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**STATE OF NEW HAMPSHIRE**

**SITE EVALUATION COMMITTEE**

**November 18, 2015** - 1:17 p.m.  
Public Utilities Commission  
21 South Fruit Street Suite 10  
Concord, New Hampshire

**IN RE: SEC Docket No. 2014-04  
SITE EVALUATION COMMITTEE:  
Site 100 through Site 300  
Rulemaking Proceeding.  
(Meeting for Members to  
Respond to the Preliminary  
Objection by JLCAR, and  
Review and Approve the  
Final Proposal on Rules)**

**PRESENT:**

**SITE EVALUATION COMMITTEE:**

Chrmn. Martin P. Honigberg  
*(Presiding as Chairman of SEC)*  
  
Cmsr. Thomas S. Burack  
*(Vice Chairman of SEC)*  
  
Cmsr. Robert R. Scott  
Cmsr. Kathryn M. Bailey  
Cmsr. Jeffrey Rose  
  
William Oldenburg  
Dir. Elizabeth Muzzey  
  
Patricia Weathersby  
Roger Hawk

Public Utilities Commission  
  
Dept. of Environmental  
Services  
  
Public Utilities Commission  
Public Utilities Commission  
Dept. of Resources & Economic  
Development  
Dept. of Transportation  
Dept. of Cultural Resources  
(Div. of Historical Res.)  
Public Member  
Public Member

*Also Present:* David K. Wiesner, Esq. (NHPUC)  
Michael J. Iacopino, Esq. (Brennan Lenehan..)

COURT REPORTER: *Steven E. Patnaude, LCR No. 52*

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**P R O C E E D I N G**

1  
2 CHAIRMAN HONIGBERG: Good afternoon,  
3 everyone. We're here in SEC Docket 2014-04, which is our  
4 rulemaking. Feel like it's been going on forever. I see  
5 some new faces in our audience. Welcome. We'll have  
6 everyone up here introduce themselves, so everybody knows  
7 who everybody else is.

8 COMMISSIONER SCOTT: Good afternoon.  
9 I'm Bob Scott, with the Public Utilities Commission.

10 CHAIRMAN HONIGBERG: Martin Honigberg,  
11 also with the Public Utilities Commission.

12 VICE CHAIRMAN BURACK: Tom Burack,  
13 Commissioner of Department of Environmental Services.

14 COMMISSIONER BAILEY: Kate Bailey,  
15 Public Utilities Commission.

16 COMMISSIONER ROSE: Good afternoon.  
17 Jeff Rose, Commissioner of the Department of Resources and  
18 Economic Development.

19 DIRECTOR MUZZEY: Elizabeth Muzzey,  
20 Department of Cultural Resources.

21 MR. OLDENBURG: Bill Oldenburg, the New  
22 Hampshire Department of Transportation.

23 MS. WEATHERSBY: Patricia Weathersby,  
24 public member.

1                   CHAIRMAN HONIGBERG: And, Roger Hawk has  
2 entered the room and is walking up to take his seat.  
3 We're happy to see Mr. Hawk. We were not sure he was  
4 going to be able to make it here today.

5                   Since last we were together we filed the  
6 Final Proposal -- Final Rules Proposal with the Joint  
7 Legislative Committee on Administrative Rules. The JLCAR,  
8 as it's known, held a hearing, and entered a Preliminary  
9 Objection to the rules. While the oral motion stated on  
10 the record was quite broad, there were some identifiable  
11 issues that had been identified. We tried to catalog all  
12 of the issues that were raised as possible grounds for  
13 objection.

14                  Mr. Wiesner has done his usual amazing  
15 work trying to put together a synthesis and explanation of  
16 what all those objections might be, and what possible  
17 responses the Committee might make.

18                  I think Mr. Wiesner is also in a  
19 position today to explain the procedural posture which  
20 we're sitting, what options we have, what might happen,  
21 depending on what option or options we take going forward.

22                  MR. WIESNER: Yes. Thank you, Mr.  
23 Chairman.

24                  CHAIRMAN HONIGBERG: Let's wait just one

1 second and let this see of humanity file through to pick  
2 up papers.

3 MR. WIESNER: Right. I'll just take the  
4 opportunity to say I do have handouts. There are five  
5 separate documents. One of them is an outline of the  
6 issues that have been raised through the Preliminary  
7 Objections, and potential responses that the Committee  
8 might consider in responding to JLCAR. And, then, there  
9 are two revised versions of the rules, which would be, if  
10 the Committee decides to make those changes, included with  
11 a response to Preliminary Objections. So, there's one for  
12 the 100 and 200 rules and one that covers the 300 rules.  
13 And, that's what folks are picking up now. Also copied  
14 a -- also have extra copies of Section RSA 162-H:1, which  
15 is the Purpose section of the statute. And, some  
16 alternative language that might be considered by the  
17 Committee today.

18 CHAIRMAN HONIGBERG: And, you'll  
19 describe where that -- the source of that last document  
20 you talked about?

21 MR. WIESNER: Yes.

22 CHAIRMAN HONIGBERG: All right. So,  
23 let's just go off the record for a second and let people  
24 finish what they're doing.

1                                    *[Off the record.]*

2                                    CHAIRMAN HONIGBERG: All right,  
3 Mr. Wiesner -- we're back on the record. Mr. Wiesner, I  
4 interrupted you, and now I'm going to turn the floor over  
5 to you to do a little bit more scene-setting and move us  
6 along to the next step.

7                                    MR. WIESNER: Well, as you noted, Mr.  
8 Chairman, at the JLCAR meeting held on October 15th,  
9 Preliminary Objections were approved by that Committee.  
10 By a letter dated October 16th, we received the written  
11 confirmation of the Preliminary Objections, which included  
12 as well a substantial number of documents, written  
13 comments, and testimony that had been submitted to JLCAR,  
14 as well as editorial comments and other substantive  
15 comments made by the Office of Legislative Services'  
16 Administrative Rules Division.

17                                   And, our job now is to fashion a  
18 response to those Preliminary Objections. And, the  
19 Committee, this Committee, has the authority to amend the  
20 rules to resolve the bases for objection, withdraw the  
21 rules, or make no changes. And, in either of those cases,  
22 a response needs to be submitted to JLCAR which explains  
23 the basis for the decision made.

24                                   And, what I have done today -- well, let



1 me just say, we will then, after submitting that response  
2 to JLCAR, go back before JLCAR sometime in December, and  
3 I'll get to the timing of that in a moment, at which time  
4 the JLCAR would review the response and decide whether or  
5 not to approve the rules as amended and accept the  
6 response as submitted, after which this Committee could  
7 adopt the rules as final. Or, JLCAR may issue a Final  
8 Objection to all or a part of the rules, as amended and  
9 submitted in the response by this Committee, or -- and/or,  
10 I should say, with respect to a Final Objection, JLCAR  
11 could also vote to sponsor a joint resolution that would  
12 result in further legislative action. And, that triggers  
13 a process in the Legislature, where there would have to be  
14 a resolution introduced in either the House or Senate.  
15 And, if it is introduced within the requisite timeframe,  
16 20 business days, if the -- once the Legislature is in  
17 session, then there would be a 90-day period within which  
18 the Legislature could complete whatever action it deemed  
19 necessary based on that joint resolution. And, the key  
20 there is that, if there's a joint resolution process  
21 initiated in the Legislature, this Committee can take no  
22 further action with respect to whichever portion of the  
23 rules is the subject of that joint resolution until the  
24 legislative process is concluded. Or, if there is

1 inaction, there's a 90-day outside window. But this  
2 Committee could adopt all of the other rules that are not  
3 subject to a joint resolution, but could not adopt the  
4 rule that was subject to that joint resolution.

5 The effect of a Final Objection, and I  
6 should note that the JLCAR has the option to issue a Final  
7 Objection at any time, in lieu of a joint regulation or in  
8 addition to a joint resolution, and the effect of a Final  
9 Objection to a portion of the rules is that the burden of  
10 proof in justifying the rules would shift to the agency,  
11 in this case, the SEC. So, effectively, the presumption  
12 of validity would no longer apply, and the SEC would have  
13 to -- would have the burden of justifying why adoption of  
14 that rule over a Final Objection and enforcement of that  
15 rule against a particular party, such as applicants, was  
16 within its statutory authority and was not contrary to  
17 legislative intent, which are two of the primary bases for  
18 objection before JLCAR.

19 CHAIRMAN HONIGBERG: Regarding the  
20 presumption you talked about, my understanding of the way  
21 it works is that rules that are duly enacted by any agency  
22 in the state that aren't the subject of an objection  
23 are -- have the force and effect of law and are presumed  
24 to be valid against any challenge. That doesn't mean that

1 someone can't come in and prove that they are invalid,  
2 unconstitutional, have some other problem, but they are  
3 presumed to be valid. Whereas, rules that are adopted  
4 over a Final Objection from JLCAR do not carry that  
5 presumption.

6 Is that another way of saying what you  
7 said?

8 MR. WIESNER: Yes. That's correct, Mr.  
9 Chairman. And, that's a very important distinction. The  
10 burden shifting to the agency means it's much easier for a  
11 party to challenge, either on appeal or perhaps through a  
12 declaratory judgment action, rules that have been adopted  
13 over a Final Objection. So, I think it's fair to say that  
14 agencies typically do everything they can to avoid  
15 receiving a Final Objection from JLCAR, as well as  
16 avoiding a joint resolution.

17 CHAIRMAN HONIGBERG: And, my  
18 understanding also is that there is a Revised Objection  
19 process that is out there for JLCAR, which apparently  
20 doesn't get used very often, but it's described in the  
21 statutes and is one of the possible paths that we might  
22 end up on.

23 MR. WIESNER: There is a process. I  
24 mean, there's a process by which the JLCAR Committee can

1 issue a Revised Objection at the request of the agency,  
2 and then would have an opportunity to respond to that  
3 Revised Objection. And, that is the last opportunity for  
4 an agency to make substantive changes to its rules before  
5 having to act on them or withdraw them, I think. And,  
6 that is something that could be done at a JLCAR meeting,  
7 where rules come back in the form of a response to a  
8 Preliminary Objection. So, for example, if rules are  
9 then -- if amended rules are submitted with a response to  
10 a Preliminary Objection, and it's clear at the JLCAR  
11 meeting that there will be a vote taken to issue a Final  
12 Objection on a particular portion of those rules, the  
13 agency can, at that time, request that the Committee, the  
14 JLCAR Committee in this context, issue instead a Revised  
15 Objection, directing the agency to change the rules in a  
16 particular fashion, after which the agency would act to  
17 approve the revision to the rules and refile them with  
18 JLCAR as a response to that Revised Objection. And, then,  
19 if the JLCAR Committee accepts that response to the  
20 Revised Objection, then the agency would be empowered to  
21 adopt those rules as final.

22 CHAIRMAN HONIGBERG: All right. There  
23 will be a test later. But does anybody have any questions  
24 for Mr. Wiesner generally about this process? I'm sure

1 NHPR is going to devote at least ten minutes tonight just  
2 to that procedural explanation. So, you might be able to  
3 listen to it again online as well. So, does anybody have  
4 any questions for Mr. Wiesner?

5 *[No verbal response]*

6 CHAIRMAN HONIGBERG: All right. Let me  
7 try to dispose of one of the options that Mr. Wiesner  
8 outlined, which was to abandon the rulemaking process.  
9 Would it be safe to assume that there's no one going to  
10 make such a motion?

11 *[No verbal response]*

12 CHAIRMAN HONIGBERG: Oh, good. So, we  
13 can put that one aside. Mr. Wiesner, let's -- then I  
14 think is the next thing to turn to the objections or is  
15 there more scene-setting we need to do?

16 MR. WIESNER: Well, I did want to speak  
17 to the timing issue. And, some folks in the room may have  
18 noticed that JLCAR -- the JLCAR meeting agenda for  
19 tomorrow's meeting actually lists these rules as an agenda  
20 item. And, I think that they did that as a placeholder,  
21 not knowing exactly when a response would be submitted to  
22 the Preliminary Objections to the SEC rules. I mean,  
23 given that we have this meeting to consider that response,  
24 there's realistically no way to submit anything such that

1 it would be considered at tomorrow's meeting. So, there's  
2 really no reason for folks in this room to think that they  
3 need to be at that meeting to hear about these rules.

4 I also think that one of the reasons  
5 that that was done is that JLCAR may act tomorrow to  
6 continue that meeting agenda item on their agenda to their  
7 next continued meeting, which is scheduled for December  
8 3rd. And, my understanding is, if the SEC were to submit  
9 its response to the Preliminary Objections next week, that  
10 it might be possible to get on the agenda for that  
11 December 3rd meeting.

12 Now, we have a statutory deadline of  
13 November 30th. So, we actually have until the following  
14 Monday after Thanksgiving to submit the response to  
15 Preliminary Objections. But, if we can do it next week,  
16 there's a better chance that the JLCAR would be in a  
17 position to take up the response and the amended rules  
18 that go with the response at their next meeting on  
19 December 3rd.

20 And, there's a regular JLCAR meeting  
21 scheduled for December 17th. So, that would be the  
22 further opportunity, if we miss December 3rd.

23 CHAIRMAN HONIGBERG: Okay. Does anybody  
24 have any questions about that?

1                                    [No verbal response]

2                                   CHAIRMAN HONIGBERG: All right. Good.

3                                   MR. WIESNER: Now, one of the documents  
4 that I have prepared and it's been handed out and  
5 distributed, and hopefully everyone has a copy, if not,  
6 you know, look on with a friend, and we have more coming,  
7 one of them is an outline that I have prepared for the  
8 Committee's consideration, which summarizes, in very brief  
9 form, the objections that have been received and are the  
10 subject of the Preliminary Objection, and potential  
11 responses to those objections. It begins by discussing  
12 the public comments. And, then, at the end of the  
13 document, highlights some of the Office of Legislative  
14 Services' comments and how they have been addressed or not  
15 addressed in the revised rules that are also available for  
16 distribution, and which the SEC members should have a copy  
17 of.

18                                  CHAIRMAN HONIGBERG: All right. Has  
19 everybody found that document? I'm going to make a  
20 suggestion that, rather than take on -- take them in  
21 order, that we hold "public interest criteria" and  
22 "cumulative impacts" to the end, and try to deal with  
23 everything else first.

24                                  Does that make sense to you,

1 Mr. Wiesner? Or, did you really want to take on the meaty  
2 issues first, on the assumption that we we'd all be  
3 exhausted and the rest would just fall out?

4 MR. WIESNER: I serve at the pleasure of  
5 the Committee.

6 COMMISSIONER BAILEY: What a good guy.

7 CHAIRMAN HONIGBERG: Thank you for  
8 humoring me.

9 MR. WIESNER: I had intended that we  
10 would take the hard stuff first.

11 CHAIRMAN HONIGBERG: I honestly think we  
12 would be better off trying to deal with that after.

13 MR. WIESNER: Okay.

14 CHAIRMAN HONIGBERG: I may regret this,  
15 but --

16 MR. WIESNER: Well, if we leave those  
17 two issues for the end of the session, and I will say that  
18 those are the two issues that have received the most  
19 attention, and are probably the subject of the strongest  
20 objections.

21 But, moving on, this then appears on  
22 Page 2. A number of parties commented on "municipal" --  
23 what I call "municipal preemption", which is essentially  
24 the recognition, if you will, in the rules where it



1 appears that the SEC has the authority to preempt and  
2 overrule municipal zoning and planning master plans. And,  
3 we received a number of comments, or I should say JLCAR  
4 received a number of comments, which are incorporated into  
5 its broad Preliminary Objection, challenging that. And,  
6 there's a list of folks who submitted those comments,  
7 including a number of towns from the North Country,  
8 Executive Councilor Joe Kenney, and several individuals.

9 I have outlined a proposed response,  
10 which highlights the Supreme Court precedent in the  
11 *Hampton* case, going back to 1980, in which it was made  
12 clear, in my view, that the SEC did have the authority to  
13 preempt municipal planning and zoning requirements. And,  
14 it does not appear that the Legislature has overruled that  
15 or modified that effectively through any of the changes  
16 that have been made to 162-H since that time.

17 CHAIRMAN HONIGBERG: I do not see this  
18 as a controversial issue. There may be many people who  
19 disagree with this, that it's not the way it should be,  
20 but I think there's little question that that's the way it  
21 is. And, those who believe that it should be different  
22 need to go to a different body and call their legislator  
23 and see if there's interest in legislation on this. As it  
24 stands right now, this, to me, is not a controversial

1 issue.

2 Does anyone want to take a different --  
3 have any different view about that?

4 *[No verbal response]*

5 CHAIRMAN HONIGBERG: All right. Let's  
6 move on.

7 MR. WIESNER: And, let me just say that  
8 one of the purposes for this outline, and the Committee's  
9 approval of the outline, is that I anticipate that, at the  
10 end of this session, based on whatever the decisions made  
11 are, that there will be an authorization to the Chairman,  
12 working with counsel, to prepare a more detailed objection  
13 that would be submitted to JLCAR. Because there's quite a  
14 bit more explanation here, these are just sort of a brief  
15 outline of the responses that would be submitted. I'm  
16 picturing a letter that's probably 10 or 12 pages long,  
17 that contains, you know, considerably more explanation on  
18 each one of these issues as to the Committee's decision to  
19 make a change or not to make a change.

20 CHAIRMAN HONIGBERG: Fair enough. Thank  
21 you.

22 MR. WIESNER: The next issue I have  
23 listed is I call it "municipal veto impermissible". And,  
24 this is essentially a shorthand way of describing an

1 objection, a comment received from New England Ratepayers  
2 and EDP Renewables, that the proposed rules reference  
3 municipal master plans and zoning ordinances, and they  
4 should not, again, given the preemption available to the  
5 SEC of those municipal requirements. And, the proposed  
6 response is that those are listed in the rules, those are  
7 referenced in the rules as evidence of municipal views on  
8 relevant siting issues, and in no way make municipal  
9 requirements applicable to the SEC because of the  
10 presumption that exists under the Hampton precedent.

11 CHAIRMAN HONIGBERG: I see some nodding  
12 heads. Anyone disagree with what Mr. Wiesner just said?

13 *[No verbal response]*

14 CHAIRMAN HONIGBERG: All right. Seeing  
15 none. Next.

16 MR. WIESNER: Next on the list is  
17 "Transmission Setbacks". And, Ms. Martin and  
18 Ms. Pastoriza, a number of other folks have said that the  
19 SEC should have specific criteria regarding transmission  
20 setbacks. You know, as you'll recall, there was quite a  
21 bit of testimony about this, and a number of written  
22 comments and suggestions and proposals submitted by many  
23 folks during the rulemaking process.

24 I think the responses outlined here is

1 that this is essentially a policy determination, and that  
2 the SEC was persuaded by the comments received during the  
3 process that it would be difficult to adopt specific  
4 distance requirements that would apply in all cases and  
5 that, in fact, it was better to leave it to a case-by-case  
6 determination with respect to each individual transmission  
7 siting project.

8 CHAIRMAN HONIGBERG: Anyone have any  
9 comments, questions or thoughts on that?

10 *[No verbal response]*

11 CHAIRMAN HONIGBERG: Seeing none. Let's  
12 move on.

13 MR. WIESNER: Next issue I have teed up  
14 is "Site Control" and "Eminent Domain". And, these are  
15 principally -- I'm principally keying off of issues that  
16 were raised either in writing or at the JLCAR meeting by  
17 Senator Forrester and Dolly McPhaul. And, I think the  
18 Chairman made it very clear at the JLCAR meeting, and I  
19 think we might reiterate that as well in this response,  
20 that the SEC has no eminent domain power. And, the  
21 reference to "eminent domain" in the site control sections  
22 of the proposed new rules are really there as an  
23 alternative means for an applicant to demonstrate site  
24 control, if it would obtain property rights through

1 eminent domain available under another statutory scheme,  
2 primarily the FERC certification process for natural gas  
3 pipelines.

4 So, the proposed response here is really  
5 just a reiteration of that limited reference to "eminent  
6 domain" in the site control rules and a confirmation that  
7 in no way does the SEC have independent eminent domain  
8 authority.

9 CHAIRMAN HONIGBERG: Does anyone have  
10 any thoughts, disagreements with that?

11 *[No verbal response]*

12 CHAIRMAN HONIGBERG: All right. Seeing  
13 none.

14 MR. WIESNER: Next issue is on  
15 "Decommissioning Plans". And, this is primarily a comment  
16 received from Dolly McPhaul. That there should be no  
17 corporate guaranties, and that the removal of all  
18 structures and site restoration should be required for all  
19 energy facilities, not just wind facilities.

20 And, the response that's outlined here  
21 is that, again, these are policy decisions made by the  
22 SEC, after consideration of relevant testimony. And,  
23 therefore, essentially do not form the basis for a valid  
24 objection before JLCAR. Because JLCAR's typical -- their

1 job typically is not to review or second guess, if you  
2 will, policy decisions made by the agency. The focus is  
3 more on what's in the agency's statutory authority,  
4 legislative intent, whether something is manifestly not in  
5 the public interest. The grounds for a valid objection  
6 are more limited. And, the JLCAR process, as I understand  
7 it, is not really intended to be a place to appeal  
8 substantive, technical policy-based decisions made by an  
9 agency that are within -- clearly within the agency's  
10 statutory authority.

11 CHAIRMAN HONIGBERG: Any disagreements  
12 or comments on this?

13 *[No verbal response]*

14 CHAIRMAN HONIGBERG: All right. Seeing  
15 none. Moving on.

16 MR. WIESNER: We next have a set of  
17 objections that are -- I captioned them as "EDP  
18 Renewables' Objections", because they were raised  
19 initially only by EDP through a letter received from  
20 Attorney Susan Geiger. And, I have numerous bullet points  
21 here. These are all related to wind projects.

22 The first objection related to the "8  
23 hour annual shadow flicker limit". And, the objection was  
24 that that was against the public interest, in part,

1 because it was adopted so late in the rulemaking process.

2 Also, an objection that the definition  
3 of "cumulative impacts" should not include applications  
4 for energy facilities accepted by the SEC, which is in  
5 line with a comment which EDP had made during the general  
6 rulemaking process.

7 Also, a challenge to the requirement  
8 that photosimulations be submitted from a representative  
9 sample of private property locations.

10 And, turning to Page 3, the  
11 decommissioning provisions of the proposed rules exclude  
12 the consideration of salvage value in determining the  
13 amount of decommissioning funding that an applicant is  
14 required to maintain. EDP claims that this is contrary to  
15 legislative intent, because the specific exclusion of  
16 salvage value did appear in an earlier version of Senate  
17 Bill 281, which was specific to wind facility siting.  
18 That specific reference to "wind facility siting" migrated  
19 eventually to House Bill 1602, and appears now in  
20 162-H:10-a. And, through that process, the specific  
21 exclusion of salvage value was removed from the bill.

22 And, finally, EDP has also questioned  
23 whether there should be a requirement that certified mail  
24 notice be given to abutting property owners. And, the

1 claim is that that's inconsistent with 162-H, that  
2 otherwise requires only publication in the newspaper  
3 before a public information session is held.

4 The proposed response that I've outlined  
5 below those bullet points essentially focuses on shadow  
6 flicker, "cumulative impacts" definition, and  
7 photosimulation requirements, again, as policy decisions  
8 that were made by the Committee after consideration of  
9 comments. And, so, it was effectively not the subject of  
10 a valid objection.

11 On salvage value, there's always a  
12 question about whether the removal of language from a bill  
13 means that it was defeated on its merits, and we'll talk  
14 more about this later, I suspect, or whether that should  
15 be read another way. And, I think that the outline of a  
16 response here is based on the notion that exclusion of  
17 that counting of salvage value, if you will, from the  
18 determination of the proper amount of decommissioning  
19 funds that must be maintained by an applicant not contrary  
20 to the legislative intent and within the authority of the  
21 SEC to require through rulemaking.

22 And, similarly, with the certified mail  
23 notice to abutting property owners, which I believe the  
24 Committee adopted in large part based on a comment



1 received from a state representative, that that is not  
2 inconsistent with the statutory notice provisions for the  
3 initial public information sessions, which do, on their  
4 face, require publication in the newspaper.

5 So, I covered a lot of ground there, and  
6 several different issues.

7 CHAIRMAN HONIGBERG: Does anybody have  
8 any questions, comments? Yes, Commissioner Bailey.

9 COMMISSIONER BAILEY: Thank you. Can  
10 somebody tell me why we took -- why we excluded salvage  
11 value from the decommissioning amount?

12 MR. WIESNER: I mean, there were  
13 comments received from numerous parties that indicated  
14 that that was the best approach. That salvage value is  
15 inherently speculative, especially when you're talking  
16 about an asset that has a 20-year useful life, what the  
17 value will be at the end of that, hard to determine. And,  
18 that it is, I would say, better to err on the side of  
19 caution, exclude it from the calculation, and require  
20 decommissioning fund essentially on the assumption that  
21 there is no salvage value. And, that other states have  
22 adopted that approach. I would not sit here and tell you  
23 that all states have adopted that approach. But I think  
24 Maine has, speaking from memory now, but I believe that

1 some states, Maine and Vermont, have adopted  
2 decommissioning standards which specifically exclude  
3 calculation of salvage value.

4 COMMISSIONER BAILEY: So, that doesn't  
5 prevent the developer from getting the salvage value, if,  
6 indeed, at the end there is some salvage value?

7 MR. WIESNER: Oh, no. Not at all.

8 COMMISSIONER BAILEY: All right.

9 MR. WIESNER: It's just -- it's relevant  
10 to the calculation of what they need to maintain in terms  
11 of decommissioning funds and security to back up that  
12 decommissioning obligation.

13 COMMISSIONER BAILEY: Okay. Thank you.

14 CHAIRMAN HONIGBERG: Any other  
15 questions, comments? Does anyone disagree with the  
16 outlined response?

17 *[No verbal response]*

18 CHAIRMAN HONIGBERG: All right. Seeing  
19 none. Oh, Commissioner Bailey, I'm sorry.

20 COMMISSIONER BAILEY: I have one more  
21 question about a different topic.

22 On the photosimulations from private  
23 property, I think the criticism was that we didn't explain  
24 in the rules how many of the private properties had to

1 be -- have photosimulations. Can you -- sorry to throw  
2 that at you.

3 MR. WIESNER: This is in Site  
4 301.05(b)(7), which appears on Page 8 of the document  
5 that's been distributed. And, these are the specific  
6 requirements for photosimulations. And, it does require  
7 photosimulations from, to the extent feasible -- it should  
8 say, "to the extent feasible, from a sample of private  
9 property observation points within the area of potential  
10 visual impact". So, "area of potential visual impact" is  
11 a defined term, which is somewhat dependent on the type of  
12 facility. There's a "feasibility" notion built in here,  
13 and it's "a sample of private property observation  
14 points".

15 COMMISSIONER BAILEY: So, how would the  
16 developer know what the sample size should be? I think  
17 that's the criticism.

18 MR. WIESNER: It's --

19 COMMISSIONER BAILEY: So, do they have  
20 to take it from two? Five? Ten? I mean, a statistically  
21 valid sample, --

22 MR. WIESNER: The current rule does not  
23 specify that.

24 COMMISSIONER BAILEY: Yes. Is there any

1 way we can help them out?

2 MR. WIESNER: I mean, the Committee  
3 might hesitate to include a specific number, because it  
4 might depend on the size of the facility, and its  
5 prominence and the location.

6 COMMISSIONER BAILEY: Right.

7 MR. WIESNER: And, so, I think you  
8 probably default to some sort of "reasonableness"  
9 standard. And, if there were -- you know, the applicant  
10 might have to make the case that they've offered a  
11 sufficient sample, and other intervenors might challenge  
12 that, which is not an ideal situation. But, again, as  
13 with transmission setbacks, may be a situation where it's  
14 better to just leave it to a case-by-case determination.

15 COMMISSIONER BAILEY: And, so, the  
16 Committee would determine whether the sample size was  
17 adequate after it was done?

18 MR. WIESNER: That's one. I mean, if an  
19 applicant said -- if there were an opportunity for private  
20 property observation points to be studied from half a  
21 dozen locations all around a facility, and an applicant  
22 came in with one, that might be a grounds for the  
23 Committee to say "That is in no way a representative  
24 sample. You've not done and shown to us that it wasn't

1 feasible for you to offer a representative sample. And,  
2 so, therefore, the application is not even complete."

3 But that's an extreme case, as I just  
4 outlined. And, if it's a difference between five or six  
5 observation points, much more likely that that would be an  
6 issue that could be litigated.

7 CHAIRMAN HONIGBERG: Commissioner  
8 Burack.

9 VICE CHAIRMAN BURACK: Thank you, Mr.  
10 Chairman. Attorney Wiesner, in your explanation there,  
11 you actually used the term "representative sample". And,  
12 so, I've gone back through the language here to see if the  
13 term "representative" actually appears, and it doesn't.  
14 And, so, my question would be, what do you think would be  
15 the impact if we were to insert the word "representative",  
16 on the third line there of this Section (7), to read "from  
17 a representative sample of private property observation  
18 points"? Do you think that would provide further clarity  
19 here?

20 MR. WIESNER: I'm not sure that would  
21 help. I'm not sure -- this is not an area where we  
22 received a comment from OLS that suggests that the  
23 language is overly subjective or unclear. And, I do have  
24 some concern that, if we included "representative", that

1 that would -- that might trigger such a comment.

2 CHAIRMAN HONIGBERG: Commissioner Scott.

3 MR. WIESNER: I'm not quite sure what  
4 that means.

5 CHAIRMAN HONIGBERG: Commissioner  
6 Burack, you want to follow up?

7 VICE CHAIRMAN BURACK: Just thank you  
8 for that explanation. It's helpful to understand that OLS  
9 did not raise that concern with respect to this language.

10 CHAIRMAN HONIGBERG: Commissioner Scott.

11 COMMISSIONER SCOTT: I just wanted to  
12 point out that the third word is "representative". So,  
13 "Photosimulations from representative key observation  
14 points".

15 VICE CHAIRMAN BURACK: True. Thank you  
16 for pointing that out.

17 CHAIRMAN HONIGBERG: Director Muzzey.

18 DIRECTOR MUZZEY: Also looking at this  
19 language, I see that this sample is further defined by  
20 being limited to just those areas that have "high" scenic  
21 value. So that, again, makes the sample size smaller. As  
22 does the direction that these photosimulations are meant  
23 to "illustrate potential change". So, we're looking for  
24 sampling that have a specific illustrative value. So,

1 it's not an overly broad request, I feel.

2 CHAIRMAN HONIGBERG: Commissioner  
3 Bailey.

4 COMMISSIONER BAILEY: So, what this rule  
5 means is that we're going to be expecting photosimulations  
6 from some private property observation points that are  
7 looking at high value scenic resources? Is that what it  
8 means?

9 MR. WIESNER: I think -- I'm now reading  
10 this a little more carefully to see, since we've looked at  
11 other sections other than the specific clause regarding  
12 "private property observation points". And, there are --  
13 it seems to me that there are photosimulations required  
14 from various locations, "from representative key  
15 observation points", and that "key option point" is a  
16 defined term, "from other scenic resources", again another  
17 defined term, "for which the potential visual impacts are  
18 characterized as high, and, to the extent feasible, from a  
19 sample of private property observation points". So, the  
20 "sample of private property observation points" may not be  
21 the same, probably not, as the "representative key  
22 observation points" or "other scenic resources". Because  
23 the "scenic resources" definition incorporates a concept  
24 of public access, which would not be the case with private

1 property. So, this is -- this is an adder, this is an  
2 additional set of photosimulations that need to be  
3 submitted, if to -- to the extent feasible.

4 CHAIRMAN HONIGBERG: Commissioner  
5 Bailey.

6 COMMISSIONER BAILEY: That's how I read  
7 it, and I think it's confusing. I mean, maybe the better  
8 way to write the rule would be, if a private property  
9 owner comes in after the application is filed, and they  
10 request photosimulations, then at least the applicant  
11 would have the -- would know what we wanted them to do  
12 photosimulations of. But, "from a sample of private  
13 property observation points", you know, that may or may  
14 not be relevant to some applications. And, a sample of  
15 private property observation points on a transmission line  
16 that goes from Canada to Massachusetts would be different  
17 than a sample of a wind project in Antrim. And, it really  
18 is difficult, I think, to figure out what "sample" means.  
19 So, --

20 CHAIRMAN HONIGBERG: So, are you  
21 suggesting then that the -- that clause be removed from  
22 the rule to respond to the objection regarding  
23 photosimulations from private property?

24 COMMISSIONER BAILEY: That would be one



1 way to address it, yes. And, I would support that, if the  
2 Committee supported it.

3 CHAIRMAN HONIGBERG: I think you've just  
4 made a motion. Is there a second for Commissioner  
5 Bailey's motion?

6 *[No verbal response]*

7 CHAIRMAN HONIGBERG: Seems like there is  
8 not.

9 Are there any other comments, questions  
10 or concerns regarding this section or this set of comments  
11 and the proposed response? Commissioner Bailey.

12 COMMISSIONER BAILEY: Can we try it a  
13 different way? Can we try it the way that I suggested,  
14 which is maybe, you know, "from a sample of private  
15 property observation points determined by the Committee in  
16 response to private property owner's intervention", or  
17 something like that?

18 CHAIRMAN HONIGBERG: I think we have a  
19 timing problem there, because this is an application  
20 requirement we're looking at.

21 COMMISSIONER BAILEY: Oh.

22 CHAIRMAN HONIGBERG: So, this is  
23 something that the applicant has to do when they're coming  
24 to us for the first time.

1                   COMMISSIONER BAILEY: Does anybody else  
2 see the problem here?

3                   CHAIRMAN HONIGBERG: Commissioner Burack  
4 may.

5                   VICE CHAIRMAN BURACK: I'm trying to  
6 recall the conversations we've had on this. But I believe  
7 the expectation was that an applicant, in the process of  
8 developing their proposal, would, in fact, be in  
9 communication with various property owners, including the  
10 private property owners, in the area, and would contact  
11 them, let them know that they would be willing to do some  
12 observation from their properties, if that property owner  
13 would permit them to do so. And, it would really be on  
14 the basis of that kind of direct interaction between  
15 the -- between the applicant and willing property owners  
16 that some number of these observation points would be  
17 identified. It also is possible that there could be no  
18 property owners willing to permit that, in which case, we  
19 would expect the applicant to tell us that. It's also  
20 possible that the applicant could have some so many  
21 property owners wishing to have that done that the  
22 applicant would have to say "We can't do all of these,  
23 we're going to do a certain number within each geographic  
24 area", for example, and try to limit it in some reasonable

1 fashion.

2 I think, as with anything, we would just  
3 expect that sort of a test of reasonableness would apply  
4 here. That's the way I would envision this would play  
5 out.

6 CHAIRMAN HONIGBERG: Any other thoughts  
7 or comments on this section or with this set of issues and  
8 the possible response?

9 *[No verbal response]*

10 CHAIRMAN HONIGBERG: All right. Seeing  
11 none, let's move on.

12 MR. WIESNER: So, I take it then that is  
13 an approval by the Committee -- an approval by the  
14 Committee of the outline of the response to the EDP  
15 Renewables' objections?

16 CHAIRMAN HONIGBERG: That's how I took  
17 it.

18 MR. WIESNER: Okay. Now, if we want to  
19 move on to the OLS comments, I think one thing we also  
20 should do, and I don't know which makes more sense to do  
21 first, but there are changes that have been made in these  
22 rules handouts which I have not flagged as issues, because  
23 they are editorial changes primarily, made at the  
24 suggestion of the OLS attorneys. And, actually, on this

1 page that we were just looking at, Page 8, on "visual  
2 impact assessment", there are a number of changes which  
3 were made in the interest of clarity, although perhaps not  
4 fully successful. It was suggested to us that, instead of  
5 one huge paragraph, we break it out into subparagraphs.  
6 And, so, I have done that.

7 And, I think one of the things that we  
8 should do today is, and we can hopefully do this fairly  
9 quickly, just run through these documents and make sure  
10 that the Committee is agreeable to all of the specific  
11 language changes that have been made, most of which, as I  
12 note, are editorial in nature. And, I'm trying to avoid  
13 the problem we had last time, which is the Committee did  
14 not adopt or approve specific language in rules changes.  
15 And, so, we had to come back and have a further follow-up  
16 meeting, which we did, and before submitting a version of  
17 the Final Proposal of these specific rules on October 7th  
18 to forestall any objection by OLS that there had not been  
19 full Committee approval of those specific language  
20 changes.

21 So, I don't know, Mr. Chairman, whether  
22 you want to walk through now or go through the OLS  
23 comments? To some extent, they dovetail with each other,  
24 but not 100 percent.

1                   CHAIRMAN HONIGBERG: I don't know the  
2 answer to that. I think what makes the most sense is to  
3 do the editorial changes at the end, as we're wrapping up  
4 whatever else, whatever else might be done, and that would  
5 include the two big issues at the beginning of the  
6 document, I would do those before doing the editorial  
7 changes, I think.

8                   MR. WIESNER: That makes sense. So, if  
9 we want to continue on with the outline, I have taken the  
10 OLS comments in the order in which they appear in the  
11 rules.

12                   And, the first comment goes to the  
13 definition of "scenic quality". And, this is Site 102.44,  
14 which you'll be able to find in the handout of the 100 and  
15 200 rules on Page 6. "Scenic quality" means a reasonable  
16 person's perception of the intrinsic beauty of landforms,  
17 water features, or vegetation in the landscape, as well as  
18 any visible human additions or alterations to the  
19 landscape." And, perhaps not surprisingly, OLS flagged  
20 this as "subjective". They also made a comment that it  
21 was "substantive and should be moved to the 300 rules". I  
22 think I disagree with that, because, in fact, this  
23 definition of "scenic quality" is incorporated in a number  
24 of other definitions, such as "scenic resources", which

1 appears directly below it. And, so, I see it as sort of a  
2 foundational definition, which is used both in other  
3 definitions in the 102 section, as well as in the more  
4 substantive certificate sections of Site 300.

5 I have not made any changes, in part  
6 because this was not an issue which received a lot of  
7 public comment. And, I think, when we're talking about  
8 "aesthetics" and "scenic quality", that there is an  
9 inherent aspect of subjectivity, which is unavoidable.

10 CHAIRMAN HONIGBERG: Yes. You can take  
11 both words, "scenic" and "quality", and then you put them  
12 together and you get, you know, subjective synergies. It  
13 becomes subjectivity upon subjectivity. I don't think  
14 there's any way to create an objective definition of  
15 "scenic quality", or even list things that would be  
16 relevant to one's determination about whether something  
17 has "scenic quality" or what its scenic qualities are.

18 I don't -- we're not obligated to make  
19 any change in response to this comment, are we?

20 MR. WIESNER: Well, we should respond by  
21 saying we don't --

22 CHAIRMAN HONIGBERG: I'm sorry. We're  
23 not recording any change in response to that comment. We  
24 could just say "Yes, it's subjective, and we don't think

1 there's any way around it."

2 MR. WIESNER: That's correct. And, they  
3 might raise the objection again, and, in theory, JLCAR  
4 could issue a Final Objection that that's too subjective.  
5 But I'm not sure exactly what the effect of that would be,  
6 because, as you note, you know, aesthetic sensibilities  
7 are perhaps, you know, inherently subjective.

8 CHAIRMAN HONIGBERG: Attorney  
9 Weathersby.

10 MS. WEATHERSBY: Would it be more  
11 palatable to them if we struck "a reasonable person's  
12 perception of" or would that make it worse? So, it just  
13 said "'Scenic quality" means the intrinsic beauty of  
14 landforms", *etcetera*.

15 MR. WIESNER: I mean, I do believe that  
16 the addition of "a reasonable person" is to somewhat limit  
17 subjectivity. And, again, I'm not sure it's 100 percent  
18 successful. But, if beauty is truly in the eye of the  
19 beholder, this seems to say "well, it needs to be in the  
20 eye of a reasonable beholder."

21 *[Laughter.]*

22 CHAIRMAN HONIGBERG: Other thoughts or  
23 comments on this?

24 *[No verbal response]*

1 CHAIRMAN HONIGBERG: All right. Does  
2 anyone feel like we need to make a change to this section?

3 *[Multiple members indicating in the*  
4 *negative.]*

5 CHAIRMAN HONIGBERG: I see a lot of  
6 shaking heads. All right. Next.

7 MR. WIESNER: The next issue I have  
8 listed is "Subcommittee formation", which appears in Site  
9 103.03(a) and (d). So, these are on Pages 8 and 9. And,  
10 what we've done here is basically reproduce the statutory  
11 language, which indicates that the Chair can establish --  
12 may establish, I should say, a subcommittee to consider an  
13 application, and other types of matters that may come  
14 before the Committee. And, there was -- and similar  
15 language in (d). In each case, we have specifically cited  
16 the relevant statute. But OLS does not like use of the  
17 word "may", and their comment is that there should be some  
18 specific criteria included here that would restrain the,  
19 basically, the Chair's discretion to form a subcommittee,  
20 either the seven-member subcommittee for an application or  
21 the smaller subcommittee for relevant matters. And, I  
22 think that their -- I anticipated that there would be  
23 concern on the Committee that it not lose discretion which  
24 it currently has, because that has been an issue of



1 concern in prior meetings when we've taken up this issue.

2 And, so, my proposal was not to change  
3 the language, just let it sit as stated in the statute and  
4 as repeated here.

5 CHAIRMAN HONIGBERG: I want to make sure  
6 I understand what you just said. When you say "as stated  
7 in", the substantive language of these provisions, --

8 MR. WIESNER: Right.

9 CHAIRMAN HONIGBERG: -- are these quotes  
10 or close approximations of the actual language of the  
11 statute?

12 MR. WIESNER: Yes. Wherever we say  
13 "pursuant to" and cite the statute, is essentially the  
14 statutory language repeated.

15 CHAIRMAN HONIGBERG: So, it could say  
16 "as stated in statute blah, blah, blah, blah"?

17 MR. WIESNER: We've added "pursuant to"  
18 in several cases believing that that might forestall any  
19 further comments from the OLS staff, and it did not. And,  
20 so, that's why we have this as an objection which they  
21 have noticed, or, actually, I should say a comment which  
22 has then been incorporated in the Preliminary Objection  
23 and remains for decision by the Committee.

24 I hesitated to propose any specific

1 criteria that might be seen as limiting the discretion  
2 which is available under the statute. Another alternative  
3 might be to just remove the reference entirely.

4 CHAIRMAN HONIGBERG: You mean remove the  
5 rules and just --

6 MR. WIESNER: Remove the rule that  
7 contains the word "may", and let the statute speak for  
8 itself. Again, I don't have a good sense whether this  
9 would form the basis of a Final Objection that might be  
10 issued by JLCAR, upon review of the Committee's response.

11 CHAIRMAN HONIGBERG: All right. Does  
12 anyone have any thoughts or comments on this section? My  
13 primary comment is, we should do nothing to remove the  
14 discretion of the Chair to form subcommittees. That would  
15 be, in my view, a very poor idea.

16 If removing these rules would do no  
17 harm, I would not -- I would think that might be a decent  
18 idea. But I'm looking around for some input here.

19 Commissioner Scott.

20 COMMISSIONER SCOTT: While I don't have  
21 a strong opinion -- well, first of all, I do have a strong  
22 opinion, I think the statute gave us broad authority in  
23 this area and we should reflect that. Generally speaking,  
24 eliminating it would now require somebody who's trying to

1 understand our full process to look at our rules, and  
2 then, in turn, look at our statute. So, now, you have,  
3 instead of one-stop shopping, you have two-stop shopping.

4 So, as a general rule of thumb, my  
5 personal preference is that, even if we're reiterating, is  
6 to have it in the rules. Having said that, I would  
7 support just keeping as is.

8 CHAIRMAN HONIGBERG: Commissioner  
9 Burack.

10 VICE CHAIRMAN BURACK: I would concur in  
11 that view.

12 CHAIRMAN HONIGBERG: Does anyone have a  
13 different view or other comment on this or should we  
14 follow the wise counsel of Commissioners Scott and Burack?

15 *[No verbal response]*

16 CHAIRMAN HONIGBERG: All right. Seeing  
17 none. Looks like no change there.

18 MR. WIESNER: And, if we move onto the  
19 next comment, it is essentially the same issue. This is a  
20 state agency's member -- state agency member's designation  
21 of a senior staff person or a staff attorney to serve on a  
22 subcommittee. And, again, this is a statutory provision  
23 that has been essentially reproduced in the rules at Site  
24 103.03(d)(1), which appears on Page 9.

1                   CHAIRMAN HONIGBERG: It appears earlier  
2 as well. It's a provision of each of the rules we were  
3 just talking about, I think.

4                   MR. WIESNER: Yes. And, again, this is  
5 an area where I think the Committee might be concerned  
6 that it not lose the discretion which it apparently has  
7 under the statute, or I should say not "the Committee",  
8 each designated -- each member of the Committee has a  
9 certain amount of statutory discretion to designate  
10 someone to take his or her place on a subcommittee. And,  
11 I anticipated that there would be concern on the Committee  
12 in curtailing that discretion in any way.

13                   CHAIRMAN HONIGBERG: I think I speak for  
14 all of the state agency officials on this when I say yes,  
15 we would not want to limit our discretion to designate  
16 senior people within our agencies to serve on these  
17 committees. It seems like the same answer as the previous  
18 one, to make no change is probably the position. Is that  
19 right?

20                                   *[Multiple members nodding in the*  
21                                   *affirmative.]*

22                   CHAIRMAN HONIGBERG: Okay. Let's move  
23 on.

24                   MR. WIESNER: The next comment from

1 Legislative Services is with respect to Site 201.03.  
2 These are the public hearings which are -- and this  
3 appears on Pages 11 and 12 of the handout document. These  
4 are the public hearings that are held in the host counties  
5 after an application has been accepted by the Committee.  
6 And, these are hearings which involve the designated  
7 subcommittee, or the full Committee, if the full Committee  
8 is hearing it, hearings which are to be held within 90  
9 days in each county in which the proposed facility is to  
10 be located. And, the comment from Legislative Services is  
11 that there was not sufficient detail in the rules as to  
12 how those hearings would be conducted.

13 I have attempted to address that on Page  
14 12. There are four new subsections. And, these largely  
15 track sections that appear later in these procedural rules  
16 with respect to public comment. And, so, under the new  
17 proposed (e), members of the public have an opportunity to  
18 state their positions. And, under (f), if there --  
19 members of the public who desire to make a public  
20 statement must essentially sign in, and any individual who  
21 wishes to have another speak for him or her may do so.  
22 Transcript will be taken, which I believe is consistent  
23 with current practice. And, the transcript and all other  
24 written documents submitted in connection with any such

1 public hearing will be required to be posted on the SEC  
2 website.

3 CHAIRMAN HONIGBERG: Do you know which  
4 rule you cribbed from to create this language? You said  
5 it was something later, and I do remember the language, I  
6 just don't remember where it came from.

7 MR. WIESNER: Without commenting on that  
8 characterization, --

9 *[Laughter.]*

10 MR. WIESNER: 202.25, on Page 21 and 22,  
11 essentially, even once the adjudicative portion of the  
12 proceeding has begun, there's an opportunity for members  
13 of the public who are not intervenors to make public  
14 comments, but they have to sign in on a roster, and they  
15 can have someone else speak for them.

16 Some of the sections which appear in  
17 this -- some of the subsections which appear in this  
18 section are not applicable, such as cross-examination  
19 under oath.

20 CHAIRMAN HONIGBERG: No, that's helpful.  
21 Thank you. Commissioner Scott.

22 COMMISSIONER SCOTT: Attorney Wiesner, I  
23 was just curious, on your additional language under (f),  
24 right now, if I'm reading this correctly, in order to

1 make -- for somebody to be able to make a oral statement  
2 at a public hearing, they will have to provide their name,  
3 their contact information, and who they represent. And,  
4 where I understand we may want that information, but I  
5 guess I'm struggling with, if somebody wants to verbally  
6 give us an opinion, and they don't want to give us their  
7 contact information, is it really our intention to bar  
8 them from doing so?

9 MR. WIESNER: I think there may be a  
10 greater interest in having that information once the  
11 adjudicatory process has begun. But I think you raise a  
12 good point, which is do we really need that, when you're  
13 out in the county and someone just wants to come and make  
14 a statement on a proposed project, and they're not sitting  
15 in this room or in any other adjudicative process?

16 CHAIRMAN HONIGBERG: I think one of the  
17 things that a lot of public bodies are interested in, when  
18 members of the public address them, is where people are  
19 from. It's not so much how to get in touch with them, but  
20 what town do they live in? Are they commenting on -- you  
21 know, when I was on the school board, if, you know, we had  
22 a lot of people from the public would come and address us.  
23 If someone was from -- was not from Concord, we needed to  
24 understand why they were there, and what interest they

1 had, and why they wanted to address the Concord School  
2 Board.

3 So, I mean, I think that piece, that  
4 item of information would still be relevant. But, beyond  
5 that, I tend to agree. I don't think we necessarily need  
6 to know how to get in touch with people. People who are  
7 interested enough to become intervenors will provide all  
8 that information. Those who want to monitor don't need to  
9 become intervenors, they can go on the website and read  
10 everything they want. And, those in between, who want to  
11 provide comments, but don't want to fully involve  
12 themselves, yes, I think it's helpful to know where  
13 they're from.

14 MR. WIESNER: So, rather than requiring  
15 contact information, it might just be a place of residence  
16 or a place of business?

17 CHAIRMAN HONIGBERG: Yes, something like  
18 that.

19 MR. WIESNER: We should probably, again,  
20 try to come up with specific language so we can approve  
21 it.

22 CHAIRMAN HONIGBERG: I agree. So,  
23 Attorney Iacopino, would you take that paragraph and  
24 create an appropriate phrase to replace "contact



1 information" --

2 MR. IACOPINO: Sure.

3 CHAIRMAN HONIGBERG: -- while Attorney  
4 Wiesner continues?

5 MR. IACOPINO: Yes.

6 CHAIRMAN HONIGBERG: Thank you.

7 MR. WIESNER: And, I take it that we  
8 don't have a problem requiring public commenters to  
9 indicate if they're there representing someone else?

10 CHAIRMAN HONIGBERG: I don't have a  
11 problem with that. Anybody else?

12 *[No verbal response]*

13 CHAIRMAN HONIGBERG: No, doesn't look  
14 like it.

15 MR. WIESNER: So, that will be the only  
16 change there, and we'll come back to the specific  
17 language. I guess I'm hearing that the Committee is  
18 approving that as an approach.

19 CHAIRMAN HONIGBERG: Commissioner Rose.

20 COMMISSIONER ROSE: Thank you,  
21 Mr. Chair. I do have one question on (g) in this case,  
22 where it references "the Committee shall arrange for a  
23 transcript of each public hearing". And, I was just  
24 curious if we perhaps may want to consider minutes of that

1 public hearing, as opposed to a full transcript? And, I  
2 didn't know if that might be a little easier in terms of  
3 trying to get the logistics of having a stenographer there  
4 and reporting every minute -- actually, every transcript,  
5 as opposed to sort of a summary of minutes of that public  
6 hearing.

7 CHAIRMAN HONIGBERG: Commissioner Scott.

8 COMMISSIONER SCOTT: Maybe somebody can  
9 help me, but I believe the current practice is there are  
10 transcripts of all the public hearings. So, it's not a  
11 change, just so you understand that.

12 COMMISSIONER ROSE: Okay. Thank you. I  
13 guess I was thinking of perhaps some other public hearings  
14 where getting the full minutes might be quite lengthy.  
15 So, if that's standard procedure, that's very helpful.  
16 Thank you.

17 CHAIRMAN HONIGBERG: Other comments or  
18 questions?

19 *[No verbal response]*

20 CHAIRMAN HONIGBERG: It looks like we'll  
21 go with that, and we'll circle back to the specific  
22 language that will replace the phrase "contact  
23 information".

24 MR. WIESNER: The next issue on the

1 outline is "additional information sessions". This is  
2 Site 201.04, which appears just below the language we were  
3 looking at on Page 12. And, this, again, contains a  
4 reference to the applicable statute. This is a provision  
5 that tracks that statutory language that says that "on the  
6 request of a municipality in which the energy facility  
7 would be located, or on the Committee's own motion, there  
8 may be additional public information sessions required to  
9 be provided by the applicant." And, the OLS comment again  
10 is keyed on the word "may", "the Committee may order the  
11 applicant to provide". And, similar to the conversations  
12 we've had on two other sections, I think the concern that  
13 I had was that we not limit the Committee's discretion,  
14 and we're essentially reproducing here the statutory  
15 authority as it appears in 162-H. So, similar  
16 considerations apply here, as with subcommittee formation  
17 and state agency member designation.

18 CHAIRMAN HONIGBERG: And, I expect we  
19 would probably answer the question the same way.

20 *[Multiple members nodding in the*  
21 *affirmative.]*

22 CHAIRMAN HONIGBERG: And, I see lots of  
23 nodding heads. So, that's what we'll go with.

24 MR. WIESNER: The next two things on the

1 outline are "cumulative impacts" and "public interest  
2 standard", and I just include them because they were  
3 raised by Office of Legislative Services, as well as  
4 public commenters. And, we are going to get to those in a  
5 few moments. So, I'll skip over those for now. I think  
6 we will resolve those issues when we get to them.

7 On the "Conditions of certificate", this  
8 is Site 301.17. So, we're now jumping to the other  
9 document which has been handed out. This is on Page 19 of  
10 the document I handed out. It is Site 301.17. It appears  
11 as "Site 301.16", and I'll explain that when we get there.  
12 That's not to presuppose what the decision of the  
13 Committee will be with respect to the public interest  
14 criteria. I'll just make that caveat.

15 The OLS comment was that this section,  
16 which basically contains a menu of different certificate  
17 conditions that may be included to cover various types of  
18 issues that typically arise in an energy facility siting  
19 proceeding, is not clear enough as to when and why the  
20 Committee would adopt those conditions.

21 And, I have attempted to address that by  
22 saying that the Committee would include such conditions in  
23 order to meet the objectives of RSA 162-H:1 and 16, which  
24 are the Purpose section and the Specific Findings section,

1 required in order to issue a certificate.

2 I mean, if you'll recall, I think we  
3 included this section, because we thought it would be  
4 helpful to provide some greater clarity and transparency  
5 to the type of certificate conditions that are often  
6 imposed, but there's no specific requirement that any of  
7 these be imposed in a situation where it would not be  
8 applicable or advisable in the view of the Committee or  
9 Subcommittee approving the certificate.

10 CHAIRMAN HONIGBERG: Anyone have any  
11 comments, questions on this proposed response?

12 Commissioner Burack.

13 VICE CHAIRMAN BURACK: I would just  
14 offer the comment that I think this is a constructive  
15 approach to addressing the concern. And, though, I think  
16 our alternative would have been to simply not include this  
17 provision at all in the rules, we had originally discussed  
18 that, but I think the way you have this structured is a  
19 better and more informative approach than not doing  
20 anything at all on these issues in the rules.

21 CHAIRMAN HONIGBERG: Do the others agree  
22 with Commissioner Burack on this?

23 *[Multiple members nodding in the*  
24 *affirmative.]*

1 CHAIRMAN HONIGBERG: I see nodding  
2 heads. All right. So, we'll move on.

3 MR. WIESNER: The next issue caught my  
4 attention when I first saw it. We had a section that  
5 addressed access to a facility site for inspection and  
6 monitoring by the Committee. And, I would never have  
7 thought that it could be claimed as a violation of the  
8 Fourth Amendment of the United States Constitution. But  
9 apparently there's a recent case from the New Hampshire --  
10 excuse me, the United States Supreme Court, *Patel versus*  
11 *City of Los Angeles* which calls that into question.

12 And, I have attempted to revise -- I  
13 have attempted to address that concern by revising the  
14 language in such a way that it does not have the same  
15 effect that it did previously. And, this is Site  
16 302.01(b), which appears on Page 23.

17 And, so, the focus of the rewritten  
18 section is that -- is really on the authority of the SEC  
19 administrator or another designated representative to  
20 inspect and monitor construction and operation of the  
21 energy facility subject to the certificate. Rather than  
22 the focus being on the obligation of the certificate  
23 holder to provide access, which is called into question by  
24 the holding in the U.S. Supreme Court case cited by OLS.

1                   CHAIRMAN HONIGBERG: Anybody have any  
2                   comments, questions or concerns about this response or  
3                   this way of responding to the OLS comment?

4                   Commissioner Scott likes it, he tells  
5                   me. Any others?

6                   [No verbal response]

7                   CHAIRMAN HONIGBERG: I, too, was  
8                   surprised to hear that someone who comes to the government  
9                   and seeks a certificate to do something isn't obligated to  
10                  allow the government to go and see if they're doing what  
11                  they have been permitted to do.

12                  But I do think that the way you've  
13                  crafted a response, focusing on the authority of the  
14                  administrator, seems to address the concern that was  
15                  raised.

16                  So, does anybody have any other  
17                  thoughts?

18                  MR. WIESNER: I mean, the fact -- the  
19                  facts of the *Patel* case are different, quite a bit  
20                  different, but the holding seems broad. And, as I say, it  
21                  does call into question these rules provisions, which  
22                  require access without any sort of pre-access review  
23                  available to the permitted entity.

24                  CHAIRMAN HONIGBERG: I guess I would

1 say, if we're going to get to the United States Supreme  
2 Court, I don't want it to be on this particular type of  
3 issue, in all honesty.

4 Should we go with it?

5 *[Multiple members nodding in the*  
6 *affirmative.]*

7 CHAIRMAN HONIGBERG: All right. Nodding  
8 heads. Let's go with it.

9 Let's do this last issue here, and then  
10 we're probably going to need to take a break.

11 MR. WIESNER: So, the final comment from  
12 Legislative Services is on the certificate suspension  
13 provisions of Site 302.01(f) and 302.02(d). And, again,  
14 this is another place where the statute says "may", and we  
15 picked that up in these rules.

16 Here I have made a change for your  
17 consideration, which changes "may" to "shall". The  
18 comment of OLS was essentially to clarify when there would  
19 be a situation where the certificate would not be  
20 suspended, if it were found that there were a violation of  
21 the certificate or a misrepresentation. And, rather than  
22 do that, the choice I made, for your consideration again,  
23 is to change "may" to "shall". Which means that, in an  
24 event that there were a violation or a misrepresentation,



1 that the Committee would be required to issue an order  
2 suspending the holder's certificate, as it states.

3           However, I made that change, in part,  
4 because there's a broad waiver provision. And, we've  
5 discussed it previously in meetings of this Committee and  
6 how it might be applicable. It seemed to me that this  
7 might be an appropriate case as well, to include language  
8 that required the suspension to occur, but permit the  
9 opportunity for a waiver to be granted, either at the  
10 request of the certificate holder or on the Committee's  
11 own motion, if the public interest would support a waiver  
12 being granted.

13           So, for example, there's been a  
14 violation, the certificate holder comes in and says "Don't  
15 suspend me. Here's my mitigation plan. Issue a waiver of  
16 that rule. It's in the public interest for the facility  
17 to continue operating, so long as it complies with the  
18 mitigation plan." And, it seemed to me that that would be  
19 a situation where the Committee might grant a waiver of  
20 the automatic suspension that would otherwise apply under  
21 this rule rewritten with the word "shall".

22           CHAIRMAN HONIGBERG: I think,  
23 substantively, that doesn't really change the obligation  
24 much. Because, if an entity is in a situation where it's

1 in violation of the rules, those rules are continuing, and  
2 there's a finding that they are -- that they are in  
3 violation, they're usually going to be coming in and  
4 arguing "don't suspend us because of X, Y, and Z." Here  
5 they would be saying "Waive the rule and don't suspend  
6 us."

7 MR. WIESNER: That's correct.

8 CHAIRMAN HONIGBERG: So, they just need  
9 to add a phrase to their prayers for relief when they come  
10 in begging for mercy. Is that essentially right?

11 MR. WIESNER: That's correct. And, the  
12 alternative to including -- I mean, we could either just  
13 leave "may" as it is, because that's the language of the  
14 statute, and consistent with the determinations we've made  
15 on other similar issues, or we could, at the suggestion of  
16 OLS, spell out the criteria that would lead to a finding  
17 that a suspension is warranted or not. And, there are  
18 pitfalls in doing so, I believe. Or, here, saying "shall"  
19 means that there will be an order suspending the  
20 certificate, unless there's a waiver of that rule.

21 And, as you note, Mr. Chairman, if the  
22 applicant does not want to be suspended and offers a good  
23 reason for it not to be, that would be coupled then with a  
24 request for a rule waiver, and there would have to be a

1 finding by the Committee or a subcommittee that it's in  
2 the public interest to grant that waiver, and not suspend  
3 the certificate, but adopt the mitigation plan, in that  
4 scenario.

5 CHAIRMAN HONIGBERG: Right. And,  
6 wouldn't always be a mitigation plan, that was just your  
7 example?

8 MR. WIESNER: That's correct.

9 CHAIRMAN HONIGBERG: Okay. All right.  
10 Do people have other -- have thoughts, comments, other  
11 suggestions on this? Commissioner Burack.

12 VICE CHAIRMAN BURACK: Mr. Chairman,  
13 thank you. This is a thorny one here. And, I think my --  
14 the root of my concern is that there are many different  
15 forms that violations can take, from the minor to the  
16 extraordinarily serious. And, I think the way the statute  
17 is written, it recognizes that the Committee necessarily  
18 is going to have to exercise its discretion in determining  
19 just how serious a violation is, and whether the  
20 seriousness thereof warrants the, arguably, pretty  
21 draconian action of actually suspending a certificate.  
22 That's about as serious as it gets. I mean, that's the --  
23 that's really, the way this statute is written, arguably,  
24 it's almost the only -- the only action that the Committee

1 can take, regardless of how serious a violation is.

2 And, it troubles me that, effectively,  
3 we would be forced to surrender our discretion up front by  
4 having to effectively issue an order in every case, and  
5 put the party in a position of having to say why we  
6 shouldn't then be actually seeking to enforce that order.

7 Maybe there are no other mechanisms  
8 available to us to deal with what I really think is sort  
9 of a continuum on the range of the seriousness of the  
10 violation. But I'm troubled by having to go to the  
11 extreme at the very start of the process, effectively.

12 CHAIRMAN HONIGBERG: Lots of comments.  
13 Director Muzzey.

14 DIRECTOR MUZZEY: I agree with  
15 Commissioner Burack's thoughts as well. There is a large  
16 difference moving from the language of "may" to the  
17 language of "shall". And, given our decision in these  
18 earlier comments by OLS to maintain the Committee's  
19 discretion and the use of "may", because the legislation  
20 gives us that discretion and uses that language, I would  
21 be more comfortable with applying that logic here as well.

22 CHAIRMAN HONIGBERG: Attorney  
23 Weathersby.

24 MS. WEATHERSBY: I'm wondering about

1 changing "may" to "shall", but having a "unless" clause.  
2 So, they "shall suspend the certificate, unless the SEC  
3 finds it is in the public's interest and an adequate  
4 mitigation plan is provided", or, you know, something that  
5 gives us some discretion to not suspend, because they have  
6 provided adequate information to us that tells us, you  
7 know, what they would put in their waiver, essentially.

8 CHAIRMAN HONIGBERG: Commissioner  
9 Bailey.

10 COMMISSIONER BAILEY: I was wondering if  
11 the continuum of minor to extremely serious could be dealt  
12 with in our determination of whether we needed to have an  
13 adjudicative hearing. And, we only have to issue an order  
14 to suspend the certificate after we've made a filing -- a  
15 finding --

16 VICE CHAIRMAN BURACK: True.

17 COMMISSIONER BAILEY: -- after an  
18 adjudicative hearing. So, if it was a minor violation,  
19 would this require us to have a hearing?

20 CHAIRMAN HONIGBERG: Commissioner Scott.

21 COMMISSIONER SCOTT: The way I read  
22 302.01(a), at least the current language, it says  
23 "Whenever the Committee or the administrator as designee  
24 determines, on its own...that any term or condition of an

1 issued certificate [has been] violated". So, that's  
2 pretty explicit.

3 CHAIRMAN HONIGBERG: Commissioner  
4 Bailey.

5 COMMISSIONER BAILEY: Well, so, that  
6 says that we have to give written notice to the person  
7 that we think there's a violation and tell them to  
8 terminate the violation. But it doesn't necessarily lead  
9 to a hearing.

10 CHAIRMAN HONIGBERG: Commissioner  
11 Burack.

12 VICE CHAIRMAN BURACK: Mr. Chairman, I'm  
13 just trying to go back and reread (f) in the context of  
14 the entire set of provisions here in 302.01. And, it may  
15 be helpful if Attorney Iacopino, I don't know if we have  
16 any specific examples that we can talk about or general  
17 sort of lessons that have been learned over the course of  
18 time. But there is clearly a process laid out here by  
19 which, in theory at least, a party that is in violation  
20 gets notice of that, has an opportunity to correct that  
21 violation, and, ultimately, you know, doesn't act in a  
22 manner that the Committee determines satisfactory, the  
23 Committee then at that point, you know, the final  
24 resolution is to issue an order.

1                   So, in some respects, perhaps the  
2 process itself, as it's laid out here, addresses the  
3 concern that I raised and that others have perhaps shared  
4 in as well. Maybe -- but I guess my question for Attorney  
5 Iacopino would be, would there always be an adjudicative  
6 hearing or has there always been an adjudicative hearing  
7 in these proceedings? That is, is there some way to  
8 preface the language here, to modify the language in (f),  
9 to essentially make clear that the Committee is making  
10 this to determine, whether following an adjudicative  
11 hearing or not, that a violation has occurred, it's  
12 continuing, and that inadequate efforts have been made to  
13 rectify the violation. I mean, that's -- those are really  
14 the circumstances in which that presumably you'd want to  
15 suspend, is if you simply had a recalcitrant or a  
16 nonresponsive party.

17                   And, I don't know if you can shed any  
18 light on that at all for us?

19                   MR. IACOPINO: I think I understand your  
20 concern there and what your -- the situation you're trying  
21 to display or to illustrate.

22                   My concern is this. Is this, if you  
23 turn -- if you use the word "shall" and you make it  
24 mandatory, or even if you do something to try to mollify

1 the language to give more process before you get there,  
2 this is for a misrepresentation or a violation. So, what  
3 happens if you have a hearing, you grant a certificate,  
4 you find out a year later there was a misrepresentation  
5 made, even a major one, made during the course of the  
6 proceeding, but you now have an energy facility, and let's  
7 say it's a big one, let's say it's pumping out  
8 3,000 megawatts of electricity, you're then required to  
9 suspend its certificate. And, that may be a -- maybe  
10 something that's clearly not in the public interest at the  
11 time. It may be, you know, it may be something that  
12 somebody says may be warranted, some people maybe think  
13 that's punishment, but the result is going to be  
14 punishment on the entire grid and everybody who is buying  
15 power. So, that's my concern with that, that part of it.  
16 And, that's just a misrepresentation.

17 Violations, obviously, can be resolved  
18 by language that would suggest a mitigation plan or some  
19 kind of correction of the violation. I think that, you  
20 know, ultimately, if you have the recalcitrant applicant,  
21 who just is not contributing, but they're putting out all  
22 kinds of power, you may not want to, you know, suspend,  
23 because the suspension may be -- may cause more harm than  
24 good.



1                   That's why, from my standpoint, I think  
2 the language as it exists is the better language.

3                   CHAIRMAN HONIGBERG: Commissioner Scott.

4                   COMMISSIONER SCOTT: I agree. I  
5 think -- I understand OLS has a job to do, and specificity  
6 is what they like to see. But the Legislature  
7 specifically used words like "may" to give us the  
8 discretion. I'm very comfortable with leaving that  
9 language as they gave it to us. We are a very unique  
10 body, obviously. And, to try to think through and capture  
11 every single possible outcome I don't think is  
12 appropriate, which is why I think they gave -- they use  
13 the word "may".

14                   So, I'm fine with keeping, over --  
15 basically, is understanding OLS's objection, but not  
16 making a change based on their objection.

17                   CHAIRMAN HONIGBERG: That would be the  
18 Director Muzzey approach, and she has made that motion,  
19 and Commissioner Scott has seconded it.

20                   Is there any further discussion? Does  
21 anybody have any other ideas on how to deal with this,  
22 before we vote? Commissioner Bailey.

23                   COMMISSIONER BAILEY: I just want to  
24 share my thoughts on this. I agree that we should not

1 change "may" to "shall" anywhere, or to change the  
2 discretion that the law gives us.

3 But I have very direct experience with  
4 getting rules through the process. And, my experience is,  
5 when you satisfy the staff attorneys at JLCAR, you have a  
6 lot better chance of success.

7 And, so, we've given them, in each case,  
8 in each of their objections, an answer, a change, except  
9 for in this -- in these spots where the word "may" appears  
10 in the statute. And, so, I would just like to suggest  
11 that we think about, once again, taking out these  
12 provisions. I agree, Commissioner Scott, that it's way  
13 better to have all the rules in one place, so that you  
14 don't have to look between the rules and the statute.

15 But, if the statute gives us discretion  
16 with the use of the word "may", and the OLS staff doesn't  
17 like the rules to say "may", then maybe we should just let  
18 the statute speak for itself and take these rules out.  
19 That way we'll have, hopefully, the support of the OLS  
20 staff with the way that we've crafted the rules. There  
21 aren't any "technical" things that they're worried about.

22 And, so, from a strategy of getting  
23 these rules through the process, I'd just like the  
24 Committee to consider taking these four instances where we

1 cite the law and use the word "may" out.

2 And, I don't really, if you want to  
3 leave it in, I don't object. I agree that we shouldn't  
4 change "may" to "shall" or do anything with that. But I  
5 think that the benefit of taking these out might outweigh  
6 the benefit of leaving them in.

7 CHAIRMAN HONIGBERG: Commissioner  
8 Bailey, you have one very, very sympathetic ear right  
9 here, so -- actually, two.

10 But, I think, let's deal with the  
11 suggestions, and then we're going to need to take a break  
12 or Mr. Patnaude is going to explode, we'll pick that up as  
13 a separate motion, --

14 COMMISSIONER BAILEY: Okay.

15 CHAIRMAN HONIGBERG: -- either right  
16 after the break or a little later, the possibility of  
17 taking out all of these sections, we'll have another  
18 discussion about it, which we've done before. I'm open to  
19 discussing it again for the reasons you just said.

20 So, is there any other discussion on the  
21 proposal with respect to the specific rules we have in  
22 front of us right now in the suspension revocation  
23 sections on the "mays" and "shalls", doing what Director  
24 Muzzey and Commissioner Scott have recommended, which is

1 making no change to what we submitted?

2 *[No verbal response]*

3 CHAIRMAN HONIGBERG: All right. Seeing  
4 none, all in favor say "aye"?

5 *[Multiple members indicating "aye".]*

6 CHAIRMAN HONIGBERG: Are there any  
7 opposed?

8 *[No verbal response]*

9 CHAIRMAN HONIGBERG: All right. So,  
10 that's a "no change" for now, with the possibility that  
11 we'll revisit it after the break.

12 We do need to take a break. We will be  
13 back here at five minutes till 3:00.

14 (Recess taken at 2:44 p.m. and the  
15 hearing resumed at 3:02 p.m.)

16 CHAIRMAN HONIGBERG: All right. Let's  
17 wrap up the first part of this. We're going to circle  
18 back to the replacement for "contact information", and  
19 then have another little discussion about "mays" and  
20 "shalls".

21 Attorney Iacopino, I don't think there  
22 was a lot of magic to this one, but what did you come up  
23 with?

24 MR. IACOPINO: Coming up.

1 CHAIRMAN HONIGBERG: What page are we  
2 looking at?

3 MR. WIESNER: This is Page 12 of the  
4 100-200 rules set, 201.03.

5 MR. IACOPINO: And, the language that  
6 I -- the language that I came up with is this: "Members  
7 of the public desiring to make oral statements at any such  
8 public hearing shall provide their name, town or city of  
9 residence, and parties represented on a roster made  
10 available for this purpose prior to the commencement of  
11 the hearing. Individuals who do not wish to speak in  
12 public may submit a statement to be read by a person of  
13 their choice."

14 CHAIRMAN HONIGBERG: Everybody got that?  
15 Everybody good with that language?

16 *[Multiple members nodding in the*  
17 *affirmative.]*

18 MR. IACOPINO: Thank you.

19 CHAIRMAN HONIGBERG: Okay. Let's go  
20 back to "mays" and "shalls" for a moment. Anybody have  
21 any inspirations? Commissioner Bailey put a suggestion  
22 out there that all of these "mays" and "shalls" sections  
23 should just get deleted and we rely on the statute. I  
24 know OLS and the Rulemaking Manual take a dim view of

1 leaving holes in statutes -- or, rather, holes in rules  
2 that don't tie back to all provisions of the statute. But  
3 statutes control here. And, it seems -- it seems like an  
4 agency should be able to rely on a statute whenever that  
5 statute gives the agency discretion.

6 Lots of people up here have experience  
7 with rulemaking, more than I do, actually. So, I'm open  
8 to further discussion of this issue.

9 *[No verbal response]*

10 CHAIRMAN HONIGBERG: You've silenced  
11 them all, Commissioner Bailey.

12 COMMISSIONER BAILEY: That must mean  
13 they don't disagree with me.

14 *[Laughter.]*

15 CHAIRMAN HONIGBERG: Commissioner Burack  
16 is reaching for the button on his microphone.

17 VICE CHAIRMAN BURACK: I'm torn on this.  
18 I candidly don't recall definitively how at DES we deal  
19 with this issue. I don't know if Administrator Monroe can  
20 tell us what her experience is, at least when she was at  
21 DES, with respect to the Air Program, how we dealt with  
22 this kinds of issue in those rules.

23 I think we could either way. I think  
24 the practical effect of leaving it or leaving it out is

1 exactly the same. That is, at the end of the day, we are  
2 relying on the statute, not on the rules, whatever we do  
3 here, particularly if there were an objection to the  
4 rules. So, the principal reason to leave this language in  
5 the rules is just so that there is, for the general  
6 public, one place they can go to understand the entire  
7 process, and aren't going to be mystified by some piece of  
8 it later.

9 But I would be interested to hear from  
10 Ms. Monroe what she recalls as DES's approach to this.

11 CHAIRMAN HONIGBERG:

12 ADMINISTRATOR MONROE: Thank you,  
13 Commissioner Burack. Yes, I remember. I've been here  
14 much shorter than I was at DES. But, as I recall, in the  
15 Air Resources Division, of which I was the Compliance  
16 Bureau Administrator for 14 years, and in that particular  
17 program, when we had statutory authority for enforcement,  
18 we did not parrot that language in the statute -- in the  
19 rules itself. We relied on the statute. And, then, we  
20 had policies, compliance assurance policies that kind of  
21 guided us through the enforcement process.

22 So, we did not have that information in  
23 the rules.

24 CHAIRMAN HONIGBERG: Well, what about

1 that policies document? How is that policies document  
2 adopted?

3 ADMINISTRATOR MONROE: The policies  
4 document was signed off by the Commissioner. It was also  
5 submitted as part of an audit by the EPA, looking at our  
6 programs and how we implemented them. So, it was merely a  
7 guide, if you will, for the Department to be consistent in  
8 its enforcement approach.

9 CHAIRMAN HONIGBERG: Thank you.

10 ADMINISTRATOR MONROE: You're welcome.

11 CHAIRMAN HONIGBERG: Commissioner  
12 Burack.

13 VICE CHAIRMAN BURACK: You know, I'd  
14 certainly be comfortable with Commissioner Bailey's  
15 proposal, that we simply remove all this language from the  
16 rule. That these sections that reference specific  
17 statutory sections and use the word "may", it just takes  
18 the issue off the table, but does not in any way affect  
19 what is actually our statutory authority to act.

20 CHAIRMAN HONIGBERG: Commissioner Scott.

21 COMMISSIONER SCOTT: Well, as I said  
22 earlier, my preference is one-stop shopping for the public  
23 and industry. But, if the price of that is, which I don't  
24 think we're prepared to do at this point, we need to be



1 much more detailed and effectively tying our hands beyond  
2 what the Legislature has given us, if that's the choice, I  
3 will support removing, despite my concern of and  
4 preference for having one place for the public to go.

5 CHAIRMAN HONIGBERG: Director Muzzey.

6 DIRECTOR MUZZEY: I just have a  
7 question, so we can take a look back and see if there are  
8 any ramifications that we're not thinking of to doing that  
9 deletion. I've noted three places that OLS had trouble  
10 with the "may" versus "shall", and someone mentioned  
11 "four" before the break. Could we just review what those  
12 places are?

13 MR. WIESNER: The first time we  
14 addressed the issue is with "subcommittee formation",  
15 which is 103.03, (a) and (d). And, then, in 103.03 as  
16 well, state agency member designation of senior staff to  
17 serve on a subcommittee. And, then, as well, 201.14,  
18 "Additional Information Sessions", where the Committee is  
19 authorized to order additional information sessions at the  
20 request of a municipality or on its own motion.

21 CHAIRMAN HONIGBERG: You said "201.14",  
22 on the handout, it said "201.04". Which is it?

23 MR. WIESNER: Oh, I'm sorry. I  
24 misspoke. It is "201.04".

1                   VICE CHAIRMAN BURACK: Mr. Chairman, may  
2 I just ask a question?

3                   CHAIRMAN HONIGBERG: You may.

4                   VICE CHAIRMAN BURACK: About process,  
5 and, again, I'm not familiar enough with the details of  
6 how JLCAR works. But would it be appropriate for us to  
7 leave these provisions in, but adopt a motion that would  
8 effectively give you the authority to preapprove you to be  
9 able to, at the next appearance before JLCAR, to offer  
10 that we would remove these provisions, if the Committee  
11 finds them objectionable and prefer that they just only  
12 appear in statute and not appear in the rule? Is that a  
13 permissible alternative approach here or is that also  
14 fraught with problems?

15                  CHAIRMAN HONIGBERG: Attorney Wiesner,  
16 I'm going to take a stab at this, and you may have more or  
17 better information. I think the answer to that is "yes",  
18 that you could authorize those who are appearing before  
19 JLCAR to represent what the Committee would do, if JLCAR  
20 object -- was prepared to object to the inclusion of those  
21 provisions as they are written.

22                   I think, in any event, we're probably  
23 going to need to come back and have another meeting. But  
24 I'm almost certain that, if that were to happen, we would

1 need another meeting to ratify whatever was done.

2 Attorney Wiesner.

3 MR. WIESNER: Yes, that's correct. As I  
4 mentioned earlier, and this Revised Objection process is  
5 not used very often, in my understanding. But the agency  
6 has to request that JLCAR issue a Revised Objection. And,  
7 one thing that we could consider today, on this issue and  
8 perhaps others, is to preauthorize -- the Committee would  
9 authorize the Chairman, who is expected to attend that  
10 meeting, to request a Revised Objection as, you know, for  
11 lack of a better word, a fallback position, if it becomes  
12 clear that the JLCAR may adopt a Final Objection based on  
13 "may" versus "shall" in any context, let's say, or  
14 other -- other elements of the responses submitted back to  
15 JLCAR.

16 CHAIRMAN HONIGBERG: Commissioner  
17 Burack.

18 VICE CHAIRMAN BURACK: Thank you. I'm  
19 not sure if I know what we, on that basis, want to do from  
20 here, but it's helpful to understand that that is an  
21 option available to us. I guess, on balance, it's  
22 probably simpler for us simply to just strike this  
23 language or these four sections and just rely upon their  
24 presence in the statute.

1                   CHAIRMAN HONIGBERG: I expected you to  
2                   make a motion, on the theory that giving maximum  
3                   flexibility to us would have us leave it in, but authorize  
4                   the call to be made that we would take it out, if the  
5                   Committee were moving in the direction of that, and we  
6                   would ask for the Revised Objection to move us in that  
7                   direction?

8                   VICE CHAIRMAN BURACK: Mr. Chairman, I'd  
9                   certainly be prepared to make that motion, if that's not  
10                  going to add yet a further step and add further time to  
11                  this process that would otherwise be avoided. If that's  
12                  not the case, then I'm certainly prepared to make that  
13                  motion.

14                  CHAIRMAN HONIGBERG: Well, and not to  
15                  spoil the end of the meeting, I'm fairly certain we were  
16                  going to need to come back again, and I was going to warn  
17                  you all that you were going to be getting another  
18                  *doodle.com* invitation to go out and poll as to when you  
19                  would be available. I forgot which week in early  
20                  December, it might be the week after Thanksgiving, and I  
21                  think it is.

22                  MR. WIESNER: If the goal were to  
23                  provide for a meeting which could occur between the two  
24                  JLCAR meetings, the one scheduled for December 3rd, which

1 is the continued meeting at which these rules may be taken  
2 up, if we're able to get the objection filed -- response  
3 to the objections filed next week, and the subsequent  
4 meeting, which is the 17th of December, then I think it  
5 would make sense to do it that second week of December.

6 CHAIRMAN HONIGBERG: Oh, that's right.  
7 The week of the 6th, I think it is.

8 MR. WIESNER: That sounds right.

9 CHAIRMAN HONIGBERG: Yes. So, I think  
10 we are going to have to set aside time the week of the  
11 6th, for a shorter meeting.

12 MR. WIESNER: And, if there's no Revised  
13 Objection, that might be an opportunity to adopt final  
14 rules.

15 CHAIRMAN HONIGBERG: Right.

16 MR. WIESNER: Which would also be  
17 required.

18 CHAIRMAN HONIGBERG: There's a lot that  
19 has to be done, in terms of process, for rules to take  
20 effect, and that's one of them. So, I think we are  
21 looking at another meeting regardless. So, I don't think  
22 we'd be adding a layer.

23 Commissioner Scott.

24 COMMISSIONER SCOTT: I wanted to second

1 Commissioner Burack's motion.

2 VICE CHAIRMAN BURACK: My motion was  
3 made.

4 CHAIRMAN HONIGBERG: I heard it  
5 distinctly. Is there any further discussion of this issue  
6 and Commissioner Burack's motion?

7 *[No verbal response]*

8 CHAIRMAN HONIGBERG: Seeing none, all in  
9 favor say "aye"?

10 *[Multiple members indicating "aye".]*

11 CHAIRMAN HONIGBERG: Is there any  
12 opposed?

13 *[No verbal response]*

14 CHAIRMAN HONIGBERG: That motion  
15 carries.

16 MR. WIESNER: So, just to be clear, we  
17 are removing the language -- removing each subsection  
18 where the word "may" appears?

19 CHAIRMAN HONIGBERG: No. We're leaving  
20 it --

21 MR. WIESNER: No?

22 CHAIRMAN HONIGBERG: We're leaving them  
23 in as they were proposed.

24 MR. WIESNER: Okay. Glad I asked.

1 CHAIRMAN HONIGBERG: Yes, you are. No,  
2 we're leaving them in as we proposed them. But the Chair,  
3 or whoever is there that day speaking for the Committee,  
4 is authorized to offer up that fallback position of  
5 removing those sections, if the Committee -- if JLCAR is  
6 moving in the direction of an objection, a Final  
7 Objection.

8 MR. WIESNER: In the form of a request  
9 for a Revised Objection issued by the Committee?

10 CHAIRMAN HONIGBERG: Correct.

11 MR. WIESNER: Good.

12 CHAIRMAN HONIGBERG: All right. We've  
13 had the appetizer and the salad and the soup. Director  
14 Muzzey, before we hit the main course?

15 DIRECTOR MUZZEY: Another appetizer?

16 CHAIRMAN HONIGBERG: Go for it.

17 DIRECTOR MUZZEY: I had a small question  
18 on Section 301.17, which is the "Conditions of  
19 Certificate" section. And, the proposal is to add the  
20 quote "in order to meet the [purposes] of RSA 162-H:1 and  
21 16". And, taking a look at that section, specifically on  
22 Page 20, Item (i), which is the end of the Conditions  
23 section, "Any other conditions necessary to serve the  
24 objectives of RSA 162-H or to support findings made

1 pursuant to RSA 162-H:16", is very similar language to  
2 what we've just added to the beginning, although one  
3 refers to "162-H:1", and the (i) section refers to just  
4 "162-H".

5 So, I'm wondering whether OLS may find  
6 that repetitive, or, if we do continue to include it at  
7 the beginning, it should mirror what's said under (i).

8 CHAIRMAN HONIGBERG: I'm going to take a  
9 quick run at a response to that. I actually think the two  
10 have different purposes. I think the introductory phrase  
11 is to identify for the world the things that the  
12 conditions generally should be related to. (i) is a --  
13 "catch-all" is not the right word, but a provision that  
14 recognizes there may be other conditions that serve the  
15 objectives of the chapter.

16 What I would, however, in light of your  
17 comment, recommend that, at the first one, rather than  
18 talk about the "objectives of RSA 162-H:1 and 16", I would  
19 just leave it as "162" -- as the chapter, "162-H", it's  
20 the whole chapter's objectives that the conditions would  
21 fulfill. And, then, (i) would refer to both, the  
22 objectives and the findings, to make it hang together.  
23 So, it is a change to what is in the document, but a minor  
24 one.



1 Other -- does anybody have other  
2 comments or thoughts in response to Director Muzzey or to  
3 me?

4 DIRECTOR MUZZEY: I would just note that  
5 I agree with that change. I think it's helpful.

6 CHAIRMAN HONIGBERG: Is everyone else  
7 good with that?

8 *[A few members nodding in the*  
9 *affirmative.]*

10 CHAIRMAN HONIGBERG: I want to see some  
11 more nodding heads on this one. Well, we're going to take  
12 a vote at the end to adopt all this, but --

13 *[Multiple members nodding in the*  
14 *affirmative.]*

15 CHAIRMAN HONIGBERG: Okay. I think  
16 we're good to make the changes I just outlined. Are you  
17 set with that, Attorney Wiesner?

18 MR. WIESNER: Yes. Removing the  
19 references to "1" and "16", and it should only be a  
20 reference to "RSA 162-H".

21 CHAIRMAN HONIGBERG: Correct. All  
22 right. Now, are we done with all the preliminaries, and  
23 we can talk about "public interest" and "cumulative  
24 impacts"?

1                   MR. WIESNER: We can do that. Or, we  
2 can march through the rules provisions. But, again, I  
3 defer to the Chair.

4                   CHAIRMAN HONIGBERG: I think we should  
5 do the -- I think we should do the substantive issues now.

6                   MR. WIESNER: Well, there are two  
7 primary substantive issues that have been the subject of  
8 numerous public comments, as well as I noted before, being  
9 questioned by Legislative Services.

10                   And, the first, and probably the  
11 greatest, is the Public Interest Criteria. Numerous  
12 parties have questioned whether that is consistent with  
13 the legislative intent, and the Preliminary Objection --  
14 that the Preliminary Objection incorporates those  
15 objections raised by several parties.

16                   A Northern Pass representative has also  
17 raised the issue of whether the current language of  
18 Section 301.16 is inconsistent with the other siting  
19 standards under 162-H:16, IV, in particular those that  
20 require determination of unreasonable adverse effects or  
21 not on numerous values, including aesthetics and effects  
22 on the environment.

23                   And, then, we also have a comment from  
24 EDP Renewables, and this is similar to the comment which I

1 mentioned before, which is that local and municipal plans  
2 should not be specifically referenced in the Public  
3 Interest Criteria given its view on preemption. And, that  
4 there should not be a reference to the "state energy  
5 policy", because that was in a previous version of the  
6 statute that was then removed.

7 And, a comment from Mr. Lukeman, that  
8 there should be a distinction drawn between "essential"  
9 versus "elective" projects, and also the effect on the  
10 local economy and plan should be taken into account.

11 But what I have outlined here, just to  
12 get the discussion kicked off, three different potential  
13 responses. And, I'll start at the bottom and work my way  
14 up.

15 Alternative Response 2, as I have it  
16 here, is to remove Section 301.16 from the proposed rules  
17 and require only that the applicants include information  
18 in their application demonstrating that the proposed  
19 facility would be in the public interest. Therefore, this  
20 would not define the public interest, would not specify  
21 the criteria to be applied by the Committee or  
22 Subcommittee in determining public interest in any given  
23 case. It would let that language just sit there as it  
24 does in the statute.

1                   That is essentially the approach  
2 suggested by Senator Feltes at the October 15th JLCAR  
3 meeting. And, I will note that I have made that change in  
4 the version of the 300 rules that was distributed today  
5 for purposes of illustration. Not to prejudge what the  
6 determination of the Committee would be, just to show what  
7 it looks like and to make it easier for there to be an  
8 approval of that approach, if that is the Committee's  
9 decision. Again, on the theory that it's easy to restore  
10 what's there and go with the status quo, if that's the  
11 decision, rather than to decide on the fly what deletion  
12 would look like, in particular, because deletion also  
13 affects a number of -- a couple of other provisions where  
14 there are cross-references to 301.16.

15                   Now, I'll jump to the top, which is the  
16 more lengthy outline of a response, which is basically a  
17 defense of the current language as not violative of  
18 legislative intent. And, there are -- the legislative  
19 intent is not entirely clear here. I believe that OLS did  
20 a good job of summarizing the issues in a memo which they  
21 included with their comments back to the SEC, and which  
22 were included in the Preliminary Objection letter that we  
23 received from the JLCAR staff. And, essentially, the OLS  
24 position, as I understand it, was to outline the issues,

1 outline and describe to some extent the legislative  
2 history, and advise the Committee, JLCAR, in this case,  
3 that it was their decision to make whether or not  
4 legislative intent would be violated by adoption of the  
5 language that currently appears in 301.16.

6 So, this alternative, which I have as  
7 the -- listed as the first response, is basically "defend  
8 the current language as not inconsistent with the  
9 legislative intent, and not internally inconsistent with  
10 an analysis of Section 16, IV, and the findings that are  
11 required by the SEC with respect to other values than  
12 public interest."

13 Alternative Response 1 is alternative  
14 language that was -- let me just back up and say, through  
15 this process, we have had regular communications back and  
16 forth with the Office of Legislative Services  
17 Administrative Rules, and that's been very helpful to  
18 clarifying the issues, and clarifying as well the process,  
19 and the effects of various decisions made at various  
20 times.

21 We received a communication today that  
22 indicated that Senator Feltes had identified an  
23 alternative approach to the Public Interest Criteria, and  
24 a desire to have that approach considered today by the

1 SEC. And, that is what has been handed out as  
2 "Alternative Language". I will characterize it as an  
3 approach which essentially directs the Committee to  
4 consider the list of values and factors which are  
5 specifically referenced in the Purpose section of 162-H,  
6 which is Section 1. And, this is literally a verbatim  
7 list of those values and factors which are culled from  
8 that section. So, this is an alternative approach, a  
9 middle ground, perhaps.

10 One view would be that this may be less  
11 objectionable, because it does not resemble as -- does not  
12 resemble the language that was removed through the  
13 legislative process of SB 214 in the Senate. And, it  
14 picks up the factors which are specifically listed in the  
15 Purpose section, as I noted, and, therefore, it doesn't  
16 require, on its face, any sort of net balancing or  
17 weighting of factors. It just directs the Committee to  
18 consider those factors in reaching its final decision on  
19 whether a proposed facility would serve the public  
20 interest.

21 So, the Committee could decide,  
22 essentially, to stick with the current language; to remove  
23 Section 301.16 entirely, which is what is shown in the  
24 handout of rules revisions; or perhaps to adopt this

1 alternative language as a substitute for 301.16; and, of  
2 course, as we discussed earlier, it is also possible to  
3 have contingency plans, if I can characterize them as  
4 such, which involve the Revised Objection process.

5 I should note that a Revised Objection  
6 does not have to be issued; it is in the discretion of  
7 JLCAR to issue. My understanding, from conversations with  
8 Legislative Services staff, is that they have not seen a  
9 case where a Revised Objection requested by an agency has  
10 been denied, but that doesn't mean that it couldn't  
11 happen.

12 I will also note that I think that it is  
13 my sense that, if the Committee response sticks with the  
14 current language, that there is perhaps a greater  
15 likelihood that there will be a Final Objection issued by  
16 JLCAR, or perhaps even a motion to sponsor a joint  
17 resolution in the Legislature.

18 CHAIRMAN HONIGBERG: All right. I will  
19 start. I know others will want to speak on this as well.

20 With respect to the rules as we  
21 developed them, I think they are fully consistent with the  
22 legislative intent. I think the analysis that OLS  
23 provided made just about the best argument that could be  
24 made for the position that these rules were contrary to

1 legislative intent. But, I think, ultimately, that  
2 argument is not as strong as the argument for, that is a  
3 deeper understanding of more of the process that led to  
4 the adoption of the statute as it sits before us.

5 There is little way to read Section 1,  
6 as it was amended, Section 16, as it was amended, to  
7 provide that "public interest" is not something new. You  
8 cannot read the statute to conclude that "public interest"  
9 isn't something new that has to be done.

10 So, you need to put some interpretation  
11 on it. And, indeed, if you look through the series of  
12 amendments that were proposed and the changes that were  
13 made to the laws as it went through the legislative  
14 process, the rulemaking provision had the public interest  
15 section added to it by the House. The public interest  
16 section specifically has a provision that was tagged to  
17 the rules, and that didn't exist when it came through the  
18 Senate, it was added in the House, and then agreed to by  
19 the Senate. So, we are expected, by the Legislature and  
20 by OLS, to do something.

21 Now, Senator Feltes originally offered  
22 up "just have the rules say "public interest"." So, it's  
23 the same as deleting the rule, but it's effectively "just  
24 have the rule say "public interest"." I think Senator



1 Feltes now has a different view of things, or at least  
2 that's my understanding from what we received from OLS, it  
3 was -- but I don't know for sure.

4 I am also realistic. I understand, what  
5 Attorney Wiesner just said is that, if we stick to the  
6 rules as we adopted them, we are likely to get a Final  
7 Objection, and possibly even a joint resolution; neither  
8 of those is a good thing.

9 If we can find the middle ground that  
10 the parties themselves couldn't find, I'd be surprised,  
11 but delighted. Maybe Senator Feltes has provided it for  
12 us.

13 To me, it is unquestionably consistent  
14 with the legislative intent, because it quotes verbatim  
15 from the statute. How could that be inconsistent with the  
16 legislative intent? I would be -- I would love to read  
17 that argument as a persuasive argument, because I don't  
18 think it can be done. But, you know, maybe somebody can  
19 surprise me or JLCAR on that.

20 At the end of the day, we all have to  
21 understand that the legal arguments and the quality of  
22 those arguments might not matter, because it may be  
23 possible for someone to get a vote despite what I think  
24 the best legal arguments are, because I don't get a vote

1 at JLCAR.

2 If it were entirely up to me, knowing  
3 nothing about the politics, I'd stick with what we did.  
4 But I'm not sure that that really is a viable option for  
5 us at the end of the day.

6 I've said my piece. I'd be delighted to  
7 hear from others. Commissioner Burack.

8 VICE CHAIRMAN BURACK: Mr. Chairman,  
9 before we just let you rest, one of the comments that I  
10 believe we heard, and this was certainly referenced in the  
11 recitations of some of the legislative history here, was  
12 the notion that the Committee might just rely upon the  
13 Public Utility Commission's precedents relating to  
14 definition of "public interest". And, I'm wondering if  
15 you can, maybe your colleagues can join you in this, to  
16 help us understand, is there a single, consistent  
17 definition of "public interest" that has been applied by  
18 the PUC in its rulings or not? In other words, is that a  
19 place that we could look for guidance?

20 CHAIRMAN HONIGBERG: I'll start.  
21 Commissioner Scott, Commissioner Bailey may have opinions,  
22 Attorney Wiesner may have things he can offer, but I'll  
23 start.

24 The short answer is "there's not."

1 There are dozens, maybe more than dozens, dozens of  
2 dozens, of decisions that use the phrase "public interest"  
3 in the PUC. It has different meanings in different  
4 contexts. In the context of the basic traditional PUC  
5 regulation of the integrated utilities and the PUC's  
6 responsibility to referee the relationship between  
7 ratepayers and the companies, for something to be in the  
8 public interest, it means that there's been prudent  
9 conduct by the utilities, prudent investments, prudent  
10 management, that the investments made were done, have been  
11 depreciated properly, all have been valued properly, have  
12 an appropriate rate of return, and that the rates result  
13 from all of those inputs are fair and reasonable to the  
14 ratepayers. That's in the public interest. In that  
15 context, the PUC doesn't look beyond that relationship.

16 At the other extreme, the PUC has  
17 certain jurisdiction over mergers and acquisitions. In  
18 the merger and acquisition context, it's much broader. I  
19 think Commissioner Bailey may have a better -- a better  
20 handle on the standards or the types of things that the  
21 PUC looks at in mergers and acquisitions. But it's a  
22 very -- there's many more considerations that the PUC has  
23 to take into account in determining what's in the public  
24 interest.

1                   We have another place where the public  
2 interest, "public good" I think is sometimes used, is in  
3 the approval of settlements that come before the PUC.  
4 Those are very narrow considerations about whether, given  
5 all of the information that we have from whatever utility  
6 is in front of us, whatever intervenors, the Office of  
7 Consumer Advocate, does this settlement make sense and  
8 produce just and reasonable rates? In that case, the  
9 settlement is in the public interest.

10                   So, there's, like I said, dozen of  
11 dozens probably, but they're very specific to the context.  
12 I guess, before Commissioner Scott, Commissioner Bailey,  
13 you want to talk a little bit about the merger and  
14 acquisition situation?

15                   COMMISSIONER BAILEY: Well, the merger  
16 and acquisition statute has changed a number of times.  
17 But the last time that I dealt with it was in the transfer  
18 of assets from Verizon to FairPoint. And, the Commission  
19 found that that transfer of assets was in the public  
20 interest, partly because of the promises that FairPoint  
21 made about deployment of broadband, which the Commission  
22 has no jurisdiction over. So, that public interest was a  
23 little bit broader than the public interest of -- that  
24 public interest analysis was a little bit broader than the

1 public interest analysis that we do when we're figuring  
2 out rates. So, it is very case-specific. And, so, there  
3 isn't really one thing that you can look at that says  
4 "this is what we mean by the "public interest"."

5 CHAIRMAN HONIGBERG: And, Commissioner  
6 Bailey, you made an important reference to the statutes  
7 that govern the PUC's jurisdiction, because those often  
8 have a standard within them that tells us what we are to  
9 do and the considerations we're to apply.

10 Commissioner Scott, do you have anything  
11 you want to add on this?

12 COMMISSIONER SCOTT: Not much more.  
13 Again, it's a different context. We're, as commissioners  
14 in the PUC, we're economic regulators. So, it's a  
15 different context. And, generally, when we're making that  
16 balance, it's between the ratepayers of an affected  
17 utility and the utility's welfare itself. So, it's  
18 different.

19 CHAIRMAN HONIGBERG: Attorney Wiesner,  
20 did we miss anything from your -- I know you did some  
21 looking for public interest decisions?

22 MR. WIESNER: I think it's, you know, it  
23 is quite fair to say that the use of "public interest"/  
24 "public good", which are terms that are repeated several

1 places in the public utility statutes, have been  
2 interpreted in different ways, have been applied in  
3 different contexts. And, it's not entirely clear how that  
4 use of those terms, and the interpretations that are based  
5 on those terms, would be carried over into the state  
6 siting process.

7 And, I will also note that often, and  
8 particularly in a merger and acquisition situation, you  
9 will see use of "no net harm" versus "net public  
10 benefits", and there -- I believe there is some judicial  
11 precedent that suggests that "no net harm" is the better  
12 standard. But the PUC, in approving transactions, will,  
13 in my not exhaustive review of cases, will sometimes say  
14 "Well, we don't need to decide whether it's a "net harm"  
15 or a "net benefit" standard, because we find that there  
16 are benefits." And, so, that muddies the water some, in  
17 some cases, from what it would be if there were perhaps a  
18 clearer standard.

19 I think, in those situations, mergers  
20 and acquisitions, the Commission is looking at a broad  
21 range of relevant factors. And, it may go beyond the  
22 "shareholder versus ratepayer" paradigm, and look at other  
23 values and interests as well. And, even in a "no net  
24 harm" standard, I would point out that the word "net"

1 appears, and that there is typically a weighing and  
2 balancing of various effects of the proposed transaction.

3 CHAIRMAN HONIGBERG: Commissioner  
4 Burack.

5 VICE CHAIRMAN BURACK: Mr. Chairman,  
6 thank you, and thank you to your colleagues in the PUC for  
7 educating all of us on that. I think that's really  
8 helpful to understand.

9 And, what I take from that is that the  
10 Alternative Response 2 that's outlined here simply would  
11 not work. That is, we were directed by the Legislature,  
12 in the revised statute, to specify the criteria for what a  
13 public interest determination would look like. And, for  
14 us to effectively, for lack of a better term, punt on that  
15 and just say nothing, and look to rely on existing  
16 precedent, I think is just an invitation to probably  
17 almost endless litigation. And, so, I would urge that we  
18 not look at that as a viable approach here.

19 Having said that, looking at these other  
20 two, both in the first Response and the Alternative  
21 Response 1, I am struck by the -- sort of the very direct  
22 and straightforward notion of the language that we were  
23 provided with here today. Which I think is an attempt to  
24 do, in somewhat different language, but to do what I think

1 we set out to do from the outset here, which was to  
2 capture what the criteria are that define "public  
3 interest", and to make clear that we should be looking at  
4 those factors as we make our determination.

5 So, I -- and, I would also say, I am  
6 certainly mindful of the fact that we did receive,  
7 specifically coming back to this initial response draft  
8 here in the first paragraph that defends the current  
9 approach, I am certainly mindful of the fact that we  
10 received a letter signed by all or practically all of the  
11 House and Senate sponsors of SB 245, indicating that they  
12 were comfortable with the language that we had provided.  
13 Also aware that one of the original signatories of that  
14 letter subsequently sent us a letter that reflected some  
15 revisions in that particular member's views on this issue,  
16 that was Senator Bradley.

17 But, notwithstanding those letters, I  
18 think that there is -- there is something to be said for  
19 the very clear and direct language that's in this  
20 alternative in 301.16. And, I would certainly be  
21 comfortable with taking this as our primary approach to  
22 this, and maybe, in the alternative, offering to the  
23 Committee that, if they're not comfortable with this,  
24 we're certainly prepared to fall back on the existing



1 language that we proposed at this time.

2 And, I will say, on this issue of the  
3 potential for a joint resolution objecting to it, the  
4 existence of that letter expressing support for what we  
5 had done on this issue would cause me to wonder how far,  
6 although, certainly, there could be a filing to that  
7 effect, I don't know how far it would get, if we had many  
8 of the original sponsors of this legislation effectively  
9 indicating that they were comfortable with where we are or  
10 with what we propose.

11 But, in my view, better that we not even  
12 sort of invite the possibility of that whole process  
13 playing out, and look to do something that, again, I  
14 believe could very clearly and directly provide us and all  
15 the parties with clear criteria that we would be guided  
16 by, and I think in the context of the overall provision of  
17 301.16 I think could work very well for us.

18 CHAIRMAN HONIGBERG: Commissioner Scott.

19 COMMISSIONER SCOTT: Thank you. Is that  
20 a motion?

21 CHAIRMAN HONIGBERG: I don't think we're  
22 ready for a motion.

23 COMMISSIONER SCOTT: It's not a motion.

24 All right.

1                   CHAIRMAN HONIGBERG: I know a motion  
2 when I hear it, Commissioner Scott.

3                   COMMISSIONER SCOTT: You'll tell us the  
4 motion when it is?

5                   CHAIRMAN HONIGBERG: Yes.

6                   COMMISSIONER SCOTT: Thank you. So,  
7 mostly I concur with Commissioner Burack's statements.  
8 Obviously, we've got a lot of feedback about legislative  
9 intent and interpretations of the language in the current  
10 draft of the rule. I think, given that, and looking at  
11 the proposed language, which is, again, based on the  
12 Declaration of Purpose under 162-H:1, given that it lifts  
13 much of the exact language out of that, I think it's a  
14 wise -- a wise decision to move ahead with that. I think  
15 it's hard to argue that it's not legislative intent, when  
16 it's the Legislature's language.

17                   And, I would argue, you know, I'm sure,  
18 no matter what we do, that somebody will be aggrieved by  
19 our decision. But I would argue that this language  
20 clearly tracks the legislation. And, if you don't like  
21 this language, you need to address it with a different  
22 body, which is the Legislature.

23                   So, I would support moving on this  
24 language as labeled the "Alternative Proposal".

1                   CHAIRMAN HONIGBERG: Director Muzzey.

2                   DIRECTOR MUZZEY: A question for  
3 Attorney Wiesner. I've forgotten, in your summary of this  
4 issue, has Legislative Services looked at this language  
5 and weighed in on it at all?

6                   MR. WIESNER: I think we had some  
7 preliminary indication from them that this was not  
8 objectionable.

9                   DIRECTOR MUZZEY: Thank you.

10                  MR. WIESNER: But that's not a  
11 definitive position, I don't believe, at this point.

12                  CHAIRMAN HONIGBERG: Attorney  
13 Weathersby.

14                  MS. WEATHERSBY: I concur that I think  
15 this is the more prudent approach. I just would want to  
16 point out, the only thing that appears to be missing from  
17 this list that was in our previous list of 201.16  
18 [301.16?] is the "municipal plans and policies". But I --  
19 that does get captured in 301.15(c), with the finding of  
20 undue interference.

21                  So, although I'd love to see it in this  
22 list, I still would be comfortable knowing that it is at  
23 least taken into contribution with a different factor.

24                  CHAIRMAN HONIGBERG: Other thoughts or

1 comments? Commissioner Rose.

2 COMMISSIONER ROSE: Thank you,  
3 Mr. Chair. I, too, agree that this appears to be strong  
4 alternative language that appears to feather that middle  
5 approach. It does appear to be straightforward. And,  
6 again, it's hard to argue that it does not track clearly  
7 to the legislative language.

8 So, I, too, feel as though that this is  
9 a viable alternative for our consideration.

10 CHAIRMAN HONIGBERG: I want to circle  
11 back briefly to something Commissioner Burack mentioned,  
12 which is the letter that we received from the sponsors or  
13 people who identified themselves as "sponsors of SB 245".  
14 And, I would characterize their letter as more than just  
15 being "comfortable" with the language as we adopted it.  
16 They were affirmatively arguing that that language is  
17 consistent with "their legislative intent".

18 Just as I had qualms about the  
19 legislative intent analysis we've gotten from others, I  
20 don't believe that sponsors or any legislator's statements  
21 after-the-fact about what they say they meant or what they  
22 thought they meant is very persuasive in terms of  
23 understanding legislative intent.

24 While I appreciate the input there, I

1 don't think that's evidence. I think the analysis we got  
2 from others, which went through, in some detail, the  
3 course of all of the proposals, all of the proposed  
4 amendments, all of the language as it changed through the  
5 course, was a much better way of making that "legislative  
6 intent" argument.

7 Now, that having been said, legislative  
8 intent is only relevant if there's ambiguities. And, in  
9 the way we've couched it now, adopting the language that  
10 is literally in the statute, makes it hard to argue that  
11 we are "contrary to legislative intent", although there  
12 may still be some question about what that intent was,  
13 we're tracking it so closely, if we were to adopt this  
14 Alternative Proposal. I think that's a very -- it's a  
15 very easy position to defend.

16 Now, how much flexibility do we want to  
17 give ourselves? I mean, we haven't even -- I haven't even  
18 entertained a motion yet on this language. But, before I  
19 do, I want to -- I want to have us at least think about  
20 how much flexibility we should try to give ourselves, in  
21 working with JLCAR, working with OLS, going forward?

22 Commissioner Burack identified our  
23 existing Final Proposal as one fallback position, should  
24 we go with this alternative language. I wonder whether we

1 should consider the minimalist approach, which may or may  
2 not be consistent with legislative intent, but it  
3 certainly seems like a lot of people think that's what we  
4 should do. And, if there were ten people who sit on JLCAR  
5 that think that's what we should do, that would be pretty  
6 significant, I think.

7 I throw it out there as something for us  
8 to think about. And, maybe we need to take this in little  
9 bites, and decide what is it we think the response should  
10 be, and then think about what else we might want to say on  
11 this topic.

12 So, I threw that out there and invite  
13 comment. Commissioner Bailey.

14 COMMISSIONER BAILEY: I can support the  
15 language in Alternative Response 1. But I think I agree  
16 with you that, in the unlikely event that we get another  
17 objection to Alternative 1, if we have -- if we authorize  
18 you to offer up Alternative 2 with, what is it called,  
19 kind of --

20 MR. WIESNER: A Revised Objection.

21 COMMISSIONER BAILEY: A Revised, yes,  
22 offer up a Revised Objection. Then, on a case-by-case  
23 basis, the Committee will decide what "public interest"  
24 means. And, we could go back to this Alternative 1

1 language from Page 1 and say "well, that's what we think  
2 it means."

3 So, it's, I think, not the best way to  
4 do it, because I think the purpose of rulemaking is to  
5 make things clear. But, if we can't get the things that  
6 we think define the "public interest" enacted, because of  
7 the politics or whatever it is, then maybe we should just,  
8 rather than have a permanent -- a Final Objection, give  
9 the Chairman the ability to offer that up as a last  
10 resort.

11 CHAIRMAN HONIGBERG: Other thoughts?

12 *[No verbal response]*

13 CHAIRMAN HONIGBERG: Does someone want  
14 to make a motion of any sort? Commissioner Burack.

15 VICE CHAIRMAN BURACK: Thank you, Mr.  
16 Chairman. I'm happy to try to make a motion here.

17 The motion would be that we substitute  
18 the language that's currently in, well, Section  
19 301.03(h)(7) and Section 301.16 with the Alternative  
20 Language Proposal that we have in front of us here today.  
21 And, that we also authorize you or preapprove you, on  
22 behalf of the Committee, if the Joint Legislative  
23 Committee on Administrative Rules were to find this  
24 Alternative Proposal objectionable, that we would

1 authorize you to work through, trying to recall what the  
2 name of this new process is, --

3 MR. WIESNER: The Revised Objection.

4 VICE CHAIRMAN BURACK: -- the Revised  
5 Objection, to request a Revised Objection to either adopt  
6 the Initial Proposal, and, if the Initial Proposal remains  
7 unacceptable or would otherwise result in an objection,  
8 then to adopt our Alternative Response 2, which is to  
9 simply, again, strike the language from the rules, and  
10 simply say that, as suggested here, in the application,  
11 they would have to provide information demonstrating that  
12 the proposed facility would be in the public interest,  
13 which effectively puts us in a position of making a  
14 case-by-case determination of what the "public interest"  
15 means.

16 CHAIRMAN HONIGBERG: One clarification,  
17 before anybody seconds that. You made a reference to the  
18 "Initial Proposal".

19 VICE CHAIRMAN BURACK: Yes.

20 CHAIRMAN HONIGBERG: Technically, it was  
21 the "Final Proposal".

22 VICE CHAIRMAN BURACK: I apologize.

23 CHAIRMAN HONIGBERG: The language in the  
24 "Final Proposal".



1 VICE CHAIRMAN BURACK: So, in my  
2 wording, "Initial Proposal" should be replaced with "Final  
3 Proposal".

4 CHAIRMAN HONIGBERG: Is there a second  
5 for that motion?

6 COMMISSIONER BAILEY: I'll second.

7 CHAIRMAN HONIGBERG: Commissioner Bailey  
8 seconds. Is there any further discussion? Director  
9 Muzzey.

10 DIRECTOR MUZZEY: Given the  
11 disagreements on this issue, as to whether there should be  
12 criteria for a finding of "public interest", and very  
13 strong feelings at either extreme for two options, I'm  
14 concerned that, if we move down the road of offering  
15 another alternative and another alternative, we are put in  
16 the position where JLCAR could also be equally split in  
17 its opinions as to what we should do.

18 And, I'm wondering if there is greater  
19 strength in offering the language that we're looking at on  
20 the "Alternative SEC Rules Language for JLCAR" sheet, and  
21 move with that instead?

22 CHAIRMAN HONIGBERG: I'm not sure I  
23 understood what you just said. I think Commissioner  
24 Burack's motion was that the primary response is the

1 language from the "Alternate SEC Rules" sheet.

2 DIRECTOR MUZZEY: Yes.

3 CHAIRMAN HONIGBERG: Okay. So, what --

4 DIRECTOR MUZZEY: It's just a question  
5 of whether, if that language is not acceptable to JLCAR,  
6 what the next move should be. Should it be to bounce back  
7 to what we had before, and then to bounce again to not  
8 having it in at all, or should we meet again as a group  
9 and discuss what we should do next?

10 CHAIRMAN HONIGBERG: You see, I think  
11 that's a problem with the Revised Objection process.  
12 Attorney Wiesner?

13 MR. WIESNER: Yes. I mean, the Revised  
14 Objection would be specific, as I understand it. It would  
15 say -- well, I mean, it's within the agency's control to  
16 request the Revised Objection. But the intent would be to  
17 forestall a Final Objection or joint resolution by saying,  
18 "If you, JLCAR, tell us to implement this other approach,  
19 and we go back and approve that, then JLCAR will have  
20 another opportunity to look at that." But, presumably,  
21 the indication from JLCAR would be "yes, that's a way to  
22 fix the problem that we see that would otherwise be  
23 objectionable to us."

24 And, so, I think it is necessary to have

1 a specific approach identified in the request for a  
2 Revised Objection.

3 CHAIRMAN HONIGBERG: Attorney  
4 Weathersby.

5 MS. WEATHERSBY: Just a question. Will  
6 JLCAR know that you are authorized to take either of these  
7 three positions? And, if so, will that affect, you know,  
8 they'll just push for what they want?

9 CHAIRMAN HONIGBERG: Yes, they will.  
10 There is an OLS person in the room. And, there are any  
11 number of people in this room who are going to be firing  
12 letters off here, JLCAR, the Speaker's Office, the  
13 Governor's Office, the Union Leader, the Concord Monitor,  
14 and every other news outlet in the state. So, yes.

15 MR. WIESNER: And, the response would  
16 describe the motion that's approved here, including the  
17 authorization to the Chairman, essentially, contingency  
18 plans, if it looks like the preferred language were deemed  
19 to be objectionable by JLCAR.

20 CHAIRMAN HONIGBERG: Other comments or  
21 questions or statements they want to make regarding  
22 Commissioner Burack's motion? Commissioner Scott.

23 COMMISSIONER SCOTT: My concern is, and  
24 I think we've heard, and I know it's Tower of Babel,

1 because we're getting all the different directions of  
2 comments, but I think the current language is problematic  
3 for JLCAR, which is why we're talking about it again. So,  
4 my inclination was we go with the Alternative approach,  
5 which just pulls language right from the Declaration of  
6 Purpose. It sounds like we're agreed on that, at least  
7 notionally.

8 But I was thinking that the fallback  
9 would be to just remove at the next step. Having said  
10 that, I wasn't -- the way I read our original language, it  
11 wasn't the same concern to me. But I'm somewhat compelled  
12 by some of the "legislative history" arguments and that  
13 type of thing. So, I was thinking it was cleaner just to  
14 have one fallback, not two fallbacks. It's rather  
15 complicated.

16 CHAIRMAN HONIGBERG: I'm not sure I  
17 disagree, except that I'm not sure there is agreement  
18 about which of the two fallback -- positions would be the  
19 fallback. Because I think there is -- there may not be  
20 consensus here as to which of those two positions is the  
21 appropriate fallback.

22 And, I do know, I mean, I share your  
23 concern. I think we got the sense, a very strong sense  
24 from the unanimous JLCAR vote, that they had problems with

1 the public interest rule that we put in our Final  
2 Proposal. One of the people who voted is one of the  
3 people who signed the letter saying "I'm a sponsor of SB  
4 245. I think the Final Proposal you submitted is a good  
5 one." I don't know how many others there are like that,  
6 who would come in and say "No, I think, if you don't like  
7 the proposal that they're making, they should go with  
8 their -- with the Final Proposal rules."

9 I would give them as many options as  
10 they -- as are out there. And, if they decide -- JLCAR  
11 decides that that's a direction they want us to go, we  
12 already have considered it. We like that proposal. We  
13 gave it to them initially. So, if that's the one they  
14 settle on as the one that's the best one, we say "okay".

15 COMMISSIONER SCOTT: We're kind of  
16 saying the same thing. They already have the language we  
17 put up there. They have already seen that. So, what I'm  
18 suggesting is, that's already out there. They're fully  
19 cognizant of that. The proposal, to me, should be we say  
20 "our preference at this point, in hearing your comments,  
21 is this Alternative language, based on the Declaration of  
22 Purpose. And, we are prepared to just delete the language  
23 altogether."

24 CHAIRMAN HONIGBERG: I think we're in

1 process land, though, again. I think, if we haven't -- if  
2 that language is not part of something, either -- it's not  
3 part of our response, either as what we think they should  
4 do or an identified approved alternative, I don't think  
5 it's on the table for the Revised Objection process.

6 Attorney Wiesner, help me out.

7 MR. WIESNER: I believe that's correct.  
8 If the response contains an amended approach to 301.16,  
9 then the Final Proposal language that we've been  
10 considering would effectively be considered a fallback.  
11 It would be a fallback in one direction, and the  
12 minimalist approach of basically deleting 301.16 would be  
13 a fallback in a different direction. And, the Chairman  
14 would be authorized to go either way, depending on where  
15 JLCAR seemed to be heading in its deliberations.

16 CHAIRMAN HONIGBERG: That's the motion  
17 in front of us.

18 Is there any further discussion?  
19 Commissioner Burack.

20 VICE CHAIRMAN BURACK: Just to be clear,  
21 my intent in the motion was to try to provide maximum  
22 flexibility, both to this Committee and to JLCAR as well,  
23 to consider the full range of options. But, ultimately,  
24 you know, JLCAR is going to be the final decision-maker on

1 this, really. They hold the final cards. And, I think  
2 the way we've got it laid out here gives the full range of  
3 options.

4 CHAIRMAN HONIGBERG: All right. Is  
5 there any further discussion?

6 *[No verbal response]*

7 CHAIRMAN HONIGBERG: Seeing none, are  
8 you ready for the vote? All in favor, please say "aye"?

9 *[Multiple members indicating "aye".]*

10 CHAIRMAN HONIGBERG: Is there any  
11 opposed?

12 *[No verbal response]*

13 CHAIRMAN HONIGBERG: All right. The  
14 "ayes" have it. It's complicated to write up. But we'll  
15 get it written up.

16 Next issue.

17 MR. WIESNER: Next issue is "cumulative  
18 impacts". And, the objections here are very similar.  
19 That it is contrary to the legislative intent underlying  
20 SB 245 for the SEC to apply cumulative impacts analysis to  
21 energy facilities other than wind facilities. And, in  
22 addition, as I noted before with "public interest",  
23 Northern Pass also makes the claim that that cumulative  
24 impacts -- broader cumulative impacts analysis is

1 inconsistent with the analysis that was otherwise required  
2 under Section 16, IV, regarding unreasonable adverse  
3 effects on aesthetics, the natural environment, *etcetera*.

4           It's my sense that -- I will say, this  
5 has also been an issue of considerable comment and a  
6 strong objection. And, I -- my sense is that the  
7 "legislative history" argument here and the "statutory  
8 construction" argument here is probably stronger in favor  
9 of the objectors than may have been the case with "public  
10 interest". And, in large part, that's because "cumulative  
11 impacts" appears in the statute, it appears only with  
12 respect to wind facilities, and then pipeline facilities,  
13 but it does not appear anywhere where it would have  
14 general applicability to all energy facilities.

15           CHAIRMAN HONIGBERG: And, so, the  
16 possible responses here are to just have "cumulative  
17 impacts" apply to wind or stick with the Final Proposal  
18 language, is that correct?

19           MR. WIESNER: That's correct. And, it's  
20 really 14(g), 301.14(g), which is imposed as a siting  
21 criteria, as it's currently written, that all energy  
22 facilities would be analyzed using a cumulative impacts  
23 test. The Alternative would be to apply that section only  
24 to wind facilities, consistent with Section 10-a of 162-H,



1 and not apply it to other types of facilities.

2 CHAIRMAN HONIGBERG: Commissioner Scott.

3 COMMISSIONER SCOTT: If memory serves, I  
4 was one of the ones who were pushing for cumulative  
5 impacts more broadly. My intention in doing that was to  
6 be able to have cumulative impacts in the application, so  
7 we understood what we were looking at. In my mind  
8 anyways, there was an understanding, "yes, I see the law  
9 says, for wind and pipelines, you treat it differently."  
10 So, that was my rationale at the time.

11 Having said that, and seen the  
12 objections, and understanding the effect of the language,  
13 it may not be the same as it was in my mind when I was  
14 suggesting it, I support at this juncture removing the  
15 cumulative impacts but for the wind, as these are written.  
16 And, again, we have a rulemaking coming ahead of us for  
17 pipelines, and we'll have to address that separately also.

18 CHAIRMAN HONIGBERG: Other thoughts and  
19 comments?

20 *[No verbal response]*

21 CHAIRMAN HONIGBERG: I will say that,  
22 like Attorney Wiesner, I thought that the "legislative  
23 intent" and "statutory construction" arguments from the  
24 objectors here were much stronger than they were with

1 respect to "public interest".

2 The course of the proposals and  
3 amendments, and where the language ended up settling,  
4 there's, obviously, no question about its applicability to  
5 wind, but it is a much, much more difficult argument to  
6 make that the cumulative impacts analysis is supposed to  
7 be applied to other types of facilities. I have to  
8 recognize that.

9 And, so, the prospect of taking it out  
10 and just of other considerations is one that I think may  
11 well make sense in this context.

12 Anyone else have thoughts or comments on  
13 this? Attorney Weathersby.

14 MS. WEATHERSBY: We would still be  
15 requiring them to provide information concerning the  
16 cumulative impacts, correct, as part of the application?  
17 In which case, we could then still consider that in our  
18 analysis of, when we go through, say, public interest, you  
19 know, its effects on private property, public welfare,  
20 health and safety. And, that can factor -- I think it's  
21 important that it somehow factors into our analysis.

22 So, two questions, I guess. One, do  
23 they still need to provide that information as part of  
24 their application? And, two, if we take it out, are we

1 still able to consider cumulative impacts in a larger  
2 context?

3 CHAIRMAN HONIGBERG: I don't know the  
4 answer to the first, as it's currently constructed. I  
5 think the assumption has been that, if we -- that, if we  
6 did agree with the objectors, we would be -- we would not  
7 be requiring other types of energy facilities to make the  
8 cumulative impacts showing in their applications or  
9 provide the information that would allow that. That  
10 doesn't preclude others from saying "there are a dozen  
11 other things around here" and trying to make an argument.

12 Now, on the second, I think it would be  
13 a challenge, frankly, if the Committee -- if the SEC were  
14 to rely on cumulative impacts as a grounds for denying an  
15 application for another type of energy facility, if the  
16 Legislature didn't make it a relevant criterion and our  
17 rules didn't. I think it could be done, I mean, maybe you  
18 could figure out a way to do it, maybe a creative lawyer  
19 could make a really wonderful showing on that. But I  
20 think it would be risky and might be grounds for appeal.

21 Director Muzzey.

22 DIRECTOR MUZZEY: Given all of our  
23 discussions today, I think we have very closely tracked  
24 the legislation that we are meant to with all the

1 decisions we've made. And, I, although I also feel that  
2 cumulative impacts should be considered for all types of  
3 energy facilities, that's not what we're currently given  
4 in the legislation. And, I think we need to closely track  
5 that, and would support limiting it to wind energy  
6 facilities at this point.

7 I do wonder if additional wording should  
8 be added to (g), on Page 18, to address, as written in the  
9 legislation at 162-H:10-a, the idea that we are  
10 "considering both cumulative impacts from multiple towers  
11 or projects or both". It's a concept that's not in the  
12 rules as they're currently drafted on Page 18.

13 CHAIRMAN HONIGBERG: So, I think a way  
14 to do that would be on the second line of (g), "cumulative  
15 impacts of or from", the phrase you just read, "multiple  
16 projects or multiple turbines", "to public health and  
17 safety", and go from there. Is that what you had in mind?

18 DIRECTOR MUZZEY: Yes. The language in  
19 the legislation is -- would be "cumulative impacts from  
20 multiple towers or projects or both", and then the  
21 language would continue with "to public health and  
22 safety", *etcetera, etcetera*.

23 CHAIRMAN HONIGBERG: Just a minute,  
24 Commissioner Bailey. Let's let Attorney Wiesner make sure

1 that he has what just happened.

2 MR. WIESNER: I have, in the second  
3 line, "shall consider cumulative impacts of or from  
4 multiple projects or multiple towers" --

5 CHAIRMAN HONIGBERG: "Or both".

6 MR. WIESNER: "Or both", "consistent  
7 with the language of Section 10-a"?

8 *[Director Muzzey nodding in the*  
9 *affirmative.]*

10 CHAIRMAN HONIGBERG: Yes. Now  
11 Commissioner Bailey.

12 COMMISSIONER BAILEY: Mine is just a  
13 question. Isn't that covered by "combined observation,  
14 successive observation, and sequential observation", as  
15 we've defined them?

16 MR. WIESNER: I mean, that is specific  
17 to the aesthetic impacts, and might not cover other sorts  
18 of impacts.

19 COMMISSIONER BAILEY: Like?

20 CHAIRMAN HONIGBERG: Sound, shadow  
21 flicker.

22 MR. WIESNER: Right. I mean, effects on  
23 wildlife, for example, or other public health and safety  
24 impacts.

1 CHAIRMAN HONIGBERG: All right. I  
2 believe, can we turn what you just did, Director Muzzey,  
3 into a motion, to essentially accept the objections to --  
4 regarding wind, that it should only -- I'm sorry,  
5 regarding cumulative impacts, that they should apply only  
6 to wind, and that, in making the changes, we would do what  
7 Attorney Wiesner started to outline in the rules with that  
8 additional phrase that you added, is that correct?

9 DIRECTOR MUZZEY: Yes.

10 CHAIRMAN HONIGBERG: All right. So,  
11 that is Director Muzzey's motion. Is there a second?

12 COMMISSIONER SCOTT: Second.

13 CHAIRMAN HONIGBERG: Commissioner Scott  
14 seconds. Is there any further discussion?

15 Yes, Commissioner Bailey.

16 COMMISSIONER BAILEY: Could you just  
17 give me the language again, Mr. Wiesner?

18 MR. WIESNER: So, this is in the second  
19 line of (g), where it says "the committee shall consider  
20 cumulative impacts of or from multiple projects or  
21 multiple towers, or both, to public health and safety",  
22 *etcetera*.

23 CHAIRMAN HONIGBERG: Attorney Wiesner,  
24 what would come out of the filing requirements? Did you

1 hit that rule in the changes that you made?

2 MR. WIESNER: There are changes in the  
3 -- I mean, we'll get to this as we walk through, if we're  
4 going to do that, and I suggest we do. There are changes  
5 in definition of "cumulative impacts" to make it clear  
6 that it applies only to wind facilities.

7 CHAIRMAN HONIGBERG: Okay. All right.  
8 Are there any further questions or any further discussion?

9 Yes, Commissioner Bailey.

10 COMMISSIONER BAILEY: Sorry. What do  
11 you mean by "towers"?

12 CHAIRMAN HONIGBERG: Isn't that a word  
13 from the statute?

14 DIRECTOR MUZZEY: I was tracking the  
15 legislation.

16 COMMISSIONER BAILEY: But could "towers"  
17 be interpreted to mean "transmission towers"? Is it --

18 MR. WIESNER: Yes, this is only for  
19 wind. I mean, so, (g) --

20 COMMISSIONER BAILEY: So, if somebody is  
21 building a wind project, and they're building it in the  
22 vicinity of a transmission line, do they need to consider,  
23 under the words that we have here, the transmission  
24 towers?

1                   CHAIRMAN HONIGBERG: I think that would  
2 be a heavy lift. Given the statute, that would be a very  
3 challenging argument to make.

4                   COMMISSIONER BAILEY: Can we call them  
5 "wind turbines"?

6                   DIRECTOR MUZZEY: I would suggest we  
7 track the legislation exactly as written. I agree it's  
8 not the perfect language, but I think it's the firmest  
9 place to stand.

10                  COMMISSIONER BAILEY: Okay. Again, I  
11 think that our job to clarify the statute and what we  
12 think we mean by it. So, I guess I wouldn't be in support  
13 of that addition.

14                  CHAIRMAN HONIGBERG: Is there any  
15 further discussion or other questions?

16                               *[No verbal response]*

17                  CHAIRMAN HONIGBERG: Seeing none. All  
18 in favor, please say "aye"?

19                               *[Multiple members indicating "aye".]*

20                  CHAIRMAN HONIGBERG: Any opposed?

21                               *[One member indicating in opposition.]*

22                  CHAIRMAN HONIGBERG: All right. That  
23 motion carries. What do we have? Eight to one. No,  
24 seven to one. I'm sorry, seven to one.



1 Off the record.

2 *[Brief off-the-record discussion*  
3 *ensued.]*

4 CHAIRMAN HONIGBERG: All right. We're  
5 back on the record. Attorney Wiesner, you need to walk us  
6 through some things, so we can then take a final vote to  
7 fix the language or set the language or whatever the  
8 OLS --

9 MR. WIESNER: I believe that's -- yes, I  
10 believe that's advisable, just so the Committee has had a  
11 chance to review the specific language changes that I have  
12 proposed, with the modifications that we've previously  
13 approved here today.

14 So, if we want to start with the Site  
15 100 rules. And, hopefully, I won't miss anything. The  
16 first change appears on Page 3, and this is in the  
17 definition of "cumulative impacts". And, what's added  
18 here are references to "wind energy facilities" everywhere  
19 where it previously was not limited to wind, so that  
20 that's consistent with the motion that was just approved.

21 At the bottom of that page, this is in  
22 response to an OLS comment, a specific reference to the  
23 state statute language, quoting it. And, then, in  
24 clarification that the term includes "any prehistoric or

1 historic district", *etcetera*, and that carries over onto  
2 the next page, and a reference to the federal regulations.  
3 So that this is basically a clarifying editorial change  
4 made in response to a comment received from Legislative  
5 Services.

6           The next change appears on Page 9, this  
7 is 103.03(e). And, here -- here we change "shall" to  
8 "may", because we were asked to. But it works in this  
9 context, because we're talking about a third party. So,  
10 "any party whose interests might be affected may object to  
11 a matter being assigned to a 3-person subcommittee". And  
12 that is -- those are language changes proposed by  
13 Legislative Services, consistent with the intent of the  
14 statute, which provides that right of objection to parties  
15 who want the full seven days -- excuse me, 7-member  
16 subcommittee.

17           CHAIRMAN HONIGBERG: So, we're going to  
18 flag that section, when we're ready to go in there and  
19 defend our "mays"?

20           MR. WIESNER: That's right. You gave us  
21 one "may".

22           And, please, if you have any questions,  
23 or if there's any objection to any of these language  
24 changes, please let me know. I don't want to rush through

1 this too quickly.

2 But, on Page 12, we already talked --  
3 looked at this language and talked about it. These are  
4 the four new subsections which provide some greater detail  
5 as to how public hearings in the host county will be  
6 conducted. And, the change from what appeared originally  
7 is the deletion of "contact information", and then the  
8 inclusion of Attorney Iacopino's language, which I have as  
9 "town or city of residence". So, that's the only change  
10 from what otherwise appears here.

11 The next change, the next change I see  
12 is on Page 20, in Section 202.17. 202.17(b), this is in  
13 regard to a motion for continuance. And, we took out a  
14 reference to the "moving party having provided a valid  
15 basis for the proposed continuance", and just qualified it  
16 by saying "the proposed continuance will promote the  
17 orderly and efficient conduct of the proceeding". That  
18 is -- I would characterize that as a "clarification  
19 change" made in response to a Legislative Services  
20 comment. And, I don't believe it changes the basic  
21 substance of the provision.

22 The next change is on -- changes are on  
23 Page 23, in 202.2(b). Under RSA 5:40, record retention is  
24 covered by the Division of Records and Management --

1 excuse me, Records Management and Archives not through  
2 "rules", but by "a uniform procedures manual", and that's  
3 actually referenced in RSA 5:40. So, that's a change  
4 consistent with the language of the underlying statute.

5 Down below, 202.29(d)(2), deletion of  
6 some language which Legislative Services believed I think  
7 was duplicative and unnecessary. And, it seemed to me  
8 that that was a reasonable comment, and, so, I made that  
9 change. And, that is it for this set of rules.

10 In the other set, which includes the 300  
11 certificate rules, the first change appears on Page 5.  
12 And, this, again, is what we were just talking about.  
13 This is 301.03(h)(6), "Information regarding the  
14 cumulative impacts of", and it used to cover "all energy  
15 facilities", it now says "of a proposed wind energy  
16 facility". And, in the last line of that subsection,  
17 there's a similar change, where "energy facilities" has  
18 been changed to "wind energy facilities".

19 CHAIRMAN HONIGBERG: A suggestion. A  
20 phrase at the beginning of that subsection that would say  
21 "For a wind energy facility, information regarding".

22 MR. WIESNER: So, we would say "For a  
23 proposed wind energy facility, information regarding the  
24 cumulative impacts" --

1 CHAIRMAN HONIGBERG: Yes.

2 MR. WIESNER: -- "of the proposed  
3 facility"?

4 CHAIRMAN HONIGBERG: So that other types  
5 of applicants would see that section doesn't apply to  
6 them.

7 MR. WIESNER: Yes. And, then, in  
8 (h)(7), just below that, this is where we would -- this is  
9 where the change -- the deletion that appears would be  
10 revised, pursuant to the motion that was approved. And,  
11 it would say "including the specific criteria set forth in  
12 Site 301.16(a) through" I believe it's "(j)".

13 CHAIRMAN HONIGBERG: It is. If you look  
14 at the individual sheet that has the "Alternate SEC Rules  
15 Language", that sets -- you'll see the "301.03(h)(7)"  
16 language as it will appear in the revised document.

17 MR. WIESNER: So, that's the  
18 cross-reference to the revised 301.16 that was approved,  
19 which has subsections (a) through (j). So, the only  
20 change that will appear there, from the current Final  
21 Proposal, will be "(d)" will become "(j)".

22 Then, we looked at this a little earlier  
23 on Page 8 -- oh, wait a minute, I missed one. Sorry. On  
24 Page 7, there are a couple of what I would characterize as

1 "purely stylistic changes" for the sake of consistency  
2 that were proposed by OLS, and I thought made a lot of  
3 sense. And, so, you see those in (5) and (6), "An  
4 identification", "A characterization". That's largely for  
5 the sake of consistency with other similar provisions.

6 Then, on Page 8, this is on  
7 photosimulations. We looked at this before. And, as I  
8 mentioned, the comment was that this section was too long  
9 and too confusing, and had internal sub colons, which are  
10 disfavored by OLS, and deemed confusing, I believe, under  
11 the Rulemaking Manual. And, so, what we've done is broken  
12 those outs into separate subsections. And, it does make  
13 it easier to read, I would say.

14 So, the substance of those provisions is  
15 exactly the same. The only thing that is changed is the  
16 presentation, basically, in an outline form, rather than  
17 packing it all into one long paragraph. And, then, some  
18 renumbering consistent with those changes.

19 On Page nine, in places where we are  
20 essentially incorporating by reference a federal  
21 regulatory definition, there's a reference to "available  
22 as noted in Appendix B". So, that appears in both  
23 301.06(b) and (e).

24 On Page 10, Site 301.08(a). In (a)(1),

1 what you see is "17" -- no, excuse me, "301.18" changed to  
2 "17". That should not be changed, because we are  
3 retaining 301.16. That was a cross-reference change. So,  
4 there will be no change there.

5 In (a)(2), this is a stylistic change  
6 proposed by OLS, which I think is a very good one.  
7 Changing "public gathering area (outdoor and indoor)" to  
8 "outdoor or indoor public gathering area", eliminating the  
9 internal parentheses.

10 On Page 11, where we talk about  
11 decommissioning plans, similarly, this was a long  
12 paragraph, which has now been broken out. Some of the  
13 substance which appeared in (7) has now been added to (8),  
14 which is essentially a long list of items that need to be  
15 covered in the decommissioning plan. So, that makes (7)  
16 shorter, and makes (8) more of a bullet point outline, if  
17 you will, of what's required in a decommissioning plan.

18 CHAIRMAN HONIGBERG: But no change to  
19 the language itself, correct?

20 MR. WIESNER: No substantive changes,  
21 just been moved to a different subsection.

22 Similar changes on Page 12, in (c)(2),  
23 where -- this is the section that applies to all  
24 decommissioning plans -- I should say, decommissioning

1 plans for facilities other than wind projects. Again, no  
2 change in substance, just basically a formatting change,  
3 in the interest of clarity.

4 On Page 18, 301.14(f)(2)(a), deletion of  
5 parentheses, and the inclusion of commas, instead of  
6 parentheses. And, then, in (b), again, the parenthetical  
7 "(outdoor and indoor)" has been replaced by the inclusion  
8 of "outdoor or indoor" before the reference to "public  
9 gathering area".

10 14(g), 301.14(g), we talked about  
11 earlier, this is cumulative impacts. And, we're going to  
12 add the additional language proposed by Director Muzzey,  
13 and approved by the Committee.

14 301.16, shown deleted here, will be  
15 revised, so it reflects the alternative language that was  
16 proposed and approved, which appears on the separate sheet  
17 that was handed out. And, that's (a) through (j).

18 So, then, the change that I had made to  
19 301.17, renumbering it will be reversed, and that will  
20 again be "301.17". As the Chairman suggested, we will  
21 delete, in the last line of the preamble, if you want to  
22 call it that, the reference to "1 and 16". So, it will  
23 just read "in order to meet the objectives of RSA 162-H".

24 On Page 20, I had renumbered "301.18" as



1 "17", and that will go back to "18". In (a)(1) and (2),  
2 there are, again, changes made at the suggestion of OLS to  
3 reference "Appendix B", which tells parties how they can  
4 get copies of the documents which are incorporated by  
5 reference here. Similarly, in (4). And, then, there's  
6 some reformatting which was done in (4) as well, for the  
7 sake of clarity and consistency.

8 DIRECTOR MUZZEY: A question?

9 MR. WIESNER: Yes.

10 DIRECTOR MUZZEY: In referencing  
11 "Appendix B", that will also -- that will contain the  
12 sound information, as well as the federal regs, 36 CFR  
13 800?

14 MR. WIESNER: Yes. Appendix B is  
15 basically an outline for parties of how they can obtain  
16 information which is incorporated by reference in the  
17 rules, but not included in the text of the rules.

18 DIRECTOR MUZZEY: Okay.

19 MR. WIESNER: So, how can you get a copy  
20 of the CFRs that are referenced or here, the ANSI or ISO  
21 standards.

22 DIRECTOR MUZZEY: Thank you.

23 MR. WIESNER: Similar changes on Page  
24 21, in (c)(1), with respect to the ISO 9613-2 standard,

1 and the IEC standard referenced -- incorporated by  
2 reference in (c)(2), and again below, in (e)(1).

3 And, an editorial or a stylistic change  
4 at the top of Page 22, deletion of a semicolon and ", and"  
5 instead.

6 And, then, in (3), this is in the  
7 interest of clarity, I would say, a specific statement  
8 that the sound measurements "shall comply with the  
9 following additional specifications", and then those  
10 specifications are listed in the preferred outline form  
11 under the Rulemaking Manual, and again a reference to  
12 "Appendix B".

13 Similar stylistic change in subparagraph  
14 (4) -- excuse me, (5). And, similar changes, again, in  
15 the interest of clarity and consistency with the outline  
16 form, in (7).

17 If you turn the page to 23, we talked  
18 about 302.01(b), and the Committee indicated that language  
19 change was acceptable.

20 In (f) of 302.01, we will restore the  
21 word "may" where "shall" appears. And, the same change in  
22 302.02(d). With the fallback authority granted to the  
23 Chairman.

24 And, those are all the changes.

1 CHAIRMAN HONIGBERG: So, we'll need a  
2 motion on that. I think, to wrap up the alternative  
3 approaches that we're going to include in the response,  
4 with respect to the very last changes we were talking  
5 about, the alternatives are removal of the sections where  
6 the "shall" and "may" presented a problem.

7 And, with respect to the "public  
8 interest" section, one alternative is the Final Proposal  
9 language, which would also have an effect on 301.03(h)(7),  
10 but that's language you have in front of you and can see.  
11 So, when we talk about approving language, you will have  
12 done it there. And, the other is removal of the sections  
13 regarding "public interest", correct? And, that is  
14 actually in front of us in the document as you gave it to  
15 us, that was the version you gave to us, deleting the  
16 "public interest", correct?

17 MR. WIESNER: Yes. So, in effect, all  
18 three proposals have been put before the Committee as they  
19 would appear, if they become final.

20 CHAIRMAN HONIGBERG: Right. And, I'm  
21 doing that so we don't have to come back and do this on an  
22 emergency basis.

23 All right. Anything else we need to go  
24 through? Does anybody have any questions for Attorney

1 Wiesner or any comments on this?

2 *[No verbal response]*

3 CHAIRMAN HONIGBERG: All right. Seeing  
4 none, I'll entertain a motion to approve everything we  
5 just talked about?

6 COMMISSIONER BAILEY: So moved.

7 CHAIRMAN HONIGBERG: Thank you,  
8 Commissioner Bailey. Is there a second?

9 COMMISSIONER SCOTT: Second.

10 CHAIRMAN HONIGBERG: Commissioner Scott.  
11 Is there any further discussion?

12 *[No verbal response]*

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

15 *[Multiple members indicating "aye".]*

16 CHAIRMAN HONIGBERG: Is there any  
17 opposed?

18 *[No verbal response]*

19 CHAIRMAN HONIGBERG: All right. That  
20 motion carries.

21 As I said, we're probably going to need  
22 another meeting, almost certainly. So, look for a  
23 *doodle.com* poll for the week of December 6th. We will not  
24 be needing to schedule as long of a period of time, which

1 is a good thing, but please be flexible with your  
2 schedules to the greatest extent possible.

3 I would normally say "we're going to  
4 adjourn", but I actually want to take five minutes and  
5 make one -- do one quick thing, to make sure that we don't  
6 have to do anything else, and then we'll adjourn.

7 So, let's break for five minutes.

8 (Recess taken at 4:34 p.m. and the  
9 meeting resumed at 4:38 p.m.)

10 CHAIRMAN HONIGBERG: All right. The  
11 rules matter, I think we are completed work on that.  
12 Administrator Pam Monroe has an item of business, as the  
13 last, it was included in the last item of the agenda,  
14 "other business", and then she sent around some  
15 information, has handed us a document.

16 I will turn the microphone over to  
17 Administrator Monroe.

18 ADMINISTRATOR MONROE: Thank you. What  
19 I wanted to present is under RSA 162-H:3-a, requires the  
20 administrator or, in the absence of the administrator, the  
21 chairperson, in order to engage additional legal or  
22 administrative support for the Committee, with the  
23 Committee's approval.

24 So, what I'd like to present to you

1 today is a Service Agreement, this is for -- this would be  
2 retroactive back to September 1st for two employees of the  
3 Public Utilities Commission who have been assisting the  
4 Site Evaluation Committee, since the duties transferred  
5 over here to the PUC.

6 And, in addition to that, what I would  
7 also ask the Committee is, this agreement would expire on  
8 February 28th, I'd also ask for approval of the Committee  
9 to hire a part-time Program Assistant I, Labor Grade 19,  
10 to be part of a pool of employees here at the PUC to  
11 assist the Site Evaluation Committee in the administrative  
12 duties of the Committee.

13 CHAIRMAN HONIGBERG: Anybody have any  
14 questions for Pam? Commissioner Bailey.

15 COMMISSIONER BAILEY: Just to make it  
16 clear, I assume that the hours that these employees are  
17 working and being paid under this contract are not the  
18 same hours that they're working for the Public Utilities  
19 Commission, that this would be after-hours?

20 ADMINISTRATOR MONROE: Correct. This  
21 has been tracked on an ongoing basis. And, what this  
22 would do would be to make the PUC whole, if you will,  
23 because there hasn't been a mechanism by which we could  
24 pay those employees, is my understanding.

1                   COMMISSIONER BAILEY: So, does the money  
2 from this contract go to reimburse the PUC for the  
3 employees not working the hours that they were here? Or,  
4 if they worked on the weekend on the Site Evaluation  
5 Committee stuff or if they worked on the weekends,  
6 effectively, they worked overtime, because of the Site  
7 Evaluation Committee --

8                   ADMINISTRATOR MONROE: Correct.

9                   COMMISSIONER BAILEY: -- work, they get  
10 paid for that time?

11                  ADMINISTRATOR MONROE: Correct. And,  
12 they have been tracking their hours that they have been  
13 working on SEC matters, when they should be working on PUC  
14 matters.

15                  CHAIRMAN HONIGBERG: But are there also  
16 situations where they have worked on the weekend?

17                  VICE CHAIRMAN BURACK: Yes.

18                  CHAIRMAN HONIGBERG: So, it's both.  
19 It's both of the scenarios that Commissioner Bailey  
20 outlined, right?

21                  ADMINISTRATOR MONROE: Yes. Correct.

22                  CHAIRMAN HONIGBERG: Are there other  
23 questions?

24                                 *[No verbal response]*

1                   CHAIRMAN HONIGBERG: I'll entertain a  
2 motion? Commissioner Bailey.

3                   COMMISSIONER BAILEY: I move that we  
4 approve these contracts.

5                   CHAIRMAN HONIGBERG: Is there a second?

6                   COMMISSIONER ROSE: Second.

7                   CHAIRMAN HONIGBERG: Commissioner Rose  
8 seconds. Is there any further discussion?

9                   ADMINISTRATOR MONROE: Can I just ask  
10 for a clarification relative to the hiring of the  
11 part-time? Or, do you want to make a separate motion?

12                  CHAIRMAN HONIGBERG: Is one motion good  
13 enough for you?

14                  ADMINISTRATOR MONROE: One's good enough  
15 for me.

16                  CHAIRMAN HONIGBERG: I think that motion  
17 was broad enough to include your entire package of  
18 requests.

19                  ADMINISTRATOR MONROE: Thank you.

20                  CHAIRMAN HONIGBERG: All right. Is  
21 there any further discussion?

22                                *[No verbal response]*

23                  CHAIRMAN HONIGBERG: Seeing none, all in  
24 favor say "aye"?



1                   *[Multiple members indicating "aye".]*

2                   CHAIRMAN HONIGBERG: Any opposed?

3                   *[No verbal response]*

4                   CHAIRMAN HONIGBERG: The motion carries.

5                   Is there any other business we need to  
6 transact? You'll need to remind me to look over and ask  
7 you that when we do this thing.

8                   ADMINISTRATOR MONROE: No, there is not.

9                   CHAIRMAN HONIGBERG: All right.

10                  Attorney Wiesner, is there anything else we need to do for  
11 you?

12                  MR. WIESNER: I have nothing else, Mr.  
13 Chairman.

14                  CHAIRMAN HONIGBERG: Is there anything  
15 else anybody up here needs to do or say?

16                  *[No verbal response]*

17                  CHAIRMAN HONIGBERG: All right. Thank  
18 you very much. Commissioner Scott moves we adjourn;  
19 Commissioner Bailey seconds.

20                  All in favor say "aye"?

21                  *[Multiple members indicating "aye".]*

22                  CHAIRMAN HONIGBERG: Any opposed?

23                  *[No verbal response]*

24                  ***(Whereupon the meeting was adjourned at 4:42 p.m.)***