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Rules suggestion addition in bold italics, Kris Pastoriza, 3/23/15

"Site 202.30 Ex Parte Communications Prohibited.

(a) Committee members, ***staff and state designated liaisons,*** shall not communicate directly or indirectly with any person or party about the merits of an application, ~~or~~ petition ***or suggestions for Rules,*** unless all parties are given notice of the communication and are afforded an opportunity to participate in the communication."

It is of great interest that without any known-to-the-public-industry-suggestion, the authors of the Draft rules wrote:

"301.03 (c)
(6) Evidence that the applicant has a current right of legal access to and control of or the ability to acquire control of the site, in the form of ownership, ground lease, easement, option, or other contractual rights or interests."

And some weeks later Mr. Getz, a former SEC member and one of six registered lobbyists working for Ever$ource, suggested even looser wording to the SEC:

"The issue of site control has come up. The proposed rules basically create two provisions out of an existing provision. If you look at 301.03(b)(7) and (c)(6), I think what was trying to be accomplished was making a distinction between the land and the structures on the land. (b)(6) I think just talks about the facility, while -- (b)(7) talks about the facility, while (c)(6) talks about the site. I think, at a minimum, (c)(6) should be some changes to make it clear that a -- that the demonstration of the control of the site is not merely limited to contractual rights or interests, because there are certainly consideration of projects. And, I think would have been -- this would have been covered under the original rule as it stands, but there are, especially with the longitudinal, the linear projects, there may be areas where highways are crossed or public lands might be crossed, or public waters, that would require permissions from governmental agencies. So, I think the -- if this route is pursued, it just needs to be expanded to consider that there's more than contractual rights that are involved, but there may be, you know, agency permissions. And, we'll propose language on that."

It is hard to escape the conclusion that Ever$ource had already had already proposed the language of the Draft Rules, which is so favorable to industry and so opposed to suggestions of the SB-99 work groups and public.

In the same testimony Mr. Getz stated: "

Among the JLCAR's manual's basic drafting and structure principles are the requirements that rules be clear and specific. Which focuses on avoid vague or ambiguous words, such as "substantial", "significant" or "reasonable", because they can lead to case-by-case variations. Those words are the fundamental pieces of what this agency is supposed to address. These are the tools of your trade. The manual uses as an example of a discretionary decision involving approval or a denial of a permit, for instance, a rule when lights are required for boat moorings, which is barely analogous to the discretion

that the SEC is called upon to exercise. The manual is very concerned about the so-called trap of oral rulemaking, that is rules that need clarification or interpretations.

In the case of adjudicative bodies, such interpretation, however, is fundamental to the nature of these bodies, and those interpretations are better characterized as "precedent".

Mr. Getz may have been correct in his characterization but if he was implying that past decisions should guide future actions, he was mistaken. The purpose of SB-99 is to avoid repetition of previous mistakes by the SEC by incorporating public input and clarifying the rules.

Mr. Getz also stated:

"A close reading of the statute suggests that the agencies that would be involved in the completeness determination are agencies like DES, the PUC, DOT, agencies where the applicant applies or petitions for some specific permission or approval, and that agency makes a decision. Agencies who do not make such decisions consequently are not part of the completeness review, and would participate in the process as set forth in 162-H:7-a, III."

Mr. Getz engaged in distancing here. The "close reading" was done by him, but he implied a distant authority, or perhaps his supposedly objective authority as a former SEC member. He did not say "my close reading" or "Ever$ource prefers the interpretation that…"

He also engaged in "description is prescription:" His "close reading" (description) was what should be (prescription.) "Agencies who do not make such decisions consequently are not part of the completeness review…" is not a statement of fact but a request by Ever$ource to the SEC disguised as a statement of fact, without support. One aspect of regulatory capture is issue-framing by the parties: "[D]escription is prescription. If you can get people to see the world as you do, you have unwittingly framed every subsequent choice."

Another aspect of the regulatory capture at the SEC is "Procedures that value positions over perspectives: Capture is implicit in how agencies organize their proceedings. In captured agencies, litigating parties emphasize positions over perspectives. The agency invites and rewards this practice by asking "What do you want?" rather than "What do you know?"

An example of this is in Mr. Rielly's (3/4/15) testimony for National Grid, and Mr. Burack's question:

"VICE CHRMN. BURACK: Mr. Rielly, I just want to make sure I understand your first point relating to aesthetics. Is it your recommendation then that the standard be two miles for any project, regardless of whether it's in an urban, rural, or other area? Or, do you not have a specific recommendation?

MR. RIELLY: No. I think, having a more narrow, in an urban area, having a more narrow scope makes sense. But, going beyond two miles, as I understand it, and in our projects, our consultants have said that's sort of their standard, their industry standard. And, going beyond that, you know, the likelihood of having any visual impact just diminishes to almost nothing. So, I would say two miles is the cap, but there could be flexibility in urban areas to narrow that.

VICE CHRMN. BURACK: Thank you. I would also request that, if you do have a suggestion for different ways to look at the financial assurance mechanism, you provide that to us as well. "

“The agency invites and rewards this practice (position over perspective) by asking “What do you want?” rather than “What do you know?””
Mr. Rielly did not know, nor did he offer any proof, that beyond two miles “any visual impact just diminishes to almost nothing.” Ever$ource knows there is visual impact beyond two miles and includes that in their simulations, (while misrepresenting the impact.)

Mr. Rielly provided another example of regulatory capture at work when he stated:

“So, I think extending a visual analysis to three and five miles for electric transmission structures is not warranted, and it would be an unnecessary complication and expense that would ultimately be passed on to customers.”

This is what is known as “What’s good for the company is good for the country”: It is common for benefit-seekers to describe their private interests in public interest terms.”

(http://law.emory.edu/ecgar/content/volume-1/issue-1/essays/regulatory-capture.html)

Ms. Geiger, a former SEC member now representing EDP Renewables and Kinder Morgan, objected that:

"Cumulative impacts", at Site 102.14, is defined in a way that requires a proposed project to demonstrate its effects on, among other things, "all proposed energy facilities for which an application has been accepted".

She expressed concern that:

“The rule could also create wasted effort by the Committee and other parties. A recent example exists with respect to the Antrim Wind Project. If another project, an energy project application had been filed while the Antrim Project was under consideration by the Committee, the new applicant would have had to present information about the cumulative effects of the Antrim Project, in addition to its proposed project. Given that the Antrim Project was never approved, this would have been a wasted analysis.”

Given that Antrim Wind, the first project to be denied a permit by the SEC, has re-filed with the SEC, this would not have been wasted analysis.

Ms. Geiger, on behalf of Kinder Morgan and EDP Renewables also stated:

“The second area of concern relates to "scenic resources" and "visual impacts" criteria. The definition of "scenic resources" in Site 102.36 includes, among other things, "resources designated by municipal authorities". ***Our concern here is that we're not aware of any process or standards by which municipal authorities would have to make these designations***. And, in the absence of these standards, the municipal "scenic resource" designations could be made arbitrarily or for the sole purpose of creating an obstacle for an applicant.” (my emphasis)

There are several processes and standards by which municipal authorities can make these designations:

#1: “The duties of the New Hampshire Scenic & Cultural Byways Council are:

1. Encourage towns and municipalities to designate scenic and cultural byways within their jurisdictions and to petition the Council for the inclusion of these byways into the New Hampshire scenic and cultural byways system." http://www.nh.gov/dot/programs/scbp/documents/2014ROP.pdf

#2: The New Hampshire Office of Energy and Planning, in their Technical Bulletin # 10, Preservation of Scenic areas and Viewsheds, advises:

"…it is important to identify and protect from development those vistas, views and scenic areas that are considered significant to the residents of a community. In this context, protecting views may be considered an extension of the concept of promoting the general health and welfare of a community and region. This enables municipalities, under their police powers, to develop standards and to impose reasonable restrictions on development within a designated view protection area."
(https://www.nh.gov/oep/planning/resources/documents/scenic-preservation.pdf)

#3: Town Natural Resource Inventories and Master Plans are means by which Towns can designate scenic viewsheds, and should be listed in Site 301.09 (c) as several people have noted:

"Site 301.09 Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall ~~consider~~ ***reflect*** in their decision:
(c) The views of municipal and regional planning commissions, ~~and~~ municipal governing bodies, ***Master Plans, local zoning, local ordinances, and local Natural Resource inventories*** regarding ***values and resources that may be compromise by*** the proposed facility.

Ms. Geiger ends her lengthy testimony with this:

"And, the last item on my list is "public interest". We think that we'll need to approve a "public interest" standard."

It is the public that defines public interest, not energy corporations.

Energy corporations represent the interests of their shareholders. The interest of their shareholders is the profits of the corporation, not public interest.

Members of the SEC must keep in their heads the knowledge that the industry representatives are speaking with the sole goal of making money for EDP Renewables, National Grid, Ever$ource and Kinder-Morgan.