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STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

July 8, 2011 - 9:10 a.m.
Public Utilities Commission
21 South Fruit Street
Suite 10
Concord, New Hampshire

RE: SEC DOCKET NO. 2010-01
Application of Groton Wind, LLC,
for a Certificate of Site and
Facility for a 48 Megawatt Wind
Energy Facility in Groton,
Grafton County, New Hampshire.
(Public Meeting/Deliberations)

PRESENT:	SITE EVALUATION SUBCOMMITTEE:
Chairman Thomas B. Getz (Presiding)	N.H. Public Utilities Comm.
Robert Scott, Director	Air Resources Division - DES
Brook Dupee, Bureau Chief	Dept. of Health & Human Serv.
Richard Boisvert	N.H. Div. of Historical Res.
Stephen Perry, Chief	Inland Fisheries - N.H. F&G
Charles Hood, Admin.	Dept of Transportation
Donald Kent, Admin.	Dept. of Resources & Econ. Dev.
Eric Steltzer	Office of Energy & Planning
Michael Harrington	Public Utilities Commission

* * *

Counsel for the Committee: Michael Iacopino, Esq.

COURT REPORTER: Susan J. Robidas, LCR NO. 44

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12
13
14
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16
17
18
19
20
21
22
23
24

I N D E X

PAGE

ISSUE: APPLICANT'S MOTION FOR CLARIFICATION
Presentation by Chairman Getz 8
Discussion ensued

MOTION BY Dir. Scott: grant the relief 27
requested by the Applicant and
strike the second sentence of the
ordering clause

Second by Dir. Perry 27
Further Discussion on the motion

VOTE TAKEN ON MOTION 34

* * *

ISSUE: APPLICANT'S MOTION FOR RECONSIDERATION 37
AND REHEARING
Presentation by: Chairman Getz
Discussion ensued

MOTION BY Dir. Boisvert: To deny Applicant's 48
Motion for Reconsideration and
Rehearing re: avian and bat studies

Second by Dir. Scott 48
Further Discussion on Motion

VOTE TAKEN ON MOTION 50

* * *

ISSUE: BUTTOLPH GROUP'S MOTION FOR REHEARING 50
Presentation by Chairman Getz
Discussion ensued

MOTION BY Dir. Scott: To deny Item 1 in Motion 54
Second by Mr. Harrington 54

VOTE TAKEN ON MOTION 54

* * *

1	I N D E X (CONT'D)	
2		PAGE
3	ISSUE: BUTTOLPH GROUP'S MOTION FOR REHEARING	
4	Presentation by Chairman Getz	54
5	Discussion ensued	
6	MOTION BY Dir. Scott: To deny Item 2 in Motion	55
7	Second by Mr. Perry	55
8	VOTE TAKEN ON MOTION	56
9	* * *	
10	ISSUE: BUTTOLPH GROUP'S MOTION FOR REHEARING	
11	Presentation by Chairman Getz	56
12	Discussion ensued	
13	MOTION BY Dir. Scott: To deny Item 3 in Motion	59
14	Second by Mr. Kent	60
15	VOTE TAKEN ON MOTION	60
16	* * *	
17	ISSUE: BUTTOLPH GROUP'S MOTION FOR REHEARING	
18	Presentation by Chairman Getz	60
19	Discussion ensued	
20	MOTION BY Dir. Scott: To deny Item 4 in Motion	63
21	Second by Mr. Dupee	63
22	VOTE TAKEN ON MOTION	63
23	* * *	
24	ISSUE: BUTTOLPH GROUP'S MOTION FOR REHEARING	
	Presentation by Chairman Getz	63
	Discussion ensued	
	MOTION BY Mr. Harington: To deny Item 5 in Motion	71
	Second by Mr. Scott	71
	VOTE TAKEN ON MOTION	73

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I N D E X (CONT'D)

PAGE

ISSUE: BUTTOLPH GROUP'S MOTION FOR REHEARING
Presentation by Chairman Getz 73
Discussion ensued

MOTION BY Dir. Scott: To deny Item 6 in Motion 74
Second by Mr. Perry 74
VOTE TAKEN ON MOTION 75

* * *

ITEM: LETTERS FROM DIV. OF HISTORICAL RESOURCES 75

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

2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the public meeting and
4 deliberative session in Docket SEC No. 2010-01
5 concerning the application of Groton Wind, LLC for a
6 certificate of site and facility for a renewable
7 energy facility in Groton, New Hampshire.

8 Let's begin with introducing the
9 Members of the Committee, starting on my right.

10 MR. DUPEE: Good morning. My name is
11 Brook Dupee, representing the Department of Health
12 and Human Services.

13 MR. STELTZER: Eric Steltzer of the
14 Office of Energy & Planning.

15 MR. PERRY: Steve Perry, New Hampshire
16 Fish & Game.

17 MR. SCOTT: Bob Scott, Department of
18 Environmental Services, Air Resources Division.

19 MR. HOOD: Charlie Hood, New Hampshire
20 Department of Transportation, Environmental Bureau.

21 CHAIRMAN GETZ: I'm Tom Getz, I'm
22 Chairman of the Public Utilities Commission and
23 chairing the Subcommittee.

24 MR. KENT: Don Kent with the

1 Department of Resources and Economic Development.

2 MR. BOISVERT: Richard Boisvert,
3 Division of Historical Resources.

4 MR. HARRINGTON: Michael Harrington,
5 New Hampshire PUC.

6 MR. IACOPINO: Mike Iacopino, counsel
7 to the Committee.

8 CHAIRMAN GETZ: And I'll note for the
9 record that we have a quorum and are prepared to
10 proceed with the meeting and the deliberative
11 session.

12 And so I would suggest to the Members,
13 this is how we would proceed: I think it may work
14 best is if I go through all of the documents that
15 have been filed since the decision was issued on May
16 6, and then we'll just take up the arguments one by
17 one as we go through them.

18 So, just in terms of the documents
19 that we're going to work on this morning, we have a
20 motion for clarification that was filed on May 13 by
21 the Applicant. There's a letter from Dr. Mazur on
22 May 17th that appears to be responding to that
23 application for clarification. We have a motion for
24 rehearing filed, dated June 5, from the

1 Buttolph/Lewis/Spring intervenor group. We have the
2 Applicant's motion for reconsideration and rehearing,
3 dated June 6. Then we have the Buttolph/Lewis/Spring
4 objection to the motion for reconsideration that was
5 submitted on June 11. Then we have the Applicant's
6 objection to the Buttolph/Lewis/Spring motion for
7 rehearing that's dated June 15th. We have an
8 objection from Counsel for the Public to the
9 Applicant's motion for rehearing, and that's dated
10 June 16. Our procedural order setting the
11 deliberative session today was issued on June 24.

12 I'll also note, after we go through
13 the motions for rehearing, I think we should discuss
14 two items that we've been copied on. One is a letter
15 from June 1 from the New Hampshire Division of
16 Historical Resources, and the other is a letter dated
17 June 28 from the New Hampshire Division of Historical
18 Resources. And I think we need to discuss that as
19 well today. But I think let's hold off on that until
20 we deal with the motions for rehearing.

21 So, is everyone okay with that
22 process? Anything we should address before we start
23 working through these?

24 Mr. Iacopino, anything that you have?

1 MR. IACOPINO: No.

2 CHAIRMAN GETZ: Okay. Let's turn to
3 the Applicant's motion for clarification that's dated
4 May 13. And the request for relief there from the
5 Applicant is that we clarify that the order, the
6 decision from May 6, does not require Groton Wind to
7 file an interconnection agreement prior to
8 commencement of construction. And among other
9 things, they say there's no discussion in the order,
10 the decision granting certificate of site and
11 facility, or transcripts or deliberations, regarding
12 the rationale for the requirement. And they argue
13 that there's additional cause for clarifying to
14 remove the interconnection agreement requirement and
15 saying it poses great hardship to the construction
16 schedule and asserts that typically interconnection
17 agreements are completed after construction of a
18 generation facility has started. And it reports in
19 that motion for clarification that Counsel for the
20 Public takes no position, but Buttolph/Lewis/Spring
21 disagree and does not concur; Dr. Mazur adamantly
22 opposes; Mr. Wetterer does not concur; and the Town
23 of Groton did not respond due to lack of sufficient
24 time.

1 But Mr. Iacopino, I understand you've
2 looked through the transcript and some of the
3 filings?

4 MR. IACOPINO: Yes. I can report to
5 the Committee that the references to the transcript
6 contained in the motion for clarification are, in
7 fact, accurate, that it appears as though there was
8 no specific discussion during the time of
9 deliberations about putting the specific condition
10 in. And moreover, in addition to that, there was a
11 similar request made by Counsel for the Public that
12 the Committee actually denied. And all of that is,
13 in fact, included in the motion for clarification. I
14 have checked that, and in fact it does -- those are
15 accurate statements with respect to the state of your
16 record.

17 CHAIRMAN GETZ: Do you have a cite for
18 the -- with respect to Counsel for Public, the
19 discussion of denying that on the --

20 MR. IACOPINO: Yes, I do.

21 MR. HARRINGTON: These would be in the
22 transcript?

23 MR. IACOPINO: I believe it's in the
24 transcript of May -- April 7th or -- it's either 3rd

1 or 7th. Hold on one second.

2 CHAIRMAN GETZ: We have the 7th or the
3 8th.

4 MR. IACOPINO: I'm sorry. So it's Day
5 3, April 11th, Page -- basically, the discussion goes
6 from Page 77 through roughly 86, I believe. And
7 there is a -- I have it highlighted. I'll bring it
8 right up.

9 CHAIRMAN GETZ: Could you give me that
10 cite again?

11 MR. IACOPINO: April 11th. Transcript
12 of April 11th. Begins about Page 76 and goes to
13 about Page 86.

14 CHAIRMAN GETZ: When you get that up,
15 can you just read it into the record today?

16 And let me just say for everybody on
17 the Committee, just to point out there's new
18 microphones, and there's a little red light on here.
19 So the red light has to be on if you're going to
20 speak.

21 MR. IACOPINO: It's a fairly extensive
22 discussion, Mr. Chairman, and I've highlighted a
23 couple parts of it that I'll read from the record for
24 you.

1 First is on Page 77 to Page 78, where
2 I was actually questioned by the Committee about
3 whether or not we have a standard condition. The
4 request was from Public Counsel. And the discussion
5 was, Mr. Chairman, you indicated that request D or
6 Letter D, quote, The Committee should require that
7 the Applicant return to the Committee should the
8 feasibility study or any other cause require the
9 Applicant to modify the facility from the design
10 presented to the Committee and the parties in the
11 hearings. To the extent that the Applicant believes
12 such modifications are immaterial, it should be
13 required to provide a report and analysis
14 demonstrating the immateriality to the Committee and
15 the parties, close quote. You were quoting from
16 Counsel for the Public's request, in their request
17 for conditions in their brief.

18 And then you address me, and you
19 asked, "Don't we have a standard condition that
20 effectively addresses that issue?"

21 I then advised the Committee that
22 there were two issues involved and that ISO --
23 essentially what I advised the Committee was that ISO
24 would require them, before they could turn on the

1 project, to have all of their studies performed, but
2 that if one of those studies -- and I got into a
3 discussion then with Mr. Harrington -- if one of
4 those studies required some modification to the
5 project, that they would have to come back to us
6 because it would have an effective change in the
7 footprint or the nature of the facility. And that's
8 all on Page 77 and 78 -- I think I was a little
9 long-winded, I'm sorry -- and 79.

10 And then, Chairman Getz, you suggest
11 on Page 79, at Line 8 -- and again this is
12 April 11 -- So then, perhaps an appropriate condition
13 would be to make it specific then, that to the extent
14 that this request is speaking to the requirements of
15 ISO, that we impose a condition to make and it clear
16 that the Applicant needs to comply with the ISO
17 requirements. And if there are any substantial
18 changes in the requirements, that the Committee will
19 be notified. And I took that as a question to me. I
20 don't know if it actually was. And I answered "Yes."

21 And then there was further discussion
22 about what happens if ISO requires some changes. Mr.
23 Harrington directed a question to me, which I tried
24 to explain to him with an example that he made a joke

1 about. But nonetheless, it was at the end of that
2 discussion on page -- well, towards the end of the
3 discussion on Page --

4 MR. HARRINGTON: 82.

5 MR. IACOPINO: Yeah, 82. There was
6 discussion on whether or not we had required such a
7 condition in any other projects. And specifically,
8 Chairman Getz, you opined that you couldn't find
9 anything in the Lempster or the Granite Reliable,
10 which are both wind facilities. And I advised the
11 Committee that I did not recall any such specific
12 condition from prior hearings before the Committee.

13 And then on Page 85, the Committee
14 took a vote. Nobody on the Committee was in favor of
15 the condition. And when you took a vote on those
16 opposed, it was denied unanimously. Everybody on the
17 committee voted to oppose the conditions suggested by
18 Counsel for the Public.

19 There was nothing that I could find in
20 the record that dealt with a specific condition
21 requiring the filing of an interconnection agreement
22 prior to the commencement of construction, nor was
23 there any vote ever taken on that specific thing. I
24 believe that language made it into our decision

1 because there is, as I learned later, such a
2 condition in the Biomass Laidlaw docket, which was
3 driven by different considerations, I believe. I
4 think that some of that language may have, due to my
5 fault, made its way into the order in this case, and
6 I didn't catch it. So...

7 MR. HARRINGTON: Mr. Chairman, just --

8 CHAIRMAN GETZ: Before we get into
9 this, let me talk about the standard for review that
10 we need to use this morning. I neglected to do that
11 right off the bat.

12 In the context of reviewing the
13 motions today, pursuant to RSA 541:3, which is the
14 governing statute here, the Committee may grant
15 rehearing or reconsideration when a party states good
16 reason for such relief. And good reason may be shown
17 by identifying new evidence that could not have been
18 presented in the underlying proceeding -- and, you
19 know, that's a citation from O'Loughlin versus New
20 Hampshire Personnel Committee, a Supreme Court
21 decision from 1977 -- or by identifying specific
22 matters that were overlooked or mistakenly conceived
23 by the deciding tribunal. And that's, again, a
24 citation to another New Hampshire Supreme Court case.

1 And also subsequent cases from the Supreme Court note
2 that a successful motion for rehearing does not
3 merely reassert prior arguments and requests a
4 different outcome. Also, you know, if there's an
5 error of law, then that's a basis for granting a
6 motion for rehearing. So that's the parameters that
7 we need to work within in judging the arguments in
8 the various petitions today.

9 Now, I'm taking from what you're
10 saying, Mr. Iacopino, that I guess there's a couple
11 ways of looking at this. In the first instance, the
12 condition does not -- that was inserted that the
13 Applicant asked us to clarify does not accurately
14 memorialize the deliberations.

15 MR. IACOPINO: Correct.

16 CHAIRMAN GETZ: And I guess you can
17 look at that a few different ways. It's either a
18 transcription error, or it's something that we've
19 mistakenly conceived in issuing the order. But
20 that's kind of my first reaction to that.

21 But Mr. Harrington, you have something
22 you wanted to say?

23 MR. HARRINGTON: Well, the only thing
24 I wanted to try to clarify is the discussion Mr.

1 Iacopino was referring to was whether or not there
2 should be a condition on if the agreement with the
3 ISO, the interconnection agreement, was changed
4 substantially from what we thought it was going to be
5 at the time, should that be brought to the
6 Committee's attention. And the condition I think
7 we're discussing that was put on -- actually put in
8 the application -- or the order is that they shall
9 submit an approved -- file an interconnection
10 agreement prior to commencing construction. So I
11 think it's kind of two different issues. You know,
12 one is talking about if something were changed in
13 getting that. But I think the condition that was
14 actually put in the order was very similar to the one
15 that was in the Laidlaw Berlin one, which says
16 "Further ordered, that the Applicant shall continue
17 to cooperate with the requirements of ISO-New England
18 and obtain all ISO approvals necessary to a final
19 interconnection agreement for a gross unit rating of
20 up to 70 megawatts. Said interconnection shall be
21 filed with the Subcommittee prior to commencement of
22 construction."

23 And I went through the Granite
24 Reliable order, and I couldn't find that similar

1 thing in there, nor was there one -- nor could I find
2 one in the Lempster case. So I just wanted to make
3 sure people were clear we're talking about as a
4 condition of commencing construction and not if there
5 was a change to the actual interconnection agreement,
6 and then had to be filed with the Committee.

7 MR. IACOPINO: Mr. Chairman, I would
8 just point out that the particular part of the order
9 complained about in the motion for clarification is
10 on Page 3 of the order and certificate. It's not
11 within the decision itself. And it reads almost
12 identical to what Mr. Harrington just read about the
13 Laidlaw decision, except that it has the 48 megawatts
14 in it. And the first sentence would be consistent
15 with the deliberations of the Committee, because that
16 first sentence states, "Further ordered, that the
17 Applicant shall continue to cooperate with the
18 requirements of ISO-New England and obtain all ISO
19 approvals necessary to a final interconnection
20 agreement for a gross unit rating of up to 48
21 megawatts."

22 And then what would need to be
23 changed, if you are inclined to grant the motion for
24 clarification, is you would need to delete the second

1 sentence which says, "Said interconnection agreement
2 shall be filed with the Subcommittee prior to the
3 commencement of construction." And that would be the
4 relief, I believe, that's sought, is the elimination
5 of that second sentence. The first sentence would be
6 consistent with the record that I have reviewed with
7 you this morning.

8 CHAIRMAN GETZ: Any other discussion
9 about this particular item? Director Scott.

10 MR. SCOTT: Two things: One is
11 extremely minor. If we're going to amend this,
12 there's obviously a typo, at least in my version.
13 Instead of "all," it says "al" for ISO.

14 I guess my other issue is -- and maybe
15 this is for counsel -- so what we have before us, I
16 believe, is a motion for clarification. How does --
17 if we were to do this, how does that compare with a
18 motion for rehearing? I mean, so we make the changes
19 as an administrative, in effect, a typo?

20 CHAIRMAN GETZ: Well, let's talk about
21 that a little bit. We're going to do that next, is
22 the procedural context here, because we have this
23 argument by Dr. Mazur filed on the 17th, who states,
24 "I would like to reiterate the position communicated

1 both to Ms. Geiger and Mr. Iacopino in recent e-mails
2 responsive to the May 13 motion" -- being the motion
3 for clarification -- "that our interpretation of the
4 process is that this matter must be brought up
5 through appeals format, first to an appropriate
6 environmental services council per its own site map
7 instruction, or eventually to the New Hampshire
8 Supreme Court. To allow the Applicant to circumvent
9 the dictated appeals process would appear to violate
10 the rules at hand and due process rights of other
11 concerned parties, intervenors, et al."

12 And I'll also note that in its motion
13 for rehearing, the Applicant, on June 6, seeks to
14 incorporate the previous motion for clarification as
15 part of its motion for rehearing. So, to the extent
16 there's any issue about what is a motion for
17 clarification, arguably it's addressed by including
18 it or incorporating it in the motion for rehearing.
19 I think it's common practice before boards to treat
20 motions for rehearing and clarification and
21 reconsideration as comparable instruments. But so I
22 think it would be fair for us to treat it as a motion
23 for rehearing, but they've also included it in their
24 motion for rehearing.

1 Mr. Iacopino.

2 MR. IACOPINO: I believe you're
3 correct, Mr. Chairman. And I would also point out
4 that the standard of review that you have listed here
5 today would also support -- would also be a standard
6 of review that would be legally supportable in
7 determining a motion for clarification. In essence,
8 the titles really don't mean much. I mean, treated
9 as a motion for rehearing or a motion for
10 clarification basically has the same effect on the
11 standard, or the standard is pretty much the same.

12 CHAIRMAN GETZ: And there's one other
13 tail to this. In its -- in the Buttolph Group
14 objection to the Applicant's motion for
15 reconsideration, they contend that the motion for
16 reconsideration was filed late. The hearing -- or
17 the decision, the underlying decision was on May 6th.
18 Under 541:3, motion for rehearing should be filed
19 within 30 days. The 30th day was Sunday, June 5th,
20 and the Applicant's motion for rehearing was filed on
21 Monday, June 6th. And the Applicant says it's, you
22 know, crystal clear that any request for rehearing
23 shall be made within 30 days. It also states that
24 there's no flexibility in the application of 541 with

1 respect to rehearing, filing time frames. We are
2 confident the Committee will agree it has no choice
3 but to dismiss the Applicant's filing.

4 But there's some case law from the
5 Supreme Court interpreting this issue. There is a
6 decision of the Supreme Court, HIK Corporation versus
7 Manchester, that says, dealing with time frames, in
8 this case it was a -- this is a 1961 decision
9 referring to a time frame, that filing was needed to
10 be filed within 20 days after a decision of the
11 board. And the court recognized there that the
12 recognized principle, that when the terminal day of a
13 time limit falls upon Sunday, that day is to be
14 excluded from the computation. And in that case,
15 they concluded that the motion was, in their words,
16 "seasonably filed" or "timely filed." So if
17 something is filed on a Sunday -- or due on a Sunday,
18 filing on a Monday, the following Monday, meets the
19 statutory requirements. And there's also a
20 subsequent case, Radzwitz versus Town of Hudson,
21 issued on October 20, 2009, that reaffirms that
22 principle, that when a filing is due on a Sunday,
23 then the Monday filing of the actual document is
24 satisfactory. So I guess in that regard, I think the

1 objection by -- from the Buttolph Group with respect
2 to the timing of the Applicant's motion for rehearing
3 is not supported by the Supreme Court's
4 interpretation.

5 So that gets us back to dealing with
6 the substance of the issue of the request for
7 clarifying, which, as I take it, would mean striking
8 the sentence that the interconnection agreement shall
9 be filed with the Subcommittee prior to commencement
10 of construction.

11 Does anyone have any further
12 discussion about that?

13 MR. HARRINGTON: Mr. Chairman, just
14 kind of a question of the process of law on this.

15 You know, as it appears that there was
16 no actual discussion of this condition, and the
17 condition was added as sort of a boiler plate because
18 we've had at it in at least one other prior before
19 this, is there a requirement that any condition that
20 was added be discussed and voted on? I would assume
21 there is by the Committee. Or is the fact that it
22 was put in the order and the order was signed by the
23 Committee members sufficient?

24 CHAIRMAN GETZ: Well, I'm not sure I

1 follow what you're saying. But if I look at what the
2 actual ordering clause is, it seems to me the first
3 sentence accurately reflects the discussion and the
4 deliberations. It's the second sentence that doesn't
5 accurately reflect the deliberations.

6 MR. HARRINGTON: That's what I was
7 referring to.

8 CHAIRMAN GETZ: So I think in terms of
9 our action today, I think it would be reasonable to
10 strike the second sentence because it wasn't
11 supported on the record. It doesn't memorialize our
12 deliberations. It was a mistake. And also, in the
13 alternative, or in addition, you can say, to the
14 extent it was in there, it was mistakenly conceived
15 and shouldn't have been in there.

16 MR. HARRINGTON: Well, I guess my
17 question is, as a matter of law then, if it was not
18 included in the deliberations, but it was added, and
19 presumably we read the order and signed it with that
20 in there, is that sufficient to allow it in? Or does
21 the fact that it wasn't discussed in the
22 deliberations automatically exclude it from being in
23 the order?

24 CHAIRMAN GETZ: Well, I guess what

1 you're saying is, if there were no motions for
2 rehearing and no other action had ever been taken,
3 would that clause have been binding? But I think
4 that's not the -- we have different circumstances.
5 It's in there. It was a mistake. The issue's been
6 raised, so now we should deal with it.

7 MR. HARRINGTON: But the fact that --
8 I'm going to try to get it clear here.

9 You're saying it was a mistake. By
10 virtue of the fact that it wasn't discussed in the
11 deliberations, does that then, by definition or by
12 law, mean it's a mistake? Or can something be added
13 to the final order that wasn't discussed at
14 deliberations, looked at, read by the Committee
15 Members, and say, I agree with that inclusion,
16 therefore I'm going to sign the order?

17 CHAIRMAN GETZ: You're talking about
18 the original order?

19 MR. HARRINGTON: Let me back up a
20 little bit. What I'm trying to get is this as a
21 matter of law --

22 CHAIRMAN GETZ: Sounds more like a
23 matter of metaphysics, but --

24 MR. HARRINGTON: Let's not get into

1 that. But if we have a situation where there was a
2 condition that was not discussed during
3 deliberations, so therefore it was not voted on
4 during deliberations, does that automatically exclude
5 it from appearing in the order? Or if it was added
6 to the order after deliberations, as in this case,
7 and everybody read the order and then decided, we
8 didn't discuss that, but that's a good idea to have
9 that in there, I will sign this, is that legal to do
10 that? Regardless of the merits of the clause, can
11 you add something after deliberations and approve it
12 by signing the written order, or does it have to have
13 been discussed in deliberations in order to be valid?

14 CHAIRMAN GETZ: I would say there's
15 nothing automatic. There has to be some kind of a
16 motion, some kind of action to dispense with
17 something that mistakenly appeared.

18 Now, I mean, the other argument could
19 be that, if we were to do something like you're
20 posing, or any board or agency were, the argument
21 would be there's no basis, no record basis for it, or
22 it's contrary to your memorialization. So there has
23 to be an action by somebody. Either we bring it up
24 ourselves, or somebody brings it to us and then we

1 take an action on it.

2 MR. HARRINGTON: I guess what I'm
3 trying to get to is, do we discuss the merits of that
4 final, that second statement, or do we simply discuss
5 how it got there; and if we say, well, it didn't get
6 there properly, so it doesn't make any difference,
7 whether it's a wonderful idea or not, we need to take
8 it out?

9 CHAIRMAN GETZ: Well, I mean, I guess
10 to the extent this arose in the first instance in
11 this case by a proposal by counsel for the record, as
12 I understand Mr. Iacopino's recitation from the
13 transcript, we could change our mind if we had a good
14 reason to change it.

15 So, I mean, that's the facts of this
16 case. And we've been asked to clarify what did we
17 intend, what did we decide, let's get this correct.
18 But if there was -- you know, if you thought there
19 was a good reason to say no, no, no, this was the
20 better course and there's a record for doing it, we
21 mistakenly conceived what was going on before, so
22 we're going to change it, you could do that.

23 MR. HARRINGTON: Okay. All right.
24 That answers my question. Thank you.

1 CHAIRMAN GETZ: Okay. Director Scott.

2 MR. SCOTT: In this case, I believe
3 that the second sentence was not the intent of the
4 Committee -- the Subcommittee and should be stricken.

5 CHAIRMAN GETZ: Is that a motion?

6 MR. SCOTT: That's a motion.

7 CHAIRMAN GETZ: Is there a second?

8 MR. PERRY: I'll second that.

9 CHAIRMAN GETZ: Any discussion?

10 Mr. Harrington.

11 MR. HARRINGTON: I'm just -- from my
12 personal, how I went through this and reviewed this,
13 I did not go back and check the transcripts on this
14 condition. I simply read that as being -- I don't
15 know if -- I don't think I went back to the project,
16 went back to the last one, which was the Lempster
17 project, and saw that it was in there and that it was
18 basically boiler plate from there. In fact, the only
19 thing that had changed was the megawatt rating from
20 70 in the Berlin case to 48 here. I probably should
21 have been rigorous and gone back and checked in the
22 previous wind project, Granite Reliable. But I
23 assumed, since it was -- this was in the Laidlaw
24 case, that it was one that we had used as a boiler

1 plate passed along.

2 And for the merits of it, I think
3 there's some merits of doing this, because in the --
4 especially in the case of a wind project, where what
5 you're saying is we don't want you to go in there and
6 start tearing up the side of the mountain prior to
7 you getting all your permits arranged. And we have
8 seen that interconnection studies can lead to things
9 that people didn't anticipate and drastically
10 increased costs. I mean, originally this project was
11 going to connect up on the lower voltage lines, and
12 it turned out they had to put in maybe a new
13 substation and a higher voltage line.

14 So, I mean, that was my logic to doing
15 that, was I just assumed that it had been a boiler
16 plate from previous orders. But I have to admit, I
17 did not go back and look at the deliberations on it
18 whatsoever.

19 So the question, is it -- to me,
20 there's some validity to requiring that that
21 interconnection agreement be approved prior to
22 starting construction, because if they were to come
23 back and say, well, oops, we made a mistake
24 downstream from here, you're going to have to make

1 \$20 million worth of upgrades to the transmission
2 system because of some new calculation that we've
3 done, and then they could find that, well, we've torn
4 up half the mountain, but for that extra 20 million
5 we're not going to continue the project. I think
6 that was the intent of putting that in. So there is
7 some merit to the clause.

8 CHAIRMAN GETZ: So you would agree
9 with granting the motion for clarification but would
10 propose keeping the sentence as well.

11 MR. HARRINGTON: I think we have to
12 look at it a little bit clearer. I mean, there is a
13 newer document that was submitted June 6, which is
14 the feasibility study report for the proposed wind
15 project, which closes in for that final
16 interconnection agreement more than it was at the
17 time the original certificate was issued. So I'm
18 just saying that there's some merit to the clause,
19 that's all.

20 CHAIRMAN GETZ: And what would you
21 propose? What's your bottom line then, in terms of a
22 proposal in this?

23 MR. HARRINGTON: I don't really know
24 at this point. I mean, I'm thinking out loud right

1 now as we go along. I haven't really studied the
2 interconnection agreement -- not the interconnection
3 agreement but the feasibility study. It doesn't
4 appear to read there are any major things in there.
5 There are some mention of some additional capacity
6 that would have to be installed to address some the
7 of the voltage conditions that would come out of the
8 analysis. But again, it doesn't seem like there was
9 any what I would consider showstoppers there. So
10 maybe in lieu of that we could say we're close
11 enough.

12 But I think -- I'm just trying to get
13 the rationale for including a clause like that is as
14 I stated, that we didn't want to have a lot of damage
15 done to the environment and then find that the
16 project was not going to be completed because of a
17 major expansion in the interconnection cost. But
18 given the June 6th submittal, I don't think -- that's
19 probably not going to occur in this case.

20 CHAIRMAN GETZ: Okay. Any other
21 discussion? Mr. Steltzer.

22 MR. STELTZER: I'm just thinking of
23 process then, if the motion before us is really for a
24 motion for clarification, so it's not necessarily a

1 motion to reconsider whether that should be added or
2 not. So if it is the will of the Committee to make a
3 -- to consider the matter of having that clause in
4 there, then would it be appropriate that it be done
5 through a motion for rehearing and that the Committee
6 would choose to have a rehearing on it, look at the
7 deliberation from the past, see if there's new
8 evidence, and then make a decision on whether it
9 should be included or not? So it's just the process.
10 I'm wondering how we handle that if there were a
11 desire of the Committee to have that clause inserted.

12 CHAIRMAN GETZ: Well, I think part of
13 that goes back to the issue Mr. Iacopino raised, in
14 terms of focusing on what, if any, is the real
15 distinction between a motion for clarification and a
16 motion for rehearing or reconsideration. So we have
17 the motions, however, you would style them, from the
18 Applicant saying this isn't what was intended. This
19 was not what was voted on. This is an error, this
20 second sentence. And I think we've got a motion to
21 strike that second sentence as inconsistent with what
22 we deliberated. But now there's a new possibility of
23 should we have something like that, which is not an
24 issue that's been raised through a motion for

1 rehearing. I think it's raised by Mr. Harrington.

2 But Mr. Iacopino --

3 MR. IACOPINO: I would just point out
4 that the substantive issue that Mr. Harrington
5 raises, there is a substantive argument in the motion
6 for clarification as well in the second paragraph.
7 Obviously, it's not taken from the point of view that
8 Mr. Harrington just raised. It's taken from the
9 point of view of the Applicant and its construction
10 schedule and its eligibility for the -- to meet the
11 requirements of its PPA and the federal ITC grant.
12 So it's not as though there's not a substantive
13 argument before you seeking the relief that they
14 seek. So I think that substantive issues are on the
15 table for this Committee in this proceeding here
16 today. They've addressed the reasons why it's a bad
17 idea. This Committee could determine that it is a
18 good idea in response to this filing.

19 CHAIRMAN GETZ: So, effectively, the
20 issue itself is in play --

21 MR. IACOPINO: Yes.

22 CHAIRMAN GETZ: -- and then we can
23 decide which way to rule.

24 MR. IACOPINO: Correct. That's my

1 analysis.

2 MR. STELTZER: That's fine. I just
3 wanted to make sure that the process in which the
4 Committee, if they were interested in considering to
5 have that included -- so, essentially, we're striking
6 it, and then the Committee could have a discussion or
7 a motion to be made to have it included, and whether
8 that could happen today.

9 CHAIRMAN GETZ: Well, I guess
10 there's --

11 MR. IACOPINO: And I'm not sure that
12 would be the exact process. I think what you
13 might -- well, it depends on how the motions are
14 made. But if the Committee were going to say, well,
15 we think it is a good reason, obviously, they should
16 all put on the record the reasons why you believe it
17 is a good condition and then vote on the motion for
18 clarification, whether to grant or deny the relief
19 requested therein is what I would suggest. But you
20 already have a motion on the floor.

21 CHAIRMAN GETZ: Yeah, we have a motion
22 on the floor to basically grant the relief and strike
23 the sentence, the second sentence of the ordering
24 clause, which we could take a vote on. But I

1 guess -- and then if the vote fails -- well, I guess
2 if it fails or passes, then we could -- you know, if
3 Mr. Harrington wants to make another motion, then we
4 can discuss that. Why don't we do that. I think,
5 you know, given the way things are proceeding, let's
6 try to take one thing, you know, one step at a time
7 and see where it leads.

8 So we have the motion on the floor to
9 effectively grant the relief requested by the
10 Applicant and strike the second sentence of the
11 ordering clause. So all those in favor, please
12 signify their agreement with the motion by raising
13 their hand.

14 (Multiple members raising hands.)

15 CHAIRMAN GETZ: I'll note that all are
16 in favor of granting that motion, except for Mr.
17 Harrington.

18 MR. HARRINGTON: I abstain.

19 CHAIRMAN GETZ: Mr. Harrington
20 abstains.

21 MR. IACOPINO: Just for clarification,
22 Mr. Chairman, that is the sixth ordering clause on
23 Page 3 of the order and certificate of site and
24 facility with conditions, dated May 6, 2011.

1 CHAIRMAN GETZ: Okay. Thank you.

2 Are there any other motions with
3 respect to the ISO approvals of a final
4 interconnection agreement?

5 MR. HARRINGTON: Just a comment. I
6 guess I'd say that maybe I think we kind of blew it
7 in our original deliberations, in that this issue
8 should have been discussed, and then we would have
9 had more of a chance to go over the details of
10 whether it's worthwhile to have this type of a clause
11 in as a standard condition. It's apparent -- I'm
12 just not going to waste the Committee's time here, by
13 the last vote, that pursuing this issue further would
14 just be that, a waste of time. But I think the
15 Committee should be careful in the future to address
16 that issue, because I think there is some merit to at
17 least deliberating whether that type of a condition
18 should be imposed. And that would be, you know, very
19 project-specific.

20 CHAIRMAN GETZ: I don't want to leave
21 the record in this state, because I think it's, in my
22 view, clear that we didn't intend that that second
23 sentence be there. And I think it's fair to clarify
24 to remove it. If we want to do something else, and,

1 as Mr. Iacopino points out, the Applicant has laid
2 out arguments why we shouldn't do something else, and
3 I took your statements previously, Mr. Harrington,
4 with respect to the June 6th filing of the
5 feasibility study report from ISO, to indicate that
6 it looked like the ISO process was moving along in a
7 reasonable fashion. So --

8 MR. HARRINGTON: And I agree with that
9 statement.

10 CHAIRMAN GETZ: Which would lead me to
11 the conclusion that reinserting some kind of clause
12 at this point would not be necessary under the
13 circumstances. Is that not a --

14 MR. HARRINGTON: And I agree with that
15 statement as well.

16 CHAIRMAN GETZ: Okay. All right. Any
17 other discussion on these issues -- or this issue?

18 (No verbal response)

19 CHAIRMAN GETZ: Okay. Then let's move
20 on to -- let's address next the motion for -- the
21 other motion by the Applicant. Let's do the two
22 Applicant's motions. So we've addressed the motion
23 for clarification. Let's move on to the motion for
24 rehearing from June 6th.

1 MR. HARRINGTON: Mr. Chairman, just so
2 we're clear on this, this is the June 6th one, the
3 Applicant's contested motion for reconsideration
4 and/or rehearing, and I believe it's a total of 18
5 pages?

6 CHAIRMAN GETZ: Yes.

7 MR. HARRINGTON: Okay.

8 CHAIRMAN GETZ: So let me just
9 summarize quickly what their motion for
10 reconsideration is.

11 I've already spoken to the objection
12 from the Buttolph/Lewis/Spring group, which deals
13 with the timely filing of the issue. And then
14 there's also an objection from Counsel for the
15 Public. But the focus of the Applicant's motion for
16 rehearing is on the post-construction avian and bat
17 species monitoring surveys. They argue that the
18 conditions contained in the decision and order
19 overlook important record evidence and are
20 unreasonable and arbitrary. They say that the
21 conditions are unlawful and an abusive discretion,
22 and notes that certain of the evidence is not
23 supported by the record. They also contend that they
24 are excessive and unprecedented and are not

1 science-based and are unreasonably expensive. And so
2 their request for relief is to issue an order
3 replacing the post-construction bird and bat
4 conditions with conditions that reflect the
5 post-construction plans agreed to by Groton Wind and
6 the New Hampshire Fish & Game Department. So, the --
7 and also note that in Counsel for the Public's
8 objection, they state that the conditions are
9 adequately supported by the evidence in the record,
10 including the testimony of Trevor Lloyd-Evans, both
11 as prefiled and in direct and upon cross-examination,
12 and the cross-examination of Mr. Gravel, the
13 Applicant's witness. And Counsel for Public argues,
14 essentially, that the Applicant is re-arguing
15 positions that were presented at the hearing and in
16 its briefs, and that there's nothing in the material
17 submitted by the Applicant that the Subcommittee
18 overlooked or misconstrued.

19 So, any discussion about the motion
20 for rehearing and/or the objections?

21 Oh, I'm sorry. Mr. Iacopino, did you
22 have something on this?

23 MR. IACOPINO: If you'd like, I have
24 gone through each of the requirements. I mean not to

1 comment on the substance, but just to draw the
2 Committee's attention to places in the record where
3 these things have been discussed by you --

4 CHAIRMAN GETZ: Well, before we do
5 that, was there anybody on the Subcommittee who
6 wanted to speak to these issues? Mr. Perry.

7 MR. PERRY: Yeah. I just want to say
8 that we did deliberate about this for an extensive
9 period of time and had quite an extensive discussion
10 about it. And again, I would agree with what I heard
11 from Public Counsel, that the motion didn't raise any
12 new issues that weren't discussed previously. So,
13 you know, my tendency is to just say that we've
14 discussed this. There's nothing new.

15 CHAIRMAN GETZ: Thank you. Anyone
16 else? Dr. Kent.

17 DR. KENT: Yeah, I'm really reluctant
18 to open this up again. So maybe just a couple of
19 comments about the larger issues instead of getting
20 into details.

21 Mr. Perry said we did deliberate this
22 extensively and did refer to all of the documents
23 that Counsel for the Applicant says we didn't
24 consider. I would say that there's a difference.

1 The problem is that we considered the documents and
2 considered the testimony of the Applicant's witnesses
3 and didn't agree with their conclusions. That
4 doesn't mean we didn't consider the record. We, in
5 fact, considered the record in great detail and
6 actually even went as far as to conduct our own
7 analysis to figure out what it meant. And I think we
8 simply have a disagreement with the Applicant's
9 position on this one.

10 The statement about -- or the
11 suggestion that we are bound by Fish & Game's letter
12 is -- I think that is inaccurate, that we are in any
13 way bound by what Fish & Game says. We actually had
14 a member of Fish & Game on this Subcommittee
15 representing Fish & Game and voted in favor of the
16 conditions.

17 Now, when we have a disagreement like
18 this, we have a committee who sat here for weeks and
19 listened to testimony and poured through thousands of
20 pages of information and informed themselves about
21 the issues, versus a couple of individuals who didn't
22 have the benefit of all of that information.

23 I think it's well within the power of
24 the Subcommittee -- and I would leave that to the

1 attorneys -- but it's well within the power of the
2 Subcommittee to make an independent decision and not
3 be bound by what any agency has to say to us. I
4 think that's a good start. I don't think I want to
5 go through all of the detail again.

6 CHAIRMAN GETZ: Well, Mr. Iacopino, is
7 there anything in particular that you think should be
8 in the record, from what you've looked at in the
9 transcript?

10 MR. IACOPINO: Well, I've just gone
11 through the transcript. And I would just generally,
12 with respect to, for instance, the 2009 Lempster
13 post-construction fatality report and the Stantec
14 bird and bat risk assessment, there is discussion of
15 those documents, beginning with Dr. Kent, on the --
16 throughout the transcript of April 7th, 2011. That
17 begins around Page 25 and goes on into the 50s, in
18 terms of discussion regarding those documents.

19 There's also discussion regarding the
20 agency recommendations, again in that same -- on that
21 same -- in that same section of the transcript. And
22 there was considerable discussion regarding the
23 testimony of Adam Gravel. There was considerable
24 discussion regarding the testimony of Trevor

1 Lloyd-Evans in the deliberations. And obviously, you
2 heard their testimony. So I would just point out
3 that that is there. And for, you know, the
4 substantive issues you all have to decide today,
5 whether or not there's been some mistake or a
6 misconception on the part of the Committee, I would
7 just draw your attention to those parts of the record
8 for your purposes today.

9 CHAIRMAN GETZ: Thank you.

10 Dr. Kent.

11 DR. KENT: Yeah, that's a good point
12 to consider for a moment. There was a suggestion by
13 the Applicant that we had no right to look at the
14 2009. And there was in the transcript a
15 suggestion --

16 MR. HARRINGTON: Excuse me, Dr. Kent.
17 Are you referring to 2009 or 2010?

18 DR. KENT: 2009 Lempster. Oh, no.
19 Excuse me. 2010. Thank you, Michael -- that we
20 shouldn't have looked at the 2010 because it wasn't
21 complete. And then I was -- in the record it
22 suggests that I was frustrated that we hadn't been
23 provided that.

24 Going back to that, I don't know if I

1 misspoke or we got the transcript wrong. But my
2 frustration was that we were having the discussion
3 with the Applicant's witness, Mr. Gravel, about
4 Lempster, because Lempster was, in large part, the
5 basis for the decision about what the level of
6 impacts were going to be at Groton. And we had the
7 2009, which I had gone through. And Mr. Gravel spoke
8 to the 2010, about the number of birds and bats
9 found. But then we got to a point where he said,
10 well, it's not -- we're not doing the work, it's
11 West, so I can't really talk about that. And I
12 became frustrated because the Applicant would not
13 present us with a witness that could talk about the
14 post-construction monitoring of that.

15 And at one point I was told by
16 Mr. Gravel, and I believe Ms. Geiger shook her head
17 yes, that I should get this from somebody else on the
18 Committee, like Fish & Game, that they have the
19 document, which is what we did. We obtained the
20 document from Fish & Game. So I'm not sure why
21 there's some angst about that. And I'm not sure if
22 there's anything legally that would prevent us from
23 having a copy of that document, whether the Committee
24 had released it as a final or not. So that part's a

1 little confusing to me, to have necessary evidence to
2 support the case provided by the Applicant that
3 Lempster and Groton are comparable, but yet we were
4 not availed of any witness to testify about what was
5 going on, and we looked at available information.

6 MR. HARRINGTON: Question.

7 CHAIRMAN GETZ: Mr. Harrington.

8 MR. HARRINGTON: The Applicant asserts
9 that the post-construction bird and bat condition
10 that we developed in reliance upon the extra record
11 information that was from the 2010 report was, in
12 fact -- I don't understand the legal term, and maybe
13 Mr. Iacopino could explain that -- was in fact the
14 2010 Lempster post-construction mortality report
15 extra record information. And if it was, does it
16 make a difference?

17 MR. IACOPINO: It was not in -- the
18 report itself was not in the record of your
19 proceeding, as far as I recall. I do believe that
20 there were references to it made by various
21 witnesses, and I can't recall who. I take Dr. Kent's
22 recollection of it at this point to be correct, that
23 it was Mr. Gravel, who was a witness for the
24 Applicant, and that there was a reference that you

1 can get that from Fish & Game. So technically, it is
2 an extra record. But the question of whether or not
3 it is, quote, legal for you to consider extra record
4 information, you certainly as members of an
5 administrative body can consider those types of
6 things that are within the purview of your various
7 agencies, and in this particular case, in the purview
8 of your role as a siting agency. So I think that the
9 position taken by Dr. Kent with respect to that issue
10 is supportable with regard to the law. You know, as
11 a lawyer, of course, I would prefer to have had it in
12 the record. But as far as the decision that you all
13 have to make, I believe that Dr. Kent's opinion is
14 supportable in the law, especially based upon the
15 fact that witnesses relied on the document and that
16 everybody knew that it was a Fish & Game document.

17 CHAIRMAN GETZ: And does that
18 especially apply to the undertaking of crafting
19 conditions? What I mean is, that the difference
20 between making a decision based on competing evidence
21 in a record one way or another about something
22 actually being a fact and a separate undertaking of
23 what conditions do we need to apply. So is there a
24 difference in terms of record versus extra record

1 when you're doing those two different undertakings?

2 MR. IACOPINO: Well, I can't answer in
3 response to the difference between record and extra
4 record. But I can say that in fashioning conditions,
5 this Committee certainly has the authority to rely on
6 its expertise and everything that underlies their
7 expertise. Dr. Kent obviously has expertise in these
8 areas in the things he relied upon during the
9 deliberations, which were agreed to by the remainder
10 of the Committee, and certainly gives support for the
11 condition that this Committee issued. I would just
12 hesitate to make that distinction based upon whether
13 something is record or extra record.

14 All expertise of the Committee, maybe
15 a combination of both, in many cases it may be from
16 things that are not on the record. Just as an
17 example: Mr. Harrington has extensive experience
18 with respect to the criteria used by the Independent
19 System Operator and the process used by it in going
20 through studies and whatnot. His explanations to the
21 Committee during deliberations about those issues are
22 certainly well within his expertise. They're well
23 within the purview of this Committee, based upon that
24 expertise, to issue conditions. And I think the same

1 goes for the environmental conditions as well.

2 CHAIRMAN GETZ: Dr. Kent.

3 DR. KENT: I'm glad to hear that,
4 because it's nice to have that reinforcement --

5 MR. IACOPINO: I may be wrong. I
6 mean, I'm just telling you my opinion based upon my
7 understanding of the law.

8 MR. KENT: No, I don't think the
9 lawmakers in this state wanted us to stick just to
10 the record, particularly if it's a record put forth
11 by the Applicant. We're supposed to make an
12 independent decision. But in this particular case,
13 it's misinformed to think that the conditions were
14 driven by the Lempster 2010 report, or even the U.S.
15 Fish and Wildlife Service Guidelines. What drove the
16 conditions I started to develop was, one, testimony
17 that there was no correlation, therefore, no
18 predictive ability between what we looked at before
19 we built the project and what happens afterwards; and
20 then the bird and bat risk assessment, going through
21 that, particularly Appendix B, Table 4 and 6, and
22 seeing the enormous amount of variation from project
23 to project in mortality and fatalities of birds and
24 bats, which was at odds with all of the conclusions

1 and narrative of the bird and bat risk assessment.
2 That's what started me developing these conditions
3 long before I had the Lempster 2010 or Counsel for
4 the Public presented us with the Fish & Game draft.

5 CHAIRMAN GETZ: Dr. Boisvert.

6 MR. BOISVERT: Would it be appropriate
7 to make a motion at this point? Turning on the mic.
8 Given what I've heard, seeing that as yet we haven't
9 plowed much new ground, I would move that we deny the
10 Applicant's motion.

11 CHAIRMAN GETZ: Second?

12 MR. SCOTT: Second.

13 CHAIRMAN GETZ: Director Scott.

14 Any further discussion? Mr. Steltzer.

15 MR. STELTZER: I'd just mention that I
16 do think that the Committee did go through an
17 adequate process to review it. While I continue to
18 disagree that the level of studies is excessive -- or
19 I believe it is excessive, and I disagree with the
20 Committee's ultimate approval of what studies are
21 needing to be done, I think the process that the
22 Committee went through to arrive at that decision was
23 adequate.

24 CHAIRMAN GETZ: Any other discussion?

1 Mr. Harrington.

2 MR. HARRINGTON: Yeah, I would agree
3 with what was just said, as far as the process was
4 adequate. And I also wanted to say for the record
5 that I agreed with Dr. Kent's previous statement. I
6 think that the driving factor to our decision was the
7 fact that the statements, which I believe was made by
8 the Applicant's witness, that there was little or no
9 correlation between pre-construction avian mortality
10 and post-construction, that that's what drove us to
11 have the additional studies after the fact, after the
12 construction. So I would support the motion on the
13 floor.

14 CHAIRMAN GETZ: Mr. Scott.

15 MR. SCOTT: Back to the earlier
16 discussion, too. My view is the SEC, for obvious
17 reasons, is composed of experts from various parts of
18 the state on purpose. And because of that, I think
19 it's assumed, in my opinion, that we will be using
20 part of that expertise that we bring to the table as
21 we evaluate these things. I think that's the purpose
22 and the function of why the make-up of the SEC is
23 such as it is.

24 CHAIRMAN GETZ: Anyone else? Well, I

1 want to express one other item. And I think that we
2 do have, that the Committee has some broad discretion
3 in fashioning conditions. And I think these -- the
4 conditions that were fashioned here, largely by the
5 input of Dr. Kent, are based on the deliberations and
6 the record that was presented to us, and I think
7 they're reasonable. And so that's just, you know, my
8 view of the -- that they're legally permissible.

9 So let's take a vote. And I guess the
10 motion is to deny the Applicant's motion for
11 rehearing with respect to the avian and bat studies.

12 So all those in favor, signify their
13 agreement with the motion by raising their hand.

14 (Multiple members raising hands.)

15 CHAIRMAN GETZ: I'll note that the
16 motion passes unanimously.

17 Okay. Let's turn to the
18 Buttolph/Lewis/Spring motion for rehearing, dated
19 June 5th. So we have two documents to look at here.
20 One is the motion for rehearing. And there are --
21 it's broken out in six sections. And I'll note that
22 there's also the objection by the Applicant filed on
23 June 15. So let's just go through them one by one.

24 The first item is on Page 1 of the

1 motion, I guess with respect to consideration of the
2 applicability of the need to strike a balance that
3 considers the extent to which this particular
4 proposed energy facility contributes to state
5 production and carbon mitigation goals pursuant to
6 RSA 162-H:1, and the associated Committee conclusion
7 that wind farms are exempt from this consideration
8 pursuant to RSA 352-F and considers our action an
9 error of law or judgment. And then there's a longer
10 discussion of that on Pages 2 through 4. Well, let's
11 just stop there for a second and see if there's any
12 discussion from the Committee with respect to that
13 argument.

14 Mr. Harrington.

15 MR. HARRINGTON: Yeah, I just don't
16 agree with the statement. I mean, we didn't say that
17 wind farms are exempt from this consideration. I
18 think there was a great deal of effort to try to
19 explain that, due to the various laws in the state,
20 that you had to take deference to what the
21 legislature had done by declaring that part of the
22 goal was to establish renewable power and that the
23 State had determined that wind is classified as a
24 renewable energy source. And I think beyond that,

1 this is just a lot of writing that doesn't really
2 apply too much to what was actually said in
3 conclusions here. It's just not accurate.

4 CHAIRMAN GETZ: Other discussion?

5 MR. IACOPINO: If I could just point
6 out one legal point. The Committee had to consider,
7 under 162-H:16, certain factors. This argument is
8 based upon the language in RSA 162-H:1, I believe,
9 which is the general declaration language of the
10 statute.

11 From a legal standpoint, if the
12 Committee has substantially considered all of the
13 requirements of RSA 162-H:16 and have found that in
14 each of those categories there is no unreasonable
15 adverse impacts, you've complied with the statutory
16 declaration.

17 CHAIRMAN GETZ: And I'll note that
18 this argument, the balancing argument, is discussed
19 beginning on Page 27 of the May 6 decision. And
20 among other things, on Page 29, the decision says
21 that the intervenors' balancing argument mistakenly
22 conflates general language of the Declaration of
23 Purpose, RSA 162-H:1, with the specific findings
24 required under RSA 162:H-16, which Mr. Iacopino

1 refers to. And on Page 30 of the decision, the first
2 full paragraph says that the intervenors essentially
3 pose another test, a general balancing test, that is
4 not contemplated under the statute and is not
5 justified by the Declaration of Purpose.

6 Director Scott.

7 MR. SCOTT: Two minor points. Again,
8 I think the intervenors missed the mark here, as far
9 as the discussion on carbon. I believe it was just
10 Mr. Harrington trying to clarify perhaps the amount.
11 And the Applicant's submittal was of issue, the fact
12 that there was still carbon reductions. And again,
13 as the air director in the state, it was obvious to
14 me that wind is not -- wind power is not producing
15 emissions. And that's a benefit also. So I think
16 that the Applicant -- I mean, excuse me, the
17 intervenors missed the mark on this argument.

18 CHAIRMAN GETZ: And it does appear,
19 from my perspective, that this is a case of them
20 reasserting a prior argument and requesting a
21 different outcome, which several Supreme Court cases
22 say that that would not constitute a successful
23 motion for rehearing.

24 Any other discussion about this

1 particular argument? Well, why don't we -- let's do
2 each of the six. Let's have a motion on each of the
3 six, rather than waiting until the end. I think it
4 could end up being confusing if we did one overall
5 motion.

6 So, Director Scott.

7 MR. SCOTT: I would like to move that
8 we deny the intervenors' request for Section 1.

9 CHAIRMAN GETZ: Second? Mr.
10 Harrington is the second.

11 Any further discussion? Mr. Steltzer.

12 MR. STELTZER: I'd just like to
13 clarify that by "intervenors," it's the
14 Buttolph/Lewis/Spring intervenor group.

15 CHAIRMAN GETZ: So clarified.

16 Okay. All those in favor of the
17 motion, signify their agreement by raising their
18 hand.

19 (Multiple members raising hands.)

20 CHAIRMAN GETZ: Note that the motion
21 passes unanimously.

22 Okay. Item No. 2 says the conclusion
23 that adverse impacts from this energy facility are
24 reasonable pursuant to RSA 162-H:16 and alleges this

1 to be an error of judgment on the Subcommittee's
2 part. And that discussion takes place on Page 5 and
3 carries over to Page 6 of the motion.

4 So, any discussion with respect to
5 that part of the motion for rehearing? Mr.
6 Harrington.

7 MR. HARRINGTON: Well, I think similar
8 to the last one they're basically asking us to
9 reconsider what we've already considered to come up
10 with a different conclusion. These issues were all
11 discussed beforehand, and I don't see that there's
12 any new information that was presented here. So I
13 couldn't support this motion.

14 CHAIRMAN GETZ: Any other discussion
15 on this particular argument?

16 (No verbal response)

17 CHAIRMAN GETZ: Okay. Hearing
18 nothing, further, is there a motion? Director Scott.

19 MR. SCOTT: I move we deny Buttolph
20 Intervenors' motion No. 2.

21 CHAIRMAN GETZ: Second? Mr. Perry.
22 Any further discussion? Well, I'll
23 just say, again, this is another area where it's
24 reasserting prior arguments and requesting a

1 different outcome. And I don't think that the motion
2 states good reason for the relief.

3 So, with that, all those in favor of
4 the motion made by Mr. Scott, please signify by
5 raising your hand.

6 (Multiple members raising hands.)

7 CHAIRMAN GETZ: Note again that the
8 motion passes unanimously.

9 Item No. 3 concerns allowing new
10 testimony from the Applicant into the docket without
11 providing an opportunity for intervenors to cross
12 examine or dispute, and it's an allegation of an
13 error of law. And this discussion takes place on
14 Page 6 of the Buttolph Group's motion for rehearing.

15 So is there any discussion with
16 respect to this argument?

17 MR. HARRINGTON: Mr. Chairman.

18 CHAIRMAN GETZ: Mr. Harrington.

19 MR. HARRINGTON: Because this is
20 saying it's an error of law, I'd like counsel to
21 weigh in on this and state his position or opinion.

22 MR. IACOPINO: I'll do what I can.
23 Ultimately, it's a substantive decision that you all
24 have to make. But I believe that the complaint

1 raised by the intervenor group really pertains to the
2 issues that were presented in the memorandum. And
3 what occurred procedurally was the parties were given
4 a date to provide their memorandum by, and then the
5 Applicant was also allowed a date, which I believe
6 was like three or four days after the memorandum date
7 to --

8 MR. HARRINGTON: Excuse me.

9 MR. IACOPINO: -- to respond to
10 conditions that were suggested.

11 MR. HARRINGTON: Terminology. When
12 you say "memorandum," do you mean final briefs?

13 MR. IACOPINO: The final briefs, yeah.

14 And I think what the intervenors are
15 complaining about was the responses that were made by
16 the Applicant. And I think it is their position in
17 their motion that those responses were new evidence
18 or that they did not have the opportunity to contest
19 during the course of the proceeding.

20 I believe that those briefs were taken
21 as briefs. And there's nothing in the record to
22 suggest that the Committee treated anything in them
23 as new evidence. They were argument, legal argument
24 for the most part, and responses to the requests made

1 by other parties. And although there may have been
2 references to factual things contained in those legal
3 arguments, I saw nothing that jumped out as being
4 some fact that was not addressed by the Committee.
5 That's just my view of it. Obviously, anybody on the
6 Committee who has a different view of that should --

7 CHAIRMAN GETZ: Well, it appeared to
8 me that the argument is one, effectively, of a denial
9 of due process, that there was testimony given
10 without an opportunity to cross-examine. But what
11 was -- what they're complaining about are the
12 arguments with respect to the conditions. So I think
13 they're mistakenly equating testimony and argument.
14 So I think that's the fundamental error in the motion
15 for rehearing, that what was -- what occurred was the
16 arguments with respect to the conditions, and that's
17 not -- that was not testimony. It was in the nature
18 of facts that we would base our decision of the
19 conditions on. And so I think that's not -- we did
20 not commit an error of law. We did not deny due
21 process. We simply listened to the arguments, the
22 written arguments with respect to the conditions.
23 So...

24 MR. IACOPINO: Mr. Chairman, I'm just

1 going to point out, for example, one example in their
2 motion. They allege, for instance, with respect to
3 the response of the Applicant to their condition 12E,
4 the Applicant -- that's the one where they wanted
5 \$7800 to be paid to every household on Groton Hollow
6 Road. And the response from the Applicant was that
7 the proposed condition is unwarranted, unjustified
8 and unsupported by any evidence, and there is no
9 precedence for such a condition. And they found that
10 response to be new testimony, and they claim that
11 they would have provided more evidence had they been
12 allowed to respond to that. I don't see how that
13 type of statement by the Applicant in their response
14 could be perceived to be new testimony of any sort.
15 It's simply a response characterizing their request
16 for a condition.

17 CHAIRMAN GETZ: Okay. Any other
18 discussion about this item?

19 (No verbal response)

20 CHAIRMAN GETZ: Hearing none, can we
21 get a motion? Director Scott.

22 MR. SCOTT: I'd like to move that we
23 deny the intervenor group's motion labeled No. 3.

24 CHAIRMAN GETZ: A second on that? Dr.

1 Kent. Any further discussion?

2 (No verbal response)

3 CHAIRMAN GETZ: Seeing none, all those
4 in favor of the motion to deny with respect to Item
5 No. 3, signify their agreement by raising their hand.

6 (Multiple members raising hands.)

7 CHAIRMAN GETZ: And I'll note that the
8 motion passes unanimously.

9 Item No. 4, the Committee findings
10 reached while Members are apparently unclear about
11 the power and responsibility of the Committee, error
12 of law and reasoning. And this is discussed on Page
13 9, and begins by saying that the Committee was
14 unclear of their legal powers and jurisdiction, the
15 decision should be nullified. Points out that Mr.
16 Harrington asked specifically if the SEC had a legal
17 right to impose a PVG, a property value guaranty.
18 And it then concludes that the entire Committee
19 should have known clearly prior to this testimony --
20 I guess Mr. McCann's testimony -- given the
21 significant exhibits which had previously been
22 entered into the docket, that a property value
23 guaranty was a legal binding document and could be
24 entered as a certificate condition.

1 Is there any discussion? Director
2 Scott.

3 MR. SCOTT: I'll just note my
4 recollection of the discussion was, when we
5 deliberated on this particular issue, it wasn't
6 whether -- when we voted, it wasn't whether we had
7 the authority to do a PVG, it's whether we should or
8 not, and that's what we voted on. I'd note that for
9 the record.

10 CHAIRMAN GETZ: Thank you.
11 Anyone else on this issue?

12 MR. HARRINGTON: I would just note for
13 the record there's a lot of legal issues that I don't
14 know the answer to, and that's why we have counsel.

15 CHAIRMAN GETZ: Thank you. Mr.
16 Steltzer.

17 MR. STELTZER: I'm just reading some
18 of the deliberations here that are cited. Day 1,
19 Page 55, Line 8. And the conversation, as I read it,
20 is largely having to do with the provision "will not
21 unduly interfere with the orderly development of the
22 region" and doesn't necessarily speak to property
23 value guaranties and how they might be applied or
24 not. So I think there's -- I don't interpret it the

1 same way as the intervenor had.

2 CHAIRMAN GETZ: Anyone else on this
3 issue?

4 MR. IACOPINO: Just as a legal piece
5 of advice, I do encourage the Committee, if they do
6 have a question about a legal matter, that the
7 appropriate thing to do is to inquire.

8 CHAIRMAN GETZ: Dr. Kent.

9 MR. KENT: I'd like to reinforce that
10 it's customary for the Subcommittee Members to
11 discuss legal issues with the attorney.

12 CHAIRMAN GETZ: Well, and it also
13 occurs to me that the whole purpose of deliberations
14 is to have an open discussion about the merits, or
15 lack of merits to any particular item, whether it's a
16 question of fact or question of law in a proceeding,
17 and that it is a process to work through the issues
18 among all the parties. And we spent a lot of hours
19 working through the issues in this case. And I think
20 it's the last thing that public deliberations should
21 amount to is all of the members of the Committee
22 walking into a room with their minds made up on all
23 of the issues. It's a process. We work our way
24 through the process and we vote on the items, and the

1 final decision is memorialized in the written
2 decision. So I really see no merit in this argument,
3 No. 4.

4 Director Scott.

5 MR. SCOTT: It's not clear to me this
6 needs a motion. It seems more of a statement. But
7 just in case, I'll move that we deny the intervenors
8 group motion No. 4.

9 CHAIRMAN GETZ: Second?

10 MR. DUPEE: Second.

11 CHAIRMAN GETZ: Second by Mr. Dupee.
12 Any further discussion?

13 (No verbal response)

14 CHAIRMAN GETZ: All those in favor,
15 please signify their agreement by raising their hand.

16 (Multiple members raising hands.)

17 CHAIRMAN GETZ: I'll note that the
18 motion passes unanimously.

19 Item No. 5 states "improper weighting
20 of evidence and misstatements of fact." And that's
21 discussed on Page 10 of the motion. Any discussion
22 about that item?

23 And I'll also note with respect to
24 that item, that the Applicant, in its objection,

1 discusses on Page 8 and 9 some of those arguments.

2 Mr. Steltzer.

3 MR. STELTZER: I'd just like to speak
4 about how the Committee weighs evidence. And I think
5 its our discretion to weigh evidence as we so choose.
6 Just because a party has testimony presented in
7 person or via Skype, or however it is, doesn't
8 necessarily mean that that evidence should have a
9 greater weight than evidence such as a report that's
10 filed in a very collaborative process. So it is up
11 to the Committee to decide how they should weigh that
12 evidence.

13 CHAIRMAN GETZ: Anyone else?

14 MR. HARRINGTON: There's a discussion
15 here about the Coos County Commissioner who was
16 elected at the time or something. Is that one of the
17 issues that counsel went through?

18 MR. IACOPINO: That is one of the
19 issues that they raised in their objection. And I
20 assume that they're correct, that at the time we
21 wrote the order, the commissioners had changed as a
22 result of an election. But I don't think that
23 that -- well, it's up to you all to decide whether or
24 not that was a major factor in your conclusion with

1 respect to any issues in the case.

2 CHAIRMAN GETZ: Yeah, and I guess --

3 MR. IACOPINO: It was essentially, I
4 believe, in the introductory portion. I don't even
5 think in the order it was something that -- maybe...

6 MR. HARRINGTON: Let me check the
7 site.

8 MR. IACOPINO: In the order, the order
9 did say that the Applicant has the support of Grafton
10 County Commissioner for District No. 3, Richards.
11 And I guess there is a letter from Ms. Richards in
12 the record. I guess what happened was that she
13 either did not get re-elected or did not run for
14 re-election, and we did not pick up that there was a
15 new county commissioner over time. That's on Page 35
16 of the order, where we discuss orderly development of
17 the region under Section A, views of municipal and
18 regional planning commissions and municipal governing
19 bodies. That's the first sentence of that section.

20 It's still -- I suppose it's still a
21 correct rendition. It's just that at the time that
22 we issued the order, Ms. Richards was no longer the
23 county commissioner.

24 CHAIRMAN GETZ: Yeah, and in the

1 intervenors' motion, what they say is that Omer
2 Ahern, Jr. is the current Grafton County Commissioner
3 from District 3, having soundly defeated Ms. Richards
4 at the ballot box during the general election last
5 year. Mr. Ahern is firmly opposed to the project.
6 See SEC docket letter from Mr. Ahern dated April 4th.
7 And the impact of the Committee -- or the failure of
8 the Committee to consider up-to-date information in
9 consideration of its duty to give due consideration
10 requires that the Committee reassess the views of not
11 only the Grafton County Commissioners, but also other
12 applicable planning commissions.

13 In its objection, the Applicant states
14 that the intervenors' contentions are without merit
15 for several reasons: The intervenors' fail to
16 mention that the letter of support from Ms. Davis
17 [sic] was sent on Grafton County Commissioner's
18 letterhead and was co-signed by County Commissioner
19 Raymond Burton, both of whom signed the letter in
20 their official capacities as Grafton County
21 Commissioners, and who held their positions as county
22 commissioners at the time the adjudicative hearings
23 were being held. By contrast, Mr. Ahern's letter was
24 submitted after adjudicative hearings had concluded.

1 There is nothing in Mr. Ahern's letter to indicate
2 that he was submitting it in his capacity as a county
3 commissioner; thus, the letter constitutes public
4 comment is the assertion by the Applicant.

5 MR. HARRINGTON: Mr. Chairman?

6 CHAIRMAN GETZ: Yes.

7 MR. HARRINGTON: I think we also have
8 to read a little further into the part of the order
9 that discusses this, because it doesn't just talk
10 about Martha Richards. It also, as you just alluded
11 to, says Grafton County Commissioner for District 3,
12 Martha B. Richards, and Grafton County Commissioner
13 for District 2, Raymond Burton, supported it. The
14 project is supported -- this is all under giving
15 adequate attention to consideration to local views of
16 the municipal and regional planning commissions and
17 municipal governing bodies.

18 CHAIRMAN GETZ: So this is on Page 35
19 and 36?

20 MR. HARRINGTON: Yes. They also go on
21 and talk about the project is supported by the Groton
22 Board of Selectmen, Groton Planning Board, which
23 advised the Subcommittee the project is welcome by
24 the vast majority of town's people and urged the

1 Subcommittee to issue a certificate.

2 So I think we have here a condition
3 that says there was one particular person who was --
4 one particular position, I guess, the County
5 Commissioner for District 3, that was in favor of
6 that. That person was voted out of office for
7 whatever reason and replaced by a new commissioner
8 who now is opposed to that. But we still have the
9 second commissioner, Commissioner Burton, in favor of
10 it, as well as the support of the Groton Board of
11 Selectmen and the Groton Planning Board. So it has
12 to be taken in context. This is one person changing
13 out of a fairly large group, when an overwhelming
14 majority still remains in support of this. So maybe
15 there was a technical violation in that this letter
16 came in after -- you know, before the deliberations
17 and maybe wasn't -- I don't recall, and I couldn't
18 find it in deliberations where we actually discussed
19 it in deliberations. But as previously just stated,
20 it was written not as a county commissioner, but
21 apparently as an individual citizen; therefore, I
22 don't think there would be any need to change our
23 conclusion that we've adequately considered the views
24 of the municipal and regional planning commissions

1 and municipal governing bodies. This is one person
2 changing out of a fairly large group.

3 CHAIRMAN GETZ: And then in that
4 section -- again, when you say "a large group,"
5 you're talking about the other towns that are
6 mentioned in this section.

7 MR. HARRINGTON: The other
8 commissioner, the Groton Board of Selectmen and the
9 Groton Planning Board, all of which there's been no
10 evidence presented that they've changed their
11 position.

12 CHAIRMAN GETZ: Director Scott.

13 MR. SCOTT: I'd also like to add,
14 clearly, since Mr. Ahern, prior to the election, had
15 sent us a letter, clearly knew about the proceeding,
16 I would argue that had he so desired, as a newly
17 elected county commissioner, he could have
18 re-asserted with a new letter in that capacity to us,
19 which I'm not aware that he did.

20 MR. IACOPINO: I just want to correct.
21 The letter from Mr. Ahern that is referenced by the
22 intervenors was sent on April 4th, 2011. And that
23 was -- I believe it was after the adjudicatory
24 hearings but before deliberations. I have the letter

1 up. Although Mr. Ahern in the letter does introduce
2 himself, tells the Committee where he lives, what he
3 does for a living, and exhibits some substantial
4 knowledge of Plymouth Historical Society and what
5 they do and some of the features, historical features
6 in the area, nowhere in his letter does he indicate
7 that he is speaking in his capacity as a county
8 commissioner, nor does he reference the county
9 commission at all, that I can see in here. He talks
10 about the economy in the area, the effect of the
11 plant on the hydro and biomass plants, but he does
12 not at any point in this letter indicate that he
13 either is a county commissioner or that he's acting
14 in his capacity as county commissioner.

15 CHAIRMAN GETZ: Mr. Perry.

16 MR. IACOPINO: Oh, and for the record,
17 this record was treated -- this letter was treated as
18 public comment and is contained -- the original of
19 it, or if it was e-mailed to us, a copy of it is
20 maintained in the Public Comment file in the records
21 of the Committee. I'm sorry, Mr. Party.

22 MR. PERRY: I was just going to say I
23 would suspect that when an elected official wants to
24 make their opinion heard in a formal setting, that

1 there's some process that they go through. It's not
2 just a matter of grabbing letterhead and sending in
3 their position. There's some amount of discussion
4 that occurs among the necessary parties before, you
5 know, pen's put to paper. So the same as you would
6 expect with a regional planning commission. It's not
7 one new member that decides they're going to put
8 their views on a piece of paper and send it in.
9 There's some process involved. And it doesn't appear
10 that this process occurred, where the Commissioners,
11 seeing as there's more than one, collectively decided
12 to change their minds. It's one individual who
13 didn't identify themselves as a commissioner, who had
14 a personal opinion and provided that in written
15 comment.

16 CHAIRMAN GETZ: Thank you. Mr.
17 Harrington.

18 MR. HARRINGTON: I move we reject this
19 condition or petition, whatever the correct term is.

20 MR. SCOTT: Second.

21 CHAIRMAN GETZ: Okay. Further
22 discussion?

23 (No verbal response)

24 CHAIRMAN GETZ: Well, then let me just

1 say this: I think, looking at Pages 35 through 37,
2 discussing the views of municipal and regional
3 planning commissions and municipal governing bodies,
4 it seems to me that, but for the first line that says
5 the Applicant has the support of Grafton County
6 Commissioner for District 3, Martha B. Richards, who
7 apparently is no longer a Grafton County
8 Commissioner, everything else in that section, with
9 all the reference to the Town of Rumney, the Town of
10 Plymouth, the Town of Holderness, North Country
11 Council, et cetera, that all of those other issues,
12 all of those other aspects or views are still the
13 views.

14 So, getting back to the standard under
15 541:3, is there good reason for the relief? And
16 basically, the reason for the relief is one person
17 who is mentioned in the order is no longer in the
18 position that they previously held.

19 So I think there's still, you know, a
20 substantial basis for the decision we made on the May
21 6th order. And, you know, due regard was given to
22 the views of the municipal and regional planning
23 commissions and municipal governing bodies. So I
24 would support the motion. Is there any other

1 discussion?

2 (No verbal response)

3 CHAIRMAN GETZ: Hearing none, then all
4 those in favor of Mr. Harrington's motion that we
5 deny the intervenors' argument with respect to Item
6 No. 5, please signify by raising their hands.

7 (Multiple members raising hands.)

8 CHAIRMAN GETZ: I'll note that the
9 motion carries unanimously.

10 Okay. The last item refers to
11 inappropriate comparisons by the Committee to other
12 New Hampshire wind farm certificates and other
13 commercial projects. And that discussion is on
14 Page 11 of the motion. So is there any discussion
15 there? Dr. Kent.

16 DR. KENT: This point says we made
17 inappropriate comparisons to other New Hampshire wind
18 farms and ignored information from wind farms,
19 particularly one in Vermont. I think it's completely
20 appropriate that we did consider wind farms wherever,
21 which we did in our deliberations. Some of them we
22 found more relevant than others. And this argument
23 seems to be more a case of disagreement about
24 interpretation of information than our failure to do

1 anything as directed by 162-H.

2 CHAIRMAN GETZ: Further discussion?
3 Mr. Harrington.

4 MR. HARRINGTON: I would just say the
5 Committee would have been not fulfilling their duty
6 if they hadn't compared this to other wind farms,
7 specifically wind farms in New Hampshire, because
8 there's a record of those, something we can look at
9 and hopefully learn from as we go forward. So I
10 think we would have not been performing our duties if
11 we had not done that.

12 CHAIRMAN GETZ: Anyone else? Mr.
13 Steltzer.

14 MR. STELTZER: I just note, reading
15 through their comments to this portion of it, it
16 really just appears to me that they're reasserting
17 their position and aren't necessarily complying with
18 the RSA 541:3, as far as overlooking information or
19 whether we made a decision unlawfully.

20 CHAIRMAN GETZ: Anything else? Can we
21 get a motion? Mr. Scott.

22 MR. SCOTT: I'd like to move that we
23 deny the intervenors group Item No. 6.

24 CHAIRMAN GETZ: Second? Mr. Perry.

1 Any other discussion?

2 (No verbal response)

3 CHAIRMAN GETZ: Hearing nothing, then
4 all those in favor of Director Scott's motion that we
5 deny the request by the intervenors with respect to
6 Item No. 6, signify by raising your hand.

7 (Multiple members raising hands.)

8 CHAIRMAN GETZ: Note for the record
9 that the motion passes unanimously.

10 So I think that addresses all of the
11 issues in the Buttolph/Lewis/Spring motion for
12 rehearing.

13 Mr. Iacopino, correct me if I'm wrong,
14 but I think that takes care of everything, except for
15 having a discussion about the letters filed by the
16 New Hampshire Division of Historical Resources.

17 MR. IACOPINO: I believe that it does.

18 CHAIRMAN GETZ: Sue, how are you
19 doing?

20 COURT REPORTER: Fine.

21 CHAIRMAN GETZ: Okay. Now, this is a
22 different issue. It's not the subject of a motion
23 for rehearing, but we do have filed with us two
24 letters: One from the Division of Historical

1 Resources, dated June 1, and this is from Christina
2 St. Louis at DHR, to Hope Luhman from the Berger
3 Group, who's a consultant for the Applicant. And it
4 says, "Thank you for requesting determinations of
5 National Register of eligibility for the properties
6 listed below." And then it has certain
7 determinations. And then it says, you know, contact
8 someone at DHR if you have any questions.

9 There's a subsequent letter of
10 June 28th. And we were copied on this. Yeah,
11 apparently that was copied to Mr. Burack and then
12 made its way to the Committee. And then there's a
13 June 28 letter that's addressed to Erika Mark at the
14 Corps of Engineers. And it's from Elizabeth Muzzey,
15 the director and state preservation officer. And
16 among other things, it begins by saying, "It is our
17 understanding that the Applicant... has requested the
18 development of a Section 106 programmatic agreement
19 in order to receive a U.S. Army Corps of Engineers
20 permit to begin construction on portions of the
21 project beginning September 1, 2011." It notes DHR's
22 worked closely with the Applicant and the Corps to
23 develop a streamlined survey process. DHR has
24 received 12 New Hampshire inventory forms. The first

1 submission of a project area form was returned for
2 substantial revisions and resubmitted and approved.
3 There was a number of recommendations. And it notes,
4 you know, other historic district area forms were
5 submitted.

6 It concludes that the DHR can no
7 longer justify the investment of time and resources
8 in coaching the project's cultural resources
9 consultant, and then discusses in the subsequent
10 paragraphs that the DHR has worked hard to streamline
11 the resources inventory process. "Typically, any
12 consultant who's qualified under federal guidelines
13 and is familiar with National Register survey and
14 evaluation policies can successfully complete the
15 necessary information and evaluations.

16 Director Muzzey says, "I am sorry to
17 report that the failure to move the Section 106
18 process beyond the identification phase is unique to
19 our experience working with the architectural
20 historians at the Lewis Berger Group on this and
21 previous projects," and, "Although a Section 106
22 programmatic agreement can sometimes be a useful
23 tool, it appears in this case that it is needed,
24 given the consultant's inability to provide

1 approvable work in a timely manner. I am concerned
2 that unless a change in cultural resources
3 consultants is made, our agencies will be facing the
4 same difficulties working under a programmatic
5 agreement... The DHR cannot in good faith sign a
6 programmatic agreement if its failure is almost
7 assured by the documented performance of the
8 project's cultural resources consultant."

9 In the closing paragraph to the Corps,
10 Ms. Muzzey says, "While we appreciate your continued
11 assistance, we'll be requesting the participation of
12 the Advisory Council on Historic Preservation during
13 the development and execution of a programmatic
14 agreement. We are hopeful that, given changes in the
15 project team and the assistance of the ACHP, the
16 Section 106 process will be successfully resolved in
17 a timely manner."

18 So I guess I just want to open it for
19 discussion. It's not clear to me what, if any,
20 action we can or should take. We may have to -- it
21 may be useful to talk about what we've said in the
22 underlying decision.

23 But before we do that, I guess I would
24 turn to both Mr. Iacopino and Dr. Boisvert and see if

1 there's any guidance to give about what the possible
2 import of this letter is.

3 MR. IACOPINO: Well, I'll address the
4 certification itself. On Page 4 there are two
5 paragraphs that address requirements: That the
6 Applicant continue its consultations with the New
7 Hampshire Division of Historic Resources and -- I can
8 read those into the record if you would like, Mr.
9 Chairman, or --

10 CHAIRMAN GETZ: Well, let's do that,
11 just to make it complete.

12 MR. IACOPINO: The first one is the
13 second ordering clause on Page 4 of the order and
14 certificate of site and facility with conditions,
15 dated May 6, 2011. It states, "Further ordered that
16 the Applicant shall continue its consultations with
17 the New Hampshire Division of Historical Resources
18 and comply with all agreements and memos of
19 understanding with that agency, and in the event that
20 new information or evidence of a historic site or
21 other archeological resources are found within the
22 area of potential effect of the project site, the
23 Applicant shall immediately report said findings to
24 NHDR and the Committee."

1 And then there's another ordering
2 clause after that which states, "Further ordered
3 that, if during construction or thereafter any
4 archeological resources or deposits are discovered or
5 affected as a result of project planning or
6 implementation, NHDHR shall be notified immediately
7 and NHDHR shall determine the need for probative
8 evaluative studies, determinations of National
9 Register eligibility, and mitigation measures, in
10 parentheses, redesign, resource protection, or data
11 recovery, as required by state or federal law and
12 regulations. If construction plans change,
13 notification to and consultation with NHDHR shall be
14 required. If any member of the public raises new
15 concerns about the effect on historic resources,
16 notification to and consultation with NHDHR shall be
17 required. NHDHR is authorized to specify the use of
18 any appropriate technique, methodology, practice or
19 procedure associated with historical resources
20 effected by the project, including the authority
21 approve modifications to such practices and
22 procedures as may become necessary."

23 That's in the order and certificate.

24 And then there's also substantial discussion

1 regarding the impacts on historic resources contained
2 at Page 53 through 57 of the actual decision,
3 concluding that, subject to the conditions, the
4 facility will not have an unreasonable and adverse
5 effect on historic sites. And there is specific
6 reference in the discussion as to how you got to the
7 conditions of the conditions that were imposed in the
8 Lempster Wind project. It's a very similar
9 condition.

10 CHAIRMAN GETZ: Thank you.

11 Dr. Boisvert, do you have anything on
12 this?

13 MR. BOISVERT: Yes. Just to put this
14 into context, first of all, I'll make it clear that I
15 was unaware of this letter until it was distributed
16 to the Committee. I've had no real contact with the
17 individuals who were involved in this project.

18 A programmatic agreement is typically
19 something that is generated for a large project. It
20 might be a federal project to provide weatherization
21 for houses, and there's the small chance that it
22 might adversely affect historic property, but
23 generally do not. So you develop a programmatic
24 agreement which allows the agency and their

1 consultants, if they have consultants, to go forward
2 and fundamentally do the project following some
3 pre-established guidelines which allow them to make
4 decisions and go forward and report after the fact
5 that what they're doing didn't do any damages and so
6 forth. That's what programmatic agreements generally
7 are around for or about.

8 They, you know, assume good faith on
9 the part of the agency and the consultants and that
10 they're competent. There's no concern here about the
11 good faith of the agencies and their consultants
12 here. However, the issue that's been raised is, are
13 the consultants giving an acceptable product? The
14 argument -- or the discussion before us by Director
15 Muzzey, who says a great deal of time has gone by,
16 and the only way for this to be completed is to have
17 a programmatic agreement which would put that kind of
18 decision-making process back into the hands of the
19 Applicant. And they lay out reasons why they are no
20 longer comfortable with doing that because of the
21 performance of the Applicant, by way of their
22 consultants.

23 This kind of statement is
24 extraordinarily rare. I've been involved in historic

1 preservation with the state historic preservation
2 office for almost 30 years, and this is the first
3 time I've encountered this kind of problem -- or that
4 I've seen this kind of problem. I haven't
5 encountered it personally. This is very unusual, and
6 it doesn't typically happen. The concerns are not
7 archeological, they are with the standing structures.
8 So this is a portion of it. And the position being
9 taken by the state historic preservation office is
10 that, at this point, while they're not closing the
11 door to a programmatic agreement, they don't -- they
12 would have to see significant changes in personnel
13 before they would go forward. And this would be in
14 order to complete the Section 106 process, which runs
15 parallel and independent to the SEC. However, we
16 have recognized the DHR's role for cultural
17 resources, absent that Section 106 process.

18 I hope that puts it into something of
19 a context. And they will continue to obviously
20 review the progress and so forth. But the letter
21 pretty much speaks for itself.

22 CHAIRMAN GETZ: Mr. Perry.

23 MR. PERRY: Yeah. I guess I'm trying
24 to understand how this impacts the conditions that

1 were read by Mr. Iacopino, because my sense was those
2 conditions are geared towards having the Applicant
3 continue to work with the state agency. Here we have
4 a letter that says the state agency can no longer
5 work with the Applicant. So I'm wondering how those
6 conditions -- I mean, that's a question I have, I
7 guess, trying to settle that. It's usually maybe
8 geared towards the Applicant. But here you have the
9 agency that the Applicant's supposed to work with say
10 we no longer can work with the Applicant. So...

11 MR. BOISVERT: What I read in here is
12 maybe the key statement, in the next to the last
13 paragraph. Ms. Muzzey says, "I am concerned that
14 unless a change in cultural resources consultants is
15 made, our agencies will be facing the same
16 difficulties working under a programmatic agreement.
17 We accepted in good faith Hope Luhman's statement
18 that this is something we do all the time, we work it
19 out and we get to a good conclusion. And that is
20 99.9 percent accurate. It happens in this instance
21 that there's a -- we expected that it would be worked
22 out. What we have before us is a statement that it's
23 not working. And how that impacts our decisions and
24 the conditions, that is more of a question, I think,

1 to Mr. Iacopino.

2 CHAIRMAN GETZ: And I think the last
3 sentence also says, "We are hopeful that, given
4 changes in the project team and the assistance of the
5 ACHP" -- the Advisory Council on Historic
6 Preservation -- "the Section 106 process will be
7 successfully resolved in a timely manner," which I
8 guess what I would infer from that is that Historical
9 Resources is looking to see that the Applicant puts
10 forth other people to work with, is my conclusion.

11 But I think the beginning of your
12 question is what's the context of this? Is this --
13 and I think maybe that gets to the issue of is this
14 something fundamental going to our underlying
15 decision, or is this, on the other hand, the working
16 out of what we anticipated in the -- by having DHR
17 work with the -- and the Applicant work together. It
18 doesn't seem to be working out very well. But is it
19 just part of the process? We haven't been asked by
20 Historical Resources to do anything in particular.
21 They have advised us of this. So I think it's a
22 question of what's the context, and what, if
23 anything, should we or may we do. And I think it's
24 just something we need to discuss to try to get a

1 feel for it today.

2 Director Scott.

3 MR. SCOTT: It sounds like, and maybe
4 perhaps where you're going. But I was going to
5 suggest that it's apparent to me, rightly so, that
6 the Division of Historical Resources is copying us on
7 this documentation. They've sent a letter,
8 obviously, the June 28th letter, to the Applicant.
9 I'm not aware of the Applicant responding yet. I
10 think we should take it under advisement, myself, and
11 await Director Muzzey coming to us and saying the
12 situation is not resolvable.

13 CHAIRMAN GETZ: And this may go to, I
14 think, in some respects, the difference between --
15 you know, what brought us here today is the motions
16 for rehearing. And that's the subject of the
17 procedural order and notice of the public meeting.
18 At the same time, RSA 162-H:12 speaks to enforcement
19 and says, "Whenever the Committee determines that any
20 term or condition of any certificate issued under
21 this chapter is being violated, it shall, in writing,
22 notify the person holding the certificate of the
23 specific violation and order the person to
24 immediately terminate the violation." I'm not sure

1 that we're at that juncture. There doesn't seem to
2 be that assertion. But I think I'd just point to
3 this in terms of I think we do have, you know, a
4 mechanism or a tool to work with if that becomes the
5 issue.

6 But one other issue, again for Mr.
7 Iacopino or Dr. Boisvert. The first sentence of the
8 June 28 letter says, "It is our understanding the
9 Applicant... has requested the development of a
10 programmatic agreement in order to receive a U.S.
11 Army Corps of Engineers permit to begin construction
12 on portions of the project beginning September 1,
13 2011."

14 So, is it fair for me to conclude
15 that, if progress is not made, then the natural
16 consequence is that the Corps will unlikely issue the
17 permit and the Applicant won't be able to begin
18 construction? So, there's a -- to the extent there's
19 a problem addressed here, that there's a natural
20 consequence to the Corps permitting process; is that
21 correct?

22 MR. BOISVERT: That's my
23 understanding, yes.

24 MR. IACOPINO: That's my

1 understanding. And Dr. Boisvert would know better
2 than I with respect to the 106 process.

3 MR. HOOD: Mr. Chairman, if I might?
4 One thing, I think I agree with what's said here,
5 that we need to have -- that this letter didn't ask
6 us to take any action that we haven't already put
7 into some of our wording. But the important thing
8 here, I think one of the things is this letter was
9 sent to the Army Corps of Engineers. In the 106
10 process, the lead federal agency is, of course, who
11 makes the ultimate call on all the aspects, all the
12 steps of the process, whether things are eligible for
13 the Register, whether the effect is what, you know,
14 is agreed to and all. They certainly are going to
15 listen to the people with the expertise, which is
16 Historical Resources. But they're going to
17 ultimately make the call. The DHR can say they don't
18 agree. They don't think this consultant is doing a
19 very good job, that the information they've got is
20 not proper. The Corps, on the other hand, could look
21 at it, listen to the DHR, but also say, no, we think
22 it is good enough to go forward to make this decision
23 on.

24 So I think in order for us to do

1 anything different, we'd have to get some information
2 back on how the Corps is going to respond to this
3 letter. If the Corps says we agree completely, we've
4 reviewed all the things that the consultant has put
5 forth, and we agree with you that they're not
6 adequate to make decisions, then there could be
7 some -- they would have some kind of call for not
8 granting that permit. If for some reason they said,
9 no, we don't agree with you, DHR, we think there's
10 plenty of information here, they could grant the
11 permit because they're ultimately the ones that make
12 the call because they're the lead federal agency. I
13 think we need to have -- if this had been the Corps
14 of Engineers getting to back to us and saying this is
15 completely inadequate and they aren't going to issue
16 a permit based on this, then we have something to act
17 on. But I think DHR's opinion that they don't like
18 what's going on isn't enough to warrant any specific
19 action on our part at this time.

20 CHAIRMAN GETZ: Dr. Kent.

21 MR. KENT: This is very interesting.
22 Our condition is separate from what the Corps does.
23 Our condition talks about continued communication
24 with DHR and working things out with DHR. It doesn't

1 address the issue of Corps of Engineers overriding
2 any decision by the DHR. So we didn't -- in our
3 condition, we didn't create an out, in essence, for
4 the Applicant that says, well, even if you can't work
5 it out work with DHR, but you worked it out with the
6 Corps, you're fine. We've maintained that you've got
7 to work it out with DHR. So some remedy has to be
8 worked out at the state level for this condition to
9 be complied with. That's the way I read what we've
10 done in our decision.

11 CHAIRMAN GETZ: Which I think gets us
12 partway there, because -- well, so we have the
13 letter. The letter advises us -- or we're copied and
14 given notice that something's going on that is out of
15 the ordinary, it appears. But it doesn't ask us to
16 do anything. So I guess --

17 MR. KENT: Right.

18 CHAIRMAN GETZ: -- where are you on
19 how this flows through?

20 MR. KENT: Technically, to me it says
21 that, as long as the Applicant is consulting with
22 DHR, they're in compliance with the certificate. If
23 they stop consulting with DHR, they're out of
24 compliance. If they're out of compliance, if they

1 decide -- and we don't know they have. But if they
2 have chosen not to consult any further with DHR,
3 they're out of compliance. And if they're out of
4 compliance with the condition, then their certificate
5 is invalid, right, and they're not allowed to
6 proceed.

7 CHAIRMAN GETZ: Well, then we would
8 take action on the enforcement if they were --

9 DR. KENT: Right. I agree with what
10 you said earlier. Let's give this a little bit of
11 time to play out and decide. We don't know what the
12 Applicant's chosen to do.

13 MR. IACOPINO: Let me just point out,
14 from a legal standpoint, that if a Section 106
15 programmatic agreement is agreed upon by the
16 parties -- and correct me if I'm wrong, Dr.
17 Boisvert -- DHR is part of that agreement as well.
18 And if in fact that is what occurs and the Applicant
19 consults with DHR through that process, they are
20 complying with the conditions as set forth. If
21 somebody, whether it's DHR or anybody else, were to
22 bring to our attention that there was some
23 non-compliance, then the enforcement process could be
24 undertaken.

1 At this point, I think that, really,
2 this letter is just, I mean, sent to us as a
3 courtesy, and it expresses the DHR's frustration, not
4 so much with whether or not the Applicant is
5 consulting with them, but with the quality of the
6 information that they're providing to them. So
7 nobody has said yet that there's not a -- that there
8 is a failure to consult or a failure to participate
9 in the process. What they're saying is -- and
10 they're saying it to the Army Corps -- is we're
11 having a real hard time with what's being produced to
12 us, as opposed any indication that the Applicant is
13 not consulting with them. Ultimately, that may be a
14 problem, but I'm not sure that it's ripe at this
15 point.

16 CHAIRMAN GETZ: Mr. Dupee.

17 MR. DUPEE: It seems to me, Mr.
18 Chairman, that the Applicant is getting a fairly
19 clear understanding of what it needs to do to move
20 the process forward. So I think by bringing this
21 matter to the attention of the Committee, even
22 indirectly, I think the Committee is probably
23 satisfying any sort of obligation to inform by making
24 it clear to the Applicant what has to happen, who has

1 to do what, and what the consequences are in
2 proceeding or not proceeding, or consulting or not
3 consulting.

4 CHAIRMAN GETZ: Anyone else?

5 (No verbal response)

6 CHAIRMAN GETZ: Well, I guess I would
7 conclude, based on this discussion, and I think it's
8 consistent with what Mr. Iacopino is saying, really,
9 at this point it's premature to take any action based
10 on these letters, but that we need to continue to
11 monitor what's going on; and then, to the extent that
12 we get some kind of information that leads us to
13 conclude that we need to take some action under our
14 enforcement powers, we would take that up, if and
15 when we get there. But it seems to me that the way
16 the door is left open by Historical Resources, that
17 the process may continue. And we'll see what
18 response or action occurs as a result of this letter.
19 And if we need to take some action, then once we have
20 further information, we'll be in a position to take
21 such action. But right now, I'm not sure that
22 there's a basis for us to do anything more at the
23 moment.

24 So, does anybody else have any

1 concerns or clarifications or thoughts about doing
2 something different at this point?

3 MR. DUPEE: I generally agree with
4 that, Mr. Chairman. And I'd also point out that the
5 Applicant does have a clear idea of what the options
6 are. So I think it's not them not being sure what to
7 do next. They know what we're going to do if things
8 continue and what they need to do to proceed.

9 MR. STELTZER: And I'd just add to
10 that, that the Applicant also has other options to
11 pursue if they feel that the agency isn't necessarily
12 providing the level of service that they would
13 anticipate from an agency as well. So it's not
14 necessarily just the need to comply with what DHR is
15 saying, but that there are other avenues if DHR might
16 be not providing the level of service that it needs
17 to be.

18 MR. HARRINGTON: Mr. Chairman, just in
19 follow-up on that, what the -- I'm not clear on that.
20 What are the other options that the Applicant would
21 have?

22 MR. DUPEE: Well, among other things,
23 Mr. Chairman, they could proceed to engage a
24 different consultant.

1 MR. STELTZER: And they could
2 certainly look at the Army Corps of Engineers, as was
3 mentioned, since they are part of the process. And
4 maybe look at, since there's two parties here --
5 whoever's in the wrong doesn't really necessarily
6 matter -- but look at other options as far as having
7 some sort of mediator to help out with getting over
8 the differences of the parties. There's a whole
9 variety of other options that might be out there in
10 order to be able to work it out as well.

11 CHAIRMAN GETZ: Mr. Boisvert.

12 MR. BOISVERT: In line with that
13 somewhat, the DHR states that it's going to ask the
14 participation of the Advisory Council on Historic
15 Preservation. It's a body that is composed of
16 various individuals appointed by the President. It
17 is an agency that fundamentally oversees the Section
18 106 process and acts to facilitate and adjudicate
19 various problems.

20 Just as an aside, it's the only agency
21 in the nation which is allowed to sue the federal
22 government without asking permission. I've actually
23 done it once. And by bringing in the Advisory
24 Council, that is another body that is in addition to

1 the Army Corps of Engineers. Typically, programmatic
2 agreements have to be approved by the Advisory
3 Council. It's indicated they're going to ask them to
4 be involved before the approval itself. So they're a
5 participant. So they'll be bringing in another major
6 player into the process. So there will be that
7 additional body involved.

8 And one can understand that the
9 Applicant and their consultant may feel that the
10 representations in the letter are not accurate. That
11 wouldn't be a surprise. But not only will there be
12 the Army Corps of Engineers, but the Advisory Council
13 to look into that consideration.

14 CHAIRMAN GETZ: Well, one other aspect
15 of this, I mean, we do have the Applicant here today.
16 But I really don't want to get into a discussion or
17 arguments, representations today about this issue, in
18 part because we don't have Historical Resources here.
19 So we'd only be getting part of the picture. And I'm
20 not sure that that is a satisfactory way of
21 proceeding.

22 But in terms of monitoring, let me ask
23 you this, Mr. Iacopino: Would it be useful, or could
24 it be something that you could do, to meet with the

1 Applicant and Historical Resources, the parties, to
2 get an update within a certain period of time and
3 report back to us, report back to the Subcommittee in
4 writing what the status of the situation is there?
5 Because I'd like to be a little more active in trying
6 to make sure that this is monitored effectively and
7 we're kept abreast of developments, either negatively
8 or positively?

9 MR. IACOPINO: I could certainly do
10 that. I could make contact with Army Corps, with the
11 Applicant, with DHR, perhaps even attend one of their
12 meetings -- it sounds as though some meetings are
13 going to occur -- and just basically flush out what
14 everybody believes the path going forward is, and if
15 there's disagreement about that, and report back to
16 the Committee. I have no problem with doing that.

17 Just a question for Dr. Boisvert. I
18 assume that this Erika Mark, project manager, would
19 be the contact for the Army Corps 106 process?

20 MR. BOISVERT: Yes, she is the
21 individual who this project will land on her desk
22 There are others who are also involved. She's the
23 person who has the lead responsibility for reviewing
24 this project. Others in the food chain have also

1 been brought into the discussion.

2 MR. IACOPINO: I can certainly do
3 that.

4 CHAIRMAN GETZ: Does that sound
5 acceptable? Any objection to having Mr. Iacopino
6 look into this report and report back to us in
7 writing?

8 (No verbal response)

9 CHAIRMAN GETZ: And would it make
10 sense to have a timeline?

11 MR. IACOPINO: Sure.

12 CHAIRMAN GETZ: Thirty days? And if
13 the 30 days falls on a Saturday or Sunday, it will be
14 due the following Monday.

15 Okay. Is there anything else that we
16 need to address this morning?

17 Mr. Iacopino, you have enough from the
18 discussion today and the votes taken to draft an
19 order on rehearing, to memorialize the decision and
20 circulate for our approval?

21 MR. IACOPINO: Yes, sir.

22 CHAIRMAN GETZ: All right. If there's
23 nothing further, I move we adjourn.

24 MR. SCOTT: Second.

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MR. PERRY: Second.

CHAIRMAN GETZ: All in favor, say

"Aye."

(Members vote by responding "Aye.")

CHAIRMAN GETZ: Thank you, everyone.

(WHEREUPON, the hearing was
adjourned at 11:27 a.m.)

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C E R T I F I C A T E

I, Susan J. Robidas, a Licensed
Shorthand Court Reporter and Notary Public of
the State of New Hampshire, do hereby
certify that the foregoing is a true and
accurate transcript of my stenographic notes
of these proceedings taken at the place and
on the date hereinbefore set forth, to the
best of my skill and ability under the
conditions present at the time.

I further certify that I am neither
attorney or counsel for, nor related to or
employed by any of the parties to the action;
and further, that I am not a relative or
employee of any attorney or counsel employed
in this case, nor am I financially interested
in this action.

Susan J. Robidas, LCR/RPR
Licensed Shorthand Court Reporter
Registered Professional Reporter
N.H. LCR No. 44 (RSA 310-A:173)