that, we'd be happy to answer
20 any questions that members of the Committee might have.

21 CHAIRMAN BURACK: Are there questions
22 for Attorney Patch at this time?

23 (No verbal response)

24 CHAIRMAN BURACK: Very good. Thank you
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1 very much.

2 MR. PATCH: Thank you.

3 CHAIRMAN BURACK: Attorney Callen.

4 MR. CALLEN: Good morning, Mr. Chairman
5 and members of the Committee. As you heard, I represent
6 Peter Bonanno and 157, I thought it was 160, but I'll
7 believe your count. You probably had somebody check
8 yours, all residents and taxpayers of abutting towns. I'm
9 here to urge you to grant rehearing. I believe that the
10 order denying the Motion for Declaratory Ruling filing --
11 filed by the initial Moving Parties was unlawful,

12 unreasonable under RSA 541:4. And, the primary reason, of
13 course, is one that's been argued before. So, although I
14 will make it, because I believe my clients have not made
15 this argument before and bring a slightly different
16 perspective, it's not a significantly different legal
17 argument, and I don't want to bore the Committee with a
18 repeat.

19 But let me be clear at least, brief and
20 clear. That scrubber is a sizable addition to the
21 Merrimack Station. In fact, my clients and I adopt Vice
22 Chair Thomas Getz's dissent and reasoning almost verbatim.
23 I believe that where this Committee went wrong is in two
24 primary assumptions or lines of thought. One is, it's I
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1 think misplaced focus on the issue of power production in
2 its analysis of "what does "sizable addition" mean in the
3 context of 162?" I will note that this Committee is a
4 "site evaluation" committee, that RSA 162-H is a land use
5 statute. It is about land use planning, it is about
6 coherent land use planning. It isn't an environmental
7 statute; we have DES for that. It's not about rate and
8 ratepayer rights; we have a PUC. It is an attempt by this
9 state to focus the issue of where and how energy
10 facilities should be sited. And, so, the emphasis that
11 "this is not sizable because it doesn't increase power
12 production" is -- is misplaced.

13 Let's be -- Let's be blunt as well that,
14 in the absence of definitions in the statute, the plain
15 meaning of the language used is controlling, and the
16 language that we're trying to interpret is "sizable". So,

17 if you look at the purpose of 162, and that's all
18 contained in the "purpose" section, 162-H:1, a concern
19 about land use and siting, and add the term "sizable",
20 what focus, what guidance does that give you on
21 interpreting "sizable"? And, the answer is pretty
22 obvious. And, I know this isn't an evidentiary hearing,
23 so I show you this, this photograph, only for the reason
24 that it is, in fact, the photograph attached to the
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1 petition. So, it's part of the record already.

2 MR. NEEDLEMAN: Well, Mr. Chairman, I'll
3 object to that. It's actually not part of the record,
4 because it wasn't introduced during the evidentiary
5 hearing. It was introduced in the Motion for
6 Reconsideration after the record was closed.

7 CHAIRMAN BURACK: Your objection is duly
8 noted for the record.

9 MR. CALLEN: The photo I proffer, and
10 I'm not submitting it, because I know it is part of the
11 record for rehearing. It is, in fact, attached to the
12 petition for rehearing. There was a one-page statement,
13 one photograph, and signature pages, or at least my copy
14 has that. The photograph, and without the photograph, the
15 point is the same, this tower at least is enormously tall.
16 It's undisputably high. It's 445 feet high, according to
17 the record as I read it and Vice Chairman Getz's dissent.
18 In fact, I think he cites that it's the "highest man-made
19 structure in New Hampshire". It's clearly obvious, if you
20 drive down 93 and glance over, how high it looms over the
21 surrounding communities. This photograph was, in fact,

22 taken in Pembroke.

23 If you ask yourself what issues are
24 relevant to a land use planning statute and a Site
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1 Evaluation Committee or Commission, pretty much the most
2 obvious one that pops to mind is "what aspects of the
3 proposed project potentially impact land use decisions and
4 surrounding property owners?" There are many that could
5 possibly impact, but certainly the visual impact of the --
6 of the addition has got to be one of them.

7 I'd suggest, too, that the other error
8 in reasoning, other than focusing on power production
9 instead of the immense size of this thing, is that the
10 Committee took great pains and at least a few pages or a
11 couple pages as I recall, to dismiss the Moving Parties'
12 volumetric argument. Their statement that this thing
13 should not be analyzed as sizable only based on footprint,
14 as though we were looking at plans, but by its volume.
15 They didn't use the word "height" specifically, or at
16 least your decision did not, but volume, including the
17 dimension of height and three-dimensional size.

18 What I heard this Committee do or read
19 the Committee do in its decision dismissing the motion is
20 to say "well, because we have some dispute over the
21 assumptions or the numbers used by the Moving Parties in
22 their presentation as to the volume of the tower, and some
23 dispute over the remaining volume of the plant or the
24 plant without the tower, which buildings were included,

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1 which weren't or whatever, we can't up to a precise ratio
2 as to what percentage increase in volume this tower
3 represents. And, because the testimony of the one witness
4 for PSNH indicated that he questioned the accuracy of some
5 of the assumptions, we throw that analysis out, because we
6 can't -- we can't rely on it." And, again, that's hyper
7 technical.

8 We're not necessarily arguing that there
9 is a key point, where, if you increase the volume at the
10 plant by 30 percent or 15 percent or 10 or 50, then
11 suddenly it's sizable, and otherwise not. I accept this
12 Committee's argument made in its decision that each case
13 is fact-specific, and it depends, you know, what
14 percentage increase would be sizable. But I don't think
15 it depends, when you're looking at something that looms
16 over my clients' properties that has such an obvious
17 impact.

18 Last point on the issue of "sizable" is
19 this: A way to test an argument, of course, as we all
20 know, is to carry them -- the principles that one
21 enunciates as its rationale to their extreme. Sometimes
22 that's unfair, but it's sometimes very illustrative. And,
23 let me do it in this case. The Committee's approach was
24 "it's not sizable, because it doesn't increase power

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1 production. In fact, it decreases power production
2 slightly. It's parasitic on the power production. And,
3 therefore, it's not sizable."

4 Well, let me presume for a second an
5 addition to the plant that's magically technologically the

6 size of a breadbox. You know, not only invisible from my
7 clients' property, but almost invisible within the
8 building, that triples the power of the plant somehow. By
9 your analysis, because the increase at the plant is so
10 enormous, the power production is so enormous, that's a
11 "sizable addition". Well, that might be a factor if it
12 has environmental impacts for DES, or, for PUC, if it has
13 impacts on rates. But, for the Site Evaluation Committee,
14 that would seem to be an almost irrelevancy. If you fit
15 this thing in the broom closet within the existing
16 station, it's an addition, it increases power, but why is
17 that a "sizable addition" from the perspective of 162-H?
18 I suggest it's not. And, that sort of tells you that the
19 analysis that power production is the triggering concept
20 that defines "sizability" is wrong. And, the opposite end
21 of the argument, my side of the argument.

22 By your analysis, since volumetric or
23 size itself is not relevant, it has more to do with power
24 production, what if I took this 445-foot high tower and
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1 doubled it again. It's 900 feet. And, we add blinking
2 lights to the top of it, make it, you know, strobe-like,
3 so it lights up the night. And, perhaps add noise and
4 odor, you know, to it. It emits all those things, but it
5 doesn't add a single kilowatt to power production or even,
6 like the scrubber, reduces the power production of the
7 plant. Again, your analysis that volume doesn't matter,
8 impact on neighbors, in terms of land use kinds of
9 considerations don't matter, power production or their
10 need to buy new land or a few of the other factors that

11 are ticked off, again don't matter, and you would suggest,
12 as a Site Evaluation Committee, under a land use statute,
13 you wouldn't want to look at the impact of that on
14 regional development or impact on neighbors or whatever,
15 because it doesn't increase power production. I'd say
16 that sort of belies the fact that -- that you must be
17 looking at the wrong factor, because we may argue that the
18 445-foot tower is sizable, but would you argue that a
19 900-foot strobing, noisy tower is not?

20 So, I'd suggest that the Committee focus
21 again on the purpose section of the statute and the plain
22 language of the word "sizable", and conclude, as
23 Commissioner Getz did, that it's sizable, in land use
24 planning terms, it's a sizable addition.

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1 Second point, next to last. My client
2 has filed a request for rehearing and a petition. We
3 believe that what we filed is more than just an add-on
4 "Please rehear the motion filed by the other Moving
5 Parties." We believe that it is a valid petition for the
6 following reason: I believe that the Merrimack Station is
7 an energy facility. I believe further that it is an
8 electric generating station and has electric generating
9 station equipment all over it. And, I believe adding the
10 scrubber is a -- the scrubber itself is an associated
11 facility. In other words, to cut to the quick, I believe
12 that our petition is a 162-H:2, VII(b) facility. And, as
13 such, an "electric generating station equipment and
14 associated facility", it qualifies as a new petition.

15 The reason that I believe the Attorney
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16 General's Office has opined that it is not effective and
17 that the Attorney General's Office need not appoint public
18 counsel under 162-H: 9, is they have construed this
19 proposal under 162-H: 2, VII (g) and called this "any other"
20 -- "any other facility". And, again, I cannot cite you
21 case law as to a definition of those two terms, but I
22 would suggest to you that the common -- the language used
23 makes this facility an associated facility at an electric
24 generating station that is capable -- designed for, or
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1 capable of, operation in excess of 30 megawatts, in other
2 words (b), and, therefore, we have a petition.

3 The only way it is not a petition is if
4 it is categorized as "other", and therefore needs, as the
5 shorthand that this Committee has used or those veterans
6 here used, two categories of petitioners in order to be a
7 petition under H: 11. That -- I reject that argument. If
8 you properly consider it a facility associated with the
9 Merrimack Station, then this is a valid petition by 100
10 plus voters of an abutting community.

11 The new issue that my client brings to
12 the table that hasn't been raised by the previous movants
13 is the impact on this "sizable" tower, and I would argue
14 "sizable addition" to the station, on their property
15 values. They are impacted. It is aesthetic. It is
16 economic. It is psychological. It is the kind of concern
17 that typically land use statutes and boards like zoning
18 boards, planning boards, who are concerned with siting and
19 land use issues, consider. And, it is provided for in
20 your statute, of course. The welfare of the population,

21 the economic issues for the population are covered under
22 162-H: 1. You are to, if you accept jurisdiction and
23 require a certificate, look into and address yourselves to
24 the orderly development of the region. That is an issue
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1 under 162-H: 16, IV(b), and the aesthetics of the proposed
2 use, 162-H: 16, IV(c).

3 So, for those reasons, I ask you to (a)
4 grant rehearing, (b) add these new issues raised by my
5 clients as in the matter of a petition, and, finally, I
6 would wholeheartedly concur with the movants' argument
7 that this Committee lacks the authority to impose the
8 costs of this hearing on the Moving Parties, but I won't
9 repeat that. They have argued it well in their Motion for
10 Rehearing.

11 Thank you very much. I'll take any
12 questions, of course.

13 CHAIRMAN BURACK: Thank you. Are there
14 questions for Attorney Callen? Mr. Below.

15 CMSR. BELOW: Thank you. Where do you
16 read in the statute that there would only be a motion or a
17 petition by less than one of the petitioner categories
18 defined in RSA 162-H: 2, XI? I mean, are you suggesting
19 that one petition by one group of petitioners, as defined
20 in that section of the RSA, is adequate to trigger a
21 review?

22 MR. CALLEN: I am suggesting that, yes.

23 CMSR. BELOW: Where do you read that?

24 MR. CALLEN: Well, I read it by piecing

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1 together, and with difficulty, these sections that are in
2 the "definition" section. I struggle to find it more
3 clearly elsewhere. But it was my understanding, and I'll
4 admit, it's possibly wrong. I will admit, too, to be a
5 relative newcomer to this process, not a veteran like the
6 Commissioners and the Moving Parties. But, in the
7 November 3rd, 2009 letter from Attorney General Delaney to
8 Attorney Iacopino, copied to us, the Attorney General
9 opines that he is not required to appoint counsel because,
10 "While Mr. Bonanno has presented a petition with 100 or
11 more signatures seeking review of the Proceeding, I cannot
12 conclude that this petition is sufficient under 162-H:2 to
13 give rise to a" -- pardon me, I interrupted myself to turn
14 back to H:2 to confirm that that is the "definition"
15 section. I'll repeat: "I cannot conclude that his
16 petition is sufficient under RSA 162-H:2 to give rise to
17 the appointment of counsel for the public. Mr. Bonanno
18 would need to submit evidence that two or more petition
19 categories requested jurisdiction before the SEC" --
20 "before the SEC [would] consider the project as an "energy
21 facility" that might require an application."

22 So, his letter ties the two concepts
23 together, and I'm a little troubled by it as well. But
24 what he is saying is that "we need not appoint counsel,

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1 nor is this" -- "nor does the SEC consider the project a
2 facility that might require an application because it
3 lacks petitions from two categories", so to speak. And,

4 those categories, of course, are listed in XI. "A
5 petitioner is a person filing meeting any of the following
6 conditions." And, the only place that it is -- that this
7 need for two categories is stated is under VII(g), where,
8 if this energy facility is defined instead of as an
9 electric generating station and associated facility, and
10 instead is defined as "any other facility" under (g), that
11 says that, "either on its own motion or by petition of the
12 applicant or two or more petitioners as defined under
13 [H: XI]."

14 I know that sounded very complex, and
15 the problem is it sounded that way because it is complex.
16 But, putting those comments from the Attorney General's
17 Office together with what he cites, the implication is,
18 since it's only -- we're only calling it "any other
19 facility", you need to be two -- you need to have
20 petitions by two categories or it's not a petition.
21 That's my reading of it. If I'm wrong, I'd be happy to
22 hear that.

23 MR. IACOPINO: Let me ask you this.
24 Let's say we accept your reading of it. Then, what
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1 benefit does being a petitioner have? It doesn't in and
2 of itself permit somebody to hail any -- any alleged
3 energy facility before the Committee, does it, just
4 because they're going to file a petition?

5 MR. CALLEN: Not automatically. But, if
6 you find that it has merit, if it alleges that there is a
7 sizable addition, I have the right to raise it. If I
8 didn't have 100 people, --

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MR. IACOPI NO: Ri ght.

9
10 MR. CALLEN: -- in my view, I need 100
11 or more in an abutting communi ty. I understood the
12 Attorney General's Office to say, "even with 100 or more
13 people from an abutting communi ty, I don't have a real
14 petition because I need to be two -- I need to present
15 petitions that qualify under two of the categories under
16 XI", ei ther "abutting communi ties" or a "governing body"
17 or one of each or whatever. That's my reading of what
18 he's saying. And, we've come up short, because we're only
19 100 plus people from an abutting communi ty. And, as this
20 is "any other faci lity", by defini tion here, we don't get
21 through the door. That's my reading of the rejection
22 letter.

23 MR. IACOPI NO: But if -- okay. Thank
24 you.

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1 MR. CALLEN: If I'm wrong, and it's a
2 peti tion with only one category of 157 signatories, I'm
3 rel iev ed, and I apologize and am embarrassed, but that
4 would be a better solution. I was reading it in its
5 harshest way, because that seemed to be what it said, and
6 maybe I'm wrong.

7 MR. IACOPI NO: Don't be embarrassed. We
8 appreciate good advocacy.

9 CHAIRMAN BURACK: Further questions for
10 Attorney Callen? Chair man Getz.

11 VICE CHAIRMAN GETZ: Good morning, Mr.
12 Callen. I just wanted to follow up on your reading of the
13 defini ti on of "energy faci lity". And, you are taking the

14 position that the scrubber project falls under 162-H:2,
15 VII(b), "electric generation" -- "electric generating
16 station equipment and associated facilities designed for
17 or capable of operation of any capacity of 30 megawatts or
18 more." And, I was trying to understand. So, are you
19 saying that the scrubber project itself falls under that
20 definition or were you trying to link the scrubber to the
21 entire, either to the turbine upgrade and/or the
22 underlying capacity of the project of Merrimack Station
23 itself?

24 MR. CALLEN: My argument is that the
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1 scrubber project alone, and I'm talking about only the
2 scrubber project, is an associated facility to electric
3 generating station equipment, that is, in total, capable
4 of producing more than 30 megawatts or more. I'm reading
5 "and associated facilities" to have meaning. If it only
6 applied to the actual generating portions of the plant, it
7 needn't say that. It would say "the generating station
8 equipment capable of producing power". But this seems to
9 say that an energy facility can be defined broadly as that
10 portion which permits the power and also the associated
11 facilities. And, whether that stretches out to the
12 gardening shed on the edge of the property as an
13 associated facility or not, I'm not in a position today to
14 argue. But I think it's so clear that the scrubber
15 project is so integral to, required by our Legislature to
16 be part of this power production, I mean, the statute says
17 "build it, you need to, if you're going to operate this
18 power production equipment, install this equipment." It

19 is certainly associated with the power production. And,
20 scooping it out of that broad definition that makes it
21 part of an electric generating station and is a part of
22 the Merrimack Station generating infrastructure, it's not
23 a transmission line, it's not a new electric transmission
24 line, it's not a renewable energy facility. And, I don't
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1 believe it's "any other facility", it's part of a power
2 plant. It's part of an existing electric generating
3 station. And, therefore, I believe it comes under that
4 definition.

5 And, I think it only matters if I'm
6 right about the argument I've just gone way down the line
7 on, where it struck me, from reading the Attorney
8 General's letter, that by saying it was (g), and not (b),
9 we don't get over, you know, over the start line, because
10 we are only one petition category of petitioners and not
11 two. If that's not relevant, then maybe which one you
12 define it as is not as relevant either. I think the key
13 point, of course, is "is it a sizable addition and do you
14 have jurisdiction to require a certificate?" That's what
15 I'm here to say, to urge primarily. And, I join the
16 Movants in saying I think the Committee was in error to
17 find otherwise.

18 CHAIRMAN BURACK: Very well. Thank you
19 very much, Attorney Callen. Attorney Needleman.

20 MR. NEEDLEMAN: Thank you, Mr. Chairman.
21 I do agree with Attorney Callen on that last point, which
22 is the real question here, is "whether it's a sizable
23 addition, whether you have jurisdiction?"

24 With respect to this issue of whether
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1 the Bonanno parties are separately petitioners, I disagree
2 with that analysis. I think the statute is quite clear
3 that it requires two categories. There's no place in the
4 statute, other than in Section (g) and then in the
5 definition of "petition", where it talks about this issue,
6 and they only have one category. I think the other point
7 that the Attorney General was making is that counsel for
8 the public is not appointed in these proceedings, as the
9 Committee knows, until an application has actually been
10 filed. And, we're nowhere near that point. We're still
11 trying to make a determination about jurisdiction.

12 I don't think, in the end, any of that
13 really matters, because I think that the Petitioners here
14 have filed a Motion for Rehearing, and I think that that's
15 why we're here. And, for purposes of that Motion for
16 Rehearing, I'll treat it the same as I'm treating the one
17 by the Moving Parties, because they essentially deal with
18 the same issues.

19 I think the critical thing that the
20 Committee needs to think about today is the standard of
21 review that these petitions or motions need to be measured
22 against. And, that standard of review is clear. These
23 Moving Parties need to show that what you did in the
24 underlying proceeding was unlawful or unreasonable. And,

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1 to do that, according to 541 and your rules, they need to
2 point to actual places in the record where you made

3 factual errors, or they need to point to places where you
4 ignored the law. Places where you were compelled to apply
5 the law in a certain way and you didn't do it. And, if
6 they can't do it, then their motion fails. And, they
7 haven't done it, and we've pointed that out repeatedly in
8 our pleading. And, I think a useful way to think about
9 this is to look at how the Supreme Court reviews these
10 types of decisions. The Supreme Court issued a decision
11 called the Keogh decision, 141 New Hampshire 142. And,
12 what that case said was, that the Supreme Court won't
13 disturb findings like yours, if the decision is supported
14 by competent evidence in the record.

15 Now, unquestionably, your decision is
16 supported by competent evidence. But I would ask you to
17 think about that in the reverse. What competent evidence
18 have the Petitioners offered to support any of the
19 positions that they're offering? That's the key question.

20 I'm going to deal with the four issues
21 that they have raised collectively: Environmental
22 considerations, volumetric increase, cost, and megawatt
23 increase. And, let me start with environmental
24 considerations, because I think that's the easiest one.

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1 That issue has unequivocally been
2 waived. At the May 8th hearing before this Committee,
3 after counsel for the Moving Parties spent a couple of
4 minutes describing all of the environmental concerns that
5 they had about this project, Vice Chairman Getz
6 specifically said "Is it fair that your issues were not
7 really directed to whether we have jurisdiction or not in

8 the first instance, but they seem to be more about the
9 issues that we should consider in a proceeding if we
10 determine that we had jurisdiction and the Applicant needs
11 to get a certificate?" And, counsel for the Moving
12 Parties said: "The issues that I presented today
13 certainly do not relate to the question of whether this is
14 a sizable addition." They acknowledged unequivocally that
15 environmental issues don't pertain to sizable addition.
16 They waived that. And, so, they can't raise that now.

17 Notwithstanding that point, in the
18 Committee's order, at Page 10 and 11, they still addressed
19 this issue. They still found that there weren't
20 environmental considerations of concern. And, the
21 Committee specifically noted that the purpose of this
22 project is to control pollution emissions.

23 Second issue: Volumetric increase.
24 Again, we need to look at the law and what the burden is
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1 that these Moving Parties have. They need to show that
2 you made some error of law. And, what they've argued is
3 that you acted arbitrarily in rejecting their volumetric
4 approach, and that they're saying that volumetric
5 measurements are clearly relevant to a sizable addition
6 analysis. They don't say how you acted arbitrarily and
7 they don't point to any law at all, case law or statutory
8 law, that shows why a volumetric comparison is relevant.

9 In fact, and the Committee knows this,
10 it was referenced in the transcript, the July 7th
11 transcript, there is no law authorizing you to do a
12 volumetric comparison, and the Committee has never used a

13 volumetric comparison as the basis for doing a sizable
14 addition determination. It just hasn't happened.

15 Even if the Committee were inclined to
16 do that type of comparison, you can't do it here based on
17 the record that was presented. The Moving Parties had the
18 opportunity to put evidence in that would have been
19 competent under that Keogh standard, and they failed to do
20 it. The evidence that they put in was not reliable. And,
21 the only witness at the hearing, Mr. Smagula, who
22 testified that he was the most knowledgeable person about
23 Merrimack Station and the most knowledgeable person about
24 the scrubber project, testified that that evidence was not
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1 credible and was not reliable. And, the Committee
2 specifically in its order found Mr. Smagula's testimony to
3 be credible. So, there is simply no basis now in this
4 Motion for Rehearing to do anything to disturb that
5 decision.

6 The third issue is cost. And, the
7 Moving Parties make the argument that the Committee failed
8 to place significant weight on the issue of cost. And,
9 again, this is -- it's a statutory issue. When you look
10 at 162-H, there's absolutely nothing in that statute that
11 requires or authorizes the Committee to consider cost.
12 Now, the Committee has made cost a factor in some of its
13 other determinations. But to argue that somehow it's a
14 determinative factor is simply wrong. In fact, when you
15 look at 162-H, what it talks about are things like
16 "increases in megawatt" or attaching jurisdiction at 30
17 megawatts. It talks about size of lines or length of

18 lines, things like that. But there's not a single place
19 in the statute that talks about cost. And, the Moving
20 Parties haven't pointed to any basis whatsoever for why
21 your failure to place significant weight on that was an
22 error of law.

23 And, then, finally, the last issue is
24 the megawatt increase. Again, the Committee squarely
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1 rejected the linkage between the turbine project and the
2 scrubber project here. So, focusing only on the scrubber,
3 it's uncontested that it's actually going to reduce the
4 megawattage of that station by 6 to 13 megawatts. So, in
5 terms of it being a sizable addition, it's actually
6 reducing the megawatts. Even if you link it with the
7 turbine project, the increase between the two is marginal,
8 as the Committee said. And, so, again, with respect to
9 that increase, there's simply no basis here under the law
10 to find that that increase is in any way sizable.

11 And, the last comment I want to make
12 just has to do with the issue of fees. Very briefly, we
13 believe the Committee got this issue correct. The Moving
14 Parties in this case were the entities that applied for
15 the Committee's relief. They were the ones that sought
16 the Commission's jurisdiction on this. PSNH did not apply
17 or seek Committee jurisdiction, and, in fact, the
18 Committee made the determination that PSNH was correct in
19 not coming to the Committee to seek a certificate. And,
20 so, for all those reasons, we believe that your decision
21 was correct.

22 I'm happy to answer any questions that
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23 you have, but that's all I had to say.

24 CHAIRMAN BURACK: Thank you, Attorney

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1 Needl eman. Questions?

2 (No verbal response)

3 CHAIRMAN BURACK: Very good. Thank you

4 very much. Attorney Patch, I think we're going to --

5 we're going to hold where we are, I believe, in terms of

6 additional comments and argument from the parties.

7 What I'd like to do now is open a

8 discussion with the Committee, a consideration of the

9 Unassented to Motion for Rehearing filed by the Moving

10 Parties. Mr. Below.

11 CMSR. BELOW: Thank you, Mr. Chairman.

12 I'd like to move that the Motion for Rehearing filed by

13 the Moving Parties on or about September 9th, 2009 be

14 granted and that we schedule a rehearing and a site visit.

15 And, I'd like to speak to my motion.

16 CHAIRMAN BURACK: Is there a second of

17 this motion?

18 VICE CHAIRMAN GETZ: Second.

19 CHAIRMAN BURACK: Second by Mr. Getz.

20 You may proceed with the discussion of your motion.

21 CMSR. BELOW: Okay. I think that we did

22 make an error of reasoning in our original decision. I

23 focused a lot on the meaning of "sizable addition", since

24 it wasn't defined in the statute, and looked in the first

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1 instance to my dictionary, which I think is the definition
2 that was cited. It's meaning "having considerable size"
3 and "considerable" meaning "large in amount, extent or
4 degree or worthy of consideration or important. And, I
5 focused in my reasoning in our deliberations on what was
6 worthy of consideration pursuant to the purposes of this
7 statute. And, the fact that the statute focused primarily
8 on megawatt output as a size criteria for purposes of
9 delineating when projects might be subject to review or
10 not. As well as some of the broader issues about trying
11 to take in consideration siting issues and environmental
12 issues. I think the statute's more than just a land use
13 statute. It is about integrated siting review, including
14 environmental and issues in compliance with state energy
15 policy.

16 And, in that regard, you know, I
17 originally concluded that it wasn't sizable in that
18 context. But I think the problem in our reasoning is that
19 that's sort of is too narrow and defies some common sense.
20 And, I think this, the light bulb particularly went off
21 when I was reviewing the Motions for Rehearing, and saw
22 the reference, I think it really came from a Concord
23 Monitor article that asserted that it would be "the
24 tallest structure in New Hampshire." And, I don't know if

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1 that's true or not. That's a factual question that we
2 would have to look at in rehearing. But just the notion
3 that it might be the tallest structure in New Hampshire,
4 and I think it's pretty likely taller than any building,
5 there may be an antenna or tower out there that might be

6 taller, but we don't know that. But, just the notion that
7 it might be the tallest structure in New Hampshire, I
8 began to rethink "what is "sizable"?" Then, I also looked
9 at my thesaurus. And, the thesaurus about size -- has
10 specifically synonyms for "sizable". And, it says
11 "notably above average in amount, size or scope; big,
12 considerable, extensive, good, great, healthy, large,
13 large scale", and also "somewhat big, biggish, largest."
14 And, I think something that might be the tallest structure
15 in history is certainly "biggish" or "largest", if not
16 "above" -- you know, certainly "above average", and
17 represents a dimension, a part of the size of the use of
18 the site in the project that I think it's just, in
19 reflection, I think we were wrong in our reasoning, in
20 saying that "something that might be the tallest structure
21 in New Hampshire is not sizable."

22 And, we also, you know, I think that was
23 reflected in our order on Page 8, where we said -- oops,
24 not on Page 8, on Page 13, where we said "The Committee
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1 notes that the newly added features of the facility will
2 be constructed in an area where industrial structures
3 already exist, and will include a chimney that is slightly
4 higher than the already existing chimney." And, as
5 Chairman Getz pointed out in his dissent, the new chimney
6 will actually be forty percent taller than the existing
7 chimney. And, I don't think something that's forty
8 percent taller, and might push it up to being the highest
9 structure or admittedly the highest structure in the state
10 is only "slightly higher", I think "forty percent taller"

11 is up on the -- in the realm of "large" or "notably above
12 average in size". Forty percent larger is "above average"
13 or above the existing, certainly. And, so, I think that's
14 the primary basis on which I conclude that we should grant
15 rehearing.

16 CHAIRMAN BURACK: Thank you. Further
17 discussion on this motion? Mr. Scott.

18 DIR. SCOTT: I guess, in maybe a little
19 bit of rebuttal, I guess, again rehashing what we talked
20 about when we made this decision, part of this was
21 precedent that we set as a Committee. And, when I look at
22 the Northern Wood Project, and we ruled that that was not
23 sizable, and when I've been to that site, I look at the
24 conveyor, I look at the wood yard, I look at the tipping
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1 yard for the trucks, etcetera, and I -- granted, this
2 tends to be somewhat nebulous in trying to make this fit
3 into the law, but I can't help but getting past, if we
4 ruled and that was not a sizable addition, how is this a
5 sizable addition? That's one of my things I stumble with.

6 CHAIRMAN BURACK: Please.

7 CMSR. BELOW: I guess the question is
8 were -- I was not part of that review. But, just the
9 description of it, the question is were any of those
10 elements, in terms of size, meaning the dimension, extent,
11 magnitude, measure, proportion in the nature of something
12 that's great in dimension or substantially above average
13 in dimension? I don't know whether those elements, you
14 know, were smaller in context or slightly larger. But I
15 think my conclusion is that the smokestack alone at the

16 Merrimack Station, the addition, it's clearly an addition,
 17 that threshold of the height of it of being potentially
 18 the tallest structure in New Hampshire is just, and forty
 19 percent taller than the existing structure, is, on the
 20 face of it, just from a plain language common sense,
 21 sizable.

22 CHAIRMAN BURACK: Further discussion?
 23 Mr. Harrington.

24 MR. HARRINGTON: Yes. I think there's a
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1 couple of issues we need to look back on here. And, one
 2 we don't want to forget that the Legislature had the
 3 opportunity to address this issue in the last session.
 4 The words are obviously vague with "sizable addition".
 5 But there were multiple bills that actually came in front
 6 of the Legislature where they would have had the
 7 opportunity to create more study, one bill was to create
 8 more study by the PUC, or to take other actions to slow
 9 down the process of building the scrubber project at the
 10 Merrimack plant. They chose not to act on any of those.
 11 Now, I know that's not a direct statement as to what
 12 "sizable addition" is. But they felt as though there was
 13 no need to clarify that.

14 The second issue I think, and this is
 15 the only guidance that is given specifically in the
 16 statute on what's a "sizable addition", is it allows a
 17 power plant up to 30 megawatts, or slightly less than 30
 18 megawatts, it has to be less than 30 megawatts, to be
 19 built without having any jurisdiction by the Site
 20 Evaluation Committee. And, I contend that, when you look

21 at the size of this tower, it is a very large tower, but
22 you have to compare it to what was there in the past.
23 We're not simply putting -- this is not proposed to put in
24 a new tower where there was no tower at all. It's to tear
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1 down an existing one and put in one that's taller than the
2 one that was there before.

3 But, if you look at what the Legislature
4 would allow an Applicant -- or, not "applicant", a party
5 to do that would not be jurisdictional to the Site
6 Evaluation Committee. You could start out with a
7 greenfield site, where probably hundreds of acres would
8 have to be cleared. Then, you'd have to put in many new
9 roads in order to get there. There would be a bunch of
10 buildings, whether they -- in the administrative nature,
11 there would also be the power plant itself, which would
12 contain boilers and cooling systems. The cooling system
13 would have to interact with some type of probably outside
14 water source or they would have to build cooling towers or
15 cooling ponds, this is assuming it's a thermal plant.
16 There would be a fuel storage area of some type. There
17 would be fuel deliveries. And, this is a very large
18 amount of change to an area. And, I think, if you had --
19 the only guidance that the Legislature has given us is to
20 look at, to say that "this is an existing industrial
21 facility, where the size of the facility is not being
22 increased, there's some changes to the buildings on the
23 existing facilities, but it's already on land that was
24 cleared and being used for industrial purposes. So,
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1 basically, what you come down to is, from a distance,
2 you're going to see the tower further away than you could
3 before, because it's now a taller tower.

4 But, I think, if you look and compare
5 that to looking at a greenfield site where there was
6 absolutely nothing, and allowing someone to build a power
7 plant of up to 29 megawatts, where there would be new
8 stacks, there would be hundreds of acres cleared, there
9 would be cooling systems, there would be traffic from fuel
10 deliveries, etcetera, I think the addition of a tower
11 being somewhat taller, which seems to be the only issue
12 that we're really debating here, it doesn't meet that
13 threshold that it would be "sizable", if you compare it to
14 the building of an entirely new power plant of slightly
15 less than 30 megawatts. So, I would stay with my original
16 position on this.

17 CHAIRMAN BURACK: Further discussion?
18 Mr. Dupee.

19 MR. DUPEE: Thank you, Mr. Chairman. We
20 heard earlier testimony regarding what the duties of this
21 Commission or Committee would be in terms of granting a
22 rehearing. I was wondering if, for my edification, if
23 Counselor Iacopino could refer or describe to us under law
24 what activities should we be taking, if we want to

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1 consider a reconsideration?

2 MR. IACOPINO: The standard of review
3 for a petition for rehearing is set forth in RSA 541, and
4 has been also defined in case law from the New Hampshire

5 Supreme Court. And, that standard of review under RSA
6 541, Section 4, is that the -- well, the moving party is
7 supposed to bring up every issue upon which they claim
8 that the decision or order complained of is unlawful or
9 unreasonable. And, RSA 541:3 permits this Committee to
10 grant a motion for rehearing if, in its opinion, good
11 reason for rehearing is stated in the motion.

12 The New Hampshire Supreme Court has gone
13 on to say that "The purpose of a rehearing is to direct
14 attention to matters said to have been overlooked or
15 mistakenly conceived in the original decision, and thus
16 invites reconsideration upon the record which that
17 decision is rested."

18 Based upon that law, the standard that
19 the Committee is to use is whether or not you believe, on
20 your review of the record, that your original decision was
21 unreasonable or unlawful or if there is some other good
22 reason to grant a rehearing. And, of course, there's lots
23 of different things that could play into that. There are
24 procedural issues that may arise in a case, which may give

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1 good reason, and may have nothing to do with the original
2 order being unlawful or unreasonable. But that is the
3 standard as set forth both in the statute and as explained
4 by the Supreme Court.

5 CHAIRMAN BURACK: Mr. Dupee.

6 MR. DUPEE: A further question. I think
7 it's fair to say in this instance that we are acting
8 lawfully. So, the question before us is whether or not
9 there is an interpretive question or other evidence that

10 we would want to go back and reconsider, and which would
11 specifically be the issue between a smokestack being
12 taller -- excuse me. So, that the choice here before us
13 is whether the smokestack being the tallest structure and
14 perhaps forty percent taller than the existing, versus the
15 argument of taking an entirely new piece of property and
16 redeveloping that, whether or not that's a significant
17 difference in our minds, I guess.

18 MR. IACOPINO: Obviously, I have no role
19 in making the decision that you all must make as Committee
20 members. But I suppose that there are two words to
21 consider here: Unreasonable or unlawful. And, if, as a
22 Committee, you believe that your prior decision is
23 unreasonable, which is I think what is the gist of Mr.
24 Below's motion. And, you all, not that you all agree, but
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1 you each have to make your own decision on this motion
2 with respect to whether or not you believe that the prior
3 decision was either unreasonable or if you believe it was
4 unlawful for some reason. That would be what would guide
5 you through your decision-making process.

6 CHAIRMAN BURACK: Mr. Below, then
7 Mr. Dupee.

8 CMSR. BELOW: My primary argument is
9 that it was -- that we were unreasonable, in that we made
10 an error of reasoning or mistakenly conceived what's a
11 "sizeable addition". But I think there is an argument here
12 that it's also arguably unlawful, because, where there is
13 no definition, we have to look at the plain, ordinary
14 meaning of "sizeable addition". And, notwithstanding, I

15 think Mr. Harrington makes a good argument as to, from a
 16 policy point of view, what might be appropriate. But,
 17 unfortunately, the Legislature hasn't really given us --
 18 we're trying to interpret the policy intent. And, I think
 19 it would be helpful if it was clarified. But, absent that
 20 clarity, we look to the plain, ordinary meaning. And, it
 21 would be unlawful if we didn't ascribe to the term
 22 "sizable" a plain, ordinary meaning in the absence of
 23 other legislative guidance in the first instance. And, I
 24 think, although we tried to do that, my focus was on only
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1 part of that meaning, which is the "considerable" being
 2 "worthy of consideration", and trying to look at what the
 3 intent of the statute was. But I think there's another --
 4 there's another half of that, the plain, ordinary meaning
 5 about something that's "large, big, or simply above
 6 average in proportion or dimension". And, I think there
 7 are aspects of this addition that are clearly above
 8 average, if not at the extreme dimensional edge of what
 9 exists, and not just on that site, but anywhere in New
 10 Hampshire, that make it within the plain, ordinary meaning
 11 a "sizable" -- simply a "sizable addition". So, there's
 12 an argument it's both unreasonable and unlawful.

13 And, I would mention that I actually
 14 originally dissented on the cost allocation issue, and for
 15 the reasons of my original dissent, which was expressed
 16 just orally. It wasn't -- I didn't write on my signature
 17 that I dissented on the cost allocation. But I also think
 18 that, in terms of the Moving Parties' Motion for
 19 Rehearing, that was part of their argument, and I still

20 agree that we inappropriately or arguably unlawfully
21 allocated costs to the Moving Parties, because I don't
22 think that fits within the statutory definition of an
23 "applicant", where we have the authority to assess those
24 costs. So, I just want to put that on the record. I
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1 think that's another basis for rehearing.

2 CHAIRMAN BURACK: Thank you. Further
3 discussion? Mr. Dupee, did you have something further
4 here?

5 MR. DUPEE: No, sir.

6 CHAIRMAN BURACK: Any further
7 discussion? Mr. Harrington.

8 MR. HARRINGTON: Just one other comment
9 I wanted to make on my -- follow-up to my previous
10 argument, and this is something that's I guess probably
11 with the law, but nevertheless we are stuck with the law
12 we were given. And, that's -- if we are to say that
13 something like "making a tower that's forty percent higher
14 than the existing tower then makes the addition sizable
15 and under jurisdiction to this Committee", what would
16 happen if we had a 20 megawatt plant? That's clearly
17 non-jurisdictional to this Committee. And, they put in a
18 very tall tower. Would that somehow mean that there's a
19 sizable addition and they would then come to this
20 jurisdiction? Well, it wouldn't, because the base
21 facility is not covered. So, I think we have to be very
22 careful about simply applying "something is "sizable",
23 therefore, it comes under our jurisdiction." Because you
24 could make something quite sizable, done on a less than 30

1 megawatt facility, which I think no one would argue comes
2 under the jurisdiction of this Committee.

3 So, I again reemphasize, the only
4 guidance the Legislature has gotten, and I don't think
5 they have given us no guidance, especially, and the
6 opportunity was given with specific legislation for them
7 to come back and change this past session, which they
8 didn't, that the law I read it as saying that up to
9 30 megawatts is not even jurisdictional. So, anything
10 that's in less scale than that couldn't be a sizable
11 addition, otherwise you're going to get into the conundrum
12 where you could say "you have a sizable addition to a
13 plant that's non-jurisdictional by definition." And,
14 then, that I think gets us really nowhere. And, that's
15 why I stick with my original opinion.

16 CHAIRMAN BURACK: I might just add that,
17 from my perspective, I believe our original decision was
18 lawful and reasonable. I don't, from my perspective, see
19 additional information or considerations having been
20 brought forward here that would change my view of this
21 matter.

22 And, unless there are further
23 discussions, what I'd like to do is call for a vote? Mr.
24 Getz.

1 VICE CHAIRMAN GETZ: Thank you, Mr.
2 Chairman. I'd like to make a couple of points. First, I

3 think we're confronted with a very unusual situation, in
4 that what the Site Evaluation Committee does in the
5 decisions they make are typically we rely on drawings,
6 simulations, blueprints, narrative descriptions. And, in
7 this case, we have the unique situation that the tower,
8 the chimney, the smokestack has been constructed. Much of
9 the scrubber project has been constructed. And, that's
10 why I would support Commissioner Below's suggestion that
11 we take a site visit. And, I think that's important,
12 again, if you turn to the language on Page 13 of the
13 Committee's order, because I think it is an error of fact
14 in my opinion to say that the "new chimney is slightly
15 higher".

16 But, more important, the two succeeding
17 sentences talk about that "the Committee notes that the
18 images depicted in [the] exhibits are viewed from only one
19 perspective and that perspective is designed to show as
20 much of the new facility as possible." And, which to me
21 suggests that the drawings were somehow inaccurate. And,
22 if you want to be able to cure that, then it seems to me
23 the logical step is to have a site visit.

24 The succeeding sentence, "The majority
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1 of the Committee does not believe that the facilities
2 pictured in Stipulated D constitute a sizable addition".
3 I don't know how you can set up an argument that says that
4 "the drawings are suspect, and then, based on those
5 drawings, I draw a conclusion that the" -- "that the
6 addition is not sizable."

7 I also have a concern about the argument

8 made by the Movants on Page 3 of their Motion for
9 Rehearing. They argue that "The Committee acted contrary
10 to law in determining that the Scrubber Project would meet
11 all criteria under RSA 162-H:1", and that's discussed on
12 Page 10 of the order. Now, it's not clear, from reading
13 the decision, what the intent was of this language. At
14 best, it would be premature to make any conclusions about
15 the findings in 162 -- in 162-H:16. Now, if this was
16 intended just as dicta, as "oh, by the way", and it was
17 not fundamental to the finding, then I guess it's either
18 premature or harmless error. But, if it's a basis for
19 making the ultimate conclusion that it's not sizable,
20 and/or goes to an argument that "well, we would have
21 approved this anyway", then I think that's an error of
22 law. And, I think, at a minimum, there should be some
23 kind of clarification about that issue or that there
24 should be some response in whatever actions the Committee
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1 takes to this argument about the criteria that would be
2 employed, in a case where we actually got to a
3 jurisdictional facility and needed to make the necessary
4 findings about an application.

5 CHAIRMAN BURACK: Mr. Scott.

6 DIR. SCOTT: Point of order, I suppose,
7 regarding Mr. Getz's question. The original motion by
8 Commissioner Below was for, and correct me if I'm wrong,
9 for a rehearing and a site visit.

10 CHAIRMAN BURACK: That's correct.

11 DIR. SCOTT: Those two don't necessarily
12 have to go together, correct? It sounds almost to me, Mr.

13 Getz, what you're suggesting is a site visit prior to our
14 ruling here, is that correct?

15 CHAIRMAN BURACK: Again, I take the
16 motion, and unless the motion were withdrawn and
17 reformulated, I take the motion as one that would call for
18 us to reconsider, which would I think necessarily mean our
19 scheduling a further hearing on this matter at a later
20 date, and would also include, in connection with such a
21 hearing, a scheduling of a site visit, prior to our making
22 any final determination on the matter. And, presumably,
23 the site visit would occur in close timing with a hearing
24 either before or after or possibly on the same day. But,
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1 again, that would be a matter we would address, if the
2 Committee votes to support the motion that has been made
3 here. Mr. Below.

4 CMSR. BELOW: Two things. One is, I
5 concur with Commissioner Getz's concern with regard to
6 what appears to be prejudging what might be the outcome if
7 it did have a full site -- a review by this Committee.

8 But, procedurally, I'd like maybe a
9 little clarification that the effect of my motion to grant
10 rehearing, and I did include the concept of having a site
11 visit in doing that, doesn't mean that we automatically
12 change our decision, simply that we kind of reopen the
13 record, including with a site visit, to reconsider our
14 previous decision. And, we could end up, in fact, with
15 the same decision or a different decision after granting
16 the rehearing. Is that approximately correct or --

17 MR. IACOPINO: Yes. But, if your motion

18 is granted, if the Board -- if the Commission does vote to
 19 grant the motion, it will have the effect of nullifying
 20 the prior decision. And, recommendation from counsel
 21 would be that, upon holding your rehearing, a new written
 22 order would then follow after you've concluded that
 23 process.

24 CSMR. BELOW: And, I guess further, if
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1 it would help, I don't know if this is appropriate, but,
 2 if it would help the members to decide on the basic
 3 question of whether to grant rehearing, I -- to have a
 4 site visit first, if that's possible or appropriate, then
 5 I would, if there's a feeling that we want to postpone the
 6 decision whether to grant rehearing and have a site visit
 7 first, I am certainly amenable to that.

8 CSMR. CAMPBELL: Mr. Chairman.

9 CHAIRMAN BURACK: Mr. Campbell.

10 CSMR. CAMPBELL: If we did vote to
 11 rehear this, can we limit our hearing to new evidence, you
 12 know, and have all parties stipulate that at least the
 13 evidence in the record as, you know, brought forward to
 14 that hearing, or do we start de novo? That's a question I
 15 have. Second is, in this discussion, and based on what
 16 the -- I think it's Mr. Callen brought forward in his
 17 argument, and what Mr. Harrington brought forward, there's
 18 some confusion in my mind about this threshold of
 19 30 megawatts. Is this -- actually, are other facilities
 20 related, which is the argument I'm hearing, sufficient to
 21 trigger jurisdiction or is it -- do you have to have the
 22 energy production? In other words, there's no question in

23 any of our minds that there's not the increase of
24 production threshold, but what about the relationship of
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1 this facility to a production facility? I'm confused
2 about that. I don't think I was at the time, but, in the
3 discussion this morning, certainly has raised that in my
4 mind. So, I need some clarification on that. To me, that
5 would seem -- everything in our decision was around
6 "sizable", not around the issue of whether or not this is
7 a facility that comes under our jurisdiction, because its
8 production is up or it's related to a production facility.
9 I need some help with that.

10 MR. HARRINGTON: Mr. Chairman, if I
11 could?

12 CHAIRMAN BURACK: Mr. Harrington, and
13 then Mr. Iacopino.

14 MR. HARRINGTON: I maybe want to
15 clarify, maybe it was confusing what I stated. I wasn't
16 trying to say that, because this didn't increase the power
17 by a minimum of 30 megawatts, that it was
18 non-jurisdictional. My argument was that, when looking at
19 what constitutes "sizable", I'm comparing it what could be
20 done with by clear definition in the law being
21 non-jurisdictional. That is, you could build a new power
22 plant, 29 megawatts in a greenfield site, where there was
23 no industrial activity or buildings or anything, clear the
24 land, put in the power plant, have new fuel deliveries and
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1 all the things that are associated with it, and that would

2 not be jurisdictional.

3 Now, in this case, I am saying that
4 should be a yardstick which we should use to determine
5 what's a sizable addition or what isn't. I wasn't trying
6 to imply that, because, in this Merrimack case, that there
7 was less than a 30-megawatt increase, that it's
8 automatically non-jurisdictional. That was not the point
9 I was making. I was simply trying to say that, up to a 30
10 megawatt power plant in a new field site should give us
11 the yardstick to use on what constitutes sizable and
12 what's not and what's jurisdictional to the Committee and
13 what's not. I think that clears things up.

14 CHAIRMAN BURACK: Mr. Harrington -- I'm
15 sorry, Mr. Iacopino.

16 MR. IACOPINO: As best as I can shed
17 light on your question, Commissioner, is the definition of
18 "energy facility" is in RSA 162-H:2, VII. And, it does
19 include a number of different criteria that can be built
20 to meet "energy facility". And, it does talk about
21 "associated facilities". Now -- So, one of the things
22 that you all as a Committee have to determine is this an
23 "associated facility"? Is it something that is, in fact,
24 part of the Merrimack Station complex?

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1 In the past, we have had issues before
2 the Committee with respect to "sizable addition" that had
3 nothing to do with actual power increases or decreases at
4 the plant. For instance, most notably, the Granite --
5 Granite Ridge. Recently, we had an argument before the
6 Committee about whether the building of a cold storage

7 facility there was something that required a "sizable
8 addition" determination or not. Ultimately, that resolved
9 itself amongst the Town and the parties.

10 But it's a decision that you make as a
11 member of this Commission. And, it's up to the Commission
12 -- up to the Committee to determine whether any particular
13 structure or addition is part of that facility, associated
14 with that facility, and whether or not it is sizable. I
15 wish I could give you more. I wish I could tell you
16 there's a rule that we can look at and say "This is
17 sizable and this isn't." "This is an associated facility
18 and this isn't." But, within the context of RSA 162, we
19 don't have those definitions.

20 CSMR. CAMPBELL: If we have -- Mr.
21 Chairman?

22 CHAIRMAN BURACK: Yes. Go ahead,
23 Mr. Campbell.

24 CSMR. CAMPBELL: Just to follow on. If
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1 we did rehear this case, we could ask for some discussion
2 and evidence and testimony around this issue. I don't
3 remember or recall, I haven't restudied this, I mean we
4 can adjourn while I do restudy it, but I don't recall off
5 the top of my head a lot of discussion around "associated
6 facilities". I remember a lot of discussion around the
7 "30 megawatts". I remember a lot of discussion around
8 "sizable", but not "associated facility". And, that --
9 And, so, it's really a question, Mr. Chairman. I earlier
10 asked, if we reheard the case, if we can limit new
11 testimony? That's number one. And, number two, could we

12 also call on testimony to help us understand how this all
13 fits together as a piece?

14 And, then, on the -- I would, as a
15 comment, since I have the floor a bit, we -- there were a
16 lot of discussion about volume, and we could spend hours
17 more on that issue. To me, the volume wasn't the issue.
18 It was always the height and the footprint. Because a
19 building, I can give you a building that has 50,000 square
20 feet, and one of them the volume is all office, and the
21 other one the volume is just empty warehouse storage.
22 They have a huge difference in terms of what they do for
23 land use and what they do for traffic and everything else.
24 It's height and footprint, it seems to me. And, that's
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1 why the volume, I think that it's just not a workable --
2 it doesn't tell you anything. If you know anything about
3 land use, it doesn't tell you anything about impacts.
4 That's why I was concerned.

5 The new issue raised in the dissent by
6 Mr. Getz focuses on height, and that's what this motion's
7 about. That would make a difference in my mind, if we're
8 focused purely on height as an issue about sizeable,
9 rather than volume, which is a whole discussion of physics
10 that I don't want to revisit, and doesn't tie itself to
11 land use.

12 But whether I vote for this motion or
13 not really depends on your ruling as Chair about how this
14 rehearing would be conducted and what it would offer.

15 And, finally, I think, if the -- in all
16 the process we went through a few weeks and months ago,

17 the thing that bothered me the most is that we were put in
18 the position of deciding at the end who would pay the
19 cost. And, it seemed to me that was the wrong place to
20 put that. And, I would not want to go to a rehearing or a
21 site visit or anything else unless we had clarity up front
22 on who's going to pay for all of our costs. Because, as a
23 Commissioner in this state government, I know the state
24 government doesn't have the money. And, so, like I say,
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1 the last time it was very awkward to be in the position of
2 dealing with that after all of it had been done and all
3 the discussion is done, and then have the parties object
4 to our ruling on that tells me the case is still
5 unsettled. And, I don't want to go forward unless it is
6 settled.

7 I don't -- so, those are my -- I need
8 help, Mr. Chairman.

9 CHAIRMAN BURACK: Yes.

10 MR. IACOPINO: In order to answer your
11 easy question, the procedural one, is that, yes, if the
12 Committee chose to do so, you could make the record that's
13 already been established as part of the -- just make that
14 part of the record on rehearing. So that I believe it was
15 Mr. Smagula who testified, his testimony can be made a
16 part of that record. Now, of course, there may be, you
17 know, people may want to recall him, there may be other
18 issues they want to raise. That would, of course, be
19 subject to rulings from the Chair about those issues.
20 But, yes, the record could be -- could include what has
21 already gone forward.

22 Your other -- The answer to your other
23 questions are not for me, they're really for you all as a
24 Committee, in terms of what's important in reaching a
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1 deci si on.

2 CHAIRMAN BURACK: Mr. Getz.

3 VICE CHAIRMAN GETZ: Just one procedural
4 issue I would add. I think what the Commissioner was
5 asking also goes to the issue of "what's the scope?" And,
6 I think it's entirely within the discretion of the
7 Committee to set what the scope of rehearing would be.

8 CSMR. CAMPBELL: The reason I asked that
9 question is, you know, goes to common sense. I grew up as
10 a farm kid. The one thing our dad wouldn't want us to do
11 is re-harrow the same ground. We did it, you know. I
12 think that, you know, if there's more information, if
13 there are issues of reconsideration, that's what I want.
14 I don't want to go through hours and hours. I mean,
15 obviously, this Commission, when it reconvenes, will
16 decide what it wants. But I'm comfortable. I haven't
17 heard an answer, Mr. Chairman, on who's going to pay.

18 CHAIRMAN BURACK: I think where we are
19 is that we have a motion before us, and we have to take a
20 vote on that motion. And, then, depending on the outcome
21 of that motion, we would decide what procedural measures
22 we would take based on the outcome of that motion. There
23 are other legal issues that have been raised that have
24 been discussed here. And, I think, rather than getting to

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1 those at this moment, it's probably more productive for us
2 to hold a vote on the pending motion. And, we'll do this
3 initially by show of hands, I think, to get a sense of the
4 Committee.

5 And, again, the motion is a motion that
6 we reconsider our order denying the Motion for Declaratory
7 Ruling dated August 10, 2009, and that we conduct a site
8 visit in connection with our reconsideration of this
9 matter. That was a motion made by Mr. Below and seconded
10 by Mr. Getz.

11 So, all in favor of that motion, and,
12 again, a majority vote here would rule. So, all in favor
13 of that motion, please raise your hand?

14 (Show of hands.)

15 CHAIRMAN BURACK: There are four voting
16 in favor. All opposed?

17 (Show of hands.)

18 CHAIRMAN BURACK: Five opposed. So, the
19 motion fails. Okay.

20 Is there -- Is there another motion?

21 VICE CHAIRMAN GETZ: Well, Mr. Chairman?

22 CHAIRMAN BURACK: Mr. Getz.

23 VICE CHAIRMAN GETZ: I guess, do we need
24 to address the issue of the fees? Is that part of the

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1 Motion for Rehearing? I mean, we have just determined not
2 to consider -- the Committee's determined not to rehear on
3 the issues of whether it's a sizable addition.

4 MR. IACOPINO: Actually, the motion --

5 the motion that was made was the motion to grant the
6 Motion for Rehearing.

7 CHAIRMAN BURACK: Right.

8 MR. IACOPINO: And, that motion failed.

9 CMSR. BELOW: And, I actually put it in
10 the plural. It was both Motions for Rehearing, because
11 they were both filed on or about the same date.

12 CHAIRMAN BURACK: Okay. And, as I
13 understood the arguments that were made, it related to
14 both of the concerns that have been addressed, raised by
15 the petitions for rehearing, in terms of the height issue,
16 as well as the legal fee issue. So, I think we
17 effectively have already considered both of those issues
18 and made a determination on both of those issues.

19 So, is there a motion that the
20 Unassented to Motion for Rehearing filed by the Moving
21 Parties --

22 (Atty. Iacopino conferring with Chairman
23 Burack.)

24 CHAIRMAN BURACK: Okay. I think it

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1 would be appropriate at this moment for me just to make a
2 disclosure here. I realized this morning, very shortly
3 before the hearing, that the name "Peter Bonanno" somehow
4 resonated in my mind, and I realized that Mr. Bonanno had
5 been a client of my former law firm, and that I had been
6 briefly consulted on a matter by one of my colleagues
7 involving a matter that Mr. Bonanno was involved with.
8 That matter has absolutely nothing to do whatsoever with
9 PSNH, with this site. It has no connection whatsoever.

10 It has no bearing in any fashion on these proceedings.
11 Again, assuming that I am correct in my recollection, and
12 I may be mistaken, because I have not had an opportunity
13 to confirm this, because the recollection just came to me
14 very shortly before starting this hearing this morning.
15 But I do not believe that I have any reason to recuse
16 myself from being involved in matters and decisions
17 involving Mr. Bonanno or the petition that he and others
18 have signed, but I just wanted to make that disclosure on
19 the record, so that everybody is aware of that, that
20 situation.

21 So, that disclosure having been made, my
22 question is, is there a -- is there a motion that the
23 Unassented to Motion for Rehearing, filed by the Moving
24 Parties on or about September 9, 2009, and the motion
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1 filed by Mr. Bonanno and others on or about September 10,
2 2010 be denied? I'm sorry, September 9 as well? Thank
3 you. The Bonanno -- 2009, I'm sorry. September 9, 2009
4 would be the date of the Bonanno motion. Again, is there
5 a motion to the effect that both of those motions would be
6 denied?

7 DIR. NORMANDEAU: Mr. Chairman?

8 CHAIRMAN BURACK: Yes.

9 DIR. NORMANDEAU: I'll make a motion
10 that those motions be denied.

11 CHAIRMAN BURACK: Is there a second to
12 that?

13 MR. HARRINGTON: Second.

14 CHAIRMAN BURACK: Motion by

15 Mr. Normandeau; seconded by Mr. Harrington. Is there a
16 discussion of this motion? Mr. Scott.

17 DIR. SCOTT: I just wanted to make an
18 observation that, in spite of the discussion we just had,
19 obviously, in both Attorney Patch's and actually I believe
20 Attorney Callen's, the beginning of both their arguments
21 they all agree that they are bringing no new arguments
22 forward. They, in fact, were certainly saying they don't
23 agree with our decision, but they weren't bringing any new
24 arguments forward. I just wanted to make that

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1 observation.

2 CHAIRMAN BURACK: Thank you. Other
3 comments or observations from the members of the
4 Committee?

5 (No verbal response)

6 CHAIRMAN BURACK: Okay. Again, I will
7 just again state that it's my belief that our original
8 decision is not unlawful or unreasonable, and that no
9 information -- no new information or arguments have been
10 presented that would, I believe, provide us with other
11 good cause to reconsider.

12 Any further discussion of this matter?

13 (No verbal response)

14 CHAIRMAN BURACK: If not, by a show of
15 hands, all in favor of the motion to deny reconsideration,
16 please raise your hand?

17 (Show of hands.)

18 CHAIRMAN BURACK: Okay. There are six
19 voting in favor. All opposed to this motion?

20 SEC-1125.txt
(Show of hands.)

21 CHAIRMAN BURACK: There are three voting

22 in opposition to this motion. So, the motion carries and

23 the rehearing is denied.

24 The second set of issues that we should

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1 consider is the motion filed by Peter Bonanno and others.

2 And, I think that there is, first, a standing issue, and I

3 would invite a motion on this issue.

4 CSMR. CAMPBELL: I move we deny the -- I

5 move that we deny the motion filed by Peter Bonanno and

6 others as it pertains to those signatories' alleged

7 standing based solely on the possibility of future rate

8 increases as a result of the construction of the scrubber

9 project.

10 CHAIRMAN BURACK: Thank you. A motion

11 by Mr. Campbell. Is there a second for that motion?

12 MR. DUPEE: Second.

13 CHAIRMAN BURACK: A second by Mr. Dupee.

14 Thank you. Is there a discussion of this motion?

15 CSMR. BELOW: Just a question.

16 CHAIRMAN BURACK: Mr. Below.

17 CSMR. BELOW: Is it correct that the

18 effect of adopting this motion doesn't deny the motion as

19 a whole, but just with regard to part of the signatories

20 and part of the claim for a basis for standing?

21 CHAIRMAN BURACK: That's correct. If we

22 were to approve this motion, what we would be finding is

23 that there are certain of the signatories who lack

24 standing, and those signatories would be those whose sole

1 impact would be effectively that they might see the
2 possibility of future rate increases. And, that's
3 distinguished from those who allege that the construction
4 of a power plant in proximity to their residence will
5 decrease the value of the residential property. And,
6 there have been Supreme Court decisions that have
7 indicated that to have standing one must be directly
8 affected. And, that the notion of the impact of future
9 rate increases in the Supreme Court's recent decision in
10 Appeal of Stoneyfield Farms, as well as the 1998 decision
11 in Appeal of Campaign for Ratepayer Rights, would suggest
12 that outcome.

13 I don't know, Attorney Iacopino, if you
14 want to add anything further to that --

15 MR. IACOPINO: I think you've summarized
16 it correctly. But this is not, just so that everybody
17 understands, this is just in the context of the Motion for
18 Rehearing, and the definition of "directly affected". To
19 the extent that there is argument that this is some kind
20 of petition under RSA 162-H, that those criteria don't
21 apply to them. But, I believe, as your lawyer, it's
22 pretty clear that it's not a petition under RSA 162-H.
23 What it is is a Motion for Rehearing by a group of 157
24 people, I did the counting, could be off, by a group of

1 157 people, who each designated what their standing was.
2 And, I believe 66 of them or 67 of them indicated that the
3 smokestack was in view of their residence, and therefore

4 they were concerned about the devaluation of their
5 property. Another 66 of the whole 157, and some of these
6 may duplicate each other, alleged recreational use of the
7 Merrimack River and potential damage to their recreational
8 use of that river. And, the remainder -- the remaining
9 individuals who signed that all only checked off
10 Subsection (c), indicating that their rates would be
11 affected. Which, under the cases that you've cited, Mr.
12 Chairman, in my opinion, those folks would not have
13 standing on a Motion for Rehearing under the Stoneyfield
14 Farms case and the 1998 case.

15 CHAIRMAN BURACK: So, again, if,
16 depending on the outcome of this motion, we would then
17 proceed to a consideration of the merits of the petition
18 that's been filed. Mr. Getz.

19 VICE CHAIRMAN GETZ: I'm sorry, I'm
20 confused. I thought the issue was -- is basically do
21 these, in the first instances, do the 157 individuals have
22 standing to file a petition for rehearing? I thought --
23 that's what I understood Mr. Iacopino's description to be.
24 And, since the Committee has denied the petition for
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1 rehearing as a substantive matter, I'm not sure that it's
2 necessary to go into the particulars of the 157
3 individuals. And, it also at the same time, it seems to
4 me, if there's one person who has standing in there, then
5 it's a valid petition for rehearing. And, I think the
6 assumption was that there was only -- or, the motion went
7 to the issue of excluding those individuals who were only
8 asserting a rate impact. Now, putting aside the merits of

9 that argument, I guess I would really think that there's
10 -- I think there's at least one person there who has valid
11 standing for the petition, based on the potential
12 aesthetics. So, I don't think we really need to get into
13 the issue of determining which individuals of the 157
14 legitimately have standing and which don't.

15 I mean, basically, I guess I would
16 consider the motion moot as well, since we've decided as a
17 substantive matter.

18 CHAIRMAN BURACK: Mr. Harrington.

19 MR. HARRINGTON: I guess I'd have to
20 share Chairman Getz's position on this. I don't
21 understand what we're voting on, if we've already denied
22 the petition, and maybe there's a legal thing I'm missing
23 here, but what is the intent of this motion? What is it
24 going to accomplish?

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1 MR. IACOPINO: I think it was expected
2 that this motion would have been brought before you, voted
3 on the actual Motion for Rehearing by the 157 people, just
4 so that the Committee addresses the issue of standing
5 appropriately, so that you have a record when it gets to
6 the Supreme Court as to why the standing was permitted to
7 some of the Petitioners.

8 However, the fact that you've denied the
9 motion already may -- may actually moot out that issue.
10 But, I mean, if it was intended that --

11 CSMR. CAMPBELL: I'm happy to withdraw
12 the motion. I just thought you wanted to clarify the rate
13 cost issue. But, if that's not of concern to you, I don't

14 have a problem with withdrawing my motion.

15 (Chairman Burack and Atty. Iacopino
16 conferring.)

17 CHAIRMAN BURACK: I think what we might
18 do here, Mr. Campbell, if you are prepared to withdraw
19 your motion and the second would concur, we could withdraw
20 that motion. I think we have effectively created on the
21 record, and we've raised this issue so that, on appeal,
22 this issue will be before the -- if there is an appeal,
23 would be before the Supreme Court for its decision as to
24 whether certain parties would or would not have standing.

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1 And, I might just note in this connection that, from my
2 perspective, particularly after having reviewed some of
3 the more recent case law, and in light of looking at the
4 particular issues raised by the Bonanno matter, I do have
5 further questions in my mind as to whether the Moving
6 Parties, in fact, have standing in this matter. But,
7 again, I expect that, if this matter is appealed, that
8 would be an issue that would be taken up by the court.

9 So, do you want to withdraw your motion?

10 CSMR. CAMPBELL: At your advice, I'd be
11 happy to withdraw it, Mr. Chairman.

12 CHAIRMAN BURACK: Very well. Thank you.
13 The motion is withdrawn. And, is the second withdrawn as
14 well, Mr. Dupee? Yes, you withdraw your second? Okay.
15 Thank you. We will treat that motion as withdrawn.

16 I think it would be helpful if we could
17 have a motion specifically relating to the other legal
18 issue that was raised by Attorney Callen. That is his

19 assertion that the petition effectively constitutes a
20 petition seeking -- seeking review of the matter pursuant
21 to -- Mr. Iacopino, do you have the citation?

22 MR. IACOPINO: RSA 162-H, Subsection 2.

23 CHAIRMAN BURACK: RSA 162-H, Section 2.

24 So, is there a motion to -- is there a motion on this

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1 matter?

2 MR. HARRINGTON: Just a question.

3 CHAIRMAN BURACK: Mr. Harrington.

4 MR. HARRINGTON: I'm not exactly clear.

5 Are you stating that -- I'm not sure what exactly we're

6 trying to --

7 CHAIRMAN BURACK: Let me try to clarify
8 this, if I can, and others I'm sure will jump in if they
9 think my efforts are not sufficient. I think what we
10 heard from Attorney Callen is really two arguments as to
11 why his clients should be entitled to be involved in this
12 proceeding. The first was that they effectively could
13 join with the other Moving Parties in asking us to
14 reconsider the original decision. And, we have now taken
15 action with respect to both that petition, as well as the
16 petition of the Moving Parties.

17 The other argument that we heard from
18 Mr. Callen is that his clients also believed that they
19 were exercising the ability to file a petition with the
20 Committee, which pursuant to various sections of the
21 statute, including the definitions in RSA 162-H, and our
22 jurisdictional provision here, and I'm just --

23 MR. IACOPINO: Two, II.

24 CHAIRMAN BURACK: Yes, I think it's -- I
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1 think we'd probably find it all in RSA 162-H, II [sic],
2 Section VII and Section XI, relating to, in addition to
3 applicants being able to bring matters before the
4 Committee for consideration, that petitioners could also
5 do so. And, his argument here, as I understand it, is
6 that they need to present only one petition signed by 100
7 or more of either folks living in abutting towns or the
8 same town as the facility in order to be able to
9 effectively have us institute a proceeding to determine
10 whether a certificate should be issued.

11 And, what I'm suggesting here is that,
12 although our counsel has told us that he believes that
13 Attorney Callen has misconstrued the statute, and
14 effectively he would need to bring in two petitions from
15 two categories, rather than just one category, I think it
16 would be helpful nonetheless for us to have a specific
17 motion and determination on that issue, that it is finding
18 that they have not satisfied the requirements for this to
19 essentially open a brand new proceeding or call upon us to
20 open a brand new proceeding in this matter.

21 MR. HARRINGTON: So, this is in regards
22 to basically starting from scratch with a new petition
23 that would say "we're requesting that the Site Evaluation
24 Committee take jurisdiction as petitioners." And, then,
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1 Attorney Callen is then saying that, where it says "the

2 applicant or 2 or more [petition categories] as defined in
3 [Section XI]", that their petition somehow fulfills the
4 obligation of meeting the two or more?

5 CHAIRMAN BURACK: That's correct.
6 That's what we understand the argument to be, I think.

7 MR. HARRINGTON: Thank you. That helps
8 very much. Thank you.

9 CHAIRMAN BURACK: Commissioner Below.
10 CMSR. BELOW: I think there may be
11 another dimension to his argument that, because this is
12 associated facilities with something that would otherwise
13 be jurisdictional, we should review it anyways. But I
14 don't think that really holds up, because the definition
15 of "certificate" refers to a "proposed facility", and
16 elsewhere I think where the term "sizable facility" --
17 "sizable addition" comes up, it's really our jurisdiction
18 is a proposed new facility that meets the definition of
19 "jurisdictional energy facility", which can include things
20 less than 30 megawatts that we or petitions from these two
21 categories determine needs review, I mean, if we -- or
22 "sizable addition". I think the issue is that the
23 scrubber project and/or the generation -- generator
24 replacement doesn't -- either was a sizable addition,
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1 which the majority of the Committee has ruled it isn't, or
2 it's a new energy facility or a proposed energy facility,
3 and I don't think it meets either of those. I mean, the
4 Committee has determined it doesn't meet the "sizable"
5 definition, and it's not a proposed energy facility in the
6 context of being something that would trigger a site

7 review, because it's already existing. So, as an existing
8 facility, it only potentially triggers the sizable
9 addition. And, besides, clearly, there's only one,
10 possibly one petition in the categories that would trigger
11 a review and not two. And, therefore, I think we could
12 decide that that issue doesn't have merit. It's not a
13 basis for us to accept -- assert jurisdiction and review
14 this.

15 MR. IACOPINO: Just so there's no -- I
16 mean, I think, just so everybody is aware, I believe that
17 the petition filed by Mr. Bonanno is a petition. The
18 question is, does it trigger a separate category of review
19 for you, other than what you've already done? And, I
20 think that any motion that you make should be based upon
21 the lack of there being two petitions, because that's what
22 the statutes require to trigger that type of review.

23 So, I would recommend, if anybody is
24 inclined to make such a motion as the Chair is speaking
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1 about, that the motion would be and move that we find that
2 the petition by Mr. Bonanno and others does not trigger a
3 review of this facility for a certificate of site and
4 facility. And, that would be my recommendation of how a
5 motion should be worded.

6 CHAIRMAN BURACK: Is there a motion to
7 that effect by members of the Committee?

8 MR. HARRINGTON: I had a question first.

9 CHAIRMAN BURACK: Yes. Mr. Harrington.

10 MR. HARRINGTON: Getting back to
11 Commissioner Below, I'm trying to just follow. What

12 you're saying is that there's, basically, it's like
 13 Chairman Getz said, there's two ways that someone can
 14 petition, presuming that they had the adequate number of
 15 petitioners. They can petition for a new bulk power
 16 energy facility, to say "we would like this to be
 17 jurisdictional to the SEC", or they can try to say that
 18 "what's being proposed to an existing facility is a
 19 sizable addition or change." And, this is not a new
 20 facility, so they don't fall under the first one. So, the
 21 only grounds for petitioning is that it meets the sizable
 22 addition or change. And, since we've already denied that,
 23 that that sort of like ends the question there. Is that
 24 what you're saying?

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1 CMSR. BELOW: Yes, that's a good
 2 summary.

3 MR. HARRINGTON: Okay. Thank you.

4 CHAIRMAN BURACK: Further discussion?

5 (No verbal response)

6 CHAIRMAN BURACK: Is there a motion,
 7 either along the lines of what Mr. Iacopino had suggested
 8 previously or any other motion on this question?

9 CMSR. CAMPBELL: I don't think any of us
 10 want to be one of the lawyers.

11 CHAIRMAN BURACK: I will make a motion
 12 consistent with Mr. Iacopino's previous motion. And, are
 13 you able to -- you have that?

14 (Court reporter indicating in the
 15 affirmative.)

16 CHAIRMAN BURACK: Okay. Is there a

17 second to that motion?

18 VICE CHAIRMAN GETZ: Second.

19 CHAIRMAN BURACK: Second by Mr. Getz.

20 Again, the motion is a motion effectively to find that we
21 do not have jurisdiction to consider the petition from
22 Mr. Bonanno and others as a new petition under the
23 statute.

24 Is there any further discussion of this
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1 motion?

2 (No verbal response)

3 CHAIRMAN BURACK: If not, all in favor,
4 please raise your hands?

5 (Show of hands.)

6 CHAIRMAN BURACK: Any opposed?

7 (No show of hands.)

8 CHAIRMAN BURACK: Thank you. That
9 motion carries unanimously.

10 CSMR. CAMPBELL: Mr. Chairman?

11 CHAIRMAN BURACK: Mr. Campbell.

12 CSMR. CAMPBELL: Before we adjourn,
13 could I ask a question? That I'm just concerned that we
14 combined the two denial motions, the one for the
15 rehearings, and then voted on them as one motion, but --
16 and therefore made the standing issue moot. Seems to me
17 that's not procedurally correct. Seems to me that we
18 should have had a motion on the rehearing, voted on it,
19 then had a motion on standing, voted on it, and then had a
20 motion on the rehearing based on the Bonanno appeal. It
21 seems -- so, I have a concern that we -- is it a minor

22 technicality or is it an important one?

23 (Chairman Burack and Atty. Iacopino
24 conferring.)

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1 MR. IACOPINO: My recommendation to the
2 Committee is that there's no reason to try to undo and
3 then redo what you've already done. You've made the
4 decision to the effect that the standing issue, it was not
5 discussed until after the ruling on the motion, as a
6 practical matter, is not going to make and should not make
7 any difference with this Committee. You've taken the
8 motions in the order that you've deemed most appropriate.
9 May not have been what I would have recommended, but just
10 the same, there's no reason to undo, there's nothing about
11 the manner in which you have acted, the procedure that
12 you've used that undermines the authority of your decision
13 here.

14 CHAIRMAN BURACK: Mr. Harrington.

15 MR. HARRINGTON: Yes. Just one final
16 question, maybe you can just address this. We had the
17 issue last time of who pays the bill. And, I'm assuming
18 that the two people I'm looking at here are not coming in
19 as charity work today. So, do we have to revisit that
20 issue today or is it just -- they just roll it into the
21 previous ruling and the bill just gets higher?

22 MR. IACOPINO: That was part and parcel
23 of the motions that you've already voted on.

24 MR. HARRINGTON: Okay. I just wanted to
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1 make clear on that.

2 CHAIRMAN BURACK: I believe that would
3 be another issue for appeal if the parties choose to
4 appeal the decision. Mr. Dupee.

5 MR. DUPEE: Thank you, Mr. Chairman.
6 Given the fact that we are going to hear this, I would
7 hope we could actually do it expeditiously.

8 CHAIRMAN BURACK: No, I think you
9 misunderstand. We are not going to rehear this matter.
10 Okay? Thank you. That was the effect of our first vote.

11 MR. DUPEE: Okay. I'm sorry, Mr.
12 Chairman.

13 MR. PATCH: Mr. Chairman, I have a
14 procedural question.

15 CHAIRMAN BURACK: Yes.

16 MR. PATCH: I don't know if the Chairman
17 of the Committee could clarify why the two other members
18 of the Committee that were in attendance this morning were
19 not allowed to participate? You had said something at the
20 beginning about that, but I think it would be important
21 for the record to clarify why they were excused.

22 CHAIRMAN BURACK: Thank you. Thank you
23 for that question, Mr. Patch. The two members who were
24 here previously, Mr. Bald and Mr. Simpkins, did not sit on
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1 the prior aspects of this proceeding. And, we indicated
2 to them that they would certainly be welcome to sit and
3 listen today, but we did not feel it would be appropriate
4 for them to participate in further decisions in this
5 matter when they had not had the benefit of actually being

6 here and being present for the live testimony or otherwise
7 had the opportunity to participate in the proceeding. We
8 had a quorum without them and we felt it was not
9 necessary, appropriate for them to sit on this proceeding,
10 as a consequence of their not having been involved at any
11 earlier time in the proceeding.

12 MR. PATCH: Thank you.

13 CHAIRMAN BURACK: You're welcome.

14 Hearing nothing further, we stand adjourned. Thank you.

15 (Whereupon the hearing ended at 12:00
16 p.m.)

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