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CHAIRMAN HONIGBERG: Good morning.

We're here in the SEC's rulemaking docket, which is 2014-04. We're going to pick up with the discussion, pretty much where we're left off the last time we were together in July.

Before we start, it is typical that we introduce our ourselves. And, so, let's do that.

COMMISSIONER SCOTT: Good morning. I'm Bob Scott, with the New Hampshire Public Utilities Commission.

CHAIRMAN HONIGBERG: Good morning. Martin Honigberg, also with the Public Utilities Commission.

VICE CHAIRMAN BURACK: Good morning. Tom Burack, Commissioner, Department of Environmental Services.

COMMISSIONER BAILEY: Good morning. Kate Bailey, Public Utilities Commission.

MS. WEATHERSBY: Patricia Weathersby, public member.

MR. HAWK: Roger Hawk, public member.

DIRECTOR MUZZEY: Elizabeth Muzzey, Department of Cultural Resources.

1 COMMISSIONER ROSE: Good morning. Jeff
2 Rose, with the Department of Resources & Economic
3 Development.

4 CHAIRMAN HONIGBERG: Also in the room
5 are Dave Wiesner, who is a Staff attorney here at the PUC;
6 Mike Iacopino, who is regular outside counsel to the SEC.

7 Mr. Wiesner, I know that we posted
8 something about waivers of rules related to filing. Is
9 that an item of business we can take up here and now? Or,
10 is it just a matter of letting the public know that, if
11 they want to request a waiver regarding the number of
12 copies to file, they should ask for it in their filing
13 process?

14 MR. WIESNER: Yes. I believe that the
15 Chairman will issue or has issued a notice that will be
16 posted regarding potential rule waiver requests regarding
17 the filing requirements. The current rules require
18 filings with the DES, rather than the PUC, and require a
19 number of copies to be filed of application filings and
20 other filings that may be seen as excessive, given the
21 fact that the Committee has fewer members than it used to
22 have. And, so, I think the notice is intended to say that
23 the Committee would consider waiver requests regarding
24 those filing requirements, so that the filings could be

1 made with the PUC, rather than DES, and that fewer copies
2 would be considered adequate.

3 CHAIRMAN HONIGBERG: But we -- and, I
4 take it then, although I've seen that notice, we have not
5 issued it yet, is that a fair statement?

6 MR. WIESNER: I don't believe it's been
7 issued yet, but --

8 CHAIRMAN HONIGBERG: I think -- I
9 actually think you're probably right. Given that there's
10 a number of people who are not around this week, I think
11 that notice may well be on someone's desk.

12 MR. WIESNER: And, the basis for those
13 rule waivers would be the changes in the statute, which
14 changed administrative responsibility for the Committee
15 from the DES to the PUC. And, as I noted, also shrunk the
16 size of the full Committee.

17 CHAIRMAN HONIGBERG: And, we did receive
18 a filing a couple of weeks ago that went to DES, had some
19 issues with it, and it took a little while to sort out.
20 There were also, I think, the required 17 or so copies of
21 the filing, when many fewer were needed. So, we're trying
22 to let the world now, the people who are doing business
23 with the SEC, should try to -- we will try to help them,
24 until we get the rules in place, make sensible decisions

1 about where and how much to file.

2 Is there any other business we need to
3 take up, before we dive back into the rules?

4 MR. WIESNER: Not that I'm aware of.

5 CHAIRMAN HONIGBERG: We'll talk schedule
6 for a minute. We have a meeting scheduled for today. We
7 have two meetings scheduled for next week, I believe.
8 I'll just look at my calendar. We have Tuesday, the 25th,
9 and Thursday, the 27th. We have time on both of those
10 days. It's Tuesday morning and Thursday afternoon.

11 MR. WIESNER: I don't believe formal
12 notices of those meetings have been issued yet, but we are
13 holding those dates. And, I believe the purpose of that
14 meeting, assuming that we can get through the Comments
15 Summary, and all issues that need to be addressed by the
16 Committee with respect to the public comments that were
17 timely filed, the purpose of the meeting next week would
18 be to approve a Draft Final Proposal that could be filed
19 with the Office of Legislative Services, and would be the
20 subject of a public comment hearing that would be held at
21 some point in September.

22 CHAIRMAN HONIGBERG: And, we'd be
23 looking to do that in mid-September?

24 MR. WIESNER: I believe that's what we

1 were looking at. And, no particular date has been
2 selected at this point. But we have a very tight timeline
3 in order to meet the November 1st deadline. And, the
4 JLCAR meeting that we would be targeting occurs on
5 October 15th. And, that really means that the final
6 proposal would need to be filed with Office of Legislative
7 Services/JLCAR by October 1st. So, we have a lot of work
8 to do in September, and a public hearing, as well as a
9 public comment period, and then further meetings of the
10 Committee to finalize the rules proposal.

11 CHAIRMAN HONIGBERG: And, we also have a
12 fair bit of work to do between now and next week. Because
13 the goal will be, will it not, to have a revised version
14 of the rules for this -- for the Committee to review and
15 approve at one of those two dates next week, correct?

16 MR. WIESNER: That's correct. And, then
17 that Draft Final Proposal would be the subject of further
18 public comment, both at the hearing and through written
19 submissions.

20 CHAIRMAN HONIGBERG: Okay. Does anybody
21 up here have questions about the schedule going forward?
22 You should all look for an e-mail with a *doodle.com* poll
23 to try and find some dates that we could meet in September
24 for that public comment hearing, and any other meetings we

1 might need in September.

2 (No verbal response)

3 CHAIRMAN HONIGBERG: Seeing none. All
4 right. Returning to the Comment Issues List, I believe
5 we're on Page 28, which is Item Number 24. Does that get
6 everybody to the right place? Oh, I see lots of nodding
7 heads. That's good. That encourages me.

8 So, if everybody would take a moment or
9 two and familiarize themselves with the place in the rules
10 and the comments as summarized here.

11 (Short pause for members to review
12 comments provided.)

13 CHAIRMAN HONIGBERG: Does anyone have
14 anything they would like to say on this comment section or
15 these issues? Commissioner Bailey.

16 MR. WIESNER: I'm so sorry. I was just
17 going to jump in and say this is -- this "second home
18 issue" that appears as Item Number 24 is really the
19 reaction of many public commenters to the use of the word
20 "permanently occupied building" or "occupied permanent
21 residence". And, I just want to offer up that I believe
22 that previous language changes endorsed by the Committee
23 in the three meetings prior to this one have essentially
24 resolved this issue. And, this language is not -- the

1 language as we see it here, with the word "permanent" used
2 as it is, is not likely to appear in the Draft Final
3 Proposal.

4 I guess I'm trying to suggest that this
5 issue may have gone away.

6 CHAIRMAN HONIGBERG: I think you're
7 probably right. Does anybody have a different memory or
8 different comments on that?

9 (No verbal response)

10 CHAIRMAN HONIGBERG: It seems the answer
11 to that is "no".

12 MR. WIESNER: I think quite a bit of the
13 public reaction was with the suggestion, and I'm not sure
14 this was even the correct interpretation of what the
15 Committee's intent was in the Initial Proposal. But there
16 seemed to be a sense that this was an attempt to exclude
17 seasonal, seasonally occupied residences. Where I think
18 the reference to "permanent" was more in terms of a
19 "permanent structure", as opposed to a tent or trailer,
20 for example.

21 But I believe we may have solved that
22 problem through other language changes previously approved
23 by the Committee.

24 CHAIRMAN HONIGBERG: All right. Let's

1 move on.

2 Next page, which is a catchall, "Other
3 Language Changes Proposed by Public Commenters".

4 MR. WIESNER: Right. The first section
5 of this Summary document, which we've just completed now,
6 focused on what were characterized as "major issues" or
7 "more significant issues". You might characterize them as
8 "policy-level decisions" for the Committee. What this
9 section does is collect many of the more arguably
10 editorial or language change proposals. Some of them
11 related to the larger issues that we've already addressed,
12 some of them quite significant in their own right, some of
13 them perhaps somewhat less significant, but still worthy
14 of consideration by the Committee, I think, in my view.
15 If someone said "put a comma here" or "use this word
16 rather than that word", and they mean exactly the same
17 thing, that is not summarized here. But this is sort of a
18 Tier 2 level of comments, if you will.

19 And, because of the sheer volume of the
20 comments, I chose not to put each one of these on a
21 separate page. Which means it may be a little bit harder
22 to follow along, but each one stands as a separate issue
23 to be addressed. And, you may be glad to hear that, in
24 this area, I did go through sequentially through the

1 rules. So, we start with definitions, and work through
2 the 200s and the 300s, in that order. So, that makes it a
3 little bit easier to follow along with the Initial
4 Proposals as they were filed.

5 CHAIRMAN HONIGBERG: All right. Before
6 we pick that up, I'm going to go off the record for a
7 second.

8 (Brief off-the-record discussion
9 ensued.)

10 CHAIRMAN HONIGBERG: So, back on the
11 record. All right. So, the first one, are we just going
12 to take them one at a time? Is that how to work through
13 this? All right. Let's do it. Commissioner Burack.

14 VICE CHAIRMAN BURACK: I think that the
15 first one, revision to 102.07 makes sense. There's just
16 the word "a" missing before "geographic". So, it should
17 read "'Area of potential visual effect" means a geographic
18 area from which."

19 CHAIRMAN HONIGBERG: Commissioner
20 Bailey.

21 COMMISSIONER BAILEY: If we --
22 Commissioner Burack, do you mean that the rule as written
23 makes sense or the idea to strike "subject to limitations
24 in Site 301.05(b)(4)", which puts some limit on how far

1 the visual impact has to be?

2 VICE CHAIRMAN BURACK: I think,
3 certainly, if you have thoughts on the limitations on
4 distance, then we should talk about that.

5 COMMISSIONER BAILEY: I think it makes
6 sense to say in the rules how -- what we expect for the
7 visual impacts. And, I'm not sure, maybe Mr. Wiesner can
8 help me out here, but, if we eliminate "subject to
9 limitations in Site 301.05(b)(4)", does that make it less
10 specific? Or, because 301.05(b)(4) is still there, then
11 the rule would be "it's limited to 10 miles"?

12 MR. WIESNER: Right. The distances that
13 are set forth, the "10 miles", is for wind projects, but
14 there are other mile limitations that apply for
15 transmission projects. Those are incorporated by
16 reference through this cross-reference to that section,
17 which may not be the most elegant way to construct
18 definitions. But I think striking this language here
19 would lose that concept, and, you know, potentially would
20 result in some mismatch between the specific limitations
21 that appear in that other section and the defined term
22 that's used here.

23 COMMISSIONER BAILEY: So, I guess I
24 think that we should not strike the language.

1 CHAIRMAN HONIGBERG: Commissioner
2 Burack.

3 VICE CHAIRMAN BURACK: Just a question.
4 Can you clarify for us, Attorney Wiesner, what language
5 you think actually now exists in Site 301.05(b)(4)?

6 MR. WIESNER: This is where the scope of
7 the visual impact assessment is specified, in terms of
8 what needs to be included in an application and the study
9 that is done to assess visual impacts. And, this is where
10 we refer to the "10-mile radius" for wind turbines. And,
11 it currently refers to, and I believe we've retained these
12 mile limitations, with some changes to the definitions of
13 "rural", "suburban" to match U.S. Census definitions. But
14 this is where the specifics appear as far as the mile
15 limitations for assessing visual impacts through the
16 studies that need to be included in the application
17 package.

18 I mean, alternatively, this level of
19 detail could be built into the definition. But I think it
20 needs to appear one place or the other, in order for the
21 definition used here, the "area of potential visual
22 effect", to be comprehensive.

23 CHAIRMAN HONIGBERG: Commissioner Scott.

24 COMMISSIONER SCOTT: Again, for Attorney

1 Wiesner. Can you help me out a little bit? Is the "area
2 of potential effect" used elsewhere? Remind me where else
3 it is. I'm just -- if we kept the reference to
4 "301.05(b)(4)", is that inclusive enough? Or, are we --
5 or, now, you know, if it's a generating facility, for
6 instance, are we -- is there any reference to "area of
7 potential effect" for any other type of source? I don't
8 remember that. But I just -- I hate to be so exclusive on
9 one set of -- one set of type of facilities that we're
10 missing the more global set.

11 MR. WIESNER: Well, I think what's
12 happening here is that there are -- that there are
13 specifically defined limitations, in terms of area, which
14 apply to wind projects and transmission projects. There
15 is no such thing for generation projects. So, the visual
16 impact assessment for a generation project would not cover
17 a specifically defined area, but it would be submitted
18 with the application, I would believe, and then would be
19 the subject of the adjudicative process to determine
20 whether it's deemed adequate. And, perhaps there should
21 be greater specificity for other types of projects.

22 I think, when he discussed this issue
23 initially, that was not raised as a significant concern.
24 What I'm concerned we not lose here is the use of the

1 defined term, and I can't tell you exactly where it's used
2 throughout the rules, but it is -- it needs to
3 incorporate, in my view, those specific limitations, which
4 appear in the cross-referenced section, 301.05(b)(4).

5 CHAIRMAN HONIGBERG: Director Muzzey.

6 DIRECTOR MUZZEY: Excuse me. Just a
7 point of clarification. We have two different definitions
8 that sound very much alike. We have "area of visual
9 potential effect", I believe -- "potential visual effect",
10 and then we have "area of potential effect". And, the
11 phrase that incorporates "visual" is used for aesthetic
12 considerations. And, then, the shorter "area of potential
13 effects" is used for historical considerations. When we
14 use the "visual" definition, that includes those specific
15 mile/half-mile limitations. And, for historical, as
16 currently written, it's left that it depends on the nature
17 of the project as to what that -- how that is defined.

18 CHAIRMAN HONIGBERG: Commissioner
19 Burack.

20 VICE CHAIRMAN BURACK: Thank you.
21 Director Muzzey, can you point to us what the cite would
22 be in the draft proposal, at least the Initial Proposal,
23 to a definition of "potential effect"? I'm not finding
24 it.

1 DIRECTOR MUZZEY: This may take me a
2 minute. And, it may be something that was added since
3 this proposal.

4 It's actually been -- it's in language
5 that was added to 301.06, "Effects on Historic Sites".
6 And, it doesn't appear in the Definition section. But it
7 is defined at 301.06, depending on what version you're
8 looking at, it's either (b) or (c). And, that's in the
9 section as to what should be included in application
10 materials.

11 VICE CHAIRMAN BURACK: Okay. Thank you.
12 I guess this may just be a question of drafting style for
13 Attorney Wiesner. But, if we're referencing a definition
14 as it does appear here, at least the version I have is
15 301.06(c), I believe, it does -- it says "Identify all
16 historic resources located in the proposed facility area
17 or within the area of potential effects as defined in 36
18 C.F.R. Section 800.16(d)." If we're referencing the
19 federal definition, should we include those also in our
20 set of definitions and in our rules, or not? Perhaps
21 that's just a style issue to discuss with OLS.

22 But, I think the broader question that's
23 being raised, and the point that I take from your comment,
24 Director Muzzey, is that, under that definition, there may

1 be a minimum sort of specified, but there also is the
2 potential for the agency that is doing that review to
3 require something additional beyond that minimum, if,
4 under those circumstances, it seems appropriate.

5 And, from my perspective, that's the
6 same principle that I would like to see us ensure that
7 we're applying and looking at the definition in Site
8 102.07. That is, I can see us setting a minimum standard
9 that, in an application, an applicant would have to
10 satisfy to show that they have at least analyzed the area
11 of potential visual effect for that distance. And, it may
12 be -- or, set of distances. And, it may be as appears now
13 in I guess it's 301.05(b)(4), as we have amended it.

14 But I would certainly hope that the
15 Committee would have the authority to require additional
16 analyses beyond those specified distances, where the
17 Committee deems that that's necessary and appropriate to
18 allow the Committee to make a full evaluation of the
19 application.

20 Is that, what I've described, Attorney
21 Wiesner, consistent with your understanding of the way you
22 believe the rules as currently drafted would operate or
23 not?

24 MR. WIESNER: I mean, we addressed this

1 specific issue in a prior meeting. And, I believe where
2 we landed was to continue to -- because we're now talking
3 about the substance of what's included in this other rule,
4 which is the mile limitations. And, this is what is
5 required for an application. This doesn't necessarily
6 prejudge what may be found by the Committee, in terms of
7 unreasonable adverse effects or how they might be
8 mitigated. But these are the limitations on what is
9 required for a study that would be submitted with an
10 application. So, you don't have to go beyond 10 miles for
11 a wind farm.

12 CHAIRMAN HONIGBERG: Commissioner Scott.

13 COMMISSIONER SCOTT: Hopefully, this
14 will help. I think, when I read this, the issue is the
15 word "limitations". So, I think that may -- you know,
16 when I read "limitations", it means "you can't exceed
17 this". And, I think what I'm hearing Attorney Wiesner
18 say, under the 301.05, is "these are the minimum things
19 that a assessment shall include", correct? Not to mean
20 that "you can't look beyond that", is that not correct?

21 MR. WIESNER: Well, the definition of
22 "potential visual effect" here keys off of the
23 limitations, the minimums that are required under the --
24 what we would call the "substantive rule" that specifies

1 what needs to be included in an application.

2 COMMISSIONER SCOTT: So, what I was
3 going to suggest is that we don't use, in the definition,
4 "subject to limitations", but perhaps something like
5 "taking into account Site 301.05" or something like that.
6 At least, to me, that's where I get hung up on. When I
7 see that "limitations" in the definition, it means to me
8 that "we can't go beyond that". And, I think that's
9 the -- what the AMC's comments, too, were. We should be
10 able to have a little bit more flexibility. And, I'm just
11 worried that -- I think that "limitations" is the word
12 that strikes me as the problem.

13 MR. WIESNER: I mean, we have previously
14 addressed what the minimum requirement would be. And, I'm
15 pretty certain that we -- the Committee was satisfied that
16 these limitations on what's required were appropriate.
17 What I'm now perhaps seeing is that, if someone were to
18 say, "even though I'm only required to study 10 miles, I'm
19 going to study 15", it may be that this definition should
20 capture that. In other words, whatever you study in your
21 study, even if it's not the minimum, is perhaps what
22 should be the substance of this definition. In other
23 words, the "area of potential visual effect", and I think
24 we're going to call that "impact", if memory serves, based

1 on prior meetings, it probably ought to refer to what was
2 actually studied, which has a minimum of 10 miles for a
3 wind project, but could go further. Whether it could go
4 further because the Committee requires it, I think
5 probably the answer is "no". Because I think we've
6 decided that, previously the Committee decided that the
7 limitations that were specified here were sufficient, and
8 that that's -- that would be the substantive rule that
9 would apply. What we're really talking about now is "what
10 is this definition that will be used in other respects
11 throughout the rules?"

12 CHAIRMAN HONIGBERG: What about just
13 taking out the two words "limitations in"? So, it says
14 "subjects to Site 301.05(b)(4)"?

15 MR. WIESNER: I mean, that may not be as
16 clear as what's intended. If what's intended is -- I
17 mean, one way to approach this is to say "The area of
18 potential visual impact/effect for a project is what was
19 studied. However, what was studied cannot be less than
20 what's required to be studied pursuant to the substantive
21 application rule."

22 CHAIRMAN HONIGBERG: And, that leads to,
23 I think, an inquiry about "where else this phrase is used
24 in the rules?" Because, if that's what it means, then you

1 really do need to know specifically where else it's
2 referenced, I think.

3 Director Muzzey.

4 DIRECTOR MUZZEY: I would agree with
5 Commissioner Burack, and given that this is in the
6 Definitions section, to have a more generalized definition
7 of this "area of potential visual effect". And, one of my
8 reasonings was that it could be used elsewhere in the
9 rules as well, and we haven't done that thorough search.
10 But, also, it seems to be a term that will be even used
11 within hearings and public comment, and that a more
12 general definition would provide the Committee and the
13 public and the applicants with the flexibility they need.

14 Coming from my field, we often use "area
15 of potential effect" versus the "area studied" as two
16 different potential -- potentially different areas. And,
17 it's better to be more specific in those, rather than more
18 general.

19 I think it would also be helpful moving
20 forward, when it comes time to perhaps update the rules,
21 that we only need to update this in one place, which would
22 be in 301.05, versus in the Definitions as well.

23 CHAIRMAN HONIGBERG: Attorney
24 Weathersby.

1 MS. WEATHERSBY: I think, too, if we
2 left it more general by striking the "subject to
3 limitations" phrase, it would clearly give us the ability
4 to require further study, a larger -- more than what the
5 minimum of 301.05 requires. Because I am struck by the
6 letter of July 29th, 2015, from the AMC and the Forest and
7 Audubon Society, about the turbines and transmission poles
8 getting higher and higher, and that lights in towers can
9 often be seen longer than 10 miles.

10 So, I -- well, there may be occasions
11 that we want something studied that is more than --
12 includes more than 10 miles radius, I think, by striking
13 that last clause, it would give us more flexibility.

14 CHAIRMAN HONIGBERG: So, what's the
15 consensus? Is there a consensus?

16 COMMISSIONER BAILEY: I respectfully
17 disagree. I think that rules are supposed to set
18 limitations, so that the applicants know what they have to
19 file. And, if we -- if we strike it, then they don't know
20 what they have to file, for things other than wind
21 projects. And, so, I'm not really sure how to fix this
22 problem, but I think that we need -- the rules should be
23 clear in what we expect people to file.

24 MS. WEATHERSBY: I think the 301.05

1 clearly says "they're expected to file, you know, this,
2 based on these radiuses around the project." But this --
3 but modifying 102.07 would allow us then to say "hey, you
4 know, you studied this, but, you know, it's clearly" --
5 "it looks like it's going to be able to be seen, we are
6 hearing testimony or whatever, it's going to be able to be
7 seen from 15 miles." It gives us the flexibility to say
8 "expand your study." But, as an initial application
9 requirement, that's set forth in 301.05 that says "you
10 need to study X."

11 COMMISSIONER BAILEY: My understanding
12 of the distinction here was that 301.05 applies only to
13 wind projects.

14 CHAIRMAN HONIGBERG: No.

15 COMMISSIONER BAILEY: And, so, by
16 putting this in the definitions "area of potential visual
17 effect" -- that's not right? Okay.

18 MR. WIESNER: If I can just jump in and
19 answer Commissioner Scott's question from before. One
20 place where the defined term is used is in the "siting
21 criteria" section, which is 301.14(a)(1). And, this is
22 where the Committee must decide that a proposed energy
23 facility -- determining whether a proposed energy facility
24 will have an unreasonable adverse effect on aesthetics,

1 the Committee must consider the existing character of the
2 area of potential visual effect. And, it says "in the
3 host community and communities abutting or in the vicinity
4 of the proposed facility." So, this is a requirement that
5 the Committee consider what the visual impacts would be in
6 this area, which is defined, and is currently defined with
7 reference to the minimum requirements that are set forth
8 in 301.05, which is the "application" section.

9 And, I think -- I think Commissioner
10 Bailey raises a valid point, that one of the purposes of
11 the rules, as I understand it, is to provide greater
12 certainty to applicants into what's necessary for a study
13 to be conducted prior to submission of an application.

14 CHAIRMAN HONIGBERG: Commissioner Scott.

15 COMMISSIONER SCOTT: Having heard all
16 that, I still -- I think I do agree that striking that
17 language I think gives us the flexibility. I think the
18 "301.05" language again is what's required to put in your
19 submittal package, that is prescriptive, as it should be.
20 But I do agree that giving the Committee some flexibility
21 does make sense. And, reading this "301.14" language, I
22 guess I've not changed my thought on that. And, it's not
23 a -- I don't see striking that language will have a
24 negative impact, and I support that.

1 CHAIRMAN HONIGBERG: Commissioner Scott
2 proposes that we strike the phrase "subject to limitations
3 in Site 301.05(b)(4)". And, I think Director Muzzey
4 seconds that, that proposal.

5 (Director Muzzey nodding in the
6 affirmative.)

7 CHAIRMAN HONIGBERG: Is there a sense of
8 the group as to whether they agree with that? Who agrees
9 with that? Show of hands?

10 (Show of hands.)

11 CHAIRMAN HONIGBERG: Who disagrees with
12 that?

13 (Show of hands.)

14 CHAIRMAN HONIGBERG: All right. So,
15 we're going to move on from there.

16 Next item is definition of "historic
17 resources" -- or, "historic sites", rather, in 102.17.
18 And, the proposal is to add a sentence.

19 MR. WIESNER: I believe this issue has
20 been addressed in the -- at the last meeting, when we
21 considered the comments of the Preservation Alliance and
22 the National Trust for Historic Preservation. So, I want
23 to suggest that I believe that this comment has already
24 been covered through that change that was approved at the

1 last meeting, and that we might consider just moving on.

2 CHAIRMAN HONIGBERG: The next point is
3 the definition of "Key Observation Point", in 102.18.

4 (Short pause for members to review
5 comments provided.)

6 CHAIRMAN HONIGBERG: Mr. Wiesner, do you
7 know where the definition, as it -- as it was in the
8 Initial Proposal, where that came from? Is that existing
9 language or did we pull that from somewhere?

10 MR. WIESNER: I don't recall where that
11 exact language came from. I will say that this definition
12 is used in two places that I was able to find, both in the
13 context of the photosimulations that need to be presented
14 with an application, and also where night lighting on wind
15 turbines per FAA requirements is referenced, in
16 301.05(b)(8).

17 CHAIRMAN HONIGBERG: Commissioner
18 Burack.

19 VICE CHAIRMAN BURACK: Mr. Chairman, I
20 think that this is a helpful change. I think the earlier
21 definition would have been very challenging to apply. I
22 think this is sufficiently specific and yet flexible
23 enough to provide the necessary guidance. And, I think
24 will be more workable and more helpful to the parties.

1 So, I would support this change as proposed.

2 CHAIRMAN HONIGBERG: I see a few people
3 nodding heads. Do people generally agree with what
4 Commissioner Burack just said?

5 COMMISSIONER ROSE: Yes.

6 DIRECTOR MUZZEY: Yes.

7 CHAIRMAN HONIGBERG: It would seem so.

8 Moving on.

9 Definition of "Scenic Quality", which is
10 in 102.35.

11 (Short pause for members to review
12 comments provided.)

13 CHAIRMAN HONIGBERG: Director Muzzey.

14 DIRECTOR MUZZEY: My question with this
15 specific language that could be added is -- so, for each
16 project, will we need a town or city vote on the project's
17 scenic impacts? Because that could introduce an arduous
18 task for communities.

19 CHAIRMAN HONIGBERG: I don't know how
20 this would be applied. I read this, and I can envision
21 referenda on whether something is "pretty". That's what
22 it looks like it's calling -- or, it would offer up the
23 opportunity for people to do that, to have ballot
24 questions. For those who were here for the Antrim Wind

1 Petition for Jurisdiction, there could be referenda on the
2 attractiveness of that, of the lake -- the pond that we
3 heard about at some length. And, I think there would be
4 significant disagreement within the Town, based on what we
5 heard, about whether that's a "pretty site" or not.

6 But I think the base definition is a
7 very soft definition as it is, but this just adds -- I
8 think what this does, is it adds the ability of the
9 hosting town or a neighboring town's ability to weigh in
10 on the scenic quality of the area being affected by a
11 potential project. That's how I read this.

12 Commissioner Burack.

13 VICE CHAIRMAN BURACK: Before getting to
14 that question, if I even go there at all, it would be
15 helpful to understand from you, Attorney Wiesner, if you
16 know, where is the term "scenic quality" used in the
17 rules? How does this come into play?

18 MR. WIESNER: It's used in the reference
19 of "scenic resource", which actually appears below on this
20 page. And, it's also used in the definition of "visual
21 impact assessment". And, then, it appears as well in the
22 "application" section that defines the "visual impact
23 assessment" that we were just looking at, which is
24 301.05(b)(2). So, it is a qualifier that applies to those

1 scenic resources and elements that need to be studied in
2 connection with an application.

3 CHAIRMAN HONIGBERG: Commissioner Scott.

4 COMMISSIONER SCOTT: I would move that
5 we do not accept that change. I think the "scenic
6 quality" definition as is is general enough that it could
7 include host town's perceptions. You know, as written
8 without that modification, it does allow that, I think,
9 certainly. And, frankly, being broader, you know, what if
10 the town doesn't view it that way? Right now, it just
11 says "a reasonable person's perception". So, the
12 landowner or, you know, other people may view it that way.
13 So, I don't see that adding the "host town's perception"
14 adds anything in that general definition as is.

15 CHAIRMAN HONIGBERG: Commissioner Scott
16 suggests that we make no change to the definition as it
17 appears in the proposal.

18 COMMISSIONER BAILEY: And, I'll second.

19 CHAIRMAN HONIGBERG: I see a nodding of
20 heads.

21 COMMISSIONER BAILEY: I'll second.

22 CHAIRMAN HONIGBERG: All right. We will
23 make no changes to that.

24 The next is "Scenic Resource Definition

1 - 102.36".

2 (Short pause for members to review
3 comments provided.)

4 CHAIRMAN HONIGBERG: Thoughts or
5 comments on this section?

6 MS. WEATHERSBY: I like the AMC's
7 version. I think it's, you know, drafted well, with
8 having "the public legal right of access" at the top,
9 rather than it mentions general places down below.

10 I also think it's important to include
11 "scenic drives and rides", which is Kancamagus Highway or
12 other scenic highways, "and properties listed on the
13 Historical Register for which the landscape is an
14 important component". So, I think it's a well-thought-out
15 change, and I would be in favor of that.

16 CHAIRMAN HONIGBERG: Commissioner
17 Burack.

18 VICE CHAIRMAN BURACK: I share Attorney
19 Weathersby's views as well, and I would support that
20 change as proposed. Thank you.

21 CHAIRMAN HONIGBERG: Commissioner Rose.

22 COMMISSIONER ROSE: Thank you. I, too,
23 am comfortable with the language that's recommended by the
24 AMC. In particular, it does reference the "New Hampshire

1 Division of Travel and Tourism". And, while we are
2 certainly stewards and promoters of our tourism industry
3 in this state, we don't have an exclusive list of all such
4 sites. So, I am comfortable with removing the specific
5 reference to the Division as a arbiter of these exclusive
6 sites.

7 CHAIRMAN HONIGBERG: Director Muzzey.

8 DIRECTOR MUZZEY: I also find that the
9 definition on the right is a very clear summary of the
10 types of resources the public and this Committee
11 considers. I would like to suggest that the very final
12 item, "properties listed on the state or national register
13 for which scenic character is an important component",
14 we've actually defined "historic properties" elsewhere in
15 the rules in a different matter. And, for consistency
16 sake, I would suggest that we use the term as it's been
17 defined in the Definitions section, instead of "properties
18 listed on the state or national registers".

19 CHAIRMAN HONIGBERG: Are you referring
20 to the definition of "historic sites"?

21 DIRECTOR MUZZEY: Yes.

22 CHAIRMAN HONIGBERG: So, we could just
23 replace that last phrase with the phrase "historic sites",
24 and we would be good?

1 DIRECTOR MUZZEY: Yes. I think that
2 would be far -- it would be more consistent. And, it
3 would be replacing "properties listed on the state or
4 national register of historic places" with "history
5 sites".

6 And, it also offers the applicant a more
7 consistent way of quantifying all of those resources as
8 well.

9 CHAIRMAN HONIGBERG: So, the AMC version
10 of that section, as modified by Director Muzzey, is that
11 how people want to go? I see nodding heads. Good.

12 MR. WIESNER: Can I just point out that
13 one of the changes that's proposed by the Various Energy
14 Companies and EDP is to delete the reference to "municipal
15 authorities" as a source of designation for scenic
16 resources. In other words, their proposal would limit
17 such resources to those designated by national or state
18 authorities, as opposed to municipal. And, I think
19 perhaps the basis for that concern is that local
20 opposition may result in designation of scenic resources
21 designed to create a roadblock for development in that
22 particular community.

23 CHAIRMAN HONIGBERG: Commissioner
24 Burack.

1 VICE CHAIRMAN BURACK: Thank you. On
2 one level, I hear that concern. On another level, I think
3 it's not recognizing that there are, to my knowledge, at
4 least one, and possibly more, existing legal authorities
5 by which communities can designate particular resources as
6 having scenic qualities. For example, there is a -- I
7 believe there's a "scenic road" designation provision in
8 state statute. Am I mistaken about that? And, there may
9 be others as well. So, I think municipalities already do
10 have such authorities, and I would certainly, you know,
11 think that we would want to ensure that whatever
12 authorities are, you know, legally granted to
13 municipalities to make such designations by the
14 Legislature would, in fact, be understood and respected
15 here.

16 One other related comment I would make
17 here is that, if we're going to adopt this change that
18 Director Muzzey has suggested, I think that reinforces in
19 my mind that we need to not just reference the definition
20 of 36 C.F.R. Section 800.16(i), but we actually need to
21 spell that out in full in our rules, so that that full
22 definition is there in our rules. People don't have to go
23 looking elsewhere to find it.

24 CHAIRMAN HONIGBERG: I would talk with

1 the Office of Legislative Services before doing that,
2 because there's a -- if you repeat a rule from elsewhere,
3 and that rule gets changed, you're dealing with the rule
4 as you have laid it out. If you just reference the
5 existing rule, if it gets changed, the changes come with
6 that change into your rules.

7 So, I would just make sure that Office
8 of Legislative Services understands what the intention is
9 and can advise us on how best to handle that.

10 VICE CHAIRMAN BURACK: Mr. Chairman,
11 thank you. Your point is well taken. And, certainly, if
12 the recommendation is that we have to just cite it by
13 reference, then, in order to address the concerns you've
14 raised, then that would be the appropriate way to do it.

15 CHAIRMAN HONIGBERG: So, how do people
16 feel about the municipal issue?

17 COMMISSIONER SCOTT: Keep it in.

18 CHAIRMAN HONIGBERG: Commissioner Scott
19 says "keep it in". Director Muzzey.

20 DIRECTOR MUZZEY: I would agree. While
21 I understand the Energy Companies' concern with that type
22 of behavior at the local level, I think taking it out also
23 ignores the work of towns and cities across the state
24 through time of designating special places and noting and

1 protecting them. And, so, we would be ignoring a far
2 greater -- potentially ignoring a far greater amount of
3 resources than what the Energy Companies are concerned
4 with. And, so, I would side with keeping it in.

5 CHAIRMAN HONIGBERG: Any other thoughts?
6 Yes, Commissioner Burack.

7 VICE CHAIRMAN BURACK: The only question
8 I would have is whether, in order to ensure that whatever
9 designations are done are done according to existing
10 statutory authority, that we just confirm that the
11 language as drafted covers only that. That, you know, a
12 designation couldn't simply be, for example, a vote at a
13 town meeting, you know, "let's just say this is a
14 beautiful place over here", as opposed to a vote in a town
15 meeting that cites a specific state statute that gives the
16 municipality the authority to designate that particular
17 resource as a resource protected for its scenic quality.
18 Again, because the Legislature has directly conferred upon
19 the municipalities the authority to be able to make such
20 designations. I would just want to make sure that that's
21 clear here.

22 CHAIRMAN HONIGBERG: Attorney
23 Weathersby.

24 MS. WEATHERSBY: I guess I would want to

1 know how many -- what types of designations can be made.
2 And, maybe it's my ignorance here. But, if they're only
3 to designate highways, say, rather than an historic
4 building or a beach or viewpoint or building, I would hate
5 to limit it to just what has already been decided by the
6 Legislature. So, I --

7 CHAIRMAN HONIGBERG: I think what
8 Commissioner Burack is suggesting is some addition to the
9 language that would require the designation by a municipal
10 authority to have a specific basis in state law. That's
11 what -- I think that's what he's suggesting.

12 VICE CHAIRMAN BURACK: Yes.

13 CHAIRMAN HONIGBERG: I think my reaction
14 to that is, the applicants -- the companies know how to
15 identify what are inappropriate or invalid designations,
16 and they will point them out in the process of whatever
17 proceeding is going on, that that wasn't done under a
18 valid authority under state law or, you know, it's an
19 inappropriate designation of, you know, the "historic Town
20 of Mannsville". I mean, I don't -- I think that's -- I
21 think they are generally able to take care of themselves
22 with respect to matters like that.

23 Commissioner Burack.

24 VICE CHAIRMAN BURACK: I appreciate your

1 comment. I think, to provide clarity for all concerned,
2 we might consider inserting after the word "designated"
3 there, "designated pursuant to applicable authority". I'm
4 open to other language, but I'm just trying to -- or,
5 "designated pursuant to applicable statutory authority".

6 COMMISSIONER BAILEY: Chairman
7 Honigberg.

8 CHAIRMAN HONIGBERG: Commissioner
9 Bailey.

10 COMMISSIONER BAILEY: If we leave it to
11 the applicant to prove that it's invalid, then does the
12 Site Evaluation Committee have to decide whether the town
13 followed the rules and the statutes? And, I mean, that
14 just seems like a big issue that we're going to have to
15 decide and arbitrate that we might address with
16 Commissioner Burack's -- some language consistent with
17 what Commissioner Burack is suggesting.

18 CHAIRMAN HONIGBERG: I have multiple
19 reactions to that, but none of them are really that
20 helpful. I mean, there's going to be 250 items that the
21 Site Evaluation Committee is going to have to adjudicate,
22 from large to small, when a controversial project comes
23 in. Adding that to the mix is not going to be a heavy
24 lift.

1 But I am open to the idea that, if we
2 can come up with a smooth phrase to modify the
3 designation, I'm not averse to it. It's got to be a valid
4 exercise of the body's authority to designate.

5 Director Muzzey.

6 DIRECTOR MUZZEY: I can understand the
7 need to make this a little tighter. However, are all of
8 these designations actually done under federal or state
9 law or rule? I'm thinking of certain large nonprofits
10 that may offer these types of designations. I think
11 there's a National Association of Fire Towers, for
12 instance, that is a nonprofit, or some sort of nonprofit
13 related to that field where you can list your fire tower.
14 And, that would be done under a law, but it's done under a
15 recognized process, and applications are vetted with
16 criteria and that type of thing. So, my concern is
17 limiting it to just "state and federal law" may leave
18 other types of long-recognized designations out of this
19 mix.

20 CHAIRMAN HONIGBERG: Well, the AMC
21 didn't pick up on that. The AMC didn't suggest that the
22 Nonprofit Fire Tower Board would be able to include
23 designations.

24 DIRECTOR MUZZEY: Well, nor did they --

1 CHAIRMAN HONIGBERG: But, if you want to
2 expand it, I mean --

3 DIRECTOR MUZZEY: Nor did they limit it
4 to statutory processes.

5 CHAIRMAN HONIGBERG: But they talk
6 about -- I'm sorry, I didn't mean to interrupt.

7 DIRECTOR MUZZEY: That's fine.

8 CHAIRMAN HONIGBERG: But they did say
9 "national, state or municipal authorities". So, I mean,
10 that's the phrase that was in the rule, they didn't
11 suggest a change to that. I'm not sure how broadly you
12 want to do this. I mean, if there's a nonprofit
13 association that gets together to -- I mean, there will be
14 one. That's actually something I can guarantee you.

15 DIRECTOR MUZZEY: Now there will be.

16 CHAIRMAN HONIGBERG: There will be.
17 There will be. There will be nonprofit associations in
18 towns that are affected by controversial projects that
19 will designate every inch of the proposed route as
20 historic in some way. That's a given, if you give -- if
21 you open up that opportunity.

22 And, having just said that "the
23 companies are good at protecting themselves from what are
24 not truly legitimate designations", then we're opening the

1 door wide open to turning the SEC process into a circus.
2 And, we're going to try to avoid that, if we can.

3 So, Attorney Wiesner, perhaps you and I
4 can come up with a simple phrase to modify the designation
5 in here that we can bring back when the group is
6 considering changes to the draft proposal, to address
7 Commissioner Burack's concern. Is that a fair assignment
8 for --

9 MR. WIESNER: If -- excuse me. Yes. I
10 was going to say, if that's the direction of the
11 Committee, we can certainly take a shot at that.

12 CHAIRMAN HONIGBERG: Is that the
13 direction of the Committee? I see nodding heads. All
14 right.

15 Next item. "Sequential Observation,
16 102.37."

17 (Short pause for members to review
18 comments provided.)

19 VICE CHAIRMAN BURACK: Mr. Chairman.

20 CHAIRMAN HONIGBERG: Commissioner
21 Burack.

22 VICE CHAIRMAN BURACK: Could I again ask
23 Attorney Wiesner if he can help us understand where and
24 how this term appears in the rules? And, I don't know if

1 it also relates to that next definition, we have
2 "successive observation" definition. Are those both
3 operable in the same place in the rules or how do they
4 appear?

5 MR. WIESNER: Yes. And, they both are a
6 factor of cumulative impacts, which is in the rules, as
7 proposed in January, only applies to wind projects, but,
8 pursuant to previous Committee direction, will now apply
9 to all energy facilities. So, both of these definitions,
10 "sequential observation" and "successive observation", are
11 basically ways of measuring the impact of multiple
12 facilities which may be viewed from a single point.

13 VICE CHAIRMAN BURACK: And, could you
14 please help us understand where in the rules those
15 provisions appear?

16 MR. WIESNER: You'll see those defined
17 terms used in 301.16(a).

18 VICE CHAIRMAN BURACK: Thank you.

19 (Short pause for members to review
20 comments provided.)

21 CHAIRMAN HONIGBERG: Attorney Wiesner,
22 could you refresh my memory as to how we are expanding
23 this "cumulative impact" concept to other types of
24 facilities, since 301.16, by its terms in the draft, is

1 just related to wind?

2 MR. WIESNER: Right. This, the defined
3 term, and basically language that looks like this, would
4 apply to all energy facilities, not just wind projects.

5 CHAIRMAN HONIGBERG: So, they're going
6 to be in an analogous section to 301.16 that would apply
7 to other types of facilities or would we just eliminate
8 the reference to "wind" and make it so that 301.16 is a
9 section of broader applicability?

10 MR. WIESNER: Well, exactly where that
11 appears is almost an editorial choice, I would say. But,
12 perhaps, in 301.14, which is the generally applicable
13 section that deals with unreasonable adverse effects on
14 aesthetics, for example, would also incorporate this
15 concept of "cumulative impacts" of multiple facilities.

16 CHAIRMAN HONIGBERG: Thank you. Well,
17 since I think we're going to take these two together, the
18 proposal to change the "successive observation", since it
19 is I think intended to be different from the "sequential"
20 one, where, in the first one, you can see multiple things
21 at the same time, the "successive" I think is intended to
22 pick up the concept that you don't see multiple ones at
23 the same time, you see them one after another. The
24 proposed change I think is inconsistent with the purpose.

1 I think making the change would essentially make the
2 definitions one. I see one nodding head. That's
3 encouraging.

4 So, to finish -- I'm sorry, Commissioner
5 Bailey, just let me finish. To finish the thought, then I
6 don't think I support the proposed change to the
7 "successive observation" definition.

8 Now, Commissioner Bailey, I'm sorry.

9 COMMISSIONER BAILEY: I think I -- I
10 think I agree. I just want to ask Mr. Wiesner, I was
11 trying to figure this out on my own, and tell me if I got
12 it right. So, "combined" means the viewer can see
13 multiple energy facilities from a stationary point.
14 "Sequential" means the viewer can see multiple energy
15 facilities from different viewpoints while moving? Or,
16 is -- and, then "successive" is that you're standing and
17 looking in one direction, and then you turn around and
18 look in the other direction?

19 MR. WIESNER: I believe that's correct,
20 Commissioner Bailey. The "successive" is -- the sense of
21 "successive" is, I'm looking in one direction -- I'm
22 standing in one place, I look in one direction, I see a
23 wind project, let's say, and I turn my head and I see
24 another one. And, "sequential observation" is I'm hiking

1 on a trail, and I see a project at one point on the trail,
2 and then 50 feet further on I see a different project.

3 COMMISSIONER BAILEY: Okay. Thanks.

4 CHAIRMAN HONIGBERG: Commissioner Scott.

5 COMMISSIONER SCOTT: I see the biggest
6 suggested change here on "sequential observation" as being
7 adding the sound component, right? So, that's beyond
8 where we were originally, certainly. And, my first
9 thought was "well, that doesn't belong there." But it
10 begs the question to me, so, bear with me, and maybe you
11 can help me -- the group here can help me with the rules.
12 So, if we have Wind Facility A, and our -- my
13 understanding of the sound standards, as it's written
14 right now, as proposed, there's the facility, the
15 individual facility can't exceed 45 dBA or 5 dBA above
16 background levels. So, that's for that facility. So, if
17 there's a different facility within earshot, how do we
18 address the cumulative impacts of those two -- the noise
19 from those two facilities? And, I don't know if I'm being
20 clear enough. But how do we ensure that those noise
21 levels aren't added -- added on top of each other in some
22 way, so now we have somebody within that earshot of having
23 to deal with something higher than the 45 dB level? Does
24 that make sense?

1 MR. WIESNER: I mean, "exactly how
2 not-to-exceed limits would be applied where you have
3 multiple facilities that can all be heard simultaneously?"
4 is an interesting question. I'm not sure that this
5 definitional change would capture that or cover that.
6 Because, again, where this applies is in the definition or
7 the use of the "cumulative impacts" definition and the
8 analysis of cumulative impacts, which I take to be more of
9 an all-in balancing test to determine if the cumulative
10 impacts of multiple projects would have an unreasonable
11 adverse effect in themselves, which might lead to a denial
12 of an application or condition or additional mitigation
13 required.

14 CHAIRMAN HONIGBERG: Director Muzzey.

15 DIRECTOR MUZZEY: With the addition of
16 the phrase "or hears" in this, it also brings a question
17 to my mind with "from different viewpoints". When
18 "sequential observation" was limited to what a person
19 could see, from different viewpoints, that specified
20 certain points along the trail, for instance. Where, if
21 we're including "hears", you don't need to do that at a
22 point where you can see anything. "Hears" is all along
23 the trail. And, so, I think we would have to discuss
24 "from different viewpoints" as well to see if that would

1 need to be changed.

2 I don't have a solution to that. But it
3 does raise that, that need.

4 MS. WEATHERSBY: Except I don't think
5 "viewpoints" is a defined term by itself. So, "viewpoint"
6 could be anywhere and a "hearing point" could also be
7 anywhere. Can a "hearing point" be a "viewpoint", I guess
8 is the question?

9 DIRECTOR MUZZEY: I was thinking that,
10 as we talked about things like "views" and "vistas", that
11 these rules should actually define "viewpoint", in order
12 to be thoroughly clear. But I believe you're right. We
13 haven't yet.

14 MR. WIESNER: I'll just point out that,
15 in 301.16(a), which is the additional criteria relative to
16 wind energy systems, where "cumulative impacts" is
17 referenced, the defined terms that we're looking at now,
18 "successive observation" and "sequential observation", are
19 used only with respect to aesthetics, and not with respect
20 to sound or noise issues. So, it seems somewhat out of
21 place then to include "hears" in this definition.

22 On the other hand, you know, a change
23 that might be more appropriate, perhaps, is to clarify the
24 "cumulative impacts", and specifically clarify that

1 "cumulative impacts" includes noise issues as well. Not
2 to suggest that it doesn't already, but it's not
3 specifically called out as "aesthetics" are.

4 CHAIRMAN HONIGBERG: Commissioner
5 Bailey.

6 COMMISSIONER BAILEY: I think it will be
7 really difficult to evaluate "cumulative impact" in the
8 "sequential observation" of sound. Because, as you're
9 walking along, you know, how do you measure that? Do you
10 have to, like, for every trail in every project or near
11 every project, you have to take sound measurements for
12 cumulative impacts? And, I think that the sound standards
13 that the Committee came up with are pretty conservative.
14 And, sound doesn't add serially. So, you know, if you
15 have 45 dB of sound here and 45 dB of sound there, in the
16 middle it's not an average. It may be 46, maybe.

17 So, I don't think "hears" should be
18 added to this.

19 CHAIRMAN HONIGBERG: Others? Do people
20 agree with what Commissioner Bailey just said? Attorney
21 Weathersby.

22 MS. WEATHERSBY: I'm more on the page
23 with Mr. Wiesner. I think that, as far as this definition
24 in 102.37 and 43 are concerned, they are limited to --

1 (Court reporter interruption.)

2 MS. WEATHERSBY: -- they are limited to
3 aesthetics, and probably should just be "sees". But I
4 think somewhere we should have the concept of the
5 "cumulative impact of sound", when you're adding another
6 project, nearby an existing project, that needs to be
7 taken into consideration somewhere, just perhaps not in
8 this definition.

9 CHAIRMAN HONIGBERG: Director Muzzey.

10 DIRECTOR MUZZEY: I would like to
11 suggest something that I think is an easier thing to get
12 our heads around. And, that is, rather than adding
13 "snowmobile trail", just use the term "trail", because we
14 know there are a number of different uses on trails. And,
15 so, leave it at that. Strike "hiking" and the suggested
16 "snowmobile trail".

17 CHAIRMAN HONIGBERG: I agree with that.
18 Anybody else have a thought?

19 (No verbal response)

20 CHAIRMAN HONIGBERG: Good. So, that's
21 easy enough. Commissioner Burack.

22 VICE CHAIRMAN BURACK: Mr. Chairman, if
23 I can come back to this topic of the "hearing" things. I
24 would agree with this notion that it needs to be

1 considered as part of a cumulative impact assessment, but
2 it shouldn't be here within these definitions, "sequential
3 observation" or "successive", or what's the other --
4 "combined observation". It really is a separate and
5 different kind of a concept and needs to be treated
6 separately.

7 CHAIRMAN HONIGBERG: I think what
8 Attorney Wiesner suggested a moment ago is actually
9 probably a better way to proceed here. And, that's not to
10 add to these definitions, which are related to visual
11 aesthetics, but to add a new section that deals with
12 cumulative sound effects.

13 VICE CHAIRMAN BURACK: And, I'm just
14 trying to --

15 CHAIRMAN HONIGBERG: Yes.

16 VICE CHAIRMAN BURACK: -- state support
17 for that approach.

18 CHAIRMAN HONIGBERG: Is that the
19 consensus of the house here? I see lots of nodding heads.

20 "Fragmentation", a proposed new
21 definition.

22 COMMISSIONER BAILEY: Mr. Chairman?

23 CHAIRMAN HONIGBERG: Yes, Commissioner
24 Bailey.

1 COMMISSIONER BAILEY: I'm sorry. Before
2 we move off that, are we not going to accept the change
3 from "viewer" to "person", since we aren't adding "hears"?
4 Because I think the other definitions all reference
5 "viewer". And, so, to keep them consistent -- or, we
6 change them all to "person" or "viewer", I don't think it
7 matters, but --

8 CHAIRMAN HONIGBERG: If we're keeping
9 them about visual, I'd be inclined just to keep them as
10 "viewers".

11 COMMISSIONER BAILEY: Me, too.

12 CHAIRMAN HONIGBERG: All right.

13 COMMISSIONER SCOTT: I concur.

14 MR. WIESNER: And, just to clarify,
15 we're not going to make any change to "successive
16 observation"?

17 CHAIRMAN HONIGBERG: No. I think that
18 would make it -- I think that would eliminate the
19 difference between it and "sequential". Director Muzzey,
20 you had something?

21 DIRECTOR MUZZEY: No. That was my
22 question as well. Thank you.

23 VICE CHAIRMAN BURACK: So, if I may, the
24 only change we, in fact, would be making here is the one

1 that Director Muzzey suggested of just replacing "hiking
2 trail" with "trail", is that right?

3 CHAIRMAN HONIGBERG: I believe that's
4 correct.

5 VICE CHAIRMAN BURACK: Thank you.

6 CHAIRMAN HONIGBERG: Now can we talk
7 about "fragmentation"?

8 (No verbal response)

9 CHAIRMAN HONIGBERG: All right. Let's
10 do it.

11 (Short pause for members to review
12 comments provided.)

13 CHAIRMAN HONIGBERG: Mr. Wiesner, is
14 there context for this proposal that would be helpful?

15 MR. WIESNER: The concept of
16 "fragmentation" of habitat is used in the application
17 requirements, where the applicant will specify what the
18 anticipated effects on the natural environment would be.
19 That's 301.07(c)(3). And, it's also relevant to the
20 siting criteria for the natural environment, which appears
21 in 301.14(e)(3).

22 CHAIRMAN HONIGBERG: So, the current
23 draft uses the word "fragmentation", but there's no
24 definition for it. So, EDP is suggesting a definition?

1 MR. WIESNER: That's correct. That's
2 correct.

3 CHAIRMAN HONIGBERG: Commissioner
4 Burack.

5 VICE CHAIRMAN BURACK: Thank you,
6 Mr. Chairman. I'm no expert in this realm, but I think it
7 is an area that very quickly can get highly technical from
8 a standpoint of ecological systems. And, I would urge us,
9 before we adopt any specific definition of
10 "fragmentation", to really consult with experts in the
11 field and understand what the ramifications are of
12 different definitions.

13 I'm not opposed to adopting a definition
14 here, but I would want to have us really do our homework
15 very thoroughly before we adopted anything. It may be
16 that, under some existing state laws or rules, that there
17 are already definitions of "fragmentation".

18 But I respectfully suggest that we put
19 this in the parking lot for the moment and come back to it
20 after doing further research.

21 CHAIRMAN HONIGBERG: Okay. To complete
22 that research, it would seem like your agency might be the
23 place that might have the best knowledge there. Is there
24 someone perhaps that you could put us in touch with while

1 the issue is parked? Commissioner Rose.

2 COMMISSIONER ROSE: Yes. I would be
3 happy to follow up on Commissioner Burack's recommendation
4 and consult with our Natural Heritage Bureau within
5 Department of Forests & Lands, to see if they have a
6 formalized definition of "fragmentation" that might be
7 applicable for us in this circumstance.

8 CHAIRMAN HONIGBERG: And, I would ask
9 that you put that person, whoever you got, in touch with
10 Mr. Wiesner about how best to fulfill that.

11 Any other comments? Commissioner Scott.

12 COMMISSIONER SCOTT: Since the two of
13 you are volunteering for research, I was curious, maybe
14 somebody could reach out to Fish & Game also. I would
15 think, when you talk about "habitat", I assume that's kind
16 of up their alley also.

17 CHAIRMAN HONIGBERG: Commissioner Rose.

18 COMMISSIONER ROSE: Happy to include
19 Fish & Game in that consultation.

20 CHAIRMAN HONIGBERG: All right. Thank
21 you very much.

22 Next item. A proposed new definition
23 regarding "State Agencies Having Permitting or Other
24 Regulatory Authority".

1 Commissioner Scott.

2 COMMISSIONER SCOTT: If I could maybe
3 put Attorney Wiesner on the spot again. To me, that was
4 self-evident, "state" -- that, without defining that
5 further, it seems self-evident. But can you put it in
6 context of why that would be needed?

7 MR. WIESNER: This is a term that's used
8 in the statute without definition. And, I believe that
9 the Various Energy Companies are proposing that there be a
10 specific definition. This is a term that's used
11 throughout the rules, with respect to hearings,
12 participation by state agencies, the number of copies
13 distributed to various agencies, and also review timelines
14 that apply to the review of such agencies.

15 CHAIRMAN HONIGBERG: Is it not also a
16 phrase used in SB 245?

17 MR. WIESNER: Yes. It appears in the
18 statute, and it's not defined in the statute.

19 CHAIRMAN HONIGBERG: What's the context
20 of its usage in the statute?

21 MR. WIESNER: In generally the same
22 context that I just referenced. In terms of participation
23 of agencies and the obligation for them to complete the
24 review of components of the application which are within

1 their jurisdiction and report back to the Committee.

2 CHAIRMAN HONIGBERG: Attorney Iacopino,
3 are you able to pull that provision of the statute up?

4 MR. IACOPINO: Yes. Section 7-a of RSA
5 162 is where the bulk of that new language appears. And,
6 the section is actually titled "Role of State Agencies".
7 And, as you will recall, the statute as amended makes this
8 distinction now between "state agencies having permitting
9 or other regulatory authority" and then "other state
10 agencies who may have an interest in the proceeding".
11 And, there's an entire procedural section now in the
12 statute that basically identifies the process for each
13 type of agency.

14 I know that the concern -- one of the
15 concerns that has been expressed by applicants comes in
16 the context of what agencies get to weigh in on whether
17 the application is complete. And, so, that I know that
18 the industry is concerned about that, because they -- I
19 think they have a concern that agencies that don't have
20 any regulatory authority may be requested to weigh in on
21 whether an application is complete or not.

22 The most recent application that we have
23 filed actually has a section right in the application
24 laying out what Eversource and New England Power believe

1 are the agencies and why they believe these are the
2 agencies with permitting or other regulatory authority.

3 So, I think that that is -- those are
4 the concerns of the -- I believe this was an industry
5 request. I think that those are the concerns of the
6 industry, is they would like a rule that perhaps gives a
7 little definition to what's in the statute, so that they
8 can have some predictability about what agencies they can
9 expect to weigh in on both whether the application is
10 complete, and then what role, each state agency that may
11 seek to participate in the adjudicatory process, what role
12 they may have. Do they have to move to intervene or will
13 they be permitted to sort of have automatic standing, so
14 to speak, and although that's not a term that's used in
15 the statute, but are they going to be permitted to have
16 that kind of role in the proceeding?

17 In other words, there are some state
18 agencies, those with permitting or other regulatory
19 authority that have a role, they don't have to file a
20 motion to intervene. They can just -- now they can just
21 participate. There are other state agencies that may need
22 to request permission from the Committee.

23 CHAIRMAN HONIGBERG: And, the feeling by
24 those making this proposal is that they need this

1 definition because -- finish the sentence.

2 MR. IACOPINO: Because they want to know
3 exactly what state agencies are going to weigh in on the
4 issue of completeness of an application, and they want to
5 know exactly which state agencies are going to have to
6 move to intervene or have otherwise statutory standing
7 before the Committee.

8 CHAIRMAN HONIGBERG: Commissioner
9 Burack.

10 VICE CHAIRMAN BURACK: Thank you, Mr.
11 Chairman. I'm trying to pull back into my head what went
12 on during the legislative process and hearings in which
13 these provisions were discussed and adopted. But,
14 certainly, one of my recollections is that the Department
15 of Fish & Game has significant involvement in many of
16 these projects, not because they have any specific
17 permitting authority, but because they may have authority
18 with respect to consideration of whether or not particular
19 activities could, if carried out, for example, result in
20 a, I'm going to use the technical term, a "taking" of a
21 threatened or engaged species. And, I hope I have the
22 terminology and the context correct there.

23 But that's just one example of an agency
24 for which there would not necessarily be any kind of a

1 prescribed process by which decisions could be made, and
2 yet, clearly, there are significant issues that that
3 agency would be responsible for addressing in the context
4 of any particular kind of proposal.

5 And, I just raise that as one example of
6 where I think, while I understand the desire for clarity
7 here, where I think that things -- we could have some
8 unfortunate unintended consequences if we didn't think
9 this through very, very carefully. Because, certainly, we
10 would want to encourage, I believe, we would want to
11 encourage parties, as is, I believe, the current practice
12 of most, at least sophisticated applicants, to go and
13 confer up front with Fish & Game on their studies, and
14 ensuring that the analyses they're doing, the data they're
15 collecting are going to be sufficient to enable Fish &
16 Game to be able to make an appropriate determination.

17 So, again, I don't know what the right
18 language is here. I'm certainly happy to entertain some
19 language. It may be that a better way for us to do this
20 is to have a specified set of agencies that would be a
21 minimum that you would need to confer with, and that to
22 confirm that they don't have any issues, and others that,
23 you know, could later choose to intervene. But, if that's
24 the approach, probably most, if not all, of the agencies

1 that previously served on the SEC, but no longer are
2 required to serve on the SEC, may be a place to start, if
3 we wanted to create a list of sort of what are the minimum
4 agencies that would have to be conferred with.

5 CHAIRMAN HONIGBERG: Attorney Iacopino,
6 you have the statute up in front of you?

7 MR. IACOPINO: I do.

8 CHAIRMAN HONIGBERG: Does the phrase
9 "other regulatory authority" appear in the text of the
10 statute?

11 MR. IACOPINO: Yes, it does.

12 CHAIRMAN HONIGBERG: Would you please
13 read me the section in question.

14 MR. IACOPINO: Okay. Well, it appears
15 in a couple of different sections. The first one that I
16 have in front of me is RSA 162-H:7, IV. It's rather
17 lengthy, but I'll read it:

18 "Each application shall contain
19 sufficient information to satisfy the application
20 requirements of each state agency having jurisdiction,
21 under state or federal law, to regulate any aspect of the
22 construction or operation of the proposed facility, and
23 shall include each agency's completed application forms.
24 Upon" -- this is the part that the industry is concerned

1 about -- "Upon the filing of an application, the committee
2 shall expeditiously forward a copy to the state agencies
3 having permitting or other regulatory authority and to
4 other state agencies identified in administrative rules.
5 Upon receipt of a copy, each agency shall conduct a
6 preliminary review to ascertain if the application
7 contains sufficient information for its purposes. If the
8 application does not contain sufficient information for
9 the purposes of any of the state agencies having
10 permitting or other regulatory authority, that agency
11 shall, in writing, notify the committee of that fact and
12 specify what information the applicant must supply;
13 thereupon the committee shall provide the applicant with a
14 copy of such notification and specification." And, then,
15 the next sentence also contains the phrase:
16 "Notwithstanding any other provision of law, for purposes
17 of the time limitations imposed by this section, any
18 application made under this section shall not be deemed
19 accepted, either by the committee or by any of the state
20 agencies having permitting or other regulatory authority
21 if the applicant is reasonably notified that it has not
22 supplied sufficient information for any of the state
23 agencies having permitting or other regulatory authority
24 in accordance with this paragraph."

1 That's in Section 7. That's 7, IV. It
2 is also in the time frames for the provisions of reports
3 to the Committee, in Section VI-b: "All state agencies
4 having permitting or other regulatory authority shall
5 report their progress to the Committee within 150 days of
6 acceptance of the application, with draft permit
7 conditions, *etcetera*, that relate to its permitting or
8 other regulatory authority."

9 Section VI-c: "All state agencies
10 having permitting or other regulatory authority shall
11 submit a final decision within 240 days."

12 And, then, in RSA 162:7-a [162-H:7-a?],
13 that's where the -- it starts off, "I. State agencies
14 having permitting or other regulatory may participate in
15 committee proceedings as follows: (a) Receive proposals
16 and permit requests within the agencies" -- I'm sorry,
17 "(a) Receive proposals or permit requests within the
18 agency's permitting or other regulatory authority,
19 expertise, or both; determine completeness of elements
20 required for such agency's permitting or other programs;
21 and report on such issues to the committee; (b) Review
22 proposals or permit requests" -- or, "permit requests",
23 sorry, "and submit recommended draft permit terms and
24 conditions to the committee".

1 Then, the next place that it is
2 mentioned is in Subsection (e) of I. "If the committee
3 intends to impose certificate conditions that are
4 different than those proposed by state agencies having
5 permitting or other regulator authority, the committee
6 shall promptly notify the agency or agencies in writing to
7 seek confirmation that such conditions or rulings are in
8 conformity with the laws and regulations applicable to the
9 project and state whether the conditions or rulings are
10 appropriate in light of the agency's statutory
11 responsibilities."

12 CHAIRMAN HONIGBERG: Seems like the
13 problem goes back to the first section you read, the
14 longer section, because that's the one that has the
15 provision in it that says "agencies can be identified by
16 rule".

17 MR. IACOPINO: Yes.

18 CHAIRMAN HONIGBERG: And, so, they're
19 here making this proposal so that there will be a rule
20 that specifies what agencies are going to be getting or
21 are going to get the outreach to determine whether
22 there's -- whether it's complete and whether they're on
23 track.

24 The language that you read beyond that

1 does all speak to agencies that have to say something,
2 issue something. The word "permit" is the word used.

3 MR. IACOPINO: Yes.

4 CHAIRMAN HONIGBERG: But there are other
5 types of approvals that can be granted, licenses and other
6 types of things. Like water crossings at the PUC, those
7 are licenses under state law, not permits. So, the
8 phraseology is -- may be different, but the concept is the
9 same.

10 So, that's why they're doing this,
11 right?

12 MR. IACOPINO: Well, I agree. In
13 Section 7, IV, there is the reference to who gets notice,
14 and that's "state agencies having permitting or other
15 regulatory authority and other state agencies identified
16 in administrative rules".

17 CHAIRMAN HONIGBERG: So, the "other
18 regulatory authority" still, at least as you've read it,
19 contemplates that the agency has to do something.

20 MR. IACOPINO: Correct.

21 CHAIRMAN HONIGBERG: Either allow
22 something, issue a permit for something, issue a license
23 for something, but it has to grant a request. Right?

24 MR. IACOPINO: I agree with you on that,

1 yes.

2 CHAIRMAN HONIGBERG: Commissioner
3 Burack.

4 VICE CHAIRMAN BURACK: Mr. Chairman,
5 again, I haven't had my head around this issue for quite a
6 while. I'm not sure that that's necessarily the only
7 thing that the Legislature had in mind. I believe that
8 the reference to the phrase "or other regulatory
9 authority" was intended to include agencies such as Fish &
10 Game, that often will not have any specific sort of
11 affirmative action they must take, other than to say that
12 or to give a party assurance that they will not take
13 action. And, I think -- I think that is a little bit
14 different here.

15 And, oftentimes they cannot do that,
16 without having a significant amount of information,
17 studies, for example, about impacts of a proposal on a
18 particular habitat species, habitat that's important for
19 the protection of certain species.

20 It may be that one way to resolve this
21 issue is to include in the rule a specific mention that
22 Fish & Game would be notified of each application and
23 would have an opportunity to weigh in, so that we can just
24 cover that issue from that standpoint. I'm not thinking

1 of other agencies, in terms of their statutory authorities
2 that might be implicated in quite this same way as Fish &
3 Game, but there could be others as well.

4 CHAIRMAN HONIGBERG: Attorney Iacopino.

5 MR. IACOPINO: The statute references
6 three types of state agencies: Those with "permitting
7 authority", those with "other regulatory authority", and
8 "other state agencies identified in administrative rules".
9 So, I think that there is -- there is some distinction
10 between what "other state regulatory" -- "other regulatory
11 authority" is and just "any state agency". So, I don't
12 know what the Legislature specifically intended with
13 respect to that particular phrase.

14 But Commissioner Burack's solution is,
15 if the Committee decides we want these agencies to be
16 notified, that takes care of the notice provision. But
17 you will then have to deal with, "okay, what role will
18 they have in the process, after we have notified them?"
19 So, I think you would have to be very distinct about, you
20 know, you may be getting notice, but you may -- we may not
21 listen to you if you think the application is complete or
22 not, because it is a -- you have to be an agency with
23 permitting or other regulatory authority. And, you don't
24 fit that bill, even though you're in our administrative

1 rules.

2 CHAIRMAN HONIGBERG: Commissioner Scott.

3 COMMISSIONER SCOTT: Attorney Iacopino
4 kind of went down the path I was going to ask Commissioner
5 Burack. I agree, Fish & Game ought to be part of this.
6 But, and, again, I guess I need to look at the rules
7 again. So, let's say, in this hypothetical, Fish & Game
8 is on the list, you must be notified. They're a business
9 agency, they don't respond, that shouldn't be the
10 applicant's problem.

11 MR. IACOPINO: Correct.

12 COMMISSIONER SCOTT: Right?

13 MR. IACOPINO: I think the applicant's
14 bigger concern, Commissioner, is you notify Fish & Game,
15 and then Fish & Game files a response and says "There's
16 not a Golden eagle survey here. So, we don't think that
17 this application is complete."

18 The industry doesn't want the Fish &
19 Game, who doesn't have the authority to issue a permit of
20 any type, to be able to dictate whether their application
21 is complete or not. So, I think that's part of the
22 concern that's raised by the industry here.

23 COMMISSIONER SCOTT: And, let me get a
24 little bit more far afield, no pun intended. The former

1 SEC, as Commissioner Burack mentioned, used to have Health
2 & Human Services on it also.

3 MR. IACOPINO: Uh-huh.

4 COMMISSIONER SCOTT: So, would we -- I'm
5 not sure I see quite the fit there, but would we have
6 public health be part of that requirement to be notified
7 also?

8 MR. IACOPINO: I would also raise the
9 Fire Marshal issue as well, which we've dealt with in a
10 number of cases. Is that the jurisdiction, the regulatory
11 jurisdiction of the Fire Marshal changes from place to
12 place, depending upon where you are, and whether the
13 particular locality has a building inspector or not. So,
14 there are some cases where the Fire Marshal may not have
15 any authority, but may have concerns. And, you know, they
16 may be an agency that you might want to consider providing
17 notice to as well. How you deal with the issue of, if the
18 Fire Marshal says "I don't believe this is a complete
19 application", is more of a substantive issue, but that's
20 an issue that I know the industry is concerned about.

21 For instance, if there is a building
22 inspector, and therefore the Fire Marshal doesn't have
23 "jurisdiction" over a particular site, yet the Fire
24 Marshal is saying "this is not complete, because there's

1 not enough information for us to decide whether this is
2 going to be safe", is going to be a concern.

3 CHAIRMAN HONIGBERG: Director Muzzey.

4 DIRECTOR MUZZEY: My question is, who
5 now decides which agencies have "permitting or other
6 regulatory authority", and ask those agencies to review
7 the application for completeness?

8 MR. IACOPINO: At this point in time, it
9 was done by the Chairman's office, basically, on my
10 recommendation. I sent the letters to the state agencies.
11 There's only been one application filed since this
12 statute's been in effect. I sent the letters to the state
13 agencies, and they were provided with the format of the
14 statute. So, that's how the decision has been made to
15 date, with the one application that we've had under the
16 new thing.

17 I will point out that, in the
18 application, the Applicants did lay out exactly who they
19 believe the relevant state -- or, the state agencies with
20 permitting or other regulatory authority were. But we did
21 add a couple to that.

22 DIRECTOR MUZZEY: And, how were their
23 opinions formed in that application?

24 MR. IACOPINO: They provided a -- I

1 would say, I guess it's a detailed legal description of
2 what they believe the statute meant, and the distinction
3 between an agency with a "regulatory authority" -- I'm
4 sorry, "other regulatory authority", as opposed to
5 "permitting authority", and then those agencies that
6 wouldn't have any authority, but would need to move to
7 intervene through the Chairman. But that's -- and, I
8 mean, I can't give you a list of which ones.

9 DIRECTOR MUZZEY: I'm just wondering
10 whether the opinions expressed in that application agreed
11 with this proposal in front of us of the definition?

12 MR. IACOPINO: I'm not sure that the
13 application, for instance, included Historic Resources as
14 "other regulatory authority". But I believe that we did
15 send a letter to Historic Resources, considering them as
16 an agency with "other regulatory authority", because of
17 the consultative process that the 106 process required.

18 DIRECTOR MUZZEY: Right.

19 MR. IACOPINO: So, I'm not sure of that.
20 I would have to go back and look again at their section
21 that said which state agencies. But I know that that is
22 one that is often a concern. And, you know, not as often
23 as Fish & Game or the Fire Marshal, but, even in the past,
24 it has been a concern over what that process is. Because,

1 for instance, as Chairman Burack noted, Historic Resources
2 doesn't actually give a permit. It's a process that you
3 have to go through, it's a regulatory process. And, it's
4 clearly defined for most cases. Although, there will be
5 those cases where 106 doesn't apply, and then there will
6 be a finer point on the issue.

7 CHAIRMAN HONIGBERG: Director Muzzey.

8 DIRECTOR MUZZEY: So, my second question
9 is that this definition does appear to add a qualifier at
10 the end, that "the agency makes a final decision by
11 issuing a permit, order, or decision within the time
12 limits set forth", and a different RSA is cited, "162-H:7,
13 VI-c". My question is, in the language that you read that
14 the -- versus our current definition of what a state
15 agency --

16 (Court reporter interruption due to
17 cellphone noise in the room.)

18 DIRECTOR MUZZEY: So, my question is,
19 does 162:7 -- 162-H:7 or 7-a add that qualifier as well or
20 is this new language that doesn't appear in current state
21 law?

22 MR. IACOPINO: I believe it was the
23 qualifier of "permitting" -- "agencies having permitting
24 or other regulatory authority" was brought throughout the

1 statute. For instance, you reference Section VI-c of RSA
2 162-H:7, which is a "time frame" statute. And, in that
3 statute, and the other time frame statutes, for when state
4 agencies have to file their reports and draft conditions,
5 all now say "state agencies have permitting or other
6 regulatory authority". So, those qualifiers that are new
7 to the statute as of July 1, 2014 are brought throughout
8 RSA 162-H:7, and then addressed in the new section, RSA
9 162-H:7-a as well. So that "agencies with permitting or
10 other regulatory authority are required to make their
11 final decisions on applications that relate to their
12 permitting or regulatory authority no later than 240 days
13 after the application has been accepted." I'm sorry, I'm
14 probably speaking too fast. But that modifier has been
15 brought throughout the statute, in reference to "state
16 agency".

17 Does that answer your question?

18 DIRECTOR MUZZEY: No.

19 MR. IACOPINO: It doesn't look like I'm
20 answering your question. I'm sorry.

21 DIRECTOR MUZZEY: I'm afraid it doesn't.

22 MR. IACOPINO: Maybe --

23 CHAIRMAN HONIGBERG: I think, let me try
24 it. I think what Director Muzzey wants to know is that

1 the way this definition is written, they're not "state
2 agencies having permitting or other regulatory authority",
3 unless they are "an agency that issues a permit, order, or
4 decision within the time limits set forth in 162-H:7,
5 VI-c." That seems like a new qualifier. That the
6 other -- that the other places -- the places in the
7 statute don't have that limiter on it. That they're
8 "agencies having permitting or other regulatory
9 authority", potentially regardless of when they're
10 required to issue their decision.

11 Do I have that right, Director Muzzey?

12 DIRECTOR MUZZEY: Yes. That was my
13 question.

14 MR. IACOPINO: Well, I think that what
15 happens is, with the Site Evaluation Committee being the
16 replacement for the jurisdiction of those various state
17 agencies, your -- the one-stop shopping center, so to
18 speak, that restriction is put on those agencies to issue
19 their final permits or final decision on their regulatory
20 authority within 240 days. So, I don't know that it was
21 meant to, that Section VII-c [VI-c?] should define what is
22 a "agency with permitting or other regulatory authority",
23 I think that's kind of "the tail wagging the dog". But I
24 don't think that was meant to define that term.

1 It does put a -- it does create somewhat
2 of an ambiguity for some agencies that have other
3 regulatory authority, but there's no defined endpoint to
4 what they do, such as the consultative process through --
5 for Historic Resources.

6 CHAIRMAN HONIGBERG: I mean, I think
7 that's right. I think what you just said is right. I
8 think the phrase at the end of this proposed definition
9 creates an unnecessary ambiguity. I think, based on the
10 conversation you and I had a few minutes ago, if we need a
11 rule, and I'm not even convinced that we do, but, if we
12 need a rule, it's to specify certain agencies that should
13 be asked.

14 But the responsibility is on the
15 applicant, as I think the most recent applicant has done,
16 to identify the ones that they think are relevant,
17 identify as many of those as possible. But also perhaps
18 identify some others in a rule to pick up the second or
19 third type of agency that's identified in the statute, and
20 then still give the Committee, through the Chair, the
21 discretion to identify others, which appears to be a
22 statutory authority that wouldn't be affected by the
23 adoption of a rule naming certain ones.

24 Is that a structure that makes sense?

1 MR. IACOPINO: I agree. Yes. I think
2 that, to name the agencies that you want to make sure are
3 notified every time there's an application pending, would
4 be a great help to those who file applications, to those
5 who are going to participate in the proceedings, to your
6 counsel, so that he has the list and it's easy or she has
7 the list and it's easy to do.

8 But that solves one half of the problem,
9 who gets notified. The other half is something that the
10 Committee has to determine in every case, on whether a
11 particular agency has a role to play or not.

12 CHAIRMAN HONIGBERG: But that's not
13 necessarily part of this rule. That's a separate --

14 MR. IACOPINO: Correct.

15 CHAIRMAN HONIGBERG: All right. We need
16 to break for Mr. Patnaude. So, let's take a 15-minute
17 break and come back at five minutes after 11:00.

18 (Recess taken at 10:49 a.m. and the
19 meeting resumed at 11:16 a.m.)

20 CHAIRMAN HONIGBERG: All right. We're
21 going to pick back up. I think everybody's here. Let's
22 try and wrap this issue up, if we can. I tell you where I
23 am on this rule. I'm not inclined to adopt a definition
24 of a term that is actually pretty self-explanatory.

1 But I am inclined to adopt a rule that
2 seems really called for by the statute, identifying
3 certain agencies within state government that must get
4 copies. That applicants are expected to identify those
5 who have permitting and other regulatory authority, and
6 that will encompass probably all of the relevant ones.
7 But that we would be wise, I think, to adopt a rule that
8 says "even if you haven't identified the Board of
9 Barbering & Cosmetology, we believe that you should send a
10 copy to that board", or whomever. And, the obvious ones
11 to me are the ones we were talking about: Fish & Game,
12 Historical Cultural Affairs, "Cultural Affairs" I think is
13 what it's called --

14 VICE CHAIRMAN BURACK: Cultural
15 Resources.

16 CHAIRMAN HONIGBERG: "Cultural
17 Resources", sorry, and a handful of others, and adopt that
18 rule without a definition. And, then, the issue of who
19 makes completeness determinations is handled as it's I
20 think handled now. That, if someone says "I have a
21 permitting authority and it's not complete", that's an
22 issue. It needs to get worked out.

23 But I don't think doing it up front will
24 work. If we try and do it up front, I think we can

1 guarantee ourselves we'll get it wrong in some way.

2 That's the epiphany I had while I was upstairs.

3 Commissioner Burack.

4 VICE CHAIRMAN BURACK: Mr. Chairman, I
5 support your epiphany. And, to your list I would add the
6 Fire Marshal's Office, and I think I'd add the Department
7 of Health & Human Services as well, just because of the
8 potential public health aspects or implications of various
9 of these projects.

10 CHAIRMAN HONIGBERG: I was not even
11 beginning to think about who should actually be on the
12 list. But I would defer to those who have been around the
13 SEC for a lot longer than I have about what parts of state
14 government typically come up in these things. And, I
15 would start with the ones who used to be on the SEC who
16 are no longer.

17 So, can, maybe Attorney Iacopino,
18 Commissioner Burack, can you run through your heads real
19 quick of where we would start? And, I think the idea is
20 we would put it in the draft that's going to go out for
21 public comment, and we would presumably hear from people
22 about who maybe should be added or removed from that list.

23 MR. IACOPINO: I think those ones that
24 had been mentioned are pretty much the ones that become

1 problematic; Fish & Game, the Fire Marshal, Health & Human
2 Services, Historical Resources.

3 CHAIRMAN HONIGBERG: Does Agriculture
4 ever come up in these?

5 MR. IACOPINO: Never has in my -- not in
6 my tenure, it hasn't.

7 CHAIRMAN HONIGBERG: And Barbering &
8 Cosmetology hasn't come up in any of them?

9 MR. IACOPINO: Yes, it has.

10 (Laughter).

11 CHAIRMAN HONIGBERG: Talking about Bald
12 Mountain?

13 MR. IACOPINO: Pretty much. Or, bald
14 eagle, whatever. I can't think of any other ones off the
15 top of my head, Mr. Chair.

16 CHAIRMAN HONIGBERG: Any other thoughts
17 on this? Commissioner Rose.

18 COMMISSIONER ROSE: Just one other that
19 may be worthy of inclusion would be the Natural Heritage
20 Bureau within Forests & Lands that does review for certain
21 plant wild -- plant habitat and exemplary natural
22 communities, which is currently -- well, it was -- Forests
23 & Lands was a part of the SEC previously.

24 MR. IACOPINO: And, Mr. Wiesner just

1 pointed out to me that OEP was on the Committee
2 previously, too, and may be good to get them a copy of the
3 application.

4 CHAIRMAN HONIGBERG: Yes. I think OEP
5 would be wise to include, for a variety of reasons. All
6 right. We'll work with that list.

7 Commissioner Scott.

8 COMMISSIONER SCOTT: For completeness,
9 is it necessary to put Environmental Services,
10 Transportation, *etcetera*, you know, the core people we
11 know issue permits, put them on there anyways?

12 MR. IACOPINO: It may not be required in
13 every case. For instance, like, within DES, we often have
14 applications that require Alteration of Terrain, the Water
15 Division, but not Air. So, I think that --

16 CHAIRMAN HONIGBERG: But, in this
17 context, we're just talking about who have you got -- who
18 do we say "you must send a copy of this"? Who must get a
19 copy? That's what we're talking about here. And, those
20 agencies are even identified in the proposal.

21 MR. IACOPINO: Right. But a copy must
22 go -- if I understand correctly, a copy must go to "state
23 agencies with permitting or other regulator authority and
24 the following state agencies". That's what I envision the

1 rule looking like. Fish & Game, Fire Marshal, Health &
2 Human Services, Historic Resources, National -- Natural
3 Heritage Bureau, OEP, and whatever other the Committee --
4 that's what I was envisioning. I don't think that
5 Mr. Wiesner --

6 CHAIRMAN HONIGBERG: I think that's
7 right.

8 MR. IACOPINO: Okay.

9 COMMISSIONER SCOTT: Okay.

10 MR. IACOPINO: So that, for instance,
11 Alteration of Terrain is pretty much every project,
12 there's always an AOT. Well, every project of any size.
13 And, you know, we wouldn't mention them specifically,
14 because they would be an "agency with permitting or other
15 regulatory authority". That's the way I envision the
16 rule. But it's your rule. So, we can write it any way
17 you want.

18 CHAIRMAN HONIGBERG: I think that's a
19 good vision for what that rule would look like.

20 Other thoughts on this, before we move
21 on?

22 (No verbal response)

23 CHAIRMAN HONIGBERG: Let's move on. Oh,
24 I heard a voice. Yes. Director Muzzey.

1 DIRECTOR MUZZEY: My question is --
2 well, my caution would be to write the rule in a manner
3 that doesn't exclude the idea that those agencies may have
4 regulatory authority. Thinking of my agency in
5 particular, which does have regulatory authority. If we
6 get put in that list of others who may not, I wouldn't
7 want there to be confusion.

8 MR. IACOPINO: No. I was envisioning a
9 rule that just said that they "have to include agencies
10 that have permitting or other regulatory authorities and
11 the following" -- "the following".

12 CHAIRMAN HONIGBERG: I think Director
13 Muzzey's concern with that language is that the
14 implication of that phrasing is that everyone after the
15 "and" doesn't have "permitting or other regulatory
16 authority". So, I think what we're talking about is, that
17 the applicant has to make a determination about who it
18 believes has "permitting or other regulatory authority",
19 must provide a copy to all of those. In addition,
20 regardless of what the applicant thinks, they must provide
21 to these, and whatever appropriate determinations will be
22 made down the road will be made.

23 MR. IACOPINO: Two-sentence rule:
24 "Having permitting or other regulatory authority. In all

1 cases, the following agencies shall be notified:"

2 CHAIRMAN HONIGBERG: We'll see how it
3 looks.

4 MR. IACOPINO: Okay.

5 DIRECTOR MUZZEY: Thank you.

6 CHAIRMAN HONIGBERG: Let's talk about
7 "Committee Engagement of Outside Services - Site
8 103.02(c)(5) and 103.05(e)".

9 (Short pause for members to review
10 comments provided.)

11 CHAIRMAN HONIGBERG: Is this rule needed
12 or is the existing authorities given to the Chair and the
13 Committee already cover the authority being contemplated
14 here? Commissioner Burack.

15 VICE CHAIRMAN BURACK: Mr. Chairman, my
16 initial response is to raise some of the same questions
17 you have, but perhaps in a somewhat different fashion. I
18 mean, my belief is that the Committee does have the
19 authority under existing statute to require that
20 additional studies be done, to require that the applicant
21 pay for additional studies. There is also a provision in
22 the statute that authorizes Counsel for the Public to
23 request approval from the Committee to be able to hire
24 additional outside experts to be able to do work.

1 What I don't think this statute
2 necessarily specifically authorizes, and I'm not sure
3 we've ever specifically seen before, is the situation
4 where an applicant actually funds work that is really
5 directly for the benefit or overseen by a particular state
6 agency. But perhaps Attorney Iacopino would have
7 recollections of something along those lines.

8 The concern I have is whether at least
9 some of these requests here may go beyond what our
10 statutory authority is as a committee, to be able to
11 authorize or require. And, I would just want to make sure
12 that we don't exceed our statutory authority here.

13 But, Attorney Iacopino, can you clarify
14 for us sort of where you think the lines are and have
15 been?

16 MR. IACOPINO: Sure. I don't think that
17 the proposal is -- I mean, the only difference is that it
18 gets generated by an application by a state agency. You
19 still have the -- well, I assume that there would still be
20 an approval of that request done by the Committee, so that
21 the Committee would, in actuality, be exercising its
22 authority under Section 10 of the statute. It's just
23 coming from a different source, rather than Counsel for
24 the Public. Say it's DES or say it's Historic Resources,

1 is asking for or saying "a particular study is needed in
2 this case and it should be done, and the applicant should
3 fund it". The Committee, I assume, that would be brought
4 to you by a motion, I assume there would be objections, if
5 somebody objected to it. And, then, there would be a
6 decision made by the Committee. So, that it's really
7 going -- the decision is going to be under your auspices
8 of RSA -- of the statute itself.

9 You know, "as agreed upon with the
10 applicant" and things like that, that gets into, you know,
11 a lot of the deep weeds of the process of are you going to
12 let the applicant veto it? I mean, that's something you
13 would have to consider. So, I don't know whether this,
14 you know, where this rule, as envisioned by this
15 commenter, where it takes the Committee. I suppose you
16 could probably have a whole chapter of rules governing
17 that, that process.

18 But the idea of a state agency saying
19 "Hey, this study needs to be done", and the Committee
20 saying "we agree". The Applicant is going to now be
21 required to do it. And, "we're going to hire so-and-so to
22 do it" is within your authority presently.

23 VICE CHAIRMAN BURACK: Thank you.

24 CHAIRMAN HONIGBERG: Commissioner Scott.

1 COMMISSIONER SCOTT: Attorney Iacopino
2 said it better than I could. But I was just looking at
3 162-H:10, Section IV, and that seemed to be very explicit
4 to me. That "The SEC shall require the applicant" --
5 "from the applicant any information it deems
6 necessary...any investigation or studies it may undertake,
7 and in the determination of the terms and conditions".
8 You know, that seems to me pretty explicit what we can
9 require the applicant to do these things. Would you
10 agree? It sounds like you agree with that, Attorney
11 Iacopino?

12 MR. IACOPINO: Yes. Although -- yes.

13 COMMISSIONER SCOTT: In which case, I'm
14 not sure what adding it to the rule does for us.

15 CHAIRMAN HONIGBERG: Director Muzzey.

16 DIRECTOR MUZZEY: As I read the
17 suggestion, I thought what was being suggested was, when a
18 state agency is actually in the stage very early on of
19 reviewing the application material, that's when that state
20 agency could request help from a qualified third party.
21 That would be before the hearing, well before any
22 deliberations, that type of thing, well before the
23 Committee might find another study that was potentially
24 needed.

1 So, for me, this introduced a timing
2 issue. Because, if we're back at that time period, where
3 state agencies are reviewing applications, the Committee
4 hasn't even begun to hear the application yet. And, it
5 seemed that this would add time to the agency review of
6 applications.

7 But that was just my interpretation of
8 what this person was requesting.

9 MR. IACOPINO: I would just point out
10 that Section 5 of -- I'm sorry, V and IV of Section 10
11 aren't really time-specific.

12 DIRECTOR MUZZEY: Oh.

13 MR. IACOPINO: They don't say that it
14 has to be after an application has been accepted or before
15 an application has been accepted. It's just "as deemed
16 necessary and appropriate to carry out the purposes of the
17 statute".

18 So, -- but, you're right, is that it
19 probably would be unusual to have that kind of request
20 during the 60-day review-for-completeness period.

21 CHAIRMAN HONIGBERG: Based on what I've
22 been hearing and what I thought was in that statute and
23 has been confirmed, I don't see the need for this rule.

24 All right. No one seems to disagree

1 with that.

2 "Quorum Requirements". If I'm not
3 mistaken, the quorum requirements are in the statute, are
4 they not?

5 MR. WIESNER: The quorum requirements
6 for meetings are set forth in the statute. That is
7 correct.

8 CHAIRMAN HONIGBERG: Do we need a rule?

9 MR. WIESNER: This would impose a quorum
10 requirement at a different stage of the process. The
11 preparation of draft rules, which may be done by counsel,
12 you know, presumably under attorney/client privilege.

13 CHAIRMAN HONIGBERG: I'm asking a
14 broader question.

15 MR. WIESNER: Right.

16 CHAIRMAN HONIGBERG: Do we need 103.04
17 period?

18 (Court reporter interruption.)

19 MR. WIESNER: I said "oh".

20 CHAIRMAN HONIGBERG: That was an
21 exclamation, not a response.

22 MR. PATNAUDE: I understand that.

23 Sorry.

24 CHAIRMAN HONIGBERG: No, I think the

1 proposed change/addition is unnecessary. If we have a
2 rule, the rule applies, and it applies to doing the
3 business of the Committee. And, anyone who's been
4 watching this process I think can be fairly well satisfied
5 that not a lot of work is being done behind closed doors
6 to advance these rules. All the discussion you see is all
7 the discussion that's taking place.

8 MR. WIESNER: I mean, this section
9 essentially tracks the statute.

10 CHAIRMAN HONIGBERG: And, I was --

11 MR. WIESNER: So, arguably, it's not
12 required.

13 CHAIRMAN HONIGBERG: I mean, and I will,
14 I mean, I've said this to many people, many of whom are in
15 this room, many of whom work in the State House, that the
16 requirement of a set of seven people for a quorum, for a
17 Committee that only has nine members, is a challenge and
18 is extremely difficult to get this group together, and it
19 is making it extremely difficult to get any business done.
20 And, I have suggested that the quorum requirement for the
21 full Committee, the full nine, be reduced. Whether
22 anybody ever takes me up on that offer, I don't know. But
23 that's -- I don't really see the need to have this rule at
24 all. We have a quorum requirement that's set forth in

1 statute. And, it is just what it says here.

2 And, 91-A also covers the last provision
3 that, if a quorum isn't present, they can't do any
4 business. And, the notion that they could adjourn
5 actually doesn't work, because they never actually
6 convened if they don't have a quorum. So, the rule, as
7 worded, I realize that's an old rule, probably doesn't
8 make sense.

9 I've silenced everyone.

10 COMMISSIONER BAILEY: Agree.

11 CHAIRMAN HONIGBERG: All right. So,
12 we'll be striking this rule from the next draft?

13 MR. WIESNER: If that's the direction of
14 the Committee, yes, Mr. Chairman.

15 CHAIRMAN HONIGBERG: I see lots of
16 nodding of heads. We'll let the Legislature, who has
17 already spoken to our quorum, control our quorum.

18 Next rule: "Committee Administrator and
19 Staff", Site 103.05.

20 (Short pause for members to review
21 comments provided.)

22 CHAIRMAN HONIGBERG: Commissioner
23 Burack.

24 VICE CHAIRMAN BURACK: Mr. Chairman,

1 thank you. As I look at these particular concerns or
2 issues, I think it's fair to say that these are, at least
3 the first three, are issues that arose in a proceeding
4 before the SEC. And, I'm not sure that I would disagree
5 that they may be issues that need to be addressed, but I
6 don't believe that the place to address them would be
7 within the scope of what the administrator is authorized
8 to do or not to do.

9 That is, I think that these are the
10 kinds of matters that, at least with respect to the first
11 two, that really can and should be addressed through
12 conditions of a certificate. And, what amount of sort of
13 deviation, to use the term here, would be acceptable or
14 appropriate to be approved outside of -- or, approved by
15 an agency that might be delegated to oversight of the
16 project, as opposed to what might be looked at by the
17 administrator itself, but ultimately subject to the SEC's
18 approval.

19 So, again, I'm not sure, as I say, that
20 these are items that need to be specifically identified as
21 the administrator's responsibilities *per se* within these
22 rules. I'd be interested in hearing Attorney Iacopino's
23 experience with these kinds of issues in projects that
24 have come before the Committee, either initially on

1 application or in follow-up proceedings.

2 MR. IACOPINO: Well, Vice Chairman
3 Burack, you're correct, because that (1) through (3) were,
4 in fact, issues that came up in the Groton Wind matter.
5 They were dealt with in the context of an enforcement
6 proceeding. Ultimately, they were resolved by various
7 agreements amongst the various parties, which were brought
8 to the Committee, and then we did have a hearing on those
9 issues that were left contested. And, all of these issues
10 were resolved through that. I think that that's what the
11 enforcement process is supposed to do.

12 The administrator, under the statute,
13 along with any other state agency that the Committee deems
14 appropriate, does have the authority statutorily to
15 monitor and to -- to monitor the project, but also to
16 specify the use of any technique, methodology, practice or
17 procedure approved by the Committee within the
18 certificate, and the authority to specify major -- minor
19 changes in route alignment.

20 So that the rule, as I believe is
21 presently written, is essentially the same as -- the same
22 authority that comes out of the statute. Number 12, on
23 Page 33 of the proposed changes, would seem to sort of
24 restrict that authority that could be delegated to the

1 administrator or the state agency. So, I'd just point
2 that out. And, I guess that's a decision that the
3 Committee wants to make, whether or not they want to do
4 that.

5 But I do agree with you, it's not in the
6 appropriate place. You may want to have a separate
7 section in the rules dealing with how the administrator
8 will monitor or determine to make deviations from a
9 certificate. But I'm not sure that it should appear in
10 the section of the rules which basically just creates the
11 administrative staff, and identifies what their statutory
12 authority is.

13 VICE CHAIRMAN BURACK: If I may, Mr.
14 Chairman. I think it's fair to say that it would not be
15 unusual for situations to arise in the course of
16 construction of a project that conditions on the ground
17 are different from what were originally anticipated. And,
18 so that, you know, if changes need to be made, and it's
19 really a question of what extent of change is -- may be
20 appropriately acknowledged by the administrator or an
21 agency to whom authority may have been delegated to
22 provide oversight, as opposed to what would need to
23 actually be notified back to the full Committee and
24 require approval of the full Committee prior to the

1 project being able to proceed.

2 And, there -- I think that's,
3 ultimately, that's the underlying question that we would
4 need to address here. And, I'm not sure what the best way
5 is to address that.

6 CHAIRMAN HONIGBERG: And, right now,
7 it's being addressed on a case-by-case basis with
8 whatever's in the certificate. And, if there are things
9 that happen that are not 100 percent in line with what the
10 certificate says, someone has to make a judgment about
11 whether it's material. Whether it's sufficiently
12 different that something should have been done. One, the
13 Company made a call that I think most people disagree
14 with, that they thought it was *de minimus* and it wasn't.

15 But I think that putting in hard --
16 hard, bright lines in the rules is going to be more
17 constraining than is necessary. That it has not
18 historically been a major problem. When it has been a
19 problem, it's been addressed through the existing system.
20 That's my reaction to that.

21 Commissioner Scott.

22 COMMISSIONER SCOTT: I agree. I think
23 the existing language is sufficient. That it very clearly
24 only gives authority to the extent that the Committee has

1 delegated that authority. So, if we didn't say so, then
2 the administrator can't do it.

3 I don't find that the change is
4 necessary or warranted.

5 CHAIRMAN HONIGBERG: Commissioner
6 Burack.

7 VICE CHAIRMAN BURACK: Mr. Chairman, I
8 hear the views and perspectives that both you and
9 Commissioner Scott have offered. I might offer the
10 thought that we, and I don't know where it would be
11 included here, but there may be a provision, if we have a
12 section --

13 (Court reporter interruption.)

14 VICE CHAIRMAN BURACK: I'm sorry. If we
15 have a section in the rules relating to certificate
16 conditions, it may be appropriate to include a provision
17 that clearly reserves the Committee's authority to require
18 parties to give notice to the Committee of places in which
19 or situations in which they have either already deviated
20 from or anticipate needing to deviate from the plans as
21 originally approved by the Committee. So, that the
22 Committee, at least the administrator, does, in fact, have
23 notice of what is occurring, and has the capability, in
24 more or less real-time, to determine whether or not it is

1 something that is sufficiently sort of consequential in
2 nature that it ought to be brought to the attention of the
3 full Committee or something that is *de minimus* or
4 something approximating that and within their authority to
5 essentially accept or approve or go to a delegated agency
6 and say "Is this okay or is this not okay by you?"

7 CHAIRMAN HONIGBERG: I would have no
8 objection to such a provision, because it seems
9 inconceivable to me that an applicant, with a certificate
10 in hand, if they were going to not be following the
11 certificate wouldn't notify the SEC. That would be a very
12 surprising thing for an applicant to do. And, I realize
13 it may have happened, but it's very bad practice. And, I
14 don't think it will happen in the future, given the
15 trouble that the one company got into.

16 But, if we want to throw a rule in like
17 that, I wouldn't have any objection to it.

18 We stumped the band again. Anyone have
19 any thoughts, further thoughts on this?

20 (No verbal response)

21 CHAIRMAN HONIGBERG: Is that the
22 consensus of the Committee, to add a brief provision along
23 those lines? I doubt it would be in this section, in the
24 administrator's duties. It would be somewhere else,

1 having to do with monitoring of a granted certificate, but
2 that's where it would go.

3 Commissioner Scott, and then Director
4 Muzzey.

5 COMMISSIONER SCOTT: I don't object to
6 the addition. It's not -- I'd be fine without it. I
7 don't think it's really needed. But I don't object to it.

8 CHAIRMAN HONIGBERG: Director Muzzey.

9 DIRECTOR MUZZEY: Could someone identify
10 where in our draft rules now we have any rules that speak
11 to a certificate or conditions on it? I was paging
12 through and looking for that.

13 MR. WIESNER: I don't believe there's a
14 specific rule that covers that.

15 DIRECTOR MUZZEY: I didn't find one.

16 MR. WIESNER: And, that's something that
17 we should consider perhaps.

18 CHAIRMAN HONIGBERG: Unless the statute
19 is clear enough that we don't need a rule.

20 MR. WIESNER: Well, I think you have the
21 right to impose, you know, what would be seen as
22 reasonable conditions on a certificate approval.

23 If we now want to have a separate
24 section that says "these are the types of conditions or

1 these are the conditions that will be included or will be
2 considered by the Committee for inclusion in any
3 certificate", we could do that. I would hope that we
4 would do it in a way that it would not be limiting on the
5 Committee's general authority.

6 VICE CHAIRMAN BURACK: Mr. Chairman, I
7 think it would be -- it would behoove us to consider doing
8 something along those lines, consistent with what Attorney
9 Wiesner has just described. Because, I think, if we spent
10 just a few minutes talking about it, we would identify
11 some other common types of provisions or conditions that
12 we would likely want to see at least considered for
13 inclusion in any certificate. And, it may be helpful to
14 lay those out in one place.

15 CHAIRMAN HONIGBERG: Attorney Iacopino,
16 in your experience, are there conditions that appear in
17 essentially all certificates?

18 MR. IACOPINO: Yes. In almost every
19 certificate, the Department of Environmental Services is,
20 I mean, it's not a condition, but I think what we're
21 talking about is changes and deviations. But there's a
22 condition you've got to abide by the permits issued by DES
23 for Alteration of Terrain or your water permits. And,
24 then, typically, in every -- every decision the Committee

1 quotes from Section 162-H:4 and authorizes the Department
2 of Environmental Services to specify the use of any
3 particular techniques, methodologies, practice or
4 procedures, we usually quote right from the statute in
5 doing that. And, also to -- we also grant them -- we
6 delegate them the authority to approve any minor changes.

7 So, that's generally done in each and
8 every certificate. And, I just used DES, because they're
9 our "frequent flyer", so to speak, we have them in every
10 single certificate. But it could be done with any
11 particular agency.

12 The statute, as amended, also applies,
13 you can also delegate authority to the administrator. So,
14 it just gives you another option for something that might
15 not be within the jurisdiction of any one particular
16 agency or is sort of an outlier issue. You know, for
17 instance, maybe something doing with aesthetics, if
18 there's an issue that a tower needs to be, you know,
19 determined whether it's going to be seen over a certain
20 ridgeline or something, that's something that there's no
21 state agency, I don't think, that probably has the
22 statutory authority to make that determination. But you
23 could designate something like that to an administrator.
24 That's probably a poor example, but you could delegate

1 that authority.

2 So, we do it. The statute permits you
3 to do it. The statute now permits you to do it with any
4 state agency, but also with the administrator.

5 CHAIRMAN HONIGBERG: So, is there a
6 benefit to having a rule regarding that?

7 MR. IACOPINO: Well, you would have to
8 make that decision as a body as to whether or not there's
9 a benefit to having the rule. I do think that, merely
10 from a logistical standpoint, to avoid issues of the
11 Committee not knowing things, but only a state agency did,
12 at the very least you should have a rule that requires,
13 whenever an applicant applies to the state agency to
14 exercise that delegated authority, that a copy goes to the
15 administrator of the agency, who is your staff, and
16 therefore will be able to alert you "Whoops. I'm not
17 sure, you know, DES may think this is minor. I'm not
18 sure this is minor." So, it gives you a failsafe, so to
19 speak.

20 CHAIRMAN HONIGBERG: I think that's
21 consistent with what we just talked about.

22 MR. IACOPINO: Right.

23 CHAIRMAN HONIGBERG: And, I have no
24 problem with such a rule.

1 MR. IACOPINO: Right. Do you need a
2 rule just on what kind of conditions the Committee can
3 impose? Well, I don't think you need a rule for that,
4 because you have the statutory authority, and every case
5 that comes before you is different. And you may need the
6 flexibility to come up with new types of conditions that
7 you haven't -- that you haven't imposed in the past. So,
8 I'm not sure that you can actually fashion a rule that
9 catalogs what kind of conditions you may choose to impose.

10 CHAIRMAN HONIGBERG: All right. So, I'm
11 back where I was a few minutes ago. I'm happy to have a
12 rule, somewhere, that says essentially what Attorney
13 Iacopino just said, "if you're going to make some changes,
14 you have to let us know." And, we'll figure out an
15 appropriate place to put that.

16 All right. Moving on. This has -- the
17 next comment has to do with where notice will be published
18 regarding public information sessions. The request is
19 that, in addition to being published in a newspaper, that
20 the notice be put in the public library or town hall of
21 the host community.

22 Commissioner Scott.

23 COMMISSIONER SCOTT: In practice, I have
24 no -- or, in theory anyways, I have no objection to this

1 addition. My only concern is, I don't know where, as
2 currently worded, the proposed change, I don't know how we
3 can tell a town to do this. I think we could tell the
4 applicant to provide to the town for public display or
5 something like that. But I'm not sure we get to tell the
6 town they must post anything in the public library or the
7 town hall.

8 So, I would suggest, if we're going to
9 keep this, we would need some tweak to the language, I
10 think.

11 CHAIRMAN HONIGBERG: Do people feel that
12 it is a good idea to require the Applicant to provide one
13 or more copies to the host, to the -- and, what I think
14 this "host" is referring to, the host of the session to be
15 held, I think. But that's an interesting question. What
16 does "host community" mean here? Does "host community"
17 mean the place where the facility is going to be, for all
18 facilities, or does the "host community" refer to the
19 public information session? That hadn't occurred to me
20 until just now.

21 Commissioner Burack.

22 VICE CHAIRMAN BURACK: Well, Mr.
23 Chairman, the context here is the public information
24 sessions prior to an application being filed. And, the

1 requirement here is that there be, under 201.01(a), "at
2 least one public information session in each county in
3 which the proposed facility is to be located". And, so,
4 in this instance, you could be -- it could be a session in
5 a county that had multiple separate communities in it, and
6 it could be -- or, it could be a situation where you have
7 the facility located in just one town and the public
8 information session is going to be held in that same town
9 or city. So, this actually gets more complicated, and
10 your question/point is a good one, gets more complicated
11 than the language here that's proposed as an addition
12 would suggest.

13 It may be instructive to look at the
14 posting requirements specified in RSA 91-A, and see
15 whether or not those would assist us in this, and figure
16 out how best to address this.

17 CHAIRMAN HONIGBERG: Director Muzzey.

18 DIRECTOR MUZZEY: I would also like to
19 suggest that it applies not only to the public hearing --
20 the public information session prior to application, but
21 we should be consistent with the public information
22 sessions after the application is accepted, and then also
23 the public hearing held by the SEC. Because each of those
24 gatherings has the same type of language about posting it

1 in the newspaper. So, if we're adding additional posting
2 requirements, we should be consistent throughout all
3 three.

4 VICE CHAIRMAN BURACK: Mr. Chairman, may
5 I suggest that we sort of put this in the parking lot, and
6 ask staff to go back and look at the way RSA 91-A speaks
7 to hostings of public meetings, and see if we could
8 develop some language that would be applicable in each of
9 these different instances for possible inclusion.

10 MR. IACOPINO: I have 91-A up, if you
11 want to hear the relevant portion of it?

12 VICE CHAIRMAN BURACK: Please.

13 CHAIRMAN HONIGBERG: Briefly, because we
14 still have things to go through here.

15 MR. IACOPINO: "Except in an emergency
16 or when there is a meeting of a legislative committee" --

17 CHAIRMAN HONIGBERG: That doesn't mean
18 read quickly. Because Mr. Patnaude won't get it, if you
19 read too quickly.

20 MR. IACOPINO: I'm reading from RSA
21 91-A, II. "Except in an emergency or when there is a
22 meeting of a legislative committee, a notice of the time
23 and place of each such meeting, including a nonpublic
24 session, shall be posted in 2 appropriate places one of

1 which may be the public body's Internet website, if such
2 exists, or shall be printed in a newspaper of general
3 circulation in the city or town at least 24 hours,
4 excluding Sundays and legal holidays, prior to such
5 meetings." That's what 91-A requires.

6 VICE CHAIRMAN BURACK: So, there, in
7 fact, is nothing in 91-A now that speaks to actually
8 putting a posting, in a hard copy, in any kind of a public
9 place?

10 MR. IACOPINO: "Two appropriate places
11 one of which may be your Internet website".

12 VICE CHAIRMAN BURACK: Thank you.

13 MR. WIESNER: And, I'll just note that,
14 to the extent that this rules language here applies to the
15 prior-to-application public information session, this is
16 the applicant session, this is not a meeting of the
17 Committee, and the Committee members will not be present.
18 And, so, it arguably is not even subject to 91-A. And, in
19 fact, the forum for the Committee could be not the town
20 hall, it could be a private -- it could be the opera house
21 or something that's privately owned. So, there may be no
22 official government function, even though it's required by
23 statute to be performed. And, the language that's in the
24 proposed rule tracks the statute very clearly, and all the

1 statute requires is notification in the newspaper.

2 CHAIRMAN HONIGBERG: How many centuries
3 has newspaper publication been satisfactory for all legal
4 requirements? I mean, how long have newspapers been
5 around? A long time, right?

6 MR. IACOPINO: Yes. I would point out
7 that there would also be a hardship on the Committee and
8 scheduling that when the Committee has meetings. For
9 instance, in Grafton County, if you're going to have a lot
10 of people, you're probably going to go to Plymouth and go
11 to the university and look to use their auditorium or the
12 availability they have there, at least for the meetings
13 that are going to be governed by the Committee.

14 So, I'm not sure you really would want
15 to hamstring yourself into having to go into the host
16 community, because you may wind up with a facility that
17 doesn't accommodate enough people and doesn't have --

18 CHAIRMAN HONIGBERG: I don't think that
19 this comment requires that. This comment is talking about
20 the note -- "where do you put notice?" And, we got
21 sidetracked when we couldn't figure out what "host
22 community" means.

23 MR. IACOPINO: Yes.

24 CHAIRMAN HONIGBERG: Is the "host

1 community" where the facility is going to be located? Or,
2 is the "host community" where the meeting is going to be
3 located?

4 Commissioner Bailey.

5 COMMISSIONER BAILEY: If we want to
6 entertain this idea, I think it should be notice in the
7 municipality where the facility is going to be built. So,
8 you could change it to say "and made available at the
9 public library or town hall in which the facility will be
10 located", just so that the people who live near where the
11 facility is going to be built are more aware of the public
12 hearings that are going to take place.

13 CHAIRMAN HONIGBERG: I've got to believe
14 that's what the intent of this comment was.

15 MS. WEATHERSBY: I'm wondering if we
16 might want to expand it slightly, in that just "send
17 notice to each town or city in the county" asking them to
18 please post it on wherever they post things. Just that
19 the requirement be "notice be sent to each town in that
20 county".

21 CHAIRMAN HONIGBERG: I'm fairly certain
22 we could require applicants to do that, to send notice to
23 the cities and towns. Is that what people want to have
24 happen?

1 Director Muzzey.

2 DIRECTOR MUZZEY: I believe elsewhere in
3 the rules we've talked about the concept of "the host
4 community where the facility will be built, as well as
5 affected communities around it". So, I would suggest that
6 we use that type of language, rather than specifying every
7 community in the county. Because there may be some
8 communities in that county that are very far from this
9 facility, and it would be not of particular interest to
10 them. Whereas, you may have an affected community that is
11 just over the county line.

12 CHAIRMAN HONIGBERG: Is that what people
13 want to do?

14 (No verbal response)

15 CHAIRMAN HONIGBERG: All right.

16 MS. WEATHERSBY: Yes.

17 CHAIRMAN HONIGBERG: We'll work
18 something out.

19 The next section is a request for some
20 additional language in a section on "Withdrawal of
21 Committee or Subcommittee Member". And, I believe
22 Attorneys Getz and some others back there, this may be
23 about you. Commissioner Burack.

24 VICE CHAIRMAN BURACK: Mr. Chairman,

1 while I appreciate the concern that I believe this, at
2 least on the left-hand side of the proposal is attempting
3 to address, that is to indicate that good cause would
4 exist for a Committee or Subcommittee member to withdraw
5 from a proceeding if they had formerly served on the Site
6 Evaluation Committee with any party or representative of a
7 party presumably appearing before the SEC in a particular
8 proceeding.

9 I think this would far exceed any
10 standard understanding or expectation of recusals or good
11 cause in the context of government service, and would,
12 frankly, be completely impractical, because I think it
13 would result, in many instances, in a great many people
14 being unable to serve on a -- who are currently state
15 employees, being unable to serve on a particular
16 proceeding, just because of the fact that somebody who
17 used to be in state service has now moved to the private
18 sector or is otherwise outside.

19 I think the way those matters are dealt
20 with is that, if any party believes that there is a
21 potential appearance of impropriety or potential
22 appearance that perhaps their relationship with somebody
23 in a previous working relationship or whatever else could
24 be perceived as affecting their impartiality, they would

1 make a disclosure up front in the proceeding to that
2 effect, and would -- explaining that maybe they previously
3 served with somebody or they know somebody or their
4 children knows somebody's children, whatever it might be,
5 and give any parties an opportunity to express any
6 concerns as a consequence.

7 But I don't think that this kind of
8 language is either necessary, appropriate or workable.
9 So, that would be my take on this. I could not support
10 that addition.

11 Likewise, I don't believe it's necessary
12 or appropriate to, in the right-hand column, to adopt the
13 language that would authorize a -- presumably, that's
14 intended to be a public member of the SEC to call upon
15 another member who's not a public member -- or, I suppose
16 could be a public member as well, to withdraw from the
17 proceeding. I think, if there are circumstances in which
18 it appears that a party sitting in a proceeding may have a
19 conflict, I would expect them to address that directly or
20 discuss that with the Chairman of the proceeding or with
21 the Counsel to the Committee and determine what's
22 appropriate. But I don't think we should be putting
23 Committee members in a position of removing other
24 Committee members from a proceeding through the rules

1 here.

2 CHAIRMAN HONIGBERG: Anyone have any
3 other thoughts on this section?

4 (No verbal response)

5 CHAIRMAN HONIGBERG: Does anyone feel
6 like changes need to be made along the lines of what's
7 being proposed?

8 (No verbal response)

9 CHAIRMAN HONIGBERG: All right. We'll
10 move on.

11 "Appearances and Representation". So,
12 the proposed change is to require "A party or a party's
13 representative to file an appearance document", but --
14 actually, let's go look over what this section is
15 amending.

16 MR. WIESNER: The proposed change is to
17 add language that should be included that was
18 inadvertently deleted from the old rule.

19 CHAIRMAN HONIGBERG: Oh. This is just
20 to restore language --

21 MR. WIESNER: Correct.

22 CHAIRMAN HONIGBERG: -- that was
23 incorrectly deleted?

24 MR. WIESNER: That is correct. There's

1 no lead-in to the (1), (2), (3) in the proposed rule as
2 filed, and that was an oversight, and that should be
3 corrected. I think this change is appropriate.

4 CHAIRMAN HONIGBERG: Any disagreement
5 with that?

6 (No verbal response)

7 CHAIRMAN HONIGBERG: Thank you. Next,
8 "Participation of Committee and Agency Staff".

9 (Short pause for members to review
10 comments provided.)

11 CHAIRMAN HONIGBERG: Commissioner
12 Burack.

13 VICE CHAIRMAN BURACK: Mr. Chairman,
14 there are three different issues here, and I'll try to
15 take them up in turn. And, maybe we will need a little
16 discussion on at least some of these.

17 But the first proposal is to strike
18 language that's in the current draft that would read "The
19 administrator and committee Staff designated by the
20 Chairperson shall participate in adjudicative proceedings
21 on an advisory basis." I believe, but I would ask to be
22 advised or corrected on this by Attorneys
23 Wiesner/Iacopino, that the intention behind this language
24 was to make clear that, if the SEC had staff, a full-time

1 staff available to it, including an administrator, that
2 the Committee could, just as we currently turn to our
3 legal counsel to ask them for specific information or
4 especially guidance or legal matters, we could turn to the
5 staff members to provide information or otherwise advice
6 to the Committee with respect to particular matters that
7 we may be considering.

8 Is that what you understand to be the
9 intention of this language?

10 MR. WIESNER: The current rules have a
11 similar provision that refers to "Committee staff". But,
12 of course, the Committee really doesn't have any full-time
13 staff. Now, the Committee will have a full-time
14 administrator, and this section may have more weight to
15 it.

16 I guess I would defer to Attorney
17 Iacopino, as to whether this has been an issue in the past
18 in proceedings before the Committee?

19 MR. IACOPINO: I agree with your
20 interpretation, Commissioner Burack. I don't think that
21 this -- I think that this rule was meant solely for that
22 purpose. I don't think it was meant for the Committee to
23 designate Staff as parties during an adjudicative
24 proceeding, like often happens at the Public Utilities

1 Commission.

2 That's why the word "advisory" is used.
3 And, there's not a suggestion, nor would there be staff
4 available, to actually participate as a party in the
5 proceeding, like as does happen in some administrative
6 agencies.

7 So, that's -- I think that's what it
8 means. I think that it correctly identifies the role of
9 your Committee -- of your administrator and Committee
10 staff. So, I don't know why you would strike it.

11 VICE CHAIRMAN BURACK: Yes. My
12 recommendation, and based on what you've told us, is that
13 we not accept this proposal. That we leave the language
14 as it stands.

15 CHAIRMAN HONIGBERG: Commissioner Scott.

16 COMMISSIONER SCOTT: I didn't know if
17 you were going -- if Commissioner Burack was going through
18 all three. But, if not, I'll just weigh in also.

19 I agree. I don't think taking that
20 language out is helpful. I think it's the opposite. To
21 the extent that the SEC has full-time staff or staff, I
22 think it's helpful for them to have the context of the
23 hearing, in addition to the certificate itself. In the
24 context, especially in moving forward, the administrator

1 and staff need to look at enforcing the certificate, and
2 answering questions on the certificate, I think that's
3 helpful. And, I think we would want them to be a party,
4 as far as participating and being at the hearing.

5 Similarly, given that context, I would
6 think it would be helpful to the Committee, for instance,
7 if the administrator had questions about, as the
8 certificate was being debated on how to best have
9 conditions for enforcement in their -- given that's their
10 role, I would like to hear from them on that. So, I would
11 not want to see that language taken out.

12 CHAIRMAN HONIGBERG: Does anyone want to
13 take a different position?

14 (No verbal response)

15 CHAIRMAN HONIGBERG: All right. Seeing
16 none.

17 VICE CHAIRMAN BURACK: Now, Mr.
18 Chairman, turning to the second provision here, on the
19 left-hand column, that would read "No SEC member" --
20 "committee member shall go before the SEC as a private
21 attorney or consultant within 5 years of their service to
22 the SEC." Again, I understand, I believe, the concerns
23 that that proposal is attempting to address. But I would
24 respectfully suggest that that would exceed our statutory

1 authority, because the Legislature has already, and I was
2 trying to find the citation here, but I'm not sure I'm
3 going to find it at this moment, I believe the Legislature
4 has already enacted a provision that is universally
5 applicable to any former state employee, as to how long
6 they must be away from state service before they can
7 otherwise appear in a proceeding of this kind. I could be
8 mistaken about that, but I think this would exceed our
9 statutory authority.

10 CHAIRMAN HONIGBERG: I know there's a
11 specific provision that relates to Public Utilities
12 Commissioners. I'm not sure about a more general statute.
13 But, I agree with you. I'm not in favor of such a
14 provision.

15 Does anybody want to make a case for it?

16 (No verbal response)

17 CHAIRMAN HONIGBERG: No. Then, the
18 third suggestion here, you have a comment on that,
19 Commissioner Burack?

20 VICE CHAIRMAN BURACK: No. I'm going to
21 leave it to others who have had a little more time to look
22 at it than I have.

23 CHAIRMAN HONIGBERG: Commissioner
24 Bailey.

1 COMMISSIONER BAILEY: I think I'd like
2 to hear from Attorney Iacopino on this one, because I am
3 not really sure, in the Committee meetings that I've
4 attended, I haven't seen a "participating state agency's
5 designated liaison" appear or participate. So, could you
6 give us an example of when this might happen? And, is
7 this rule talking about when a designated liaison might
8 say something in the record as part of the proceeding?

9 MR. IACOPINO: This is totally new
10 ground. We've never had this statute for any application
11 that's been pending. We do have one pending now that the
12 statute would be relevant to. But we've never had an
13 agency designate a liaison to the SEC. I think that the
14 manner in which that liaison is used is within the
15 discretion of the Committee. And, you can establish the
16 procedures that you wish to impose. If you wish to
17 provide a process whereby the liaison is examined by the
18 other parties, I think that you could do that. I don't
19 think you're required to. I think that's a policy
20 decision to be made by the Committee as to how you intend
21 to use the services of a liaison from each state agency,
22 because I can envision a number of different ways that a
23 liaison could operate.

24 Some liaisons may just come and monitor

1 the proceedings and be there to answer questions about
2 "well, where should they send your copy?" There are other
3 liaisons who may have substantive, you know, input on, you
4 know, how large should the sewer pipes be. You know, the
5 information that we get from state agencies really runs
6 the gamut in any given application, from the very minor,
7 which is not usually controversial, to the more major
8 issues.

9 I remember, during the course of one
10 application, where the issue was whether or not the storm
11 water plan should be set to I believe it was the 50-year
12 flood or the 100-year flood. And, from the Bench, during
13 deliberations, the Director of the Water Division at that
14 point pointed out that "It's not really a big difference.
15 It's not going to be a burden on the applicant to design
16 it to the 100-year flood." I'm sure I have the number of
17 years wrong, but that was basically something that came
18 out.

19 Now, that's the type of thing that I
20 could imagine a liaison from a state agency being asked
21 for input on. It's also something that's sort of, well,
22 if I were a participant in the proceeding, I'd probably
23 want to say "why?", you know, and question that person.

24 So, I think that it's up to you, as a

1 committee, to ultimately decide how you're going to use
2 this new role, because the statute itself does not limit
3 it in any way. It says that "the agency shall have a
4 committee [liaison]", and you "may request the attendance
5 of the designated liaison, if the person can materially
6 assist the committee in its examination or consideration
7 of a matter."

8 VICE CHAIRMAN BURACK: Mr. Chairman,
9 thank you. This is, as Attorney Iacopino points out, this
10 is new ground for us. I think that the challenge that we
11 have here is that we not create a situation in which every
12 agency that now is going to be involved in these
13 proceedings effectively becomes a party to the
14 proceedings, and we have situations in which agency
15 personnel are being requested to, or particularly this
16 liaison, and it could lead to others as well, be asked to
17 show up at multiple technical sessions, be subject to
18 examination, to cross-examination, to have to spend hours
19 here before the Committee. And, I don't think that that's
20 what's either necessary or necessarily what the
21 Legislature intended.

22 I think there could be very limited
23 circumstances under which it may be helpful to the
24 Committee to be able to hear from an employee of a state

1 agency that's involved in a proceeding, to better
2 understanding, you know, for example, why specific
3 conditions are being suggested. Typically, that --
4 frankly, that hasn't been an issue, as near as I can
5 recall, in proceedings before the SEC in the past.

6 So, I don't want to close the door
7 completely on this. But the way this language reads, it
8 is so broad, I believe that it opens up every agency that
9 has a liaison to the proceeding, which would be probably
10 multiple agencies in state government, I think it just has
11 the potential to lead to a whole lot of additional time
12 spent, not necessarily really to the long-term benefit of
13 the proceeding itself.

14 CHAIRMAN HONIGBERG: Commissioner Scott.

15 COMMISSIONER SCOTT: To the extent we do
16 adopt this language, I would suggest we modify it.
17 Because, right now, as written, it pretty much gives a
18 right that many of the parties could examine the liaison.
19 And, so, to the extent we keep this, I was going to
20 subject that we added a modifier, "upon approval of the
21 Chair may examine", or something like that, so, we give
22 some discretion. They don't have an automatic right.
23 They have to go through the Committee.

24 VICE CHAIRMAN BURACK: Yes. I think

1 there has to be a very high standard here. That is, there
2 has to be really good cause shown for why they need to be
3 able to -- be able to examine or cross-examine this
4 person. It's not just they have a general interest, there
5 is a very specific point or issue that needs to be
6 clarified, in order to be able to have the information
7 necessary to move the proceeding forward.

8 I could only be comfortable with this
9 with that kind of language.

10 CHAIRMAN HONIGBERG: Substantively, I am
11 with Commissioner Burack. And, I don't think a rule is
12 necessary. I think, if there's a party to a proceeding,
13 who believes it would be beneficial to ask questions of
14 the agency's liaison, they know how to ask the Chair, ask
15 the Committee to make that happen. And, if there's a good
16 reason given, it can happen.

17 But I don't see the need for a rule. I
18 disagree with the rule as the -- the proposed addition.
19 And, I don't think a rule is necessary. But I maybe could
20 be convinced otherwise.

21 Commissioner Scott.

22 COMMISSIONER SCOTT: I agree. Let's not
23 add the language.

24 CHAIRMAN HONIGBERG: Anyone want to take

1 a different position?

2 (No verbal response)

3 CHAIRMAN HONIGBERG: All right. Thank
4 you. We'll move on. It is 20 after 12:00 right now. We
5 had -- I had thought we had noticed this until one
6 o'clock, but I'm reminded that we said we'd go till noon.
7 Are people able to stay for a few more minutes and I see
8 if we can get through another couple of items?

9 (Multiple members nodding in the
10 affirmative.)

11 CHAIRMAN HONIGBERG: All right. Thank
12 you.

13 "Intervention - 202.11(f)".

14 (Short pause for members to review
15 comments provided.)

16 CHAIRMAN HONIGBERG: The only request
17 here is to extend the amount of time for someone to seek
18 full Committee review of a decision on intervention,
19 extend that time from 10 days to 30 days.

20 Commissioner Bailey.

21 COMMISSIONER BAILEY: That seems like a
22 long time to me. If somebody has 30 days to ask us to
23 consider something, and then we have to have a lot more
24 time to figure out when we can get together to decide it,

1 I just think that that is not practical.

2 CHAIRMAN HONIGBERG: Other thoughts?
3 Commissioner Burack.

4 VICE CHAIRMAN BURACK: I concur. I just
5 think that's excessive. If a party is trying to get into
6 a proceeding at the early stages, which is when you would
7 have a petition to intervene, those decisions really all
8 do need to be made very quickly, so the proceeding can
9 move forward.

10 And, I don't think 10 days is
11 unreasonable under those circumstances. And, in my
12 experience, that has worked in the past.

13 MR. WIESNER: I'll just note, this is
14 based on the statute, and the statute refers to "10
15 calendar days". That's 162-H:4, V.

16 CHAIRMAN HONIGBERG: Well, then, it
17 seems like we probably couldn't make this change. Is that
18 a fair statement?

19 MR. WIESNER: I believe that's a fair
20 statement.

21 CHAIRMAN HONIGBERG: All right. Let's
22 move on.

23 VICE CHAIRMAN BURACK: But it also
24 suggests that the language needs to track the statutory

1 language, that it's "10 calendar days", not just "10
2 days".

3 MR. WIESNER: So noted.

4 DIRECTOR MUZZEY: Do the rules already
5 note that all days are "calendar days" in general? They
6 may.

7 MR. WIESNER: If they do, they should --
8 if they don't, they should.

9 CHAIRMAN HONIGBERG: Although, I'm
10 stretching here, I actually think there may be a provision
11 of RSA 21, in the general definitions regarding time,
12 under state law, on timing. There's lots of general rules
13 about timing. But I'm really reaching in the memory banks
14 for that one.

15 Let's move on. The next item is
16 "Discovery".

17 (Short pause for members to review
18 comments provided.)

19 COMMISSIONER BAILEY: Mr. Chairman?

20 CHAIRMAN HONIGBERG: Commissioner
21 Bailey.

22 COMMISSIONER BAILEY: Is the first
23 proposed change to prevent discovery requests before
24 there's a procedural schedule? I'm asking that of the

1 counsel. Mr. Iacopino, in your experience, have people
2 tried to ask discovery of the applicant before there's a
3 proposal schedule, and has that been an issue?

4 MR. IACOPINO: I don't recall it having
5 been an issue. I can't say it's never actually happened.
6 I certainly always encourage the parties to discuss
7 discovery as early as possible. And, if they can come to
8 some agreements, even before a procedural order issues,
9 it's always better to get it out of the way as soon as
10 possible.

11 So, to answer your question, I don't
12 think discovery prior to a procedural order has been a
13 contested issue, that I can remember.

14 COMMISSIONER BAILEY: So, then, really,
15 there isn't any reason for this language or --

16 CHAIRMAN HONIGBERG: I guess, put more
17 generally, --

18 MR. IACOPINO: That's for you to decide.

19 CHAIRMAN HONIGBERG: -- do you know if
20 there's another reason for this proposal?

21 MR. IACOPINO: I don't, I don't know. I
22 assume that -- I don't know the reason for who wrote it, I
23 guess this was presented by EDP, I don't know what their
24 rationale behind it is. Mr. Wiesner might, I don't know.

1 MR. WIESNER: It would occur to me is
2 that this may be an attempt to say that, if the procedural
3 order, for example, sets out a schedule for discovery,
4 that a party with the right to discovery would have to
5 comply with that procedural order. And, I believe that
6 has been the practice. And, that's important, in my view,
7 in order to keep the proceeding on track on the schedule,
8 so that a certificate could be issued within a year's
9 time. But that --

10 CHAIRMAN HONIGBERG: Isn't there a
11 presumption that -- isn't there a presumption that, if
12 there's a procedural order, that discovery outside of the
13 procedural order is not allowed? Or, if you want to do
14 discovery outside of the procedural order, you need to --

15 MR. IACOPINO: File a motion.

16 CHAIRMAN HONIGBERG: -- file a motion
17 and get something approved? I mean, I --

18 MR. WIESNER: And, --

19 CHAIRMAN HONIGBERG: I'm just -- I don't
20 know that this phrase is necessary.

21 MR. WIESNER: I mean, part of what's
22 happening here is EDP is proposing that the language
23 referring "an applicable procedural order" in (b) be
24 deleted, and a reference to the "procedural order" be

1 included in (a), which may have more general
2 applicability.

3 CHAIRMAN HONIGBERG: I'm okay with that
4 change. It really doesn't -- I don't think it adds much
5 or subtracts much, but it doesn't bother me. I think it
6 can work. Anybody disagree?

7 (No verbal response)

8 CHAIRMAN HONIGBERG: What about the
9 proposal that they have made, the two proposals they have
10 made in (d)?

11 COMMISSIONER BAILEY: I think, if
12 there's a group, they should be limited. If the Committee
13 has decided that a group should be grouped, they should be
14 limited to the same number of data requests as any other
15 party.

16 CHAIRMAN HONIGBERG: I will say that,
17 when parties are grouped, that's done pursuant to an
18 order, and that order almost always says something like
19 "if a party feels they have some unique issue or aspect or
20 things they want to advance, they can come back and
21 explain why that is." So, there's an out. But, if you
22 have been combined, it seems appropriate to me to make
23 that that group function like one entity for most
24 purposes, unless and until that decision gets changed.

1 Everybody seem -- agree with that? So,
2 these changes that are proposed by EDP Renewables are good
3 with people?

4 (No verbal response)

5 CHAIRMAN HONIGBERG: All right. Let's
6 talk about what's in the right-hand column, which are
7 proposed additions. What's the current practice regarding
8 technical sessions and recording and transcripts?
9 Mr. Iacopino.

10 MR. IACOPINO: Basically, I would say
11 for the past couple of years, we have been recording them.
12 It has become somewhat of a problem at times. People are
13 using what is supposed to be a relatively informal
14 discovery process, where all of the experts can get
15 together at the table to try to tie people down and, you
16 know, tie them to prior statements. So, I mean, I think
17 it's a judgment call for the Committee on whether you want
18 to require them to be transcribed or not.

19 What we have been doing, is it's
20 generally just been, I don't know even know why we started
21 transcribing them, but at one point we started
22 transcribing them. And, we've done that for the last
23 couple of years.

24 CHAIRMAN HONIGBERG: Are there smaller

1 proceedings where technical sessions have not been
2 transcribed?

3 MR. IACOPINO: There are large -- large
4 proceedings and small proceedings where, in the past,
5 where the technical sessions were not transcribed. And,
6 some of those involved some of the biggest applications
7 that we've had before the Committee.

8 So, for instance, neither the gas plants
9 were the tech sessions recorded, the Con Ed plant in
10 Newington or the AES plant in Londonderry. I believe
11 that -- well, and there are other ones that have not been
12 recorded. It's only basically the last two or three years
13 we have started recording them.

14 CHAIRMAN HONIGBERG: Commissioner
15 Bailey.

16 COMMISSIONER BAILEY: I have some
17 experience with technical sessions, based on my Staff
18 participation. And, I can see where recording a technical
19 session would change the dynamic and the usefulness of the
20 technical session. My experience with technical sessions
21 is to have an open discussion, sometimes it's
22 brainstorming. It's not supposed to be adversarial and
23 making the points like a deposition.

24 So, based on my experience, I don't

1 think that they should be recorded.

2 CHAIRMAN HONIGBERG: Commissioner Scott.

3 COMMISSIONER SCOTT: I concur with that.

4 The technical session, in my mind, is meant for the
5 parties to work out issues between themselves, it's not
6 for the Committee to be ruling on what's in a technical
7 session that's what's brought before us. So, I don't see
8 the benefit. Clearly, anything we're doing, needs to be
9 in the public setting. But I don't think that's the
10 correct forum.

11 CHAIRMAN HONIGBERG: Is it currently the
12 situation, Attorney Iacopino, that the default position is
13 recorded and transcribed? And, if someone wanted it not
14 to recorded and transcribed, they would have to take some
15 action to make that happen? Or, is it the reverse? Or,
16 is there no standard right now?

17 MR. IACOPINO: There's no standard in
18 those cases where I've presided over the technical
19 session. Recently, they have been transcribed. Although,
20 I have told parties that, after the last battle that we
21 had, I probably won't be requiring them to be transcribed,
22 to the extent I was in charge of it. And, that's because
23 we spent a lot of time on people basically getting into
24 each other's character and background and stuff like that,

1 which I thought was inappropriate for a technical session.

2 In other words, they were using the
3 technical session to try to attack a witness on the basis
4 of their prior testimony, or not even that, on the people
5 they associated with. I didn't think that was really the
6 role of a technical session. You're supposed to be
7 talking about the technical details of the project.

8 CHAIRMAN HONIGBERG: All right. So, we
9 currently do not have a rule on this.

10 MR. IACOPINO: Correct.

11 CHAIRMAN HONIGBERG: Does anyone feel
12 like we should have a rule?

13 (No verbal response)

14 CHAIRMAN HONIGBERG: Seems like the
15 answer is "no".

16 The next proposal or suggestion is
17 regarding "enforcement actions" related to discovery. Am
18 I reading that correctly?

19 MR. WIESNER: I believe that's correct,
20 Mr. Chairman. And, the rules as proposed, which are
21 largely based on the PUC's discovery rules, provide an
22 opportunity for motions to compel discovery responses.
23 And, you know, one view is that that should be sufficient,
24 without specifically having authority to fine parties who

1 are nonresponsive, which seems to be the thrust of this
2 proposal.

3 CHAIRMAN HONIGBERG: Commissioner
4 Burack.

5 VICE CHAIRMAN BURACK: Really just a
6 question for Attorney Iacopino along those lines. What is
7 the nature and extent of our statutory enforcement
8 authority as a body?

9 MR. IACOPINO: You have statutory
10 enforcement authority after a certificate has been issued,
11 which does include going to the superior court and
12 imposing fines of \$10,000 per day for being in violation
13 of a certificate. It's also a misdemeanor to violate
14 provisions of RSA 162-H.

15 But we don't have anything that goes
16 specific to conduct of the parties during the proceedings.
17 I'm not sure that you have statutory authority to issue a
18 fine because of something that somebody does during the
19 course of the proceedings, such as a discovery violation.

20 Certainly, if that's an intervenor, you
21 could terminate their intervention, because that's
22 permitted under the intervention statute. And, you
23 certainly can compel discovery, and then take appropriate
24 action, if the discovery is not brought forward, by either

1 excluding that party or excluding the material or making
2 an adverse inference about the contents of what would
3 be -- would have been produced, had it been produced.

4 So, there are other options, short of
5 severe fines, to pursue the discovery -- or, to regulate
6 discovery.

7 VICE CHAIRMAN BURACK: Do you believe
8 the Committee would have the authority to either suspend
9 or dismiss an application or an application proceeding, if
10 the Committee felt that the applicant itself were not
11 being forthcoming or otherwise uncooperative, or, for
12 whatever reason, was engaged in improper conduct from the
13 Committee's standpoint? Do you think we have that
14 authority under statute?

15 MR. IACOPINO: I've never thought of it.
16 I don't know. I think that my initial instinct is to say
17 that you probably do. But, before I would ever advise the
18 Committee to ever take that action, I would, obviously,
19 have to look through the statute.

20 CHAIRMAN HONIGBERG: Is it fair to say
21 that we're in general principles of administrative law?
22 And, that we're --

23 MR. IACOPINO: Yes.

24 CHAIRMAN HONIGBERG: -- pretty much like

1 every other state agency. We don't have the authority to
2 impose typical sanctions that a court would have for
3 discovery.

4 MR. IACOPINO: Yes.

5 CHAIRMAN HONIGBERG: And that, absent
6 statutory authority, we are limited to doing the kinds of
7 procedural things you talked about in your earlier answer,
8 is that a fair statement?

9 MR. IACOPINO: Yes. You have only
10 statutory authority. You have no inherent authority.

11 VICE CHAIRMAN BURACK: Mr. Chairman,
12 that being the case, I don't think we can do anything with
13 this provision suggested here. And, I think we just have
14 to happily go on.

15 CHAIRMAN HONIGBERG: Commissioner
16 Bailey.

17 COMMISSIONER BAILEY: Is discovery in
18 these proceedings generally submitted under oath?

19 MR. IACOPINO: No. There is prefiled
20 testimony, which is submitted under oath. And, obviously,
21 they're subject to cross-examination, and there's an oath
22 taken at the hearings. Many of the -- most of the
23 discovery that's done is a production of documents. It's
24 supposed to be complete, so that, if somebody requests

1 something, they don't just get the first ten pages of the
2 document. Or, you know, there's not supposed to be any
3 "hiding of the ball" that goes on. But it's not under
4 oath. So, it's just simply the production of information.

5 COMMISSIONER BAILEY: Mr. Wiesner, in
6 PUC discovery, usually there's a big long page of
7 qualifications that we send out with questions that sort
8 of outlines the expectations that everything is supposed
9 to be complete and truthful and all of that kind of thing.
10 Is that -- do you know what I'm talking about?

11 MR. WIESNER: Yes. And, that would
12 typically be under oath in the context where there's a
13 narrative response to a data request. So, if someone has
14 put the request in the form of a narrative response to a
15 question which is posed, and it may or may not refer to
16 attached documents or analysis, workpapers, whatever, that
17 response is itself under oath and needs to identify the
18 witness. That's just the standard practice that's been
19 adhered to in the PUC. And, Attorney Iacopino is much
20 more familiar than I am with the practice of the SEC.
21 Although, it appears that it's much more in the nature of
22 production of documents. Which I suppose, if the
23 response -- if the data request called for "provide all
24 documents", then the response might be "I have provided

1 all documents. See attached." But I guess I'm hearing
2 that that's not typically made under oath?

3 MR. IACOPINO: There's certainly no
4 requirement of it that I'm aware of. And, I was just
5 trying to find a set of data requests, but I can't get
6 onto my own DPN here. So, I don't -- I'm trying to see
7 whether just if the form is used, but I don't really think
8 it is. I don't think generally it's under oath.

9 CHAIRMAN HONIGBERG: Commissioner Scott.

10 COMMISSIONER SCOTT: My suggestion is
11 that we do not add any of this language. Moving onto the
12 last part, that "all discovery information become part of
13 the official record". My view is, if the parties don't
14 bring it forward to the Commission again as an exhibit,
15 then they're not using that as part of their argument, I'm
16 not sure what's served by the public interest of some
17 extraneous document that was received in discovery. I
18 don't see how that helps inform the public.

19 And, similarly, that language is overly
20 broad, because I would see that would bring in
21 confidential business information would, under this
22 language, would have to be presented also on the official
23 record. And, again, I don't see how the public interest
24 is served by that.

1 CHAIRMAN HONIGBERG: I don't disagree
2 with that. Does anybody want to take a different position
3 on any of this?

4 (No verbal response)

5 CHAIRMAN HONIGBERG: All right. We're
6 going to break in a few minutes. That was the last thing
7 we're going to discuss substantively.

8 We will be together again on Tuesday.
9 I'm almost certain now that we're going to need the other
10 day next week as well, which I think is Thursday. So,
11 make sure that time, which has already been held in all of
12 your calendars is still held.

13 We will be looking for a day in
14 mid-September to do a public comment hearing. If
15 people -- let's go off the record for a minute.

16 (Brief off-the-record discussion
17 ensued.)

18 CHAIRMAN HONIGBERG: All right. So,
19 we'll go back on the record. We are going to be trying to
20 schedule something in mid-September. We have not been
21 able to quickly come up with a date while we have all been
22 sitting here. So, we're just going to step away and do it
23 offline.

24 And, then -- but we will be back here

1 Tuesday next week, and almost certainly Thursday next
2 week. We'll be looking at the remainder of the issues,
3 but also beginning to look at a revised final proposal
4 that we're going to be putting out for public comment.

5 Does anyone have any other questions,
6 comments or things we need to do before we adjourn?

7 (No verbal response)

8 CHAIRMAN HONIGBERG: Commissioner Burack
9 moves we adjourn. Commissioner Bailey seconds. Is there
10 any further discussion?

11 (No verbal response)

12 CHAIRMAN HONIGBERG: Seeing none, all in
13 favor say "aye"?

14 (Multiple members indicating "aye".)

15 CHAIRMAN HONIGBERG: Any opposed?

16 (No verbal response)

17 CHAIRMAN HONIGBERG: Thank you all.

18 **(Whereupon the meeting was adjourned at**
19 **12:47 p.m., and the meeting to reconvene**
20 **on August 25, 2015, commencing at 9:00**
21 **a.m.)**