

In Re:
SEC 2012-01 ANTRIM WIND
HEARING FOR ORAL ARGUMENTS ON SUBDIVISION REQUEST

SESSION 2 ONLY
September 6, 2012

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STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

September 6, 2012 - 10:53 a.m. SESSION 2 ONLY
Concord, New Hampshire

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

PRESENT: SITE EVALUATION COMMITTEE:

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

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

COUNSEL FOR THE COMMITTEE: Michael Iacopino, Esq.

COUNSEL FOR THE PUBLIC: Peter C. L. Roth, Esq.
 Sr. Asst. Atty. General
 N.H. Atty.Gen. Office

COURT REPORTER: Susan J. Robidas, N.H. LCR No. 44

1
2 APPEARANCES: Reptg. Antrim Wind, LLC:
3 Susan S. Geiger, Esq. (Orr & Reno)
4 Rachel Goldwasser, Esq. (Orr & Reno)
5 Jack Kenworthy (Antrim Wind)

6 Reptg. Antrim Board of Selectmen:
7 Galen Stearns, Town Administrator
8 John Robinson, Selectman
9 Town of Antrim

10 Reptg. Harris Center for Cons. Edu.:
11 Stephen Froling, Esq.

12 Reptg. Antrim Planning Board:
13 Bernie Waugh, Esq.
14 Sarah Vanderwende, Member
15 Martha Pinello, Member
16 Charles Levesque, Member

17 Reptg. Audubon Society of N.H.:
18 David M. Howe, Esq.

19 Reptg. Industrial Wind Action Group:
20 Lisa Linowes

21 Reptg. North Branch Group
22 of Intervenors:
23 Richard Block
24

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1 (Whereupon the hearing resumed at 10:53
2 a.m. after a brief recess.)

3 CHAIRMAN IGNATIUS: So we will
4 resume this presentation of legal arguments.
5 I think the next party to present is
6 Industrial Wind Action. Ms. Linowes.

7 MS. LINOWES: Yes. Thank you,
8 Madam Chairman and Members of the Committee.
9 A lot has been already said. I'm not sure if
10 I could add much to the legal discussion, but
11 I just want to make a few points.

12 It's appropriate that
13 R.S.A. 162-H consider a full, integrated --
14 the entire project in an integrated fashion.
15 I have not seen where that has not been done
16 in the past in other cases that I've been
17 involved in.

18 In this case, in fact, the fact
19 that the Site Evaluation Committee is
20 considering the environmental and economic and
21 technical issues is interesting, because
22 planning boards, to my knowledge, do not have
23 authority to review project applications
24 before them from an economic side, only the --

1 that is omitted.

2 In any event, in order for this
3 Committee to assume authority over site --
4 over subdivision, it would have to ignore
5 three statutes, not just one: R.S.A. 674:11,
6 37 and 18. That's a significant leap.
7 There's nothing in those statutes that state
8 that the Site Evaluation Committee has
9 authority to overrule those. I think that
10 that is a very simple question before the
11 Committee.

12 Second, the authority of
13 subdivision that's been granted to planning
14 boards requires that three things happen
15 within a community: They have to, first,
16 having a planning board; the planning board
17 has to be granted subdivision authority, and
18 then it has to produce rules and regulations
19 governing subdivision. If the Site Evaluation
20 Committee is assuming the authority of a
21 planning board under subdivision, at the very
22 least it should put together rules governing
23 subdivision. To my knowledge, that has not
24 been done. And there's a lot that goes on

1 when a request for subdivision comes before a
2 planning board. It's not a simple looking at
3 a map and approving it.

4 In keeping with prior actions
5 by the Site Evaluation Committee, in terms of
6 other permits from the state agencies, it's
7 appropriate and most consistent for this
8 Committee to move forward in the same way that
9 it does with those permits, and that is to
10 assign it a condition of approval that the
11 subdivision be approved by the Antrim Planning
12 Board. That would allow it to -- that's the
13 simplist response to this Committee.

14 If the Committee fears that
15 somehow a determination to approve this
16 project by the Committee is in jeopardy
17 because the Antrim Planning Board might
18 disapprove the subdivision, then that is not
19 an appropriate reason to decide that this
20 Committee will assume that authority. That
21 process has to go through its steps.

22 And I'll just make one last
23 comment. I am a former planning board member
24 for two towns, and one town in which I was

1 elected. I understand the Antrim Planning
2 Board is an elected board. We have three sets
3 of laws that govern -- that are -- that we
4 abide by at the -- given to us by statute.
5 Those are the authority to -- for zoning --
6 under zoning, the power of subdivision and the
7 power of site plan. Those are three separate
8 sets of regulations that are in place. And as
9 a former planning board member, we take those
10 very seriously. That's our only guidance when
11 we're going through the process of approving
12 applications, when in some cases significant
13 amounts of money are in play. We don't take
14 those lightly. I'm not speaking as an Antrim
15 Planning Board member. But no planning board
16 member that I know of takes our
17 responsibilities lightly. And the idea that
18 the Antrim Select Board signed that contract
19 or that agreement giving away that authority,
20 I can tell you as a former planning board
21 member, we would never have the authority to
22 waive our statutory obligations. I don't see
23 where the select board had that authority. I
24 think that the weight in which this Committee

1 gives to that agreement must be minimal.

2 Thank you.

3 CHAIRMAN IGNATIUS: Thank you.

4 Are there questions from Committee members?

5 (No response.)

6 CHAIRMAN IGNATIUS: I have just
7 a couple. I want to get your thoughts on the
8 argument that the Applicant has made, that by
9 having both the Site Evaluation Committee
10 process and either a simultaneous or secondary
11 process with the planning board would result
12 in piecemeal regulation.

13 MS. LINOWES: I don't see where
14 that is happening at all. The planning board
15 has specific obligations for the site -- in
16 this case, subdivision. We recognize -- as a
17 planning board member, they would recognize
18 that the use -- potentially they don't have
19 authority over there. And I still think
20 there's an open question as to whether or not
21 the Site Evaluation Committee can overrule all
22 zoning within a community.

23 But that being said, there's a
24 very specific action that has to be taken:

1 Subdivide a piece of land. It should be
2 irrelevant what is happening with that land.
3 The question is: Does subdivision have to be
4 done? Yes, it does. Then that authority
5 belongs with the planning board. And I think
6 that there is the integration of that into the
7 overall permit granted from the Site
8 Evaluation Committee is that I don't see where
9 there's any inconsistency, any more than there
10 is inconsistency with the DES granting the
11 all-terrain -- the terrain alteration permit
12 or wetlands permit. I understand that there's
13 specific consideration or acknowledgment of
14 the state permits in 162-H, and it wasn't done
15 with locals. I can't answer why that is. But
16 I would argue that I don't think that the
17 legislation -- the Legislature intended it to
18 omit the local authority on all issues.

19 CHAIRMAN IGNATIUS: Thank you.
20 Mr. Iacopino.

21 MR. IACOPINO: I just want to
22 make sure I understand correctly. You said
23 there were three subdivision statutes that we
24 would be disregarding or overruling if we

1 determined that the Site Evaluation Committee
2 could grant the subdivision. And you said it
3 was R.S.A. 674:11 and 37, and then you said
4 18.

5 MS. LINOWES: Oh, I'm sorry
6 676:18. I apologize.

7 MR. IACOPINO: That's why...
8 I'll ask you the same question that I asked
9 Mr. Waugh about the process. If the Committee
10 were to determine that there should be a
11 similar process for the planning board on a
12 subdivision review as with the state agencies,
13 in your opinion, how would that process work?
14 Who would -- where would one go if they were
15 unhappy with the planning board's decision on
16 the subdivision? Do they go to the superior
17 court, or do they come here to the Site
18 Evaluation Committee?

19 MS. LINOWES: In that case, it
20 would go to the superior court because the
21 approvals granted by the planning board, that
22 there is -- the statute already covers what
23 happens when someone is upset with a decision
24 that's made; it will go to the superior court.

1 And I don't think that there should be a
2 binding of your -- of the Site Evaluation
3 Committee's authority in overruling of that.
4 It should be maintained as separate.

5 MR. IACOPINO: I have no other
6 questions.

7 CHAIRMAN IGNATIUS: Anything
8 further from the Subcommittee?

9 (No verbal response)

10 CHAIRMAN IGNATIUS: All right.
11 Thank you. We move then to Counsel for the
12 Public, Mr. Roth.

13 MR. ROTH: Thank you, Madam
14 Chairman, members of the Subcommittee.

15 A couple preliminary things I
16 wanted to say about what we're doing here
17 today. In my years of practice as a lawyer,
18 remembering from taking property in law
19 school, one of the things that I've discovered
20 and that I remember and I sort of keep close
21 to me is that there's a natural conservatism
22 built into real estate matters, and they're
23 for the reasons that Attorney Waugh spoke of;
24 it's permanent. Real estate is different than

1 other things. And so real estate lawyers are
2 a breed apart, and they deal with property and
3 subdivisions and plans and rules and where the
4 commas lie or don't lie very, very differently
5 than other practices of law. There isn't the
6 sort of, well, it almost works kind of thing
7 in real estate. It's very conservative. And
8 here, what the Applicant is doing is asking
9 you to tinker with the words, essentially.
10 Not just write a deed, but to tinker with the
11 words. How does a decision get made that
12 affects interest in land or real estate?
13 That's a very different thing that you need to
14 be exceedingly careful about.

15 The other general observation
16 that I would make is that we're very fortunate
17 to have Attorney Waugh here. There is not a
18 person in the state, certainly not in this
19 room, but maybe none in the state with the
20 kind of experience and knowledge about this
21 stuff than he has. And now, while I consider
22 myself more or less, you know, in accord with
23 his views, his expertise is, I think,
24 unquestionable. I don't agree with one thing

1 that he said, though, and that is how this
2 process gets integrated with the planning
3 board issue. And I'll get to that eventually.

4 And then the last sort of
5 general observation I would make -- or next to
6 the last -- is that this is a bigger issue
7 than this project. Whether this Committee
8 takes the -- makes the decision to supplant
9 the subdivision powers of the Town of Antrim
10 goes to the basics of government in this
11 state. It's not just about whether this
12 project or substation gets built. It's about
13 the separation of powers between the towns and
14 the state and about the execution of laws and
15 the writing of laws. The Applicant's position
16 is essentially asking you to write laws for
17 yourself, and that's something that I think is
18 not generally favored by the courts.

19 The last thing, the general point that I
20 make is there's an article by a former Supreme
21 Court justice, Felix Frankfurter, and it's
22 called, "Some Reflections on the
23 Interpretation [sic] of Statutes." And in it
24 he made the point that I think is extremely

1 important for everyone here to think about;
2 and that is, we have to listen to what the
3 statute does not say in addition to what it
4 says, but to listen to what it does not say.
5 And I think that what this statute does not
6 say is really important, and I think it is
7 perhaps the key to what's going on here.

8 Now, I'm going to talk directly now about
9 the preemption issue. Preemption under the
10 modern view occurs when you have a
11 comprehensive regulatory scheme. This is
12 not -- you know, with all due respect, you are
13 not a regulatory body. The Site Evaluation
14 Law is not a regulatory statute. It does not
15 dictate how a project operates. It does not
16 dictate how a project is designed or
17 constructed. There are no detailed plans or
18 criteria that are required or reviewed.
19 There's no review or oversight of the facility
20 during or after construction. There are lots
21 of things that don't get regulated that happen
22 at an energy facility that you don't have any
23 idea about, that never come before you.

24 And the question was asked earlier about,

1 well, what's the difference between the
2 hazardous waste and the solid waste statutes
3 and this one, such that this one should
4 somehow be more preclusive? And the answer
5 is: It's actually the other way. Those
6 statutes, as I have experienced with the
7 hazardous waste law and the solid waste law,
8 and unfortunately this one, too -- those
9 statutes have detailed criteria and extensive
10 and very detailed regulations that determine
11 virtually how everything gets done inside
12 those facilities and how they're designed and
13 built. There are engineers at the Department
14 of Environmental Services who look at a solid
15 plant -- you know, solid waste facility plans
16 and determine whether it's going to work or
17 whether it's going to fail. They hire
18 engineers to worry about that stuff if it's
19 not -- if they don't understand it. The level
20 of detail in those regulatory schemes dwarfs
21 what is done here. And I think that it's
22 critical to remember that. What you're asked
23 to do here is to not be a pervasive regulator
24 of the energy industry. You're asked to

1 provide -- to measure the environmental
2 impacts of a facility in a particular site to
3 avoid the problem where, as arose in Hampton,
4 the Town of Hampton says, Nope. No way.
5 We're not having it. We don't -- and that's
6 really -- and I'm going to talk about Hampton.
7 But, you know, the idea is your position is to
8 find out how this is going to have
9 environmental and societal impacts -- that is,
10 the land use. And I think the land use, if
11 you look at the statute here, it's not defined
12 anywhere. But the closest thing that I can
13 come to in defining it under 162-H:1, II, is
14 conformance with sound environmental
15 utilization. And that's at the end of
16 Paragraph Roman II. So land use, as is
17 understood here, is -- really has to do with
18 the impacts of the facility on the community.
19 And those impacts are more attuned to when you
20 look at the make-up of the Committee and the
21 agencies that are involved -- things like air
22 and water and public health services, fish and
23 game -- there's nobody in the Site Evaluation
24 Committee that deals with the specifics of

1 municipal planning. There's nobody on the
2 Site Evaluation Committee that deals with
3 labor. That's an economic issue for the
4 Applicant. They're going to have employees.
5 But you're not asked to review the labor
6 contracts or the labor practices. Is the
7 argument going to be carried that far to say,
8 Oh, well, it covers -- you know, preemptive of
9 all economic issues and impacts, because
10 that's what the statute says in there
11 somewhere; so, therefore, we can pay our
12 workers not in conformance with state labor
13 laws? No, that's ridiculous. That's
14 absolutely ridiculous. So, too, this issue is
15 an issue that is apart from what you're asked
16 to do.

17 CHAIRMAN IGNATIUS: Mr. Roth, I
18 have to cut you off because it's been ten
19 minutes, and I've given everyone that --

20 MR. ROTH: Ten? Oh, my gosh.

21 CHAIRMAN IGNATIUS: -- the
22 extra five.

23 MR. ROTH: I apologize for
24 going over.

1 CHAIRMAN IGNATIUS: That's
2 okay. I'm sure there will be questions that
3 bring things forward that you want to address.

4 Are there questions from
5 Committee members?

6 (No verbal response)

7 CHAIRMAN IGNATIUS: All right.

8 Oh, yes. Ms. Bailey.

9 INTERROGATORIES BY MS. BAILEY:

10 Q. In your brief, you say that leaving
11 subdivision to town officials will not
12 frustrate nor contravene the legislative
13 intent of the Site Evaluation Committee Act.
14 If the legislative intent of the Site
15 Evaluation Committee is to preempt locals from
16 impeding siting, and the municipalities have
17 the power to kill the project because they can
18 refuse or deny the subdivision, doesn't that
19 contravene the legislative intent if this
20 Committee decides that it should be sited in
21 Antrim or wherever?

22 A. Well, that assumes, I think, the answer to the
23 question is it is preemptive. And I don't
24 agree that this statute is preemptive of all

1 things. And I think that that goes somewhat
2 again to the question of the integration. How
3 do you deal with these external factors? So I
4 guess I don't agree with the premise of the
5 question, which is that it's preemptive.

6 Q. I have one more area here.

7 A. If I can just add to that answer? There's no
8 promise in 162, or anywhere else in state law,
9 that every project as presented is going to
10 get built. We could have a project that makes
11 too much noise or it's too big and ugly or is
12 just wrong for where it's supposed to go. As
13 I read in one case, a nuisance is, you know,
14 sometimes the right thing in the wrong place.
15 So you could -- I think the basic idea that
16 somehow the town could prohibit this by not
17 allowing the subdivision is true. But
18 that's -- I guess my answer is kind of, so
19 what? I mean, not every project is guaranteed
20 a building permit from this Committee.
21 Similarly, you know, if Groton Wind had gone
22 to the Town of Holderness and they said, No,
23 we're not going to approve your subdivision,
24 frankly what they would have done, probably,

1 is they would have found another way to do it.
2 And in this case, there's no evidence that
3 there's no other way to do it.

4 Q. Speaking of Groton Wind, can you explain the
5 apparent difference in your position on the
6 energy facility issue?

7 A. Certainly. And I would point out that
8 Attorney Geiger is also taking the opposite
9 position that she took in that case. So, you
10 know, we're both, you know, kind of on other
11 sides of an apparently similar issue.

12 But I think it's important to remember
13 the context of Groton, and I think it's also
14 important to point out something that the
15 Applicant has said that is somewhat misleading
16 about Groton. There was no decision in Groton
17 made that jurisdiction applies to these
18 things. There were questions raised about it,
19 and the case proceeded. But you will not find
20 in the order that was suggested -- or in the
21 final order in this case -- anything that
22 says, Therefore, we've determined that the
23 substation and the power lines are an
24 associated facility.

1 Q. But isn't it true that you argued that it
2 should be in that case?

3 A. Yes, and I want to explain why.

4 The context of that case was extremely
5 different than this one. We had just
6 completed, like, five days of hearings in that
7 case. The jurisdiction of the Committee had
8 never been raised or challenged by anybody.
9 The Applicant came in, and during -- it was
10 revealed during those hearings, or at the end
11 of one of those hearings, that the Applicant
12 had changed the route for running its
13 connection lines and now needed to run bigger
14 lines and operate a substation. And the
15 Applicant argued, Well, that doesn't really
16 apply. Those aren't really our lines. Those
17 aren't really our poles. We shouldn't have to
18 have any more hearings. Let's just jam it
19 through and do it on what we have.

20 And the chairman at the time, Chairman
21 Getz, was concerned about this issue of
22 whether it was an associated facility. And
23 Attorney Geiger made the argument, Well, it's
24 not an associated facility because we don't

1 own it and it doesn't meet the statutory
2 criteria. And I have the transcripts here if
3 you want to look at them. So we were in a
4 position where we're having what were
5 apparently and possibly environmental impacts
6 of the facility that were going to be ignored.
7 And the hearing was going to be truncated,
8 essentially, because of that.

9 The Committee in that case decided, Well,
10 there are a lot of questions about that issue
11 and a number of other ones that are
12 unanswered. We need more process. And
13 really, the whole context of that discussion
14 was in answering the question: Should there
15 be an extension of the time in which to finish
16 this case? And the answer was: There's a lot
17 of questions unanswered, and we shouldn't
18 finish this case.

19 I looked at that case, in the context of
20 that case -- and frankly, if my positions that
21 I voice in cases for clients were -- became
22 law all the time, I'd be thrilled. But it's
23 not the case in this situation. I looked at
24 this one more carefully. I thought about the

1 context. We were directly confronted with the
2 jurisdictional issue up front, not in the
3 middle of a hearing, that all of a sudden we
4 discovered that the facts were not as we
5 thought they were. And when I looked at this
6 more carefully under the context of this case,
7 and in the context of the question of
8 jurisdiction, where we were attempting to take
9 from a planning board, another governmental
10 entity, its authority to do something fairly
11 simple and straightforward -- an issue which
12 did not come up in Groton -- that I considered
13 that to be wrong and I think an over-extension
14 of this committee's jurisdiction.

15 Q. So you think it's not an associated facility?

16 A. No. And if it is, there's an evidentiary
17 burden upon the Applicant to prove that.
18 Because the way if -- the way I understand a
19 substation facility, it's designed as part of
20 the transmission and distribution system.

21 And I read a nice little case from
22 Nebraska or something -- Nebraska, I
23 believe -- from the early '60s, where they
24 describe the whole -- what a substation is and

1 why it operates the way it does and what it's
2 part of. And you know, if you -- it is part
3 of the transmission and distribution unless
4 they can show through evidence and expert
5 testimony -- which they haven't done here, or
6 even suggested that they have that evidence --
7 that it is part of, owned by the generation
8 system. So I think that the question of
9 whether it -- I mean, if this were a
10 transmission line being certificated by PSNH
11 or a substation that somehow met the criteria
12 in the statute, maybe this substation would
13 qualify as an associated facility to the
14 transmission line. But I don't think it
15 qualifies as an associated facility to this --
16 associated equipment to this facility, because
17 it's integral to the distribution and
18 transmission, not to the generation.

19 Q. Thank you.

20 INTERROGATORIES BY CHAIRMAN IGNATIUS:

21 Q. Mr. Roth, you know the overall structure of
22 162-H is premised on the idea that for certain
23 projects you have one-stop shopping; you come
24 together in one proceeding that provides a

1 timely response, up or down, for an Applicant.
2 By having a process within the municipal
3 planning board as well, is there a concern
4 about running afoul of the restrictions that
5 you not have undue delay, that you give the
6 Applicant some finality and some
7 predictability on results? How do you square
8 those two things?

9 A. I think the statute is intended to resolve
10 those issues with respect to those things
11 within the jurisdiction of the State of New
12 Hampshire. And those things within the
13 jurisdiction of the State of New Hampshire
14 include traffic, you know -- are reflective of
15 the people on this Committee: The
16 environmental issues, the transportation
17 issues, public health issues, fish and
18 wildlife issues, energy planning. That's what
19 they're thinking about.

20 If you look at, for example, you know,
21 the... bear with me a moment. 162-H:10, I,
22 deals with joint hearings with representations
23 of the other agencies that have jurisdiction
24 over the subject matter and shall be deemed to

1 satisfy initial requirements for public
2 hearings under statutes requiring permits
3 relative to environmental impact. And then it
4 talks about the hearing shall be a joint
5 hearing with all state agencies in lieu of
6 hearings required by them. And then it refers
7 several times to "state agencies." So I think
8 that the Legislature intended this to be a
9 one-stop shopping within the context of the
10 jurisdiction of the State of New Hampshire,
11 but not within the context of all other
12 jurisdictions that may have some impact on
13 this.

14 I mean, if you look -- you know, there
15 are projects that have come here that have to
16 go through FERC. There are projects that come
17 here that have to go through the Army Corps of
18 Engineers and the Environmental Protection
19 Agency, projects that come through that have
20 to get things resolved with ISO. And as we
21 learned today, the Groton case had to go back
22 to the planning board in the Town of
23 Holderness to get their substation --
24 subdivision approved.

1 So I think -- and I would also point out
2 that this is sort of reflective of the
3 argument that's being made by the Applicant,
4 that somehow this preemption is this
5 all-encompassing blob that absorbs everything
6 in its path.

7 And I think about things like the PUC.
8 The PUC has jurisdiction over their power
9 purchase agreement. That's not preempted.
10 That's not even part of this common scheme
11 here. If they needed to do an eminent domain
12 to get the land to build it, they wouldn't --
13 you couldn't do that. You know, I don't think
14 anybody in this room would think that that
15 could be done here. Or if they have a dispute
16 with their turbine supplier or some other
17 commercial contractor, they can't come in here
18 and say, Well, you have jurisdiction to
19 resolve all issues.

20 So I think, you know, the Committee's
21 jurisdiction has been carefully described to
22 include those things that deal with state
23 agencies and state permitting, so that the
24 undue delay idea is focused on that. And the

1 Committee has repeatedly said, Well, you know,
2 that's another issue you have to deal with.
3 You know, here's your permit based on what we
4 can do for you here. Go forth and get your
5 other stuff that you need elsewhere.

6 Q. Have you considered the language that's in
7 Stablex and other cases that we mentioned
8 already this morning that talk about if there
9 is a partial preemption and residual authority
10 that remains with the municipality that can be
11 exercised, as long as it's done in a way
12 that's not exclusionary and is not -- and that
13 is done in good faith? Have you thought about
14 that good faith test, given it's clear that
15 there is an emotionally charged atmosphere
16 about this project that's been apparent
17 through the public hearings and proceedings
18 that even led up to us taking jurisdiction?

19 A. I have. I have given it some consideration.
20 And I take faith in what Attorney Waugh says
21 about how the process gets handled, that under
22 state law there's a presumption of good faith
23 of the member, similar to this body here, and
24 that that process has its own manner of

1 dealing with that issue.

2 I would also point to the dissent that I
3 believe, Madam Chairman, you participated in,
4 in the jurisdictional issue of this case.
5 There is no evidence that the planning board
6 lacks good faith. And that certainly can't be
7 a reason to say, Well, therefore, we're going
8 to take it away from them.

9 Q. For those of you who don't follow this hour by
10 hour, the dissent you're referring to is in
11 the prior proceeding on whether the
12 Commission -- the Committee should even take
13 jurisdiction of this proposal. And the
14 determination was that it would take
15 jurisdiction, which then led to the opening of
16 this new docket. It's not actually in this
17 docket. It's in the preceding.

18 Do you have any experience with a
19 municipality entering into an agreement
20 similar to the one that the Antrim Select
21 Board did regarding that there be no need for
22 any local approvals?

23 A. No, I don't. And I take Attorney Waugh's
24 recitation of those cases, and I agree with

1 his interpretation of them. And I would point
2 out perhaps an additional authority for that
3 proposition that the select board doesn't have
4 the authority to act in -- or to divest
5 unilaterally the jurisdiction of the planning
6 board, and that's in R.S.A. 674:42, which
7 says, After a planning board is granted
8 platting jurisdiction by a municipality under
9 674:35, the planning board's jurisdiction
10 shall be exclusive. And then because it was
11 so nice, they have to say it twice. The
12 planning board shall have all statutory
13 control over plats or subdivisions of land.
14 To me, this suggests that the Legislature very
15 clearly said, once this is out of the hands of
16 the select board, there's no back seat. That
17 really -- it stays with the planning board.

18 Q. And yet, wouldn't you agree that the cases
19 that you've cited and we've talked about today
20 does allow certain preemption -- does require
21 certain preemption of ordinances if they would
22 run afoul of the Site Evaluation Committee
23 process?

24 A. I do. And I agree Attorney Waugh's

1 interpretation of there's a difference between
2 land use and subdivision. And I think that
3 there's going to have to be a parsing of the
4 Antrim Planning Board regulations to determine
5 those regulations that are land-use-based
6 versus those regulations which are
7 subdivision-based, because I would -- when I
8 read those regulations, I said, Well, jeez,
9 there's a bunch of stuff in here -- I
10 shouldn't say a bunch -- there's certain items
11 here that seem to be land-use-based. And I
12 think that the subdivision issues -- I think
13 we're talking about a fairly small population
14 of issues -- should be sorted out and kept to
15 the planning board. But I believe that the
16 land use is, at least as far as making a
17 siting decision, is subsumed into this
18 Committee.

19 I agree with the Stablex decision
20 language, and I really honestly think that has
21 supplanted sort of the pro curium broad-base
22 decision of the Town of Hampton. I don't
23 think the Town of Hampton is really
24 necessarily good law anymore, because the

1 Stablex decision clearly says, as do its
2 progeny, that the police powers of the
3 municipalities are retained. And I think that
4 it's not a far stretch to say that subdivision
5 rules, the very strictly, narrowly construed
6 subdivision rules, are within this town's
7 police powers.

8 Q. Do you have any examples of portions of the
9 ordinance that you would say are preempted by
10 162-H?

11 A. The only one that comes to mind, I believe it
12 was the last criteria in the planning board
13 regulations, which said the planning board
14 shall consider pollution impacts of the
15 facility -- of the proposed use, I guess. I'm
16 not sure how they worded it. But I felt that
17 that one was -- clearly, this body is asked to
18 determine the pollution impacts of a facility
19 in the site that it's being placed. And that
20 would put this body and the town planning
21 board potentially in conflict with it, with
22 their respective jurisdictions. I don't see
23 anything potentially in conflict between the
24 planning board saying you have to have a

1 subdivision size of X number of square meters
2 or X number of feet of road frontage, that
3 kind of thing, access to public water supply,
4 whatever the rules are that deal strictly with
5 subdivision rather than, you know, you can't
6 build, you know, a subdivision in this
7 particular neighborhood. I'm less comfortable
8 with saying there's going to be a conflict
9 there. I think instead you're going to have
10 the Site Evaluation Committee has precedence
11 on those issues which are particularly and
12 have shown to be in the statute. Remember
13 Frankfurter: What the statute doesn't say and
14 what the statute says. The statute says you
15 have certain criteria that you apply in
16 certain areas, and those don't include, I
17 believe, the subdivision of land.

18 Q. And if we were to conclude that there isn't a
19 total preemption, but a partial list of those
20 things that would run afoul of the scheme set
21 forth in 162-H, what process do you think
22 would work to figure out which authority --
23 which ordinance provisions are preempted and
24 which remain as part of the residual authority

1 of the municipality?

2 A. Well, as Attorney Waugh said, you would take
3 the language from the Stablex decision and
4 apply it to the various planning board
5 regulations, and in your decision on this
6 question today, announce which of those
7 planning board regulations you felt fell
8 within or without the Stablex exception, or
9 within or without your own duties and powers.

10 Q. And would that be something we would just read
11 an ordinance and think about what that means,
12 or would that be an evidentiary proceeding to
13 have presented what those ordinance provisions
14 entail?

15 A. No, I think you would just read it and make
16 your own interpretation of what it says.

17 Q. Thank you.

18 CHAIRMAN IGNATIUS: Other
19 Committee questions?

20 If not, Mr. Iacopino,
21 questions?

22 MR. IACOPINO: I'll just follow
23 up on that one.

24

EXAMINATION

BY MR. IACOPINO:

Q. First off, do you believe the parties ought to have some kind of input on that decision?

A. I think there's probably been a bit too much input in this case already, and I think that it's ripe for a decision by the Committee.

Q. I want to back up to your argument in your brief that the substation and switchyard are not associated facilities. You'll agree that they are only being built for the purpose of electricity that will come from this particular project; is that correct?

A. I actually don't know that. That's not a fact in evidence. They may very well have other purposes for Public Service of New Hampshire. We just don't know that.

Q. Well, the Applicant -- do you have any reason to dispute? The Applicant says that it's an essential component of their project and that it is -- that they're required in order to get it on the grid?

A. I agree that the substation is necessary to create a step-up to put it on the grid at that

1 location. I don't know if that answers your
2 question.

3 Q. Well, obviously you can tell where my
4 question's going, is how you're defining
5 "associated facilities."

6 A. Well, the way I'm defining associated facility
7 is, associated to what? And I think that
8 where it's owned by PSNH, it's going to be
9 operated by PSNH; it's going to be on
10 PSNH-owned land. It is integral to the
11 distribution and transmission system I think
12 in a traditional view of substations;
13 therefore, it's associated to the transmission
14 and distribution, not to this facility.

15 Q. Well, in your view, can equipment like this be
16 associated to more than one purpose?

17 A. As a jurisdictional matter, I think that would
18 be very difficult, and that would be a
19 question of evidence. And we don't have that
20 evidence here because, as I understand it,
21 there's sort of -- there are two sides to the
22 substation, and one is the low-voltage side
23 and the other is the high-voltage side, if I'm
24 getting it correctly. And it may very well be

1 that evidence would show that the low-voltage
2 side -- or one side of that substation is
3 necessary, integral to their system, to the
4 generation's facility. And at some point, the
5 wires cross over an invisible boundary -- and
6 maybe it's not so invisible -- that it becomes
7 a PSNH side. And we don't have evidence about
8 that. And that case that I cited in my brief
9 suggests that that is a very difficult
10 evidentiary question for purposes of
11 determining jurisdiction over the facility.

12 Q. That's the case over FERC jurisdiction from
13 the Eastern District of California.

14 A. That's correct.

15 You know, Mike, I don't think you
16 necessarily need to answer that question,
17 because I think what the question that has not
18 even been responded to in any meaningful way
19 by the Applicant is: Do they have standing to
20 do this? You know, they say they have an
21 option in a lease. But the case law in New
22 Hampshire is that an option in a lease is not
23 enough to get you standing to do things that
24 are contrary to the rights of the owner of the

1 property that you're leasing. And there may
2 be more to that relationship, but we don't
3 have any evidence of that. So at this point,
4 at least, they have not presented standing to
5 show that they are the correct party in
6 interest to pursue a substation that's going
7 to be owned by a third party and a subdivision
8 of land owned by another party.

9 Q. Well, up to this point, there's been no
10 evidence taken by the Committee at all on any
11 issue; correct?

12 A. Yeah, I assume so. But there's not even been
13 a proffer from the other side on this issue.

14 Q. Well, they have asserted that they have a
15 certain relationship with the owner of the
16 property.

17 A. But I don't recall that that assertion or that
18 proffer includes a statement that, yes, we
19 have the authority by that property owner. I
20 did not hear that this morning. I have not
21 seen it in their papers, that we have the
22 authority from that property owner to seek a
23 subdivision on his land, on his behalf. If
24 Attorney Geiger wants to make a proffer like

1 that, I'm all ears, and I'll drop the
2 argument. But so far, I have not heard that.

3 Q. Have you appeared in a -- before a planning
4 board on a subdivision?

5 A. Yes, actually, I have.

6 Q. And have you ever read the notices that go in
7 the paper, where oftentimes there are
8 contractors that appear, and basically appear
9 for the landowner or for the developer before
10 the planning board?

11 A. Oh, sure. And if they are authorized
12 individuals, then they can do that. And I
13 think the Antrim Planning Board regulations
14 provide that authorized individuals for the
15 landowner can appear. But there's been no
16 evidence or even a proffer that the Applicant
17 in this case is an authorized individual.

18 Q. Okay. So you don't think that implication is
19 plainly apparent from what they've already
20 provided in their application?

21 A. No, I don't.

22 Q. Okay.

23 A. It's not even a bald assertion.

24 Q. Also in your brief you get into a discussion

1 of repeal by implication. And I want to
2 address that with you, because there's
3 obviously a lot of discussion of the doctrine
4 of preemption, which is a legal concept. But
5 the doctrine of repeal by implication is also
6 a separate legal concept, and I want to
7 understand if you believe that those are two
8 separate reasons why the Committee should not
9 grant the relief requested.

10 A. Yes, I do. And in agreement with what Ms.
11 Linowes said and Attorney Waugh, there are
12 statutes that are applicable to the
13 circumstances that somehow become negatory as
14 a result of this board's existence. And to
15 me, in my reading of it, that creates at least
16 a hint or a suggestion that somehow, at least
17 in these cases, the Legislature intended to
18 repeal those statutes so that they would no
19 longer be operable. And I think if that
20 intention were present, it would be a lot more
21 manifest in what was done. In fact, as the
22 argument in the brief says, the evidence
23 appears to be to the contrary.

24 Q. But nobody is making the argument that the

1 authority of the Site Evaluation Committee
2 renders any land-use statute to be negatory.
3 It's just that the State has preempted that
4 part of the law, part of that type of
5 regulation. Wouldn't a doctrine repealed by
6 implication really be only valid in a case
7 where somebody's saying that the entire
8 statute across the board has been repealed?

9 A. I don't think that's the case, Mike. I think
10 that you can have a repeal by implication
11 under specific circumstances where the statute
12 still continues to apply in other instances.
13 And I think that's what's happening here. You
14 know, the suggestion that the Committee has
15 jurisdiction to do the subdivision suggests
16 that those statutes that are unique to
17 planning boards to do subdivisions are somehow
18 no longer in effect when it comes to energy
19 facilities. You know, repeal by implication
20 would be the only way to get there. In this
21 instance, I don't think it works, because of
22 the preemption issue is really not that
23 strong. I think -- I just don't see it with
24 respect to those -- the narrow issue of the

1 subdivision law.

2 Q. But I guess my question to you is, how do
3 those two rules of law, how do they interact
4 with each other in this particular case then?
5 Because clearly there is at least some
6 preemptive authority of the Site Evaluation
7 Committee over municipalities. I think you
8 might agree with that.

9 A. Oh, I do agree with that.

10 Q. And nobody is arguing that, as a result of the
11 Site Evaluation Committee authority, for
12 instance, the Antrim Planning Board doesn't
13 have the authority to regulate the subdivision
14 for the Costco or for the Best Buy or whatever
15 the next industrial building to be built in
16 the town is. So I'm just trying to see how
17 you --

18 A. But if you put a wind turbine on it, maybe
19 that's not so true anymore. And that's the
20 distinction. If you build a Costco with a
21 solar array on the roof, have you now created
22 an energy facility? And Costco can say, Hey,
23 we have an energy facility. We don't have to
24 worry about your stinking planning board

1 regulations anymore. And that's the
2 distinction.

3 Q. Okay. And yet, the planning board still has
4 the authority to regulate the next development
5 down the street.

6 A. Correct.

7 Q. Aside from, obviously, the jurisdictional
8 issue of 30 megawatts and all of that.

9 But again, still, the planning board has
10 not lost its statutory authority by virtue --
11 or even if that happened, even if somebody
12 coming to the Site Evaluation Committee was
13 building a Costco and putting 30 megawatts of
14 solar on the roof, the planning board still
15 has their authority to deal with the
16 subdivision down the road or other
17 subdivisions that might come before them.

18 So I'm just trying to get at, are you
19 making these as independent arguments, or are
20 you just saying that, because you don't think
21 preemption applies, you're going to the next
22 argument that they haven't actually made,
23 which is repeal by implication?

24 A. Yeah. Well, it somewhat goes back to the

1 process. When the Chairman's order came out
2 in July, it said all briefs in by July 24th.
3 So I had to guess what the arguments were
4 going to be that were going to be made by the
5 Applicant. I didn't know whether they were
6 going to say preemption or repeal by
7 implication or what. So I had to put in my
8 basket all the arguments that I could think
9 of. In their reply brief, which the Chairman
10 correctly struck, they argued, We're not
11 arguing repeal by implication. So it's not
12 really an issue. And I'm fine with that. But
13 when I made the arguments, I didn't know what
14 they were going to say, and so I wanted to be
15 prepared to answer it.

16 Q. You also reference the 2002 legislation in
17 your brief about -- that amended, I believe, a
18 planning board -- I forget which -- R.S.A.
19 672 -- to essentially encourage or not
20 unreasonably limit renewable energy resources.
21 And you cited that, if I understand your
22 argument correctly, for the proposition that
23 there is no -- that preemption doesn't apply
24 because the planning committee has -- is

1 required to -- I don't know -- give special
2 consideration I guess is the best term, to
3 renewable energy facilities.

4 A. That's correct.

5 Q. Do you agree that that also could cut the
6 other way with respect to your argument, that
7 the fact that the State has shown -- or that
8 legislation has sort of carved out this
9 special niche for renewable energy, that we
10 should take it as support for the process of
11 the preemption -- or for the doctrine of
12 preemption?

13 A. Well, I don't see how you get there from the
14 fact that -- from what the Legislature did.
15 The Legislature made amendments to the
16 municipal planning statutes, which essentially
17 recognized and legitimized municipal planning
18 activity with respect to renewable energy
19 facilities, and didn't make any changes to the
20 Site Evaluation Committee statute saying, Oh,
21 and by the way, you know, you are in charge of
22 renewable energy facility, you know, planning
23 board activity now. That's, again, you know,
24 going back to Frankfurter: Listen to what the

1 law doesn't say. There's nothing in there
2 that says, By the way, you're in charge of
3 municipal planning board activity now. And
4 instead, the Legislature put stuff in the
5 municipal planning board law that says, Hey,
6 when a renewable energy facility comes to
7 town, this is what you have to do.

8 Q. Right. But what the statute says is not -- it
9 says they shall not unreasonably limit
10 renewable energy installations.

11 A. Correct.

12 Q. So you don't think that cuts against that
13 argument at all.

14 A. Not really.

15 Q. Okay.

16 A. I mean, unreasonably limiting it -- I don't
17 think that they had the authority to
18 unreasonably limit it even without that being
19 in there. I think that their powers are
20 limited to be only reasonable conditions, so
21 that this was simply sort of a booster point
22 for renewable energy, and hopefully effective
23 that way.

24 Q. Okay. I'm going to ask you the same

1 question -- I'm sorry.

2 A. Oh, go ahead. I'm sorry.

3 Q. I'm going to ask you the same question about
4 the hazardous waste and solid waste Committee
5 -- statutes that I asked the others.

6 Are you aware in 147-A or 149-M of any
7 designation to either the hazardous waste
8 Committee or the solid waste Committee of any
9 type of land-use planning authority in those
10 statutes?

11 A. No, I'm not aware of anything. And I think
12 that the North Country Environmental Services
13 case essentially explored that issue in some
14 detail. So, to the extent that there is any
15 authority remaining for land-use planning in
16 the town, it's described in North Country
17 Environmental Services and the other cases, I
18 think. You know, it's not a complete win for
19 either party on those issues.

20 Q. But you do recognize that those -- that that
21 term is indeed used in the Site Evaluation
22 Committee's statute; right?

23 A. Yes, and I submit that that depends on what
24 you mean by "land use." When you come to the

1 narrow question of subdivision, I think I
2 agree with Attorney Waugh, that subdivision is
3 not land use. Subdivision is what does the
4 piece of property look like before you built
5 something on it, and then land use is what are
6 you going to do with it once you've got the
7 piece of property configured the way you want
8 it. And as I said earlier, you know, there's
9 a lot of things about property ownership that
10 aren't going to come here: Eminent domain,
11 lot line adjustments, contract disputes,
12 subdivision.

13 Q. Well, I wanted to address that with you as
14 well, because in your opening you went through
15 the whole example of labor and whatnot.
16 Clearly, the Site Evaluation Committee statute
17 applies to the siting, construction and
18 operation of energy facilities. You'll agree
19 with that; correct?

20 A. That's what it says.

21 Q. So that, if there -- so you said we don't
22 really regulate. But you recognize that, in
23 fact, there are -- there is an enforcement
24 duty imposed upon the Site Evaluation

1 Committee as part of the statute.

2 A. That's correct. And I would point -- I would
3 suggest that the enforcement paragraph --
4 enforcement section of the statute is further
5 evidence that this is not a regulatory
6 agency --

7 Q. Why do you say that?

8 A. -- that this is regulatory statute. The
9 enforcement simply says you can pull the
10 permit. There isn't even in there a provision
11 that says you can fine somebody; you can
12 authorize, you know, an assessment of
13 penalties against a person. I mean, there's
14 a -- in the Penalties section, it says for a
15 knowing violation of this chapter, the
16 superior court can award penalties. But if
17 you look at the statutes for the Department of
18 Environmental Services, for example, there are
19 all kinds of ways that those bodies can issue
20 orders. They can compel people to do things.
21 They can hold hearings on that -- and I'm not
22 saying you can't hold hearings. But you don't
23 have the power to order, for example, the
24 Applicant to do anything if they violate the

1 terms of their permit.

2 And going towards your question, you have
3 even less power to order PSNH to do anything
4 when they're not even an Applicant. So you
5 don't have the power to make that kind of
6 order. You don't have the power to assess
7 penalties. So your enforcement powers are
8 really fairly limited. And to me, that is one
9 of the issues that makes this not a regulatory
10 agency and not a regulatory statute, because
11 your enforcement powers are simply, you know,
12 you make this grant to the Applicant that says
13 they can go ahead and build this and do this,
14 and you have the ability to take it away, but
15 that's pretty much where it ends.

16 Q. But there's no difference in the -- well, no
17 difference to speak of in the authority of the
18 Site Evaluation Committee today than at the
19 time when the Supreme Court reviewed the
20 statute when it decided Public Service versus
21 Town of Hampton, is there?

22 A. You know, that's -- the statute has gone
23 through a fair amount of evolution and
24 revolution since then. And I wouldn't want to

1 hazard a guess to answer that question, but --
2 in the way you pose it. But what I would say
3 is that in the Town of Hampton case, it was a
4 really very -- you know, it was sort of a
5 in-your-face poke in the eye by the Town of
6 Hampton to say, you know, Yeah, we
7 participated in this proceeding for years, and
8 now we really don't like it and we've appealed
9 it and lost, so now we're going to pass a law
10 that says, Oh, by the way, you can't put that
11 thing in our town. And that's a very
12 different question than whether the town had
13 the ability, I mean, because that went right
14 to the core of the jurisdiction of the Site
15 Evaluation Committee. That's a very different
16 question about whether other agencies and
17 bodies have the ability to regulate the
18 activities of this project.

19 Q. Yeah, but doesn't your argument that this is
20 not a regulatory body, doesn't that argument
21 go right to the core of jurisdiction of the
22 Site Evaluation Committee as well? Because
23 the Legislature deemed that certificates would
24 be granted and enforced through a Committee

1 that has a number of various representation of
2 various agencies on it, as opposed to, for
3 instance, statutory authority to issue
4 regulations that say, you know, wind turbines
5 will be no higher than X-number of feet, no
6 deeper than -- you know, pads shall be built
7 no deeper than, you know, 6 feet into the
8 ground and things like that. Isn't the
9 regulatory authority granted to this Committee
10 just as strong and just the same as to the
11 Solid Waste Committee or the Hazardous Waste
12 Committee?

13 A. No, I disagree. What you do here is you look
14 at the plans. You look at the facility as a
15 whole, kind of, you know, not quite a
16 5,000-foot view, but maybe a 500-foot view --
17 although that's probably a poor number in this
18 case, given the size of the turbines. And the
19 criteria that you apply are not does it -- is
20 that turbine pad, you know, 6 inches too deep
21 or 5 feet too deep? You look at it and you
22 go, is that turbine pad creating an
23 unreasonable adverse impact on wildlife or
24 scenery or, you know, the economic interests

1 of the region as a whole? A regulatory agency
2 like the Department of Environmental Services
3 permitting a landfill is going to go out there
4 with a measuring tape and measure that berm,
5 and they're going to go out there and measure
6 the diameter of the pipe to make sure that the
7 pipe is the right size. You guys don't get
8 into the weeds on that stuff. You look at the
9 overall impact of what the facility is going
10 to be like when the decision is made to put it
11 where it's put, not is this complying with the
12 very carefully and painfully wrought, for
13 purposes of the Applicant, regulatory program
14 that controls their every move.

15 Q. Although you recognize -- you recognize the
16 right to condition certificates. I'm sure
17 that you recognize that, or the authority of
18 the Committee to condition certificates. And
19 you see --

20 A. It's in the statute.

21 Q. And you've seen the certificates that have
22 issued in other cases, which probably have 40,
23 50 pages of conditions, some of which are
24 agreed upon by the parties, some of which come

1 from state agencies, and some of which come
2 from the Committee itself. And isn't there an
3 argument to be made, though, that that
4 authority granted to the Committee, in fact,
5 is a more sweeping regulation, more sweeping
6 fulfillment of the area to be regulated than a
7 regulation by a statute that addresses
8 specifics, such as, you know, how high a
9 chimney will be or, you know, how many parts
10 per million of particulate matter is permitted
11 to be released?

12 A. Well, you know, I would view the outside
13 permitting process -- you know, the
14 Environmental Services permits being really
15 what we're talking about here -- as they have
16 to go through all that stuff anyway. And
17 that's part of the one-stop service that we
18 spoke of a few minutes ago.

19 Q. Right.

20 A. And that is, bring all the state agencies in
21 here. And that's part of your -- part of the
22 jurisdiction with respect to bringing all the
23 state agencies into one place to get the
24 permits issued. What happens to those permits

1 after they're done? I suspect -- and based on
2 what I see in the docket here, every time
3 Environmental Services has a problem with
4 somebody's storm water permit or somebody's
5 wetlands permits, they don't come in here and
6 say, Hey, yank the certificate. They take
7 their own normal enforcement action. This
8 body doesn't sit and dictate whether each
9 permit provision that Environmental Services
10 makes is being followed to the letter. That's
11 all being handled by the agencies themselves.
12 You're sort of a big, you know, sort of a
13 clearinghouse.

14 Q. But this agency does have the authority to
15 delegate those post-certificate conditions --
16 or monitoring those post-certificate
17 conditions to those departments so that they
18 don't have to come back here.

19 A. Sure. But as I see what happens in reality is
20 that you're not acting as the Über regulator
21 of all Environmental Services permit activity.

22 CHAIRMAN IGNATIUS: Mr. Stewart
23 had a comment or question.

24 MR. STEWART: Yeah. My

1 understanding, Mr. Waugh said something
2 similar to you, having been through a few of
3 these processes, that there's a certificate
4 from the Site Evaluation Committee that has
5 conditions from the Department of
6 Environmental Services, which, in essence, are
7 our permit. But we don't have a separate
8 permit. I think we have an SF -- FSEC
9 certificate. And then, as Mr. Iacopino
10 indicated, authority is delegated to the
11 department, which essentially is the same
12 process as if FSEC did not exist. But there
13 is not a separate permit. We're implementing
14 kind of a subset of the certificate. And I
15 think that's -- you know, that speaks to the
16 regulatory authority, where, really, FSEC is
17 delegating to the department the authority to
18 implement the statute it typically would
19 implement. So I think that's the subtlety.
20 And I think I have that right. Somebody will
21 correct me if I don't.

22 BY Mr. IACOPINO:

23 Q. Let me switch gears on you. In your brief,
24 you made reference to the fact that, at least

1 from your point of view -- and I understand
2 you don't speak for the planning board -- that
3 the subdivision as proposed by the Applicant
4 would be a minor subdivision.

5 A. Yeah, that's based on my rather uneducated,
6 non-real estate professional, and somewhat,
7 I'd probably hazard a guess, reckless. I
8 would say that with glibness in view of the
9 planning board regulations. It looked to me,
10 based on a kind of quick read, that it would
11 probably qualify as a minor. But I'm no
12 expert on subdivision law. Real estate -- the
13 natural conservatism in real estate should
14 have kept me from saying that. But it looked
15 right.

16 MR. IACOPINO: I don't have any
17 other questions.

18 CHAIRMAN IGNATIUS: Mr.
19 Boisvert, questions?

20 INTERROGATORIES BY MR. BOISVERT:

21 Q. This may be more properly put to the
22 Applicant. But would all the environmental
23 studies, relevant studies done for tower
24 location, et cetera, also be carried out

1 wherever a substation is placed? Would they
2 be considered part of the project and
3 therefore falling under the need for various
4 studies?

5 A. Yeah. If the substation and the lines are
6 considered part of the project, then the
7 Applicant would be responsible for
8 demonstrating that those parts of the project
9 met the criteria for granting a certificate in
10 Section 16.

11 Q. And if they're not, if it's considered a
12 separate facility, then those studies would
13 not be done?

14 A. Not necessarily. If they were not considered
15 part of the facility, then they would not be
16 within the jurisdiction of the SEC, and they
17 would be back in the jurisdiction of the
18 planning board. And the planning board could
19 require that kind of information be provided.

20 Q. So long as their rules allow for the various
21 studies.

22 A. Sorry. I didn't hear.

23 Q. So long as their rules allow for the various
24 studies.

1 A. Yeah, that's correct. And it's -- going from
2 memory from the jurisdictional phase of this
3 case, it struck me that they had the ability
4 to require that stuff to be done.

5 Q. Again, as I said, this question may be more
6 proper to the Applicant.

7 May I ask it to the Applicant?

8 CHAIRMAN IGNATIUS: Why don't
9 we wait until we get finished and we can go
10 back to that.

11 I have one other question, Mr.
12 Roth. The long discussion between you and Mr.
13 Iacopino about whether the Site Evaluation
14 Committee should be considered a regulatory
15 body, whether it has regulatory authority, I
16 confess I've lost track of what the import of
17 the answer being yes or no is. If there is a
18 conclusion it's not a regulatory body or not a
19 regulatory statute, then what?

20 A. Well, then the issue is whether the statute is
21 preemptive, because that's the analysis that's
22 applied by the case law. You know, if you
23 have a comprehensive, detailed regulatory
24 scheme, then you earn the right of preemption

1 over similar laws in other spheres. And my
2 argument is that this Committee's jurisdiction
3 is sort of the 500- to 1,000-foot view, not
4 the nitty-gritty of the regulating the
5 activities of an energy facility once it's
6 constructed.

7 Q. But is your argument that the comprehensive
8 regulatory scheme leads you to complete
9 preemption, and if you don't have it, then you
10 don't have complete preemption? Or that there
11 can still be, even absent that, what you would
12 consider a comprehensive regulatory scheme;
13 there could still be partial preemption on
14 certain issues?

15 A. That's correct. If there is preemption, then
16 it's not complete, as the Applicant argues. I
17 think that goes way too far, and unnecessarily
18 too far. And instead, at a minimum, you have
19 to two things that are left out: Those things
20 which are not covered by the SEC's
21 jurisdiction -- you know, the example being
22 labor -- and those things which fall within
23 the municipality's normal police powers, as
24 was described in the Stablex.

1 CHAIRMAN IGNATIUS: All right.

2 Thank you.

3 Any other questions from
4 members?

5 (No verbal response)

6 CHAIRMAN IGNATIUS: Thank you.

7 I appreciate everyone's forthright and
8 thoughtful answers. Some of these things I
9 think are different than we've seen in other
10 cases, and it's interesting to explore. And
11 we recognize that people may not have thought
12 through all of it before walking in this
13 morning, so I appreciate everyone's
14 willingness to try to explore it together.

15 Because there's been quite a
16 lot of argument ranging into many issues, I'm
17 going to give the Applicant an opportunity for
18 a brief response, if you so choose. You know,
19 let's try to keep it between 5 and 10 minutes.

20 MS. GEIGER: Okay. I'll try to
21 be brief. Basically, just a couple of points
22 I would like to respond to and have the
23 Committee focus on.

24 First, there's been a lot of

1 talk about the town agreement, the effect of
2 the town agreement. The Applicant would
3 merely point to the town agreement as evidence
4 that at least the board of selectmen agree
5 with the Applicant's position that there need
6 be no further town approvals for any of the
7 facilities or subdivisions or plans that have
8 come before and been certificated by this
9 Committee.

10 In addition, I'd like to
11 address Attorney Roth's admonition a couple of
12 times, that we listen to what the statute does
13 not say. In our brief on Page 6, the
14 Applicant has indicated that back in, I think
15 1990s, when amendments to R.S.A. 162-H were
16 being considered, a legislator named
17 Representative Susan Spear, went on record and
18 said that the language of the existing statute
19 seemed to preempt local zoning and planning,
20 and she suggested to the Legislature that they
21 add language which clearly states that it is
22 not the intent of this law to preempt local
23 control. Well, the Legislature did not insert
24 the language that Representative Spear

1 requested, so 162-H does not contain language
2 indicating that local control is maintained in
3 the alternative that the Site Evaluation
4 Committee does not preempt local control. So
5 I think it's very important to consider that
6 piece of legislative history for the reasons
7 cited by Attorney Roth.

8 In addition, we don't know, for
9 example, if there is residual authority left
10 to the planning board, as has been argued, for
11 the review of a subdivision plan. It's not
12 clear which of the criteria that are in the
13 many pages of the town's rules, if you will,
14 would apply here. Many of the things that the
15 town looks at in connection with at least
16 major subdivisions -- and again, I don't know
17 if this is a major or minor subdivision -- but
18 they're the same things that we've had to
19 submit to this Committee. For example:
20 Location of wetlands and 100-year flood
21 elevation lines; location of water bodies,
22 streams, rock ledges; location of soil test
23 pits; information relating to erosion and
24 sediment control. All of the things that we

1 had to submit to DES concerning water quality
2 and wetlands and alteration of terrain. A
3 storm water drainage plan, that's another
4 thing the town would look at in at least a
5 major subdivision review. So if we had to go
6 back to the town for subdivision review, we
7 would, in essence, be confronted with a
8 duplicative process that we've already
9 undergone here. And I don't think that's what
10 the Legislature intended when it enacted
11 162-H.

12 In addition, appeals of any
13 decisions made by the planning board with
14 respect to subdivision approvals go to the
15 superior court and then to the Supreme Court.
16 Here, the Legislature has made it very clear
17 that any appeals from an SEC decision go
18 straight to the Supreme Court. And the reason
19 for that is to make sure that energy
20 facilities do not get bogged down in the
21 judicial process and that legal issues
22 surrounding them are resolved quickly.

23 That's certainly not the case,
24 and it's not been the case with this

1 Applicant. It's not been our experience here.
2 It has taken this Applicant, I believe, over
3 two years to resolve litigation with the town
4 over the siting of its meteorological tower.
5 And quite frankly, that's one of the reasons
6 that we're here. If we thought that the
7 subdivision approval process applied and that
8 it was easy, I'm sure we would have gone
9 there. But, A, we don't think it applies;
10 and, B, if it did apply, it's not going to be
11 easy. So we don't think that's what the
12 Legislature intended. We don't believe that
13 the Legislature intended there to be any
14 residual authority on the part of the towns
15 for subdivision approval, which, as I've
16 explained, can be a very lengthy process that
17 would take much longer than I believe any
18 appeals of the decision here to the Supreme
19 Court.

20 So, in the final analysis, if
21 the positions of our opponents prevail,
22 essentially what happens is this facility is
23 subject to another process, potentially a
24 process that might end with a result that

1 makes it impossible for this facility to build
2 its step-up facilities, which are associated
3 facilities. They are needed by this project
4 to interconnect the power that the windmills
5 produce to the grid, and therefore do fall
6 within the definition of associated facility.

7 So, thank you very much for
8 your time and attention this morning. I know
9 this has been a long process and it's somewhat
10 unusual, and we appreciate your consideration.
11 Thank you.

12 CHAIRMAN IGNATIUS: Thank you.

13 We now need to determine our
14 next steps here. We can move to
15 deliberations, which we will do publicly. We
16 may also have a need to consult with counsel,
17 because this is a legal issue and not a
18 factual determination, which is what we
19 normally are addressing. And we also don't
20 want to lose sight of a couple procedural
21 matters that have to be resolved. We also --
22 I should just warn everyone that we've got at
23 least two of our members have other
24 commitments at 2:00, and so we really do want

1 to press on and not take a lunch break that
2 would really throw us off. Get as much done
3 as we can. If we're not able to conclude,
4 we'll have to come back. But our hope is that
5 we can conclude by 2:00. That being said, at
6 any point people should feel free -- this is
7 not a formal -- as formal as a courtroom may
8 be. You're welcome to get up and wander back.
9 There's coffee and sodas and snacks in the
10 room just past where the restrooms are.
11 There's a little kitchen. You're free to go
12 back there and bring things back in the room.
13 Don't feel that that's inappropriate in any
14 way. Mr. Waugh.

15 MR. WAUGH: I'm just wondering
16 if I could have a similar opportunity to make
17 three short rebuttal points.

18 CHAIRMAN IGNATIUS: I think
19 not, and the reason being a couple: One is
20 just practicality. I don't want to have all
21 parties going forward again. The Applicant
22 has the burden of proof here, and so we
23 generally give that opportunity, if needed, to
24 them. But I think we've been through an awful

1 lot. It's hard to imagine there's an area we
2 haven't already covered. So we're going to
3 move on.

4 I think the first question for
5 us is: Do we feel a need to consult with
6 counsel on the legal issues; and if so, should
7 we do that through a motion?

8 MR. IACOPINO: You can. I
9 don't think -- because it's a non-meeting,
10 there's no motion required, because under the
11 Right To Know Act, consultation with legal
12 counsel is not an executive session. No
13 formal motion and no issuance of minutes after
14 the fact is required. So if the Committee
15 wishes to meet with counsel, that's certainly
16 within your purview to do.

17 CHAIRMAN IGNATIUS: All right.
18 Are there Committee members -- do you have a
19 sense -- are you ready to begin to deliberate,
20 or would you welcome an opportunity to talk
21 with counsel?

22 MR. STEWART: I would welcome
23 an opportunity to talk with counsel.

24 CHAIRMAN IGNATIUS: All right.

1 Then why don't we do that. I think we -- it's
2 hard to know if that's going to be -- what the
3 time to return is. We'll just have to let you
4 know when we're ready to return. And, again,
5 feel free to pick up a snack or something
6 while we're out in the other room. So we'll
7 recess briefly. Thank you.

8 (WHEREUPON A RECESS WAS TAKEN AT 12:09
9 P.M., AND PROCEEDINGS RESUMED AT 12:48
 P.M.)

10 CHAIRMAN IGNATIUS: All right.
11 We're going to resume the proceedings today.
12 And I appreciate everyone's patience. We have
13 met with counsel to discuss just the legal
14 status of where we are, and I think we are now
15 ready to commence deliberations. If so, is
16 there a motion to that effect?

17 MR. STEWART: I'll make a
18 motion that we commence deliberations.

19 CHAIRMAN IGNATIUS: Thank you.
20 Is there a second?

21 MR. SIMPKINS: Second.

22 CHAIRMAN IGNATIUS: Thank you.
23 Then all in favor of moving to deliberations,
24 signify by saying "Aye."

1 ALL COMMITTEE MEMBERS: Aye.

2 CHAIRMAN IGNATIUS: Any

3 opposed?

4 (No verbal response)

5 CHAIRMAN IGNATIUS: None. All

6 right. Then we will begin the process of

7 deliberations.

8 It may help if I try to

9 structure our discussion a little bit so that

10 we can go through items in as logical way as

11 we can.

12 I think as we look at the

13 question of the jurisdiction of the Site

14 Evaluation Committee and the Subcommittee, the

15 first question that I think we need to resolve

16 is: Is the reason for the subdivision that's

17 been requested is in order for construction of

18 the facilities for PSNH to use in

19 interconnecting the generation facilities, and

20 do we consider that to be an associated

21 facility that is within our jurisdiction under

22 162-H? Do Committee members have a view on

23 whether it is or is not an associated

24 facility? Mr. Stewart.

1 DIRECTOR STEWART: My opinion
2 is that this is an associated facility. If it
3 wasn't for the project, the facility would be
4 unnecessary. You know, it may have other uses
5 theoretically in the future, but at the end of
6 the day, without this project, the facility
7 would not be necessary. So it is an
8 associated facility.

9 CHAIRMAN IGNATIUS: Mr.
10 Simpkins.

11 MR. SIMPKINS: I would agree
12 with that also, again, using the same tests,
13 that if it wasn't for this project, this
14 facility would not be built.

15 CHAIRMAN IGNATIUS: Any other
16 comments? Mr. Green.

17 MR. GREEN: I agree with both
18 of them. I believe that in order for them to
19 get the power from the wind turbines to the
20 distribution lines, you do need that
21 substation. So I would agree that it is part
22 of the facility.

23 CHAIRMAN IGNATIUS: All right.
24 Is there anyone who takes an opposite view?

1 Maybe that's an easier way to ask. Is there
2 any contrary view to that?

3 (No verbal response)

4 CHAIRMAN IGNATIUS: Appears
5 there is not. That being the case, if it's
6 within our jurisdiction to consider, then the
7 question is: Is subdivision of land in order
8 to allow for that to be constructed and
9 operated by PSNH, is that subdivision decision
10 something that would be within our pursue? Do
11 we have preemption to take that on from the
12 local municipal planning board? And so I
13 think the first question really is: Do we
14 have any preemption? Does the Site Evaluation
15 Committee have preemption over any local
16 municipal authority at the outset? Is there
17 any view on that? Do we have any preemption;
18 and if so, to what extent would our preemption
19 go? Ms. Bailey.

20 MS. BAILEY: I think that
21 162-H:16, II, says that the certificate shall
22 be conclusive on all questions, including land
23 use. Certainly implies that there is some
24 preemptive authority on this issue.

1 CHAIRMAN IGNATIUS: Is there
2 anyone who either concurs with that or has a
3 different view, that there is no preemption?
4 Let's first start with that. Does anyone have
5 a view that the Site Evaluation Committee has
6 no preemptive authority over municipal -- what
7 would normally be municipal decision-making?

8 (No verbal response)

9 CHAIRMAN IGNATIUS: Appears
10 not. And I think that probably all of the
11 parties who have spoken today would agree that
12 there is some degree of preemption.

13 So then, the harder question
14 really is: How far does that extend? Is it a
15 complete preemption or only partial
16 preemption? Do members have views on that?
17 Ms. Lyons.

18 MS. LYONS: I agree that
19 there's some partial preemption, as long as it
20 goes back to the public good and to the
21 project at hand. May not have to get all the
22 way down into regulations for some very
23 specific things that relate particularly to
24 the community, but as it relates to public

1 good.

2 CHAIRMAN IGNATIUS: All right.

3 Other views?

4 (No verbal response)

5 CHAIRMAN IGNATIUS: I can tell
6 you my sense is similar, that I think there is
7 preemption, but not a total preemption, that
8 there is both good policy reasons and the
9 actual structure of the statute that seems to
10 suggest that it's a blending of the two, that
11 when there's something that relates to the
12 actual siting and land-use aspects of a
13 proposal, that's clearly within our authority,
14 but that there may be things that do not
15 relate to the use of the land and do not
16 relate to the siting decisions that we're
17 required to make that should still remain
18 within the municipality's authority. And the
19 decision to subdivide land seems to
20 potentially encompass both categories.

21 As we heard, some of the
22 provisions for subdivision sound very much
23 like what we do have to decide and have
24 evidence that will be presented about things

1 such as mapping out of wetlands and drainage
2 fields and that sort of thing that are part of
3 the Site Evaluation Committee's consideration.
4 So, to me, it's not a question of is it
5 subdivision or not, but that even within
6 subdivision there may be some things that are
7 preemptive and that we govern and not the
8 local planning board. But there may be other
9 aspects of subdivision that have nothing to do
10 with the Site Evaluation Committee's
11 determinations of siting and land use and
12 environmental impacts, and that sort of thing
13 that still, in my view, would exist going
14 forward, still within the hands of the
15 planning board to determine. Now, others may
16 not see it that way, and so I don't want to
17 impose that view of mine. But that's where
18 I -- how I sort it out. Other comments, other
19 thoughts on that, either in agreement or
20 disagreement, or a different take you have?
21 Mr. Stewart.

22 DIRECTOR STEWART: I would
23 generally agree. I'm quoting from Attorney
24 Geiger's brief, so presumably the statute

1 citation is right. But R.S.A. 162-H:16, II,
2 states that SEC shall be conclusive on all
3 questions of siting, land use, air and water
4 quality. And I think the ambiguity is where
5 subdivision and land use overlap. You know,
6 is that complete or is it partial, in terms of
7 how decisions are made on subdivision? But
8 it's very clear on land use, that SEC has
9 authority.

10 CHAIRMAN IGNATIUS: Any other
11 comments on that question?

12 MS. BAILEY: I agree, and I
13 think to the extent that the planning board
14 could overrule our decision on land use
15 through the subdivision, that that's a
16 problem. So I haven't seen the regulations
17 that apply to what they look at, but I think
18 maybe we should look at those.

19 CHAIRMAN IGNATIUS: Hmm-hmm.
20 That's a -- we'll have to get to that question
21 next, if we get that far.

22 Are there any other comments on
23 degree of our jurisdiction? It's my sense --
24 Mr. Simpkins.

1 MR. SIMPKINS: Well, just a
2 comment. I would agree with what you said
3 just a little bit earlier. The one issue that
4 is very hard to see how it could be overcome
5 without planning board approval is the R.S.A.
6 676:18, the recording of the plat. There does
7 not seem to be -- reading the law, it puts the
8 registrar of deeds in a sticky situation,
9 because it's a misdemeanor for them to file or
10 record one without planning board approval,
11 except in certain circumstances. So I'd just
12 make that comment, that's it's very hard to
13 overcome that hurdle.

14 CHAIRMAN IGNATIUS: And so,
15 following that, in your view, that suggests
16 that there still is some role for a planning
17 board in signing off on the subdivision
18 itself.

19 MR. SIMPKINS: Under that
20 statute, it appears there would be, yes.

21 CHAIRMAN IGNATIUS: It's my
22 sense that we're all thinking similarly on
23 this, that there is some residual role for a
24 planning board to play. But line by line,

1 section by section of an ordinance is still
2 unclear, because we haven't gone through that
3 review. We haven't asked people to do that
4 today. So that would be the next hurdle. Is
5 that correct? I'm seeing nodding. Anybody
6 disagree with that? I'm seeing heads shaking
7 the other way.

8 So then, I think we ought to
9 think about what the best process would be to
10 determine that degree of authority that
11 remains for the planning board. And this is
12 uncharted territory here. I don't think we
13 have any easy model to turn to. We can create
14 it. A couple of options could be to have as
15 part of the adjudicatory hearings that we'll
16 be undertaking later on the full project, to
17 have that built into the proceedings and to
18 have oral argument from people on what they
19 think it ought to be, or have actual
20 evidentiary presentation of witnesses speak to
21 that and present that evidence to us, working
22 through the ordinance that are in existence
23 for the Town of Antrim. It could be taken out
24 of order and done the way we've done this

1 today, or we could build it into the full
2 proceeding. I think whatever we do, we want
3 to just make sure that we're really isolating
4 time and focus on that, so that it doesn't get
5 lost in the mix of one witness addresses it on
6 Monday and somebody four days later take up
7 another item, that we probably ought to
8 coordinate it to be a block of time during the
9 day.

10 But do you have a preference?
11 Do we take it out of order in just a separate
12 day for that one issue, or just make it part
13 of the full week-long proceedings on the
14 application itself? Mr. Stewart.

15 MR. STEWART: I agree with
16 doing it during the proceedings. I hope it
17 wouldn't take a whole day, but it could, the
18 way these things go. And I should note that
19 my view is that the degree of authority
20 could -- it could range from zero to something
21 else. So we're not excluding the potential
22 that we're concluding the subdivision is kind
23 of a subset of the land-use issue under the
24 statute I cited earlier.

1 CHAIRMAN IGNATIUS: Let me make
2 sure I understood. You're saying that after
3 going through each of those sections of the
4 ordinance, you might conclude they're all on
5 the preempted side, and there really is
6 nothing residual in this case.

7 MR. STEWART: Yeah. I'm having
8 a hard time understanding where land use --
9 you know, the criteria for land use and
10 subdivision separate. And I think that's what
11 the topic would be, to a large degree. And so
12 I'm just cautioning that it could be that
13 there is nothing at the end.

14 CHAIRMAN IGNATIUS: All right.
15 That's a good point.

16 MR. STEWART: And there may be
17 something.

18 CHAIRMAN IGNATIUS: That's a
19 good point, since we're doing this in the
20 abstract right now about what those provisions
21 actually are.

22 MR. STEWART: The engineer in
23 me is thinking quantitatively.

24 CHAIRMAN IGNATIUS: Mr. Boisvert

1 MR. BOISVERT: I think, looking
2 at it procedurally, the parties all want to
3 know where the boundaries are. And the sooner
4 they know that, the more we can put our time
5 to good use. And to vet it and stretch it out
6 through several days of hearings I think might
7 leave us with contingency questions and people
8 saying, Well, we can't decide until we take
9 care of this other matter. I'm reminded of
10 being told by an engineer that a no on time is
11 better than a yes late. Having a long
12 discussion, ambiguity and so forth simply
13 causes people to spend a lot of time
14 unproductively. And I think that we need to
15 have some clarity as to where the boundaries
16 are, if there are boundaries. We believe that
17 there are some boundaries. At this point, I,
18 for one, am uncertain where it is to be drawn.
19 I think we need to resolve that at the front
20 end. How we do that procedurally, I'm not
21 certain, and I don't know how it fits with the
22 requirements for this kind of subcommittee.
23 But I think that we should try to resolve this
24 specific question because it is pivotal to a

1 major portion of the project.

2 CHAIRMAN IGNATIUS: I think
3 that's a good point. One way would be to say
4 that the first order of business when we
5 commence the adjudicatory proceedings would be
6 to take up this issue and to have witnesses
7 come forward on what the ordinance or
8 ordinances call for and work through that and
9 then sort of restart the proceeding with the
10 actual sort of more normal presentation of the
11 project, and some witnesses who may have
12 testified would then re-testify on the things
13 that address everything else, so that we sort
14 of pull that out and do it before the rest of
15 the case gets underway. And as is apparent
16 from looking at the testimony that's been
17 filed, some people have -- a copy of the
18 ordinance has been put in through one witness
19 already. But nobody's really been prepared to
20 lay out, kind of section by section, how
21 something would work on the preemption test.
22 And so we could allow for some additional
23 prefiled testimony on that issue, and
24 witnesses who may not have been planning on

1 addressing that, or even individuals who are
2 not even on the witness list, to authorize
3 additional witnesses to take that issue up
4 from any party that wants to. I would think
5 that people could coordinate to have, you
6 know, one or two witnesses to present that and
7 not have every party bring their own forward.
8 But I'll leave that to people, if we get to
9 that ultimate vote to do this, that that could
10 be coordinated and worked out by parties.

11 Is it -- does anyone have a
12 different view than Mr. Boisvert's suggestion
13 to sort of take this up early and my building
14 on that to say maybe we do that as the first
15 order of business when the adjudicatory
16 proceedings begin?

17 MR. GREEN: I'd like see us
18 take it up and get it resolved and move on.

19 CHAIRMAN IGNATIUS: All right.

20 MS. LYONS: Do you think it's
21 beneficial to do that before we do the
22 adjudicatory proceedings so that we know what
23 we are focusing on?

24 CHAIRMAN IGNATIUS: Well, that

1 would be the alternative, to just set a date,
2 you know, two weeks from now, let's say, as we
3 are here today on one discrete issue, and
4 bring people forward to do that.

5 MS. BAILEY: Would people need
6 an opportunity to file written testimony, and
7 can we get that all done in two weeks?

8 CHAIRMAN IGNATIUS: Right. We
9 want to make sure we have enough time to be
10 able to do that.

11 MS. BAILEY: And how far out is
12 the next hearing? Has that been decided?

13 MR. IACOPINO: Monday.

14 CHAIRMAN IGNATIUS: No, we need
15 to resolve -- currently it's scheduled for
16 Monday, but that's another item of business we
17 need to request. There's been a request to
18 extend it. So, picking a realistic date for
19 that, to give people a chance to prepare
20 prefiled testimony, we'd have to build that
21 in. Two weeks is probably too short.

22 MS. LYONS: I don't mean to
23 make the suggestion to slow down the
24 proceedings, but to frame the second half of

1 the discussion better.

2 CHAIRMAN IGNATIUS: Hmm-hmm.

3 Yup. No, I think there's some validity to
4 that as well.

5 (Discussion off the record between
6 Chairman Ignatius and Atty. Iacopino.)

7 CHAIRMAN IGNATIUS: All right.

8 I think it may turn out to be a practical
9 matter to find dates that would work prior to.
10 And that somewhat relates to picking a date
11 for the procedural -- for the full proceedings
12 that was, I think, the next thing on the item.

13 So let's -- is it correct that
14 the sense of the group is that we look to see
15 if there is time for a separate day or a
16 portion of a day to look at the ordinance
17 provisions and make a determination of which
18 and whether they should be considered
19 preemptive or not prior to, not just the first
20 day, but, you know, before we even come into
21 this room for the full adjudicatory
22 proceedings? It's still part of the same
23 docket, still part of the same record, but
24 done as a discrete issue. Assuming we can

1 find a date that is far enough out to give
2 people an opportunity to prepare for and
3 present prefiled testimony, and still be prior
4 to the actual commencement of the rest of the
5 adjudicatory proceeding. Is that fair in what
6 people are thinking is the right way to go? I
7 see a lot of nods yes. No opposition to that?

8 (No verbal response)

9 MR. IACOPINO: I think it would
10 be considered to be part of the adjudicatory
11 proceedings because presumably there will be
12 opposing views on it. It would be a contested
13 case under R.S.A. 541-A, and therefore part of
14 our adjudicatory proceedings and subject to
15 the rules governing adjudicatory proceedings.

16 CHAIRMAN IGNATIUS: Thank you.
17 I thought I was saying that, and I obviously
18 wasn't. So I appreciate the clarification.

19 Then, you know, we've been sort
20 of nodding and looking and discussing. As
21 I've put it, it's the "sense of the
22 Committee." But we should take a formal vote
23 on those determinations, and then any vote
24 taken will then be recorded in a written order

1 that would be issued prior to the next phase
2 of this.

3 So I guess we need -- do we
4 need a motion for that? We probably do.

5 MR. IACOPINO: Somebody should
6 make a motion.

7 CHAIRMAN IGNATIUS: I guess I'm
8 looking for a motion that would reflect our
9 discussion that we consider the
10 interconnection substation facilities to be
11 associated facilities of the Applicant's
12 proposal project, that we consider there to be
13 preemption of some issues relating to what
14 otherwise is within the authority of local
15 municipal planning boards, but that we do not
16 consider it an absolute authority, and that in
17 order for us to determine what, if any,
18 provisions of the local planning board
19 ordinances are preempted, and what, if any,
20 remain within the authority of the planning
21 board, would require us to go through an
22 analysis of each section of the local
23 ordinance. One second.

24 (Discussion off the record between

1 Chairman Ignatius and Atty. Iacopino.)

2 CHAIRMAN IGNATIUS: And I'm
3 reminded that the request is specific to
4 subdivision and not to any other regulations.
5 So I didn't mean to expand our scope of what
6 we're undertaking. We've got enough to deal
7 with just subdivision. Is there a motion to
8 that effect?

9 MR. BOISVERT: So moved.

10 CHAIRMAN IGNATIUS: Is there a
11 second?

12 DIRECTOR STEWART: Second.

13 CHAIRMAN IGNATIUS: All right.
14 Then any further discussion of it? Ms.
15 Bailey.

16 MS. BAILEY: Did you say that
17 we do not consider it to be absolute
18 preemption? Is that what you meant when you
19 said that? Because I thought that Mr. Stewart
20 said he hadn't concluded that yet, that we
21 still could conclude that it was absolute
22 preemption. Is that -- did I get that wrong?

23 MR. STEWART: Yeah, I think she
24 -- the Chair had if any -- there was some

1 language in there that covered that potential.

2 CHAIRMAN IGNATIUS: Yeah, I
3 think my thinking is that when I say
4 "absolute," meaning you don't even ask, you
5 don't even look at the ordinance, you're
6 simply -- it's all in our hands. And instead,
7 I thought we were talking about is that there
8 may or may not be preemption on each
9 particular item, and it might be at the end of
10 the day that you've gone through all 20
11 provisions, and all 20 of them fell on the
12 preemption side. So in that particular
13 circumstance, there is nothing left for the
14 local planning board to do. Or it may be that
15 all 20 of them fall on the not preemption
16 side. But it's a case-by-case, issue-by-issue
17 analysis rather than a blanket determination
18 that there is nothing that the planning board
19 could ever do, that's it's all in our hands
20 and that we were concluding that.

21 MS. BAILEY: Okay. Thank you.

22 CHAIRMAN IGNATIUS: So we have
23 a motion and a second. Any further
24 discussion? Mr. Boisvert.

1 MR. BOISVERT: I'd just like to
2 comment that my reason for wanting to go
3 through it, if you will, line by line, is
4 because there was testimony presented that
5 there were some residual authorities left,
6 even after preemption. Not having seen the
7 planning board's rules, I don't know if any of
8 their rules would in some sense, from this
9 non-lawyer's point of view, match up with some
10 of the case law that was presented. And
11 because there is a possibility that there is
12 something within Antrim Planning Board's rules
13 that would coincide with what a reasonable
14 interpretation of the case law is, that's what
15 I am looking for when we go through this
16 process, is to give some guidance for people
17 out there who will be preparing testimony. I
18 want to see where it matches up or whether
19 there's no chance of it matching up at all.
20 That's how I'll be making my decision.

21 CHAIRMAN IGNATIUS: All right.
22 Thank you.

23 Anything further? If not, all
24 those who are in favor of the motion, please

1 signify by saying "Aye."

2 ALL COMMITTEE MEMBERS: Aye.

3 CHAIRMAN IGNATIUS: All those
4 opposed?

5 (No verbal response)

6 CHAIRMAN IGNATIUS: Any
7 abstentions?

8 (No verbal response)

9 CHAIRMAN IGNATIUS: I also
10 concur in that, and I think that is our
11 unanimous determination.

12 We then need to discuss
13 procedural scheduling. And Mr. Iacopino, can
14 you remind us? I've lost track of who's made
15 a request for extension of time and where we
16 stand and any possible dates that would work.
17 And maybe add to that, we do have a statutory
18 obligation to conclude cases within a certain
19 period of time and how any extension fits into
20 that.

21 MR. IACOPINO: Yes. Presently
22 pending are two motions to postpone the
23 adjudicatory hearings. One was filed by the
24 Industrial Wind Action Group and the other was

1 filed by Counsel for the Public. I believe
2 there's a response from the Applicant
3 indicating a limited assent, based upon
4 getting a final order by November 30th. And
5 is it all right if Ms. Geiger interrupts me if
6 I don't get it right?

7 I think that was the limitation
8 that you had put on your assent to Counsel for
9 the Public's motion, is that as long as it did
10 not extend the calendar for a decision beyond
11 November 30th, which is, in essence, a 30-day
12 extension of the overall calendar?

13 So that's sort of what's before
14 you. I believe various parties have indicated
15 assent to the two different motions. I forget
16 who has. I didn't note any objections at all
17 in what has been filed. If I am incorrect and
18 any of the parties do object to the
19 postponement, you should probably speak up
20 now.

21 MR. ROTH: Excuse me. They
22 were not objections, but there were two
23 parties who indicated an inability to appear
24 for a renewed hearing before October 22nd.

1 MR. IACOPINO: Yes, that's
2 correct. But I also canvassed the Committee,
3 and I don't think that's going to be an issue
4 in terms of the calendar, anyway, 'cause many
5 of the Committee members could not be there
6 for those dates as well.

7 CHAIRMAN IGNATIUS: So the
8 request to extend seems as though, if it's a
9 limited extension, there is no opposition to
10 that, as long as the order is finalized by
11 November 30th.

12 There is further discovery that
13 has been ordered to continue -- to be
14 delivered and which is what leads to the
15 request for further time. And am I correct,
16 that we would need a further date for
17 responsive testimony to be filed?

18 MR. IACOPINO: Well, I would
19 think that, based upon the deliberations that
20 you just had, you would probably want prefiled
21 testimony from any party who desires to
22 present it with respect to which aspects of
23 the subdivision regulations of the Town of
24 Antrim are residually left to the town and

1 which ones are the types of regulations which
2 would -- which have been now --

3 CHAIRMAN IGNATIUS: Preempted.

4 MR. IACOPINO: -- preempted,
5 thank you -- preempted by the Site Evaluation
6 Committee authority. So I understood, at
7 least during that conversation, that we would
8 require that there is scheduled tomorrow a
9 prehearing conference, which was primarily for
10 the purposes of getting exhibits marked and
11 any final motions or things that needed to be
12 resolved before we started the hearings on
13 Monday. I would imagine that would not have
14 to happen tomorrow. But we would have to
15 schedule one of those prior to the next
16 scheduled set of adjudicatory hearings.

17 You also indicated that you
18 wanted to have a separate date for the
19 adjudicatory hearing on the subdivision
20 regulations, and we would need to get dates
21 that the members of the Committee are
22 available for that, as well as when the
23 parties are available, because I do know that
24 some of the parties have indicated some

1 problems with dates in October.

2 So I don't know how you want to
3 address each one of those issues, but...

4 CHAIRMAN IGNATIUS: Yes, I
5 don't know how formal a motion we need,
6 whether we -- it sounds as though there's no
7 concern with a limited extension. Do we need
8 to vote on that or --

9 MR. IACOPINO: Actually, I
10 believe that's a decision that the Chair can
11 make; however, the continuance must be in the
12 public interest.

13 CHAIRMAN IGNATIUS: All right.
14 And we know that because some discovery
15 disputes extended out so that it made it
16 difficult to prepare for the hearings to
17 commence this coming Monday, in my view, it is
18 appropriate to have some more time for that
19 discovery to be received, if not already, and
20 reviewed. And then certainly when we add to
21 it this further issue regarding analysis of
22 the subdivision ordinances, that's going to
23 take some time. And prefiled testimony would
24 be helpful, I think, in sorting out issues

1 that are in contention and those over which
2 there was no dispute could make it a more
3 efficient hearing. So in my view, it is in
4 the public interest to have an extension
5 that's of limited duration and we look for
6 dates that can accomplish all of those goals.

7 MR. IACOPINO: Madam Chair,
8 when I canvassed the Committee for a week of
9 hearings, the week of October 29th appeared to
10 be the week that best suited --

11 UNIDENTIFIED SPEAKER: Is your
12 microphone on?

13 MR. IACOPINO: Is that better?
14 I'm sorry. Thank you.

15 When I canvassed the Committee,
16 the week of October 29th seemed to be the best
17 week for commencement of the planned
18 adjudicatory hearings, if they were to be
19 continued. So that would mean we would have
20 to schedule other things in advance of that,
21 if that remains the date. I can't imagine
22 that we could go beyond that and still get an
23 order out by November 30th, realistically.

24 CHAIRMAN IGNATIUS: And looking

1 for dates for a day to work through the
2 subdivision ordinance, I don't know if people
3 have calendars today and could even determine
4 that. The goal would be to find something
5 within -- you know, far enough out to give
6 people time to prepare, but prior to the
7 October 29th date.

8 MR. IACOPINO: Peter, I'm
9 looking --

10 Do you mind if I ask Public
11 Counsel?

12 CHAIRMAN IGNATIUS: Of course
13 not.

14 MR. IACOPINO: Do you recall
15 who had the issues with the 15th and 22nd? I
16 believe it was --

17 MR. ROTH: I think Mr. Block
18 was one of them, and I don't remember who the
19 other one was.

20 MR. IACOPINO: Mr. Block, what
21 date was your problem with?

22 MR. BLOCK: Anything before the
23 22nd was a problem, leading up to the weekend.

24 UNIDENTIFIED SPEAKER: I

1 recall that Carolyn Foss said that she was
2 chairing a professional conference the week of
3 the 22nd.

4 MR. ROTH: That's consistent
5 with my memory as well.

6 MR. IACOPINO: Had you
7 anticipated that Ms. Foss would be necessary
8 to address the subdivision issues?

9 UNIDENTIFIED SPEAKER: I do
10 not expect that, no.

11 CHAIRMAN IGNATIUS: We can
12 certainly look if -- I don't know if people
13 have calendars and would know whether the week
14 of the 22nd, any day that week would work for
15 you.

16 MR. BOISVERT: If we could
17 avoid Wednesday, but...

18 MR. ROBINSON: That entire week
19 for me is out. I'll be in the North Country
20 that week and unavailable.

21 CHAIRMAN IGNATIUS: Well, then
22 what I think I'd like to do is ask all of the
23 Committee members to, either today or when you
24 get back to your offices, check your calendars

1 and get back to Mr. Iacopino with availability
2 of that week, and I will do the same. And
3 then, based on that, I'll issue a procedural
4 order with new dates that accommodate as many
5 people as we can. And if it can be done in
6 two stages, it will be. If there's no way to
7 make it work in two stages, then we'll have to
8 just have everything commence on the 29th.
9 But we'll see if we can. Similarly, we will
10 work up a date for prefiled testimony on the
11 subdivision ordinance issues, and all of that
12 will be written in a -- submitted in a written
13 order for you to follow. Ms. Geiger.

14 MS. GEIGER: I just wanted to
15 remind the Committee that we had a
16 postponement of yesterday's deadline for
17 submission of supplemental prefiled testimony.
18 So I think that's one more date that needs to
19 be built into the schedule. It doesn't
20 necessarily need to coincide with the deadline
21 for filing information or positions on the
22 subdivision regulations, but I just wanted to
23 make sure that everyone understood that we
24 needed a new deadline for the submission of

1 that information.

2 CHAIRMAN IGNATIUS: Thank you
3 very much.

4 MR. ROTH: Madam Chairman, just
5 one other item that has come to my attention.
6 On August 22nd, the Applicant filed prefiled
7 direct testimony of Ruben Segura-Coto, who is
8 a new witness. He was -- his testimony was
9 not originally filed with the Committee or
10 presented to the parties before that date, and
11 I would submit that the schedule should
12 probably have a limited amount of discovery,
13 and perhaps a technical session built into it
14 to meet this new witness.

15 CHAIRMAN IGNATIUS: Is there
16 any opposition to that request?

17 MS. GEIGER: The Applicant
18 doesn't have a problem with answering written
19 discovery questions. I'm not certain of the
20 witness's availability for an in-person tech
21 session. It may not be necessary, depending
22 on the answers to the questions that we
23 receive.

24 MR. ROTH: If he would even be

1 available by phone. I don't know whether
2 we'll need -- I haven't really even looked at
3 his testimony, but I think it's fairly
4 important. But if we could at least have him
5 available telephonically to answer questions
6 in addition to written, as I said, limited
7 number of written questions.

8 CHAIRMAN IGNATIUS: All right.
9 We will address that in the final order. Mr.
10 Froling.

11 MR. FROLING: Most of us who
12 have been taking advantage of the Wi-Fi have
13 received a message from Jan Murray that we
14 have a hearing tomorrow morning at 10:00.

15 MR. IACOPINO: We're going to
16 take care of that, too.

17 CHAIRMAN IGNATIUS: Yeah, we
18 don't want to confuse people. But formally,
19 it's still on until it's formally not on. So
20 that you for that.

21 MR. FROLING: So, off then?

22 MR. IACOPINO: What I would
23 like is, I would like for -- once the
24 Committee has adjourned, I would like for the

1 parties to stay here so that we can work out
2 dates for, you know, the intermediate dates
3 for prefiling and the other types of things.
4 So...

5 CHAIRMAN IGNATIUS: And I think
6 you can -- the prehearing conference scheduled
7 for tomorrow will be cancelled. We haven't
8 gotten that out formally yet, but it will be
9 cancelled. So you don't need to plan on
10 coming. And if you know anyone who is
11 thinking of coming and who isn't here today,
12 please let them know. We'll obviously have
13 something issued from Ms. Young to get that
14 out to everyone. But to the extent you run
15 into anyone or talk to them anyway, please
16 remind them that that won't be going forward
17 tomorrow.

18 Mr. Iacopino, do we need any
19 formal determination of the procedural things
20 we've just discussed? Or is it understood
21 where we're heading, and a formal order will
22 settle all of that?

23 MR. IACOPINO: I think we'll
24 focus on a October 29th adjudicatory hearing,

1 and we will get dates for the intermediate
2 requirements and give them to you to issue an
3 order.

4 CHAIRMAN IGNATIUS: Then I
5 think that concludes all of the business that
6 we had for today. I really do appreciate
7 everyone's willingness to explore something
8 that we haven't dealt with before. And it's
9 been interesting and I guess sort of
10 surprising that we haven't dealt with it
11 before, but we haven't. So I thank you for
12 all of that. And we will get you an order as
13 soon as we can, recording all of the decisions
14 we made today and the dates for the next phase
15 of this proceeding. So, with that, we will
16 take -- I'm sorry. We will issue all of that
17 in a written form and be in suspension until
18 we reconvene on a date that is yet to be
19 determined. But thank you. We stand
20 adjourned.

21 (Whereupon the hearing was adjourned at
22 1:28 P.M.)

C E R T I F I C A T E

I, Susan J. Robidas, a Licensed
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I further certify that I am neither
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