STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

May 24, 2018 - 9:00 a.m. DELIBERATIONS
49 Donovan Street Morning Session ONLY
Concord, New Hampshire

{Electronically filed with SEC on 05-29-18}

IN RE: SEC DOCKET NO. 2015-06
Joint Application of Northern
Pass Transmission, LLC, and
Public Service Company of
New Hampshire d/b/a Eversource
Energy for a Certificate
of Site and Facility.
(Deliberations on Motions
for Rehearing)

PRESENT FOR SUBCOMMITTEE/SITE EVALUATION COMMITTEE:

Chrmn. Martin P. Honigberg Public Utilities Comm.
(Presiding as Presiding Officer)

Dir. Craig Wright, Designee Dept. of Environ. Serv.
Christopher Way, Designee Dept. of Business &
Economic Affairs
William Oldenburg, Designee Dept. of Transportation
Patricia Weathersby Public Member
Rachel Dandeneau Alternate Public Member

ALSO PRESENT FOR THE SEC:

Michael J. Iacopino, Esq., Counsel for SEC
Iryna Dore, Esq., Counsel for SEC
(Brennan, Lenehan, Iacopino & Hickey)

Pamela G. Monroe, SEC Administrator

(No Appearances Taken)

COURT REPORTER: Steven E. Patnaude, LCR No. 052
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PROCEEDING

[Upon arrival of all Subcommittee members, at 9:00 a.m. the Subcommittee members held a conference with SEC Counsel.]

(Deliberations commenced at 9:30 a.m.)

CHAIRMAN HONIGBERG: Good morning, everyone. We are here to deliberate a number of pending motions in the Northern Pass docket. We have the Motion for Rehearing, which was filed by the Applicant, joined by a number of parties; opposed by a number of others. We have a Motion to Recuse two members of the Subcommittee. We're going to take those two requests first. We also have a pending request for findings and rulings that was filed by the City of Berlin, I think, that we will take up, I think, as the last order of business, when we get to it.

So, a couple of things. I'll ask people to remember to do, which is silence or turn off your cellphones now please.

[Brief off-the-record discussion]
ensued.

CHAIRMAN HONIGBERG: Back on the record. I'll ask everyone to remember that this is for the Subcommittee's time to deliberate among itself pursuant to New Hampshire law. This is our turn to talk, not yours.

If anyone has any questions about anything that's going on, I'll ask you to direct them to Ms. Monroe, who's sitting up there, or Mr. Iacopino, who's sitting to my right, or Ms. Dore, who is sitting over there next to Ms. Monroe.

I think those are the items of business that I needed to remind all of you of.

So, with that, let's turn to the motion that was filed to recuse two members of the Subcommittee. I think Commissioner Bailey wanted to speak first on the request directed to her that she be recused from further participation in this docket.

CMSR. BAILEY: Thank you, Mr. Chairman.

I have read the Business Intervenor
Group's Motion for Recusal. The Motion discusses a decision by the New Hampshire Supreme Court that refers to an analogous federal statute requiring disqualification of a judge in any proceeding in which his impartiality might reasonably be questioned. It then uses three sentences from our deliberations, taken completely out of context, to argue I'm so biased that I should recuse myself from further participation in this case. I'd like to review the context in which I made the allegedly biased statements.

During deliberations, after everyone had indicated the Applicant had not met its burden to demonstrate the Project would not unduly interfere with orderly development, and it seemed as though we could not grant the Certificate, I suggested the Subcommittee discuss whether we should continue the deliberations.

From there, various Subcommittee members discussed their thoughts on that. In response to something Ms. Weathersby said in favor of continuing the deliberations, I shared
my thinking about what she had said, as part of
the deliberative, conversational process, on
the record, before making my decision on that
issue. Those are the thoughts the Business
Intervenor Group believes demonstrate that I am
impartial -- that I am not impartial.

The deliberation doesn't demonstrate
bias. It demonstrates I did what I'm supposed
to do as a member of this Subcommittee. We are
required to think out loud during
deliberations, discuss among ourselves in front
of everyone, test each other, and then make
independent decisions to determine the majority
opinion.

As I understand it, the standard for
me to consider whether I should be recused is
if my impartiality might be reasonably
questioned or if, from the standpoint of a
reasonable person, facts demonstrate that
impartiality can be questioned.

I don't believe the three sentences,
which apparently demonstrate to the Business
Intervenors Group that I am impartial [sic],
meet that standard. Those sentences were taken
from deliberations about a process mechanism.
The Subcommittee had already decided unanimously that the Applicant had not met its burden -- or, indicated unanimously that the Applicant had not met its burden to allow us to make a finding necessary in order to grant the Certificate. We were discussing whether, under the statute, we needed to deliberate the remainder of the elements also required to grant the Certificate.

My thinking during that discussion does not demonstrate deep-seated and unequivocal antagonism that would render fair judgment impossible. I do not believe the Business Intervenors Group has even come close to demonstrating a reasonable person would conclude I should recuse myself.

CHAIRMAN HONIGBERG: I take it then you're not recusing yourself voluntarily?

CMSR. BAILEY: I am not.

CHAIRMAN HONIGBERG: All right. I believe that it is still an issue for the Subcommittee, other than Commissioner Bailey, to consider whether we believe it would be
appropriate for Commissioner Bailey to recuse herself from further participation in this docket.

Is there anyone on the Subcommittee who would like to offer up any thoughts on that or make a motion to grant or deny the pending Motion regarding Commissioner Bailey?

Mr. Way.

MR. WAY: I agree with what Commissioner Bailey has put forth. I think the deliberation process is supposed to be a frank and open discussion. I have not seen any of the -- I have not seen the slant that's suggested. And I think that we've been very open-minded as we've gone through this process, which has lasted, what, a year and a half now at least.

So, I would make a motion to deny.

CHAIRMAN HONIGBERG: Is there a second?

DIR. WRIGHT: Mr. Chairman, I'll second.

CHAIRMAN HONIGBERG: Any further discussion on that aspect of the motion that's
directed at Commissioner Bailey?

I will say that the Motion lacks merit directed at Commissioner Bailey, and it lacks merit directed at Ms. Weathersby when we get to that. So, I will be voting in favor of the motion.

Is there any further discussion?

[No indication given.]

CHAIRMAN HONIGBERG: Seeing none, all in favor of the motion by Mr. Way to reject the request to recuse Commissioner Bailey say "aye"?

[Multiple members indicating "aye".]

CHAIRMAN HONIGBERG: Are there any opposed?

[No indication given.]

CHAIRMAN HONIGBERG: Commissioner Bailey has abstained. And Ms. Weathersby has abstained?

MS. WEATHERSBY: Abstain.

CHAIRMAN HONIGBERG: All right. Now, let's turn to the request directed at you, Ms. Weathersby.
MS. WEATHERSBY: Thank you, Mr. Chairman. Thank you for this opportunity to address the concerns outlined in the Motion for Recusal of the Business Intervenors Group.

In that Motion, the Business Intervenor Group referred to statements I made during deliberations on the Applicant's Motion for Rehearing. I stated, essentially, that I was not in favor of vacating this Committee's oral decision, but rather I believe that we should suspend it until the final order was issued. As support for that position, I indicated that I believe the Committee's oral decision denying the Application was well reasoned and lawful. I'm paraphrasing, of course. The Business Intervenors state that those comments demonstrate that I lack the impartiality required to continue participating in this docket. I disagree.

The statements the group refers to in no way demonstrate that I have ruled out any possibility that a motion for rehearing may shed light on substantial facts and arguments that we may have failed to consider or

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misunderstood, including possible certificate conditions. Rather, I made those statements based on the evidence that was presented and testimony heard over the course of many months. Having read every document, comment, and sitting through all but I think one day of testimony, for which I read the transcript, evidence that was both for and against the Application, I formed various opinions based on that information. As a member of this Subcommittee, I'm expected to form opinions about the merits of the case. I'm expected to express those opinions during deliberations. That's my job here as an SEC member.

When it came time to consider the Applicant's Motion for Rehearing, I reviewed the Motion, the objections, the applicable law, and the rules. I then expressed my opinion about the merit or lack of the Applicant's claim that the Subcommittee could or would change its decision if it continued deliberations and considered all of the factors of RSA 162-H:16. My statements were my impartial opinion about the merits of the
Applicant's argument, and were based on a consideration of all evidence, testimony, and pleadings presented over many months.

I believe that my stated opinion was impartial and lacked any indication of favoritism or bias. It did not indicate any degree of impatience, dissatisfaction, annoyance, anger, or contain any indicia of prejudice. But what I said really was just an opinion formed after considering all of the evidence and testimony in this matter. While the Business Intervenor Group is free to disagree with my statements made during deliberations, there's nothing about those statements that will require my recusal or disqualification.

Therefore, I do not feel it necessary and am not recusing myself for the remainder of deliberations.

That said, if the Subcommittee feels as though the Motion has merit, or even if my recusal would remove an appealable issue or otherwise aid in this process, I will willingly recuse myself from further deliberation on this...
Application to assist that process.

CHAIRMAN HONIGBERG: I don't know that you're going to get out that easily.

Does anyone on the Subcommittee -- it's apparent that Ms. Weathersby is not voluntarily recusing herself. Does anyone on the Committee wish to make any comments or make a motion regarding Ms. Weathersby's further participation?

Mr. Wright.

DIR. WRIGHT: Thank you, Mr. Chairman. I don't believe that the motion has any merits. I believe Ms. Weathersby has acted in a manner which is consistent with what we're supposed to do as Committee members.

And I would move that we deny the Motion.

CHAIRMAN HONIGBERG: Is there a second?

MS. DANDENEAU: I'll second.

CHAIRMAN HONIGBERG: All right. The motion has been moved and seconded.

Any further discussion regarding Ms. Weathersby's further participation?
[No indication given.]

CHAIRMAN HONIGBERG: Seeing none, all in favor of the motion to reject the request that Ms. Weathersby recuse herself say "aye"?

[Multiple members indicating "aye".]

CHAIRMAN HONIGBERG: Any opposed?

[No indication given.]

CHAIRMAN HONIGBERG: And I assume Commissioner Bailey and Ms. Weathersby are abstaining. That Motion is denied.

Let's move on to rehearing. I'll remind everyone that we have the motion that was filed at the end of April by the Applicant, which also incorporated arguments made in the earlier motion the Applicant filed before the written decision was issued. So, we have that set of issues to discuss as well. They are mentioned in the latter motion, and the earlier arguments are incorporated. So, we have both things, both sets of documents to consider as we go through the issues, and there are a lot of issues.

I believe the first one -- well, I'm
going to ask counsel maybe to do something quickly, which is to remind us of the standard of review on a motion for rehearing under New Hampshire administrative law and under our own statute and rules.

Off the record.

[Brief off-the-record discussion ensued.]

MR. IACOPINO: Okay. Any decision of the Committee may be the subject of a motion for rehearing, and ultimately of an appeal to the New Hampshire Supreme Court. Is this on?

[Referring to the microphone.]

MR. IACOPINO: The motion for rehearing is supposed to specify all of the grounds that the person making the motion believes warrants rehearing. The motion should specify why rehearing is required on each of those grounds, and why there's good reason for that rehearing.

The purpose of rehearing is to have the Committee determine if they have overlooked or mistakenly conceived anything in your original decision. Ultimately, that means that
you missed something or do you think that you
were mistaken about something in your original
decision.

The motion for rehearing invites
reconsideration upon the record of those things
that you feel -- if you feel you've overlooked
or misconceived something within the record.
And in doing that, the Committee has a sort of
standard of review that they use, and that is
"is there good reason to believe that you've
either mistaken something or overlooked
something warranting a rehearing?" So,
ultimately, the decision is up to you to
determine "is there good reason or good cause
for you to rehear something on the record
that's been created?"

Ultimately, the Supreme Court
determines if your decision was unlawful or
unreasonable. And both of those issues you
should keep in mind. Clearly, if you believe
that you've done something that is unlawful,
that would be something that would be
mistakenly conceived. If you believe that
you've done something unreasonable, or even if
there is a more reasonable way to do something, it's up to the Committee to determine that.

So, that is the standard. It's whether there is good reason to believe that you've mistakenly conceived or overlooked something that requires rehearing on the record that already exists.

CHAIRMAN HONIGBERG: Thank you, Mr. Iacopino.

I think the first issue to discuss then is the argument that the Subcommittee failed to deliberate on all four of the statutory criteria. That was an issue raised in the first Motion for Rehearing, which we deferred until after the written order was issued and subsequent Motions for Rehearing were filed.

Would anyone like to start the discussion on that issue?

[No indication given.]

CHAIRMAN HONIGBERG: Seeing no hands immediately, I'll remind everyone that what happened, at least the way I remember it, is that we deliberated on the first two criteria.
We concluded during deliberations on the second criterion that the Applicant had failed to meet its burden of proof.

Having concluded that, I think it was all of us felt that they hadn't met their burden of proof. And having taken that vote, we then voted to end deliberations and voted to deny the Application. The motion to end deliberations was five to two. Ms. Weathersby and I voted to continue deliberations; the other five voted to stop.

I'm going to repeat something I said at the time, that I think is picked up and argued by Counsel for the Public, among others. That while it might -- while it was probably a better administrative practice to continue deliberations, the statute does not require the continuation of deliberations in those circumstances. And the statute on that I think is actually fairly clear. It's worded in such a way that the only way we could grant a certificate would be to deliberate on all four and make the required findings. But, if the Subcommittee was going to vote to deny, if it...
found that it could not -- that the Applicant
could not meet one of the criteria, an
applicant -- a certificate could not be issued,
and there would be no need to continue
deliberations. That continues to be my view.

So, I don't believe that this Motion
has -- this Motion should be granted on this
issue. That we are not -- that we are not
required to.

Having said that, should we conclude
that there are other reasons to reconsider our
earlier decision, we will then be turning
around and reopening deliberations. And, so,
it may take care of itself a different way.

But presented solely as the legal
issue "are we required to deliberate on all
four, having concluded that the Applicant did
not meet one of them?" I would deny the
request on that particular issue.

Anyone? Commissioner Bailey.

CMSR. BAILEY: No.

CHAIRMAN HONIGBERG: No. I'm sorry.

Who wanted to speak?

MR. WAY: I guess I --
CHAIRMAN HONIGBERG: Mr. Way. I'm sorry.

MR. WAY: I agree with you. When I looked at back at what we had done, and trying to find out whether what we agreed upon was lawful or unreasonable, certainly, with regards to the decision being lawful, I'm still of the same mindset. I think what we did was appropriate.

When we looked at the first set of findings and we proceeded forth, I think we all had a fairly general consensus. When we got to orderly development, it seemed to me that it was such an overwhelming agreement amongst everybody that this was not going to be something that was easily overcome. Matter of fact, I think even I said that it was something that would be difficult to walk back from. And that we would not be able to issue that Certificate without the finding of orderly development not being unduly met.

So, I think, from my standpoint, it was reasonable. I haven't seen any new information that would make me rethink that at
this point. Although, I'm always open, and would be interested to hear what everybody else says.

CHAIRMAN HONIGBERG: Anyone?

Commissioner Bailey.

CMSR. BAILEY: Can I have one second to go get something out of the other room?

CHAIRMAN HONIGBERG: Sure.

[Short pause.]

CHAIRMAN HONIGBERG: All right.

Commissioner Bailey.

CMSR. BAILEY: I agree that the statute only requires consideration of all the elements in order to grant a certificate.

However, I think we should take a look at SEC Rule 202.28 pointed out in the Applicant's Motion, which is what I went to get. That might be interpreted the way they say, and it might be interpreted the way that we have proceeded.

But the rule says "The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 17",

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which is the analysis that we have to do for each one of those findings in the law, "and issue an order pursuant to 541-A:35 issuing or denying a certificate."

So, I think there is a little vagueness in that rule. It's not well-written. I think that you could interpret it to say that we have to make a finding regarding the criteria enumerated in 162-H:16, IV, and issue an order either denying or granting a certificate. And we can make an argument -- and we did that, I think, we made a finding on one of the criteria. But the word "criteria" is plural.

And, so, I think, in the interest of fairness, we probably should go through each one of the criteria in the statute. And I think that it would be reasonable to go through all of the findings required in the statute. Even though the statute doesn't require us to do it, I think that this rule could be read to say that we should.

CHAIRMAN HONIGBERG: Any other thoughts regarding this issue?
Mr. Wright.

DIR. WRIGHT: Thank you, Mr. Chairman. Thank you, Commissioner Bailey. I think I tend to agree with you. I don't know if it's an issue of fairness to continue through all the criteria. I do know the Applicant also brought up that in past cases subcommittees have, where they have made a finding, where they couldn't grant a certificate on one of the criteria, that I believe they did, Antrim 1, go back through and continue the deliberations in all the issues.

So, I mean, I do think you raise a really good issue for us to think long and hard about.

CHAIRMAN HONIGBERG: Ms. Weathersby.

MS. WEATHERSBY: So, just devil's advocate a little bit here. Although "criteria" may be plural, by stopping and making a finding concerning a single criteria, did we, in a sense, make a de facto decision regarding the others, in that they were really inapplicable, because a certificate couldn't have been granted? I'm just --
CHAIRMAN HONIGBERG: I'm not sure that's --

MS. WEATHERSBY: All right.

CHAIRMAN HONIGBERG: -- that we would need to get quite that fair to respond. I mean, my response to what Commissioner Bailey said is that we did make a finding regarding the criteria; that finding was that we could not -- that the Applicant had not met one of them. That's "a finding" regarding the criteria.

There are other ways to read that rule, no question. And it's, I think, undoubtedly the case that, in order to grant the Certificate, we would need to make a finding on each criteria. But the rule doesn't say "we shall make a finding on each criterion". It says we make a finding "on a criteria", which we did.

Now, people still may feel that it makes sense to reopen, but I don't think it's because the rule requires us to do so.

Other thoughts?

[No indication given.]
CHAIRMAN HONIGBERG: All right. Does anyone want to make a motion?

Before we do, how about something else?

MS. WEATHERSBY: I do have a thought. Because, along with that Administrative Rule 202.28, the other administrative rule that was pointed out to us that I think just bears discussion was the 301.17, which says "In determining whether a certificate shall be issued for a proposed energy facility, the Committee shall consider whether the following conditions should be included in the certificate". And there's a whole bunch of possible certificate conditions that are really typically included in a decision when -- in a certificate when the certificate is issued.

And then -- and it was an argument of the Applicant that that 301.17 requires us to have considered each of those. And because we didn't specifically consider each of those, therefore, our decision was unlawful or unreasonable.

I read that as being conditions that
are to be in a certificate which is to be issued, not one which is denied. So, I don't think that argument holds merit. But I just wanted to kind of tee up the topic to see if anyone else had any other thoughts.

CHAIRMAN HONIGBERG: So, generally, the discussion about whether it was necessary to consider conditions in a circumstance where we had already concluded that we couldn't grant the certificate, is that what you mean?

MS. WEATHERSBY: Yes.

CHAIRMAN HONIGBERG: Okay. Other thoughts on that?

[No indication given.]

CHAIRMAN HONIGBERG: We're a quiet bunch this morning.

I'll tell you my reaction to that is like yours, Ms. Weathersby. That that rule applies in a situation where a certificate is being granted and conditions are required. I don't think, in fact, I'm fairly certain, that the statutory scheme does not empower us to say "well, we can't approve the application you filed, but we could approve an application that
was different in 17 or 20 different ways",
which is the implication of an argument like
that.

It may be that an application has
merit, should be granted, but there are
necessary conditions to deal with issues from
the Department of Transportation or Fish & Game
or Environmental Services, or any number of
other State agencies, or local requirements
that are important that the Applicant abide by
in the course of constructing or operating its
project. That's not our situation here. And
the whole discussion about conditions assumes a
set of facts that are different from what we
have here.

Anyone else? Mr. Way.

MR. WAY: And I imagine we're going
to probably get more into the discussion of
conditions as we go down the line here. And I
agree with you and I agree with Ms. Weathersby.

You know, when we're -- particularly
when we're talking about orderly development
and the need or at least a desire to have some
conditions, I think what we were talking about
is that the burden of proof wasn't met. And it wasn't about that we had a finding that there was an undue interference with orderly development. I think, in a lot of ways, we were saying that the burden of proof in many areas just simply wasn't provided.

So, then what are we supposed to do? Are we supposed to fill in those gaps ourselves and come up with conditions, when we really may not have the foundation of facts for which we could make a decision? And that's where I wrestle with it.

I mean, certainly, I can read between the lines on what conditions might be good or not good. But, in reality, I really need that base foundation of facts for which we can then proceed. And I think that's the problem we had. When we didn't feel that there was enough information, whether it be on tourism, whether it be on conforming land use, whether it be on property values, we simply said that we didn't have enough confidence, we didn't have what we felt was good information for us, in some cases, to make a decision.
So, it's hard for me then to envision how we put conditions onto that, that set of facts.

MS. WEATHERSBY: So, this is turning into a discussion on conditions generally. And all I meant by raising 301.17 administrative rule issue was whether the Committee felt as though that rule, which says, in determining whether a certificate shall be issued, we shall consider nine different conditions -- possible conditions, whether we've felt as though that was followed.

And it is my interpretation of that rule, and I think this other discussion is really important and we need to have it, but my interpretation of the rule is that those conditions, such as, you know, "(b) A requirement the certificate holder notify the committee of a change in the location", etcetera. Those conditions are -- they don't make any sense if the Committee is denying a certificate; change of ownership, delegation of State agencies.

If we find that the statutory
criteria are not satisfied and we are denying a certificate, that I don't feel as though 301.17 requires us to then have a discussion on each of those nine possible conditions.

CHAIRMAN HONIGBERG: Commissioner Bailey.

CMSR. BAILEY: I agree with that. I think that the plain reading of this particular rule says "determining whether a certificate shall be issued". So, if we got through all the statutory criteria, and we had determined that we could issue a certificate, then we would have to go through these conditions.

But, since we didn't get to that point, I don't think the rule is applicable.

CHAIRMAN HONIGBERG: Mr. Oldenburg.

MR. OLDENBURG: Listening to all the conversation, I would make a motion that we deny the motion for rehearing based upon that we failed to deliberate on all four criteria.

CHAIRMAN HONIGBERG: Is there a second to Mr. Oldenburg's motion?

MR. WAY: Second.

CHAIRMAN HONIGBERG: Mr. Way seconds.
Ms. Weathersby.

MS. WEATHERSBY: "To deny the motion"? I'm just, procedurally, I'm not sure. Are we denying the motion based on one of the issues? I think that we need to sort of check off that issue, you know, we poll people or maybe not, but save the motion until we've talked about everything else, the other issues. I don't know, procedurally, I don't --

MR. OLDENBURG: I'll let the lawyers in the room reword that.

MS. WEATHERSBY: I'll defer to our counsel, but I just didn't want to get into something that we would have to get out of.

CHAIRMAN HONIGBERG: Yes. We've had to do that before.

Mr. Iacopino, help us out here.

MR. IACOPINO: I think Mr. Oldenburg is only discussing that one subset of the Motion. I don't think it was his intention that the entire Motion be denied. And I mean, you can take a vote on it, or you can choose not to vote and just have one vote at the end of your consideration on the entire Motion.
But, you know, if you do take a vote, and then later on somebody wants to make a motion to go the other way, you can do that, too. I mean, that's one of the problems with public deliberations, is that things -- the sands can shift and you may have to, you know, make changes.

But, to the extent that the motion calls for a denial of the entire Motion, I would recommend that that motion be out of order until you have reviewed the entire Motion filed by the Applicant, as well as the objections, and anything else that the Committee finds to be relevant to the overall issue of rehearing.

CHAIRMAN HONIGBERG: I didn't interpret Mr. Oldenburg's motion to be directed at the entire Motion for Rehearing. I thought he was directing it at this issue. But I heard what Ms. Weathersby said, and I'm wondering whether it might be better for us to do straw polls on issues, and then see where we are. And then maybe we'll be able to craft a motion at the end of that process that will work for
all.

What do people think of that, in the context of discussion right now?

Mr. Way.

MR. WAY: I agree with that. I had seconded it. And I think I'd withdraw my second, if I could do that. And I --

CHAIRMAN HONIGBERG: You certainly can. Mr. Oldenburg, will you withdraw the motion for now?

MR. OLDENBURG: I will withdraw the motion.

CHAIRMAN HONIGBERG: All right.

MR. OLDENBURG: And it was my intent to talk about the subset, not the whole -- the whole Motion.

CHAIRMAN HONIGBERG: Yes. All right. So, do people want to have further discussion on this very specific issue about the argument that the Subcommittee was required to deliberate on all four statutory criteria? And we'll do a little straw poll and see where people are.

[No indication given.]
CHAIRMAN HONIGBERG: All right.
Let's assume that the -- how many agree, I'm going to put Commissioner Bailey on one side, who agrees with Commissioner Bailey and who agrees with Mr. Oldenburg regarding things, I think you are articulating that, right? How many are with Commissioner Bailey right now and believe we should be deliberating all of the statutory criteria?

[Intimation given.]

DIR. WRIGHT: I am.

CHAIRMAN HONIGBERG: I see two hands. Who's with Mr. Oldenburg, Mr. Oldenburg's position?

[Intimation given.]

CHAIRMAN HONIGBERG: That's the other five of us. Okay.

The next issue is an argument that the Subcommittee failed to consider conditions that might have resulted in different findings on undue interference. And there are specific sub arguments on property values, tourism, business and employment effects, and land use.

I think Mr. Way and Ms. Weathersby
started the discussion. Does anyone want to pick that discussion up and move it along or carry it in a different direction?

Commissioner Bailey.

CMSR. BAILEY: I agree with what Mr. Way articulated on this particular point. I don't think that it's the Subcommittee's -- I don't think that the Subcommittee could craft conditions, since we didn't fully understand the impact, based on the evidence that we received in the record. So, I don't think that we failed to consider the conditions, because we couldn't consider conditions, because we didn't have enough evidence to know whether there was an undue impact on orderly development or not.

But we did -- we were able to determine that we didn't have enough information to make a finding that it would not unduly interfere with orderly development.

CHAIRMAN HONIGBERG: Other thoughts? Ms. Weathersby.

MS. WEATHERSBY: I think one of the Applicant's arguments is that, even if we
didn't feel as though we had enough information based on their expert, we could have taken experts from other parties and Counsel for the Public and relied on their information, assumed it to be true, and crafted conditions based on that.

First, I don't feel as though we're required to do that. And second, I think that, specifically regarding their comment about the information by the Kavet group, including information about -- let me back up. They indicate that we should have looked at the ForwardNH Fund, the Property Value Guarantee, the Business Loss Program, North Country Job Creation Fund. And as I recall, when I looked at Counsel for the Public's expert's information and report concerning economics and tourism, they had factored those funds in and still found a negative impact on tourism. So, and I could be wrong on that, but I'm pretty sure that that report included those funds.

So, relying on another expert's reports, we still wouldn't really have had information that we then could have crafted
some other solution. So, I just don't -- by
crafting new conditions. So, I just don't find
that that argument by the Applicant to be very
persuasive.

CHAIRMAN HONIGBERG: Other thoughts?

Mr. Wright.

DIR. WRIGHT: Thank you, Mr. Chair.

I guess, in my mind, I keep coming
back to, I just can't feel like I understand
the extent and nature of the interference with
orderly development. So, I just, in my mind, I
don't know how I or we, as a Committee, could
develop or articulate reasonable conditions. I
just don't see how we could do that.

CHAIRMAN HONIGBERG: I have a similar
thought, Mr. Wright, in that the statute
clearly contemplates the granting of
certificates when there are adverse impacts on
those various components of society, really.
So, the question is "whether they're
unreasonable?"

I don't believe that we were given an
adequate base of information, similar to what
Mr. Way said, to know where we're starting from
in bad. There's no question, a lot of the
things that are listed and offered up by the
Applicant would have made things better, but
better than what? Where are we -- are we
starting from the apocalyptic hellscape
envisioned by many of the intervenors or are we
in a place where things are -- they're mild
effects that could be mitigated by modest
conditions or supplements to the economy?

Without knowing how bad it would be,
we don't know how much better we need to make
it to make the adverse impacts not
unreasonable. That was how I thought of this.
And it really comes down, I think again echoing
what I think Mr. Way said earlier, that since
we didn't get what we needed from the
Applicant's witnesses and evidence, we have no
way of figuring out how to make it good enough
or not bad enough.

Mr. Oldenburg.

MR. OLDENBURG: I sort of interpret
the "conditions" as "conditions of approval".
You know, it's "if you're going to approve it,
these are the conditions that you have to

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meet."

And by denying it, we basically said "There's no condition that could be put on this to approve it." So, how do you put conditions on something that was denied?

If there was -- if there were conditions that they could meet to approve it, we would have approved it with those conditions. To me, it was denied, because there were no conditions they could meet to make it approvable.

CHAIRMAN HONIGBERG: Mr. Way.

MR. WAY: I keep coming back to that, and I agree. That there really wasn't an adequate record for us to then put the conditions on.

Now, when I look back at some of the testimony and the questions and answers that we were able to have with the witnesses, frankly, I was somewhat -- not somewhat, but I was impressed a lot of times by the Construction panel, and their willingness to be able to consider conditions. But I think we had a lot more information by which to craft those
conditions or asked, for example, Mr. Bowes  
"would you consider a condition of such and  
such?"

How does one do that with the tourism  
piece or the right-of-way piece, when there  
really wasn't much information, I don't feel,  
that was given to us so that we really could  
work with it. There seemed to be a lot of  
gaps. You know, when we look at the tourism,  
for example, and we look at listening sessions,  
and there's no real -- there's no real  
substance to those listening sessions, how are  
we to take that information and then mold it  
into something? That was the hardest part that  
I had, is that there seemed to be gaps that we  
then have to fill, and essentially start  
crafting the Application in that -- for that  
piece ourself. That was a challenge that I  
think I had.

CHAIRMAN HONIGBERG: Ms. Weathersby.

MS. WEATHERSBY: I just want to echo  
what's been said. Without knowing the extent  
and nature of the interference, we really could  
not articulate reasonable conditions that would
mitigate that interference.

CHAIRMAN HONIGBERG: All right. I guess I want to make sure that we touch on the arguments that the Applicant made -- that's probably a bad way to introduce what I'm about to say. There were subparts to this issue in the Applicant's Motion, and it was a focus on property values, tourism, business and employment effects, and land use.

And so, we've talked quite a bit about tourism. We've talked about land use. I don't really know that we've talked so much about business and employment effects, and I don't really think we've talked about property values in this context.

Picking up property values, I think, like the tourism issue, that was a place where we felt that the Applicant's expert witness's presentation and testimony and reports had been so undercut by the cross-examination and the evidence that was presented by others that we just didn't find him credible. And so, to me, property values and tourism land in similar places to what I said earlier. I don't know
how bad it is, so I don't know how much better
I need to make it that it's not unreasonable
anymore.

The business and employment effects
may be a little bit different. And I guess
Mr. Way was just discussing land use a moment
ago.

So, someone help me out now with
business and employment effects. Commissioner
Bailey.

CMSR. BAILEY: I think business and
employment effects are somewhat similar,
because the evidence that we had, I believe,
was more about the impact of business during
operations. There was some, and, Mr. Way, you
could help me out here, because I know you
remember this better than I, but there was a
lack of information about the impact on
businesses, especially during construction. It
was -- it was -- my memory of it was that the
impact on businesses would be offset by a gain
on businesses somewhere else. And it was never
really quantified what that impact would be,
other than "we'll make sure that it's all
right."

MR. WAY: Yes. I think when we looked generally at employment, economic benefit, I think, in the first part of our deliberations, I think appropriately so, that we found that overall there would be a benefit to the state. Particularly with regards to employment, and I was an advocate of that, because I don't believe that temporary employment that might be construction, electrical, however, is something to be negated. That's important to that industry. It does have a benefit.

I think, as we went through this process, we can also not ignore the fact that there are going to be businesses that are going to be impacted, primarily by the underground construction piece, I would tend to think. You know, for example, when we looked in the Plymouth or Franconia area, and then I think hearing from about 50 different businesses, you can't discount that.

And so -- but when we looked at the issue overall, I think we found that there
would be a benefit. But we have to consider
those other views as well.

CHAIRMAN HONIGBERG: Commissioner
Bailey.

CMSR. BAILEY: Yes. I think you're
right. I think that it was absolutely clear
that there would be a benefit to employment
during construction. But I think what we
were -- well, the conditions that we would have
had to place, if we were going to grant a
certificate, would have been on those
businesses that had -- that experienced the
opposite effects to the benefits of
construction. And we didn't really -- we had a
lot of information about the benefits of
employment during construction, but very little
information about how many people might lose
their jobs because of construction, because,
you know, of loss of business. That I think
was the nexus that we struggled with.

And so, that's why I put this in the
same campus, property values and tourism,
because we really didn't know. There wasn't a
lot of information on the record about the
negative impacts on businesses during construction. So, how do you mitigate that?

CHAIRMAN HONIGBERG: Ms. Weathersby.

MS. WEATHERSBY: So, I would agree, and just expand, because the Applicant has asked us or questioned, you know, "we had this Business Loss Program, and you guys could have, you know, as a condition, soup that up for us, you know, if you felt like losses were greater than what we had presented." But, you know, perhaps we could have done that as a condition, but it would have been very difficult to know -- I think we generally found that that program, as presented, would have been inadequate. But to know how far to take it, I don't think that we had that information to craft a certificate condition concerning using the Business Loss Program to compensate for business losses as a result of the Project.

CHAIRMAN HONIGBERG: Let's talk a little bit more about land use. Mr. Way, you started us off I think a little bit on land use. I think, Mr. Oldenburg, during deliberations, you talked about land use some.
Anyone want to pick this discussion up a little bit to talk about the conditions issue there?

Mr. Way, you have your hand on your microphone, which is an encouraging sign.

MR. WAY: I've got to learn.

CHAIRMAN HONIGBERG: After 75 days, you haven't learned?

MR. WAY: Yes. You know, I mean, when we -- and maybe this is spilling a little bit into some of the next issue that was raised, but, you know, "what happens within that right-of-way?" And I think, you know, one of the issues that we had raised and tried to get a body of information on, a foundation for which we could then make a decision, is that we raised the issue, and I don't know whether it was Mr. Oldenburg, Mr. Wright, or me, whoever, someone crafted the term "tipping point", you know, when we were looking. Which really is just another word to say -- another phrase to say "to what extent", and I think it's not a new definition. The idea that we're putting a new definition or a new rule in there or a new
standard, I don't think that's true.

I think all we were trying to say is, there comes a point when what you are doing in that right-of-way no longer is conforming to what the original intent and use of that right-of-way is. We don't know. Tell us. Tell us what that extent is. Tell us that point where it's something completely different. And that was a body of information that was very lacking.

Once again, what condition do we put on? Do we then -- do we then craft what the extent of that activity is going to be in that right-of-way? Or, how do we -- how do we put a condition on that?

CHAIRMAN HONIGBERG: Other thoughts?

Mr. Wright.

DIR. WRIGHT: I would just also raise, I think a number of us, as Committee members, brought this up during the deliberations, you know, just because it's a right-of-way, doesn't mean it should continue to be used for that purpose. Does it become a point in time where you reach, I don't want to
say that "tipping point" word again, but it just, to me, there seemed to be so much reliance on the fact that we were -- at least part of the line was in an existing right-of-way, that it just that was the end of the argument. And I don't think some of us felt that way. And I don't -- again, I don't know how we could condition anything beyond that. So, --

CHAIRMAN HONIGBERG: Mr. Oldenburg.

MR. OLDENBURG: I would just add that some of the concerns that we had were also with the new overhead right-of-way in the North Country, where the views, the aspect of new towers, I don't know what condition you could come up with that would mitigate having new towers in your view. There was no screening. The whole reason for the view is you want to see it, you want to see the view. So, screening of the towers, in some of the areas, didn't -- it wasn't like you could come up with a condition to either screen or mitigate.

So, in some of the land use issues, especially in the new right-of-way, I didn't
get a pervasive feeling that anything could be
done to mitigate those, any condition.

So, that was one of my concerns,
especially up north.

CHAIRMAN HONIGBERG: I would add to
that. I was concerned about the new
right-of-way and the use of the town roads in
the North Country, which would have had
different effects than use of the state roads
might further south.

Other thoughts? Commissioner Bailey.

CMSR. BAILEY: Again, the information
that we had about the impact on where the line
would be buried was "there's no impact on that
land use." And we had other testimony that
suggested that there might be an impact. But
we didn't really have enough, again, to come up
with conditions, because there was no
acknowledgment that there would be any impact.
So, based on the evidence that we had, it would
have been very difficult to consider conditions
for the underground portion as well.

MR. WAY: And if I could? I think,
during the questioning and answering, we tried
to give every opportunity to have that happen, to give us more information, help us out, help us to understand, give us information on the extent. But it just didn't seem to be forthcoming. There was a party line, I think, that was spoken and stuck to. But that didn't give us the information that we needed as those having to consider the Project.

CHAIRMAN HONIGBERG: Commissioner Bailey.

CMSR. BAILEY: We also were required to give consideration to the views of the municipal officials. And the municipal officials didn't give us any conditions that they would have considered would have mitigated the impact on land use. And I think that had it -- it may have been possible for the Applicant to work with those folks, and I know that it's really difficult and they were hoping that we would preempt them, but work with those municipal officials may have led to some possible reasonable conditions that everybody could have lived with.

But I don't think it was -- we didn't
have enough information to come up with those conditions.

CHAIRMAN HONIGBERG: Any other thoughts on conditions? I don't sense any support for the Applicant's position on this set of issues. Am I missing anything here?

[No indication given.]

CHAIRMAN HONIGBERG: Didn't think so. Are we ready to move on to the next issue?

Off the record.

[Brief off-the-record discussion ensued.]

CHAIRMAN HONIGBERG: We have an argument about the Subcommittee's decision being arbitrary and *ad hoc* as a result of vagueness in our interpretation of various rules, largely 301.15 and how that interacts with 301.09.

Anyone have any thoughts on the Applicant's argument in this regard?

[No indication given.]

CHAIRMAN HONIGBERG: I'll start. This is an argument for lawyers. And in many ways, I think this is an argument for the
Supreme Court that the Applicant is setting up on the -- on the off chance that the Applicant wasn't successful in front of the Subcommittee, the Applicant's motion sets up an argument to make to the Supreme Court about whether the rules properly implement the statute, whether they are clear enough for companies like the Applicant in seeking certificates. Whether we, specifically in this case, applied those rules in a way that is fair and not arbitrary. So, there's a number of issues that lawyers spend a lot of time learning about in Administrative Law class in law school, and then those who practice before regulatory bodies make to those regulatory bodies, and then carry to the Supreme Court if they're unsatisfied with the result.

I largely agree with Counsel for the Public's response to the Applicant here, that burdens of proof matter. That the phrases that the Applicant points to aren't vague either on their face or as applied by this Committee. And that they had it with -- the Applicant had it within its own power to make whatever case
it needed to make, and failed.

So, I believe that the Counsel for the Public has it right on this issue. But reasonable minds may differ. Anybody have any thoughts?

Commissioner Bailey.

CMSR. BAILEY: I agree. I think that the rules lay out what we're supposed to consider in 301.15, and 301.09 says what the Applicant needs to file in order for us to make the determinations under 301.15. And the rules are what they are. And I think that the order ties those two together.

So, I don't think that the Applicant has -- I wouldn't change my decision to reconsider based on this argument.

CHAIRMAN HONIGBERG: In light of what you just said, Commissioner Bailey, I am reminded that I think there's some rulings out there, or maybe they're opinions from the Attorney General, I can't really remember, that we may not actually have the authority to declare our rules unconstitutional. Maybe we've done something that's unconstitutional,
and they can convince us of that and we should stop.

But if the argument, and I'm not sure this is really the argument, if the argument is that "the rules are vague", I don't know that that's -- that we can even say that. These rules have been through the administrative rules process, approved by the legislative committee that has to approve all rules. They have the force and effect of law.

So, I think they are what they are as far as we're concerned, and we have to deal with them on their own face and on their own terms.

Ms. Weathersby.

MS. WEATHERSBY: So, I think part of the Applicant's argument is that the Committee, during its deliberations, didn't define "region", didn't define "unreasonable", "interference". And I'm not sure that that's our role. I think that we're not necessarily required to define those terms. Rather, we're required to follow the rules as they're set forth, with the definitions that are in them,
and the statute, and come up with a decision.

So, I -- you know, could we have discussed this more? Perhaps. And everyone's -- I'll leave it at that.

Except to say, you know, as we deliberate, it's a discussion. We don't come to this body with "I think X, because of Y, Z, and K." You know, it's a discussion back and forth. And our terms can be imprecise. We might use "unreasonable" in one sentence, and "unreliable" in another. But it's a back-and-forth. Where we're not necessarily coming with a precise plan of everything defined. And that's kind of the nature of deliberations.

And I'll stop. I don't want to get in trouble.

CHAIRMAN HONIGBERG: Well, and would you agree with me, Ms. Weathersby, that we're not -- this isn't an objective test that an Applicant has to check a bunch of boxes? They do when filing their application. But, in terms of doing what needs to be done to have a certificate granted, there's not a formula.
That, if they have done these seven things, check, check, check, check, check, check, check, it's approved. This is a subjective process. And the statute is loaded with subjective terms --

MS. WEATHERSBY: Yes.

CHAIRMAN HONIGBERG: -- that we are required to interpret, the rules try to give some structure to the discussion, define some of those terms and identify things that have to filed. But, ultimately, this is a subjective, not an objective process.

MS. WEATHERSBY: Correct.

CHAIRMAN HONIGBERG: Other thoughts?

[No indication given.]

CHAIRMAN HONIGBERG: I don't sense any support for the Applicant's arguments regarding the arguable arbitrary and ad hoc decision-making and unconstitutional vagueness.

I think we're going to take this opportunity to take a ten-minute break.

(Recess taken at 10:35 a.m. and the deliberations resumed at 10:56 a.m.)
CHAIRMAN HONIGBERG: All right.

We're going to resume our discussion of the Applicant's Motion for Rehearing. There are a few subissues within the rules-based portion of the application having to do with vagueness and ad hoc decision-making.

One of the things that the Applicant says has to do with applying criteria that appear nowhere in the statute and regulations. And I think, in large measure, they're picking up on phrases that you've heard again today, like "tipping point", which isn't something that's in the rules, isn't something that's in precedent.

But I think, in my view, and I think Mr. Way will probably agree with this, it was a way for us to think about land use, and deal with the Applicant's presentation that said "well, as long as you're putting a transmission line in a transmission corridor, you can never, under any circumstances, be changing the use."

And I think that was one of the places where we talked about that.

And I think that there are some
others. But, ultimately, that phrase isn't the legal phrase. The legal phrase is whether there is affect on land use and whether that change or that effect is unreasonable in the larger context. That's where I -- how I was thinking about it.

Mr. Way, you want to offer anything up further on that?

MR. WAY: No, I agree. That when we're going through the deliberative process, and we're all trying to get a handle on the information that's been provided to us, you know, when you look at things like I said, and as I said before, the phrase "tipping point", that's just our attempt to try to find out "the extent of". You know, how far does one go before the argument is no longer -- before the argument is no longer valid?

And I think that's true with a lot of things as we went through this process, a lot of the questioning. We asked questions of both sides when their argument would no longer hold water, at what point would it fail? And so, I think that was simply just a tool.
And I think one of the other issues that they had talked about, maybe, Ms. Weathersby, you can answer this, too, is when we're looking at some of the non-conforming requirements that had been used in other instances that we took as more of an advisory. That wasn't a condition that we were implying on -- that we were applying as a test, but it was something that helped us to grasp the issue.

MS. WEATHERSBY: I certainly would agree. Whether it's "tipping point" or "nonconforming use", those are points in a discussion. They weren't a new standard that the Applicant was held to or a box that needed to be checked. It wasn't a requirement. It was part of a discussion that allowed us to consider certain aspects of the proposal and its reasonableness. But it wasn't a new legal standard that we held them to, in my opinion.

CHAIRMAN HONIGBERG: Also, with respect to arguments about making up criteria and being too subjective, I mean, I think as I said earlier, there's an inherently subjective
aspect to this with the language in the statute about "unreasonable" that automatically requires the exercise of some judgment about whether something is or isn't unreasonable.

But, ultimately, we are trying to make informed decisions based on the record that to fit within the statutory mandate as informed by the rules. I mean, that's the way I think about the criteria. We have criteria in the statute. We've gone beyond those in the rules, and given the parties and any applicant information about what needs to be in their application. When you bring that all together, we try and get enough information to make an informed decision. And it's going to be different for every type of application, and every application within particular types. But, ultimately, that's the objective, at least that's the way I see it.

Commissioner Bailey.

CMSR. BAILEY: And the ultimate decision of each Committee or Subcommittee members -- the ultimate decision of each Subcommittee that forms the basis for the
majority opinion is and was based on facts that we found in the record.

So, to say that I don't think there's a concern that -- about subjectivity, because we based our decisions on the facts and applied it to the facts that were given to us, based on the rules, and applied it to the requirements in the statute. And to me, there's an element of subjectivity, but it is not -- it's not based on lack of facts. Well, it is based on -- I mean, our ultimate decision was based on lack of facts.

CHAIRMAN HONIGBERG: Well, it picks up an argument the Applicant made, that the decision doesn't contain adequate findings of fact. And one of the things an administrative body needs to do when it makes a decision is identify the facts on which it's relying to make its decision.

I don't find merit in that argument. I think the decision, the written decision contains many, many findings based on the record that support the conclusions that we reached. I wasn't persuaded by that at all.
Commissioner Bailey.

CMSR. BAILEY: I agree.

CHAIRMAN HONIGBERG: All right. Any other thoughts on rules?

Yes, Mr. Wright. Sorry.

DIR. WRIGHT: Sorry. Just I guess, in my simple mind, it comes down to, I think we made a reasonable determination based on the facts in the record. That's what it comes down to to me. And I'm an engineer, so --

CHAIRMAN HONIGBERG: All right. The next issue -- oh, I think the next issue has to do with a series of arguments directed at misperceiving evidence or overlooking evidence in the record in making the findings and rulings that we made.

The first one has to do with land use and the views of municipalities. Anyone want to offer up any thoughts on how we dealt with the views of the municipalities?

Mr. Way.

MR. WAY: Well, I guess, I mean, we're supposed to consider the views of municipalities in the region. And well, I

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think, obviously, overwhelmingly, I think we
had some very good input from the municipality,
but the Applicant was required to take those
views as well, or at least present those views
to us. And there really wasn't a large body of
information that was coming in that respect.
And that wasn't the criteria by which we made
our decision.

I think that it was just that we --
we felt, with regards to land use, there really
wasn't a lot of interaction with the
communities. There wasn't a full appreciation
maybe of what was said in the master plans. I
don't think there was a good interpretation of
what they were -- what the communities were
looking for in their master plans. You know,
for example, if they did not mention towers in
any form, that did not imply consent.

So, you know, I think there could
have been a lot more interaction. I think we
said that. That the interaction was mostly
passive.

CHAIRMAN HONIGBERG: Other thoughts?

I think, from a substantive standpoint, I know
that the statute directs us to consider the municipal views. It does not tell us that the municipal views are dispositive. I think the decision that we made follows that directive from the Legislature. I think, if it were up to the municipalities, nothing would happen in large infrastructure projects like this.

Contrary to the views of the municipalities, I think the Legislature intends this body to have the authority to override local land use decisions. But having given this body that authority, it tells us to consider their views. I think that's what we did. I don't think we relied on them. I think, if we had viewed this Project as a winner, for a variety of reasons, it would have been approved, notwithstanding the objections of the municipalities. But that's not where we are. We listened to them, we heard their positions, took them into account, and made the decision that we made.

Other thoughts on municipalities? I think someone mentioned, I think it was mainly Ms. Weathersby's discussion, about how zoning
laws and land use -- local land use laws, how those doctrines that exist in land use law might inform us here. So, I think that was something they complained about in this Motion, that we were relying on local rules. I don't get the sense that we did that.

Ms. Weathersby, you want to share any thoughts on what you were thinking when you were doing that?

MS. WEATHERSBY: Well, I think the record's pretty clear, that that conversation that we had was just that. It was a conversation during deliberations, concerning this legal doctrine. It wasn't something we relied on. It's just "This is out there. Is it helpful in this case or not?" But I don't think we said "oh, you know, they need to meet or not meet the specific legal principle" in any manner. And I think the record's pretty clear on that.

CHAIRMAN HONIGBERG: Anyone else have anything they want to talk about in this context?

MS. WEATHERSBY: Is there where we
talk about the "deviating from precedent"
concerning putting transmission -- using
transmission corridors, if it's constructed in
an existing right-of-way, since we've always
said that's a good land use principle?

Is this where we would talk about

that or is that --

CHAIRMAN HONIGBERG: I think that's a
great segue, even if it wasn't. But go ahead,
Commissioner Bailey.

MS. WEATHERSBY: Even if it wasn't
very articulate.

CHAIRMAN HONIGBERG: Commissioner
Bailey wants to do something first, I think.

CMSR. BAILEY: I agree largely with
what has been said. But, in the Rule 301.09,
which is the rule that describes what the
applicant is required to file with us, in order
for us to reach our decision under 301.15 on
effects on orderly development, it says "Each
application shall include the information
regarding the effects of the proposed energy
facility on the orderly development of the
region, including the views of municipal and
regional planning commissions and municipal
governing bodies regarding the proposed
facility, if such views have been expressed in
writing, and master plans of the affected
communities and zoning ordinances".

And the Applicant makes some argument
that they weren't required to look at master
plans or figure out how the orderly development
fits in with the master plans and zoning
ordinances. And I think this rule makes it
clear that they should have done that.

And so, that's why I don't think that
this argument has merit.

CHAIRMAN HONIGBERG: Now, Ms.
Weathersby, you want to move onto your segue?

MS. WEATHERSBY: Sure. Part of land
use was the Applicant's -- land use issue was
that the Applicant has argued that, because the
Project would be in an existing right-of-way,
it's consistent with land use. It's not
something they've argued all along, and they
faulted us for on appeal. And that our
precedent has been, if it's an existing
right-of-way, therefore it's proper siting.
I certainly disagree with that. I think in -- well, first, it's not entirely in an existing right-of-way, the proposed Project. It's also using state highways as utility corridors, which is different than at least the applications I've sat on in the past.

And as we've discussed, I do think there comes a point where an existing above-ground utility corridor becomes so encumbered that it becomes non-proper siting.

So, I don't find that that argument holds weight. And I don't think that we're necessarily bound to follow our decisions in all cases -- from prior cases.

CHAIRMAN HONIGBERG: Commissioner Bailey.

CMSR. BAILEY: We have to apply the facts of each case to the decision that we're making in each case. And, so, while precedent can be looked at to see how it's gone in the past, if you have something that's completely different than anything that's ever been proposed in the past, you can't expect everything to go the same way.
CHAIRMAN HONIGBERG: Mr. Way.

MR. WAY: And I don't want to get really too deep in the weeds when we talk about the word "region". But, as Commissioner Bailey just said, every project is different. And I think that that phrase ends up being different for each project as well to an extent.

The reason that I think the right-of-way is important, if we are -- if the premise is that "anything that is done in the right-of-way is conforming", that's 83 percent of the Project. That can really, you know, wipe away a lot of other issues, because you can say at the end of the day "overall, there's not an impact."

But I think, in this case, that issue was important to suss out a little bit. We did have to have some sort of ceiling so we could make a judgment. Because I think I don't necessarily -- didn't necessarily buy the argument that, when you look at the Project in toto, that you can't look at all the individual pieces that add up to it.

CHAIRMAN HONIGBERG: All right. I
think we've -- yes, Mr. Wright. Sorry.

DIR. WRIGHT: I was just going to add, I think, in the case of the existing right-of-way, it just seems like to me it's not just the fact that you're installing a new, much taller line, it's also that you need to make significant changes to an existing line that's already in the right-of-way. So, to me, that's adding up.

CHAIRMAN HONIGBERG: All right. The Applicant argues that we missed evidence or misperceived evidence regarding property values.

I think one of the things they point to is a perception from deliberations that we thought Dr. Chalmers didn't look at properties along the line. I know that he did. And I remember him testifying that he got out and looked at the properties from the street. But I also remember that the overwhelming majority of his report is based on work done by others having to do with what would be arguably comparable situations with specific properties in subdivisions, and that he relied on maps
more than he did on his own measurements or own views of those properties, the ones that are along the proposed line.

Ultimately, though, and this is I think the way we ended up talking about it with him, is that his work was, since it relied on others, if the work of those others was deemed to be inadequate or faulty, that called into question all of his conclusions, or many of his conclusions.

That's ultimately where I think the problem was with Dr. Chalmers, is that his subdivision studies, his comparables had problems. And so, it was hard to rely on any of his conclusions.

Does anyone have other memories of Dr. Chalmers and how we went about that? Because, as I said, the Applicant thinks we missed or misstated evidence regarding Dr. Chalmers.

CMSR. BAILEY: I agree exactly with what you just said. I also -- I don't think that we didn't understand what Mr. Chalmers was saying. And with regard to the analysis that
he did of the impacts, based on his street
view, there was information from another party,
I don't remember who it was, that suggested
that standing on the street and looking at the
impact of the Project sort of behind someone's
house isn't the same as standing in the house.
And I don't know how they would have gotten
into the house. But he didn't -- he didn't
even acknowledge that there would be a
difference. And so, I think that that was
another piece of the evidence that we weighed.

CHAIRMAN HONIGBERG: Other thoughts?

Mr. Way.

MR. WAY: I agree with everything
that I'm hearing. You know, when we used the
phrase, you know, "windshield view", I don't
think we were necessarily meaning that every
view was inside the car. I think it was just a
phrase to suggest that it was an assessment
that may not have been done directly on the
property.

I think also, too, I looked at, as I
recall, one quote attributed to me that where I
thought there would be "no impact to property
values", I don't think that was what I meant to imply as we were going through deliberations. Obviously, I understand that there's going to be some impact to property values.

I guess part of the concern, and I voiced this in questioning, was that "well, are we talking about one percent impact or is it one to three percent? Is it three to six percent? Is it six percent to nine or 12? I'm not sure." And we got sort of differing answers.

So, I guess that's all I have to say on that.

CHAIRMAN HONIGBERG: Ms. Weathersby.

MS. WEATHERSBY: To that point, I think that it's been alleged that we said that Dr. Chalmers said that "there would be no impact on property values". And clearly, that's not what he said. He said there would be an impact on certain properties in certain locations and proximity, etcetera, proximity to the towns. And I think we all understood that.

I also think we've been faulted for -- or, another argument of the Applicant is...
that they were not required -- the rules don't require them to ascertain the impact on commercial properties, condominiums, second homes, vacant land, underground portions, etcetera. And perhaps our rules don't spell out all the different types of real estate, but our rules do require them to inform us as to the effects on real estate values in general. And those subsets, in my mind, are real estate values. It was important to me to understand how a second home, with a big -- that's on a view lot, would be affected as compared to a home in a subdivision. So, I think that that analysis of Dr. Chalmers was lacking.

I think they have also said that Dr. Chalmers did, in fact, address those types of real estate that I just listed off. And I think, in some instances, he did. But, again, I don't think the analysis was not thorough, and didn't leave us with a good sense of the impact on the real estate values of those properties -- of commercial properties, other than the ones where the Project would directly impact it, like the concrete fellow -- concrete
business in Concord, for example, but didn't analyze how it might affect a bed & breakfast, for example. Condominiums, yes, they, kind of after much nudging, did assess McKenna's Purchase, but not others.

So, I'll stop it at that. I found that our -- that the analysis of those types of properties was lacking.

CHAIRMAN HONIGBERG: Commissioner Bailey.

CMSR. BAILEY: The Applicant's motion also asks us to make a distinction of an expert between the word "not credible" and "unreliable".

And I was wondering if, counsel, do you have any opinion on whether that -- those terms are significant and whether we need to address that?

MR. IACOPINO: I don't have an opinion as to what you need to address. But I would tell you that, as a committee, you are free to determine whether you find an expert witness's testimony to be credible or not credible, and to be reliable or not reliable.
The two terms, although they certainly are close to synonymous, they are not entirely synonymous. And "reliability" may apply more in a specific instance.

For instance, if an expert was doing some modeling or testing or something like that, you might be more inclined to discuss its reliability, as opposed to the witness's credibility.

But they're both within your purview to decide.

CHAIRMAN HONIGBERG: Can I make a distinction, this is all still addressed to counsel, don't move that microphone, between credibility as "I think that person is lying", versus, as opposed to credibility, "I don't believe what they're saying, because there's a problem with their underlying work" or "there's a logic flaw" or "an inadequate basis"? Not that I think the person is trying to mislead us.

MR. IACOPINO: Right. The classic example is the witness who wears glasses and doesn't have them on at the time when they see
something. The person may not be lying, but they may not be credible, because they didn't have their glasses on.

CHAIRMAN HONIGBERG: My Cousin Vinny.

[Laughter.]

CHAIRMAN HONIGBERG: So, I mean, does that answer your question, Commissioner Bailey?

CMSR. BAILEY: Yes. And when we were using the term "not credible", it was in no way intended in my mind to mean that he was lying. I just didn't believe -- I didn't think that his analysis was reliable, I guess.

CHAIRMAN HONIGBERG: Other thoughts on property values?

[No indication given.]

CHAIRMAN HONIGBERG: All right. Let's talk tourism. I think some of the issues are similar. And I think that many of us found the Applicant's tourism expert to not have done enough work or be relying on work that was valuable or useful in reaching the conclusions that he reached. So, again, I think -- I think the consensus, and the order reflects this, is that we didn't find his testimony credible.
And to make the distinction you just made, Commissioner Bailey, not because he was lying, but because the work that was done wasn't good enough for us to agree or find his conclusions credible, ultimately.

And who has other thoughts on tourism or remembers more or wants to discuss it more?

Mr. Way.

MR. WAY: I would agree. And back to that argument, when we look at "credibility" and "unreliability", you know, the awareness of New Hampshire issues, and maybe some of the other facts and figures, that came across as an issue of credibility.

But, when we looked at unreliable -- when we looked at some of the methodology and the data that came out of it, I think that led to the "unreliable" aspect.

And with tourism, it struck me that they were very far off the mark there, compared to some of the other experts for the Applicant, which I considered to be very credible and reliable. But for property values, and, in particular, on tourism, it just didn't convince
And as Commissioner Bailey said, I don't think there was any misleading information there, it just it wasn't done. There wasn't the outreach, there wasn't the data from the surveys. I thought there was inaccurate comparisons between projects. It all summed up to something that really didn't give us much information to work with.

CHAIRMAN HONIGBERG: Commissioner Bailey.

CMSR. BAILEY: I think the Applicant also suggests that, and I don't know if this is in the "ad hoc" conversation, or are we still in the "ad hoc" conversation?

CHAIRMAN HONIGBERG: We could be, yes.

CMSR. BAILEY: Okay.

CHAIRMAN HONIGBERG: Because there's complaints about the decision-making process on a number of the specific issues we talked about. And I've forgotten off the top of my head if this is one they specifically made, but feel free.
CMSR. BAILEY: Okay. Well, one of the complaints is that the rules didn't require the witness or the tourist expert to conduct surveys or hold listening sessions. And that's true. But in his attempt to persuade us that there wouldn't be an impact on tourism, he conducted surveys and he showed us what the surveys were. And he also conducted listening sessions. And we determined that those surveys that he conducted weren't adequate to prove the point he was trying to make.

And I think that's a little different than saying "Our rules don't require surveys and listening sessions. So, therefore, we can't hold that against them." I don't find this argument has a lot of merit.

CHAIRMAN HONIGBERG: I think to add to what you just said, Commissioner Bailey, he relied on that work in reaching his conclusions. We looked at that work and found that he maybe shouldn't have relied so heavily on them.

Any other thoughts on tourism?

[No indication given.]
CHAIRMAN HONIGBERG: The Applicant also has raised issues with our discussion of construction and the effects of construction on the surrounding area.

Commissioner Bailey.

CMSR. BAILEY: I don't understand their argument. Because 301.15, which is the rule that says the "Criteria relative to a finding of undue interference", says that we have to, "in determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the Committee shall consider: The extent to which, [among other things], construction of the proposed facility will affect land use, employment, and the economy of the region."

So, that's why we talked about construction in this section.

We probably would have talked about it again, had we gone on to, you know, safety and some of the other criteria in the statute. But I think, I mean, the rule says we're required to consider the impact of construction.
So, again, I think the argument's meritless.

CHAIRMAN HONIGBERG: And I agree with you. And I even think, during the deliberations, we recognized that construction was a topic we were going to have to return to if we continued through the process, because there were going to be other issues with construction, separate and apart from their affect on the orderly development of the region, that were going to be part of or have to be part of the discussion.

I think this is an area where, I think Mr. Way said it earlier, I was favorably impressed largely with the Construction panel, particularly the leaders of that effort, in their sincerity, their ability, their experience, to try and do a good job, and do it in ways that would be as -- causes as little disruption as possible.

But, ultimately, we didn't have to discuss everything related to construction, because we didn't get into that as part of the deliberations.
Other thoughts on construction?

Mr. Oldenburg.

MR. OLDENBURG: I think one of the points that was brought up was a statement that I made that I didn't believe that the construction itself would unduly impact the region. And I -- and the reason I said that was, is the construction is short term. It is being -- the rules that they would follow, the conditions that were put on them by the DOT, by everything else, would be following sort of the rules that the DOT deals with on every project. So, it's hard to differentiate the work that would be done, say, in the underground section in this, and what the DOT typically does every day on a road.

So, if this was going to impact the region, so every DOT project impacts the region. And we saw examples I brought up is we had closed a bridge for over six months up in Stewartstown. So, the fact that they were going to close roads, local roads, at least temporarily during that time, I thought if they could -- if they could work out the details, I
didn't, which I struggle with, the details, on the local roads, that I didn't think it would affect the region any more than any other roadway project.

So, that was the reason why I sort of made that comment, is that, to me, the construction activities would have an impact on tourism, could have an impact on property values, but the construction itself I don't think was going to have an impact, an overt, long-term impact to the region.

CHAIRMAN HONIGBERG: Anyone else? Ms. Weathersby.

MS. WEATHERSBY: I just think what Bill just said is exactly why we needed to talk about this in the context of orderly development. I mean, there was evidence, it doesn't all fit into public health and safety where they wanted us to talk about it. There were, you know, all kinds of testimony, reports about the effects that construction might have on -- particularly on tourism and the economy and jobs, and I think we needed to address those in the spot in the deliberations that we
CHAIRMAN HONIGBERG: Mr. Way.

MR. WAY: I'd agree with that.

Excuse me. When we look at all these topics that we're discussing, and let's bring up aesthetics for a moment that I think Mr. Oldenburg brought up earlier, I mean, it's hard to consider municipal views without some level of discussion of aesthetics, regardless of the fact that aesthetics would probably come up later as a discussion point, and the same thing with construction.

I think, when we're looking at it in the context of orderly development, we're not looking necessarily at the physical aspect of construction, but more the impacts that happen. You can't look at places like Plymouth or Franconia, and some of the other places as well, and not consider the impacts of construction on the employment in the area, and the livelihood of businesses, on the tourism that's going to happen, on the property values.

So, there's all -- there's all the degree of intertwining here. And I think the
more we would have gotten into this, the more
that intertwining would have -- in the criteria
would have faded.

CHAIRMAN HONIGBERG: Anyone else have
any thoughts on construction?

[No indication given.]

CHAIRMAN HONIGBERG: I think the next
issue to discuss is an argument by the
Applicant that the written order reflects
deliberations that took place outside of the
public and are therefore in violation of RSA
91-A. I think, put -- to explain that a little
bit, the Applicant says that there are things
in the order that we, when we were deliberating
in public, didn't talk about explicitly. And
so, therefore, that means we must have done
something behind the scenes that violated RSA
91-A.

It is not an argument, as I
understand it, that we held meetings in
violation of 91-A. But, in the course of
deliberations, we did something that would
violate RSA 91-A.

I guess I'll ask counsel to see if I
articulated that well enough for us to discuss it.

MR. IACOPINO: I think you have, Mr. Chairman.

CHAIRMAN HONIGBERG: All right. Anyone have any thoughts? Or, I mean, how can we describe -- are we able to describe the process that this Subcommittee follows when it creates and signs the order? I mean, I -- would it be better for you to do that or for me?

Because it goes through Mr. Iacopino, so let's -- why don't I have Mr. Iacopino explain the order drafting process.

MR. IACOPINO: The order drafting process that the Committee uses is, once deliberations are concluded, generally, the staff, generally, counsel is asked to memorialize the decisions of the Committee.

I generally write the order. It is then submitted to all of the Committee members, with an explicit email or cover letter that says "this is" -- "you only respond to me if you have corrections or changes, or you think
there is something that I got wrong." And they respond to me. And to the extent that, and usually the responses tend to be grammatical or stylistic, in terms of language, but sometimes there is something substantive that I forgot to put in the order or something like that.

I would then amend the order. I would send it back out without telling any other member of the Committee who suggested this change. And ultimately, we hear from the Committee members on whether they're ready to sign the order.

That's the process that is used. The Committee members do not discuss it with each other. They are explicitly advised not to do so. It's the only way that an order can get written when the Committee is required to deliberate in public.

CHAIRMAN HONIGBERG: So, the deliberations that we engaged in publicly, and are engaging in now, they become the basis for what you write?

MR. IACOPINO: That's correct.

That's correct.
CHAIRMAN HONIGBERG: And you have access to all the testimony, just as we do during the deliberations, and all the exhibits, just as we do during deliberations?

MR. IACOPINO: Yes. I have access to everything that you do, as well as everything that the public has. In fact, the public has access to all of that as well, unless there's been a specific confidentiality order on an exhibit or a particular portion of the proceeding.

CHAIRMAN HONIGBERG: Okay. With that background, does anyone agree with or want to discuss the Applicant's argument that the order includes things that weren't part of deliberations, and have any discussion about that? Anybody?

MR. WAY: I don't agree.

CHAIRMAN HONIGBERG: Commissioner --

MR. WAY: I don't agree.

CHAIRMAN HONIGBERG: That was Mr. Way. Commissioner Bailey.

CMSR. BAILEY: I don't agree either.

I think that you can find some form of
discussion about every single thing that is in the written order in our public deliberations. It may not be word-for-word, but it's not supposed to be word-for-word. The written order is supposed to be the final decision. And we all read the written order, and we all decide whether we're going to sign it as is or not before we do that.

I don't think that the Applicant gave us any examples of where the order said something that we didn't discuss in deliberations.

CHAIRMAN HONIGBERG: I was going to say the same thing. I believe that was my observation, and I think a number of the people who objected to the Applicant's Motion made the same observation, that there are no examples given, of things that are in the order that aren't -- that weren't part of the deliberations. And I think that's a weakness in the argument.

Any other thoughts on this topic?

[No indication given.]

CHAIRMAN HONIGBERG: All right. I
see no interest in further discussing it.

[Chairman Honigberg conferring with Atty. Iacopino, and then Atty. Iacopino conferring with Admin. Monroe.]

CHAIRMAN HONIGBERG: What we think is the last argument the Applicant made has to do with what it perceives to be inadequate deliberations. That the deliberations were done in too conclusory a fashion, and don't therefore satisfy the requirements of New Hampshire's Administrative Procedure Act, and don't provide an adequate record that can be reviewed by the Supreme Court.

I had two reactions to that. One was that the deliberations were fine, as I said earlier. They didn't go as far as the Applicant would have liked in a number of ways, but we deliberated what we needed to deliberate, and finished those aspects of things. And then the order reflects those deliberations and has a more than adequate record for review by the Supreme Court.

I think that that was my reaction to
that argument. But I don't know if anybody has any different views or other views they want to express on this?

MR. IACOPINO: Just for the Committee's edification, that's in Paragraph 87 of the Motion for Rehearing.

MR. WAY: What page is that?

MR. IACOPINO: I don't know that.

Hold on a second.

MS. WEATHERSBY: Thirty-nine.

MR. IACOPINO: Thirty-nine.

[Short pause.]

CHAIRMAN HONIGBERG: Commissioner Bailey.

CMSR. BAILEY: So, basically, the argument is that we didn't support our conclusions with facts on the record? I mean, if that's the argument, I disagree with that. I think that our conclusions were based on facts in the record. We articulated those facts upon which we relied. And I think the Supreme Court can either, I don't know if they read our deliberations or just look to the order, but I think, in both cases, it's clear
what we relied on. We didn't just say
something arbitrarily.

CHAIRMAN HONIGBERG: You know, I
don't have the argument in front of me. But I
think, actually, this was a complaint from the
original Motion for Rehearing related to the
oral deliberations, before we issued the order.
I had forgotten that until I just started
looking at it. But I'm pretty sure that's the
genesis of this complaint.

So, the written order, I think,
cures, or it should anyway, cures what may have
ailed the oral deliberations, in terms of
clarity. It shouldn't go beyond that, but
that's what it should have done.

Any other thoughts? Ms. Weathersby.

MS. WEATHERSBY: I agree with you. I
think it goes back to this sort of two-part
decision-making, where we have the
deliberations, where it is more of a
discussion. And we're not presenting a case
with "these are the 12 reasons that support my
analysis". And, you know, it's a discussion to
see how we feel the Applicant has measured up
against various criteria. And then we go into the order, where a little more flesh gets put on those bones.

It would be a whole lot easier if we just had a one-step process, but we don't. We have this two-step process. And while our discussion portion, the deliberations, may not have had as much detail supporting the conclusions we made, I think that the order does sufficiently outline the reasons for our decision.

CHAIRMAN HONIGBERG: Other thoughts?

MR. WAY: I was just going to say "well said". I think, frankly, in our deliberations, we were fairly clear to the reasonable person what our reasons were for getting to that point. And whatever came out of that process, I think the order speaks for itself and is very clear and simply adds to that.

So, I don't think that's an issue.

CHAIRMAN HONIGBERG: Anyone else?

Ms. Weathersby.

MS. WEATHERSBY: I just want to
clarify, when I said "two-part decision-making", it's a two-part order-making. The decision is made, and then the order itself is the process. I didn't mean to suggest otherwise.

CHAIRMAN HONIGBERG: It's again one of the joys of public deliberations, in that not every sentence we utter is going to be as precise as we wish it were.

Any other thoughts?

[No indication given.]

CHAIRMAN HONIGBERG: We're at a natural breaking point for a variety of reasons. So, what we're going to do is take our lunch break. And we will return no later than one o'clock.

(Lunch recess taken at 11:47 a.m. and concludes the Deliberations Morning Session. The Deliberations continues under separate cover in the transcript noted as "Deliberations Afternoon Session ONLY".)
CERTIFICATE

I, Steven E. Patnaude, a Licensed Shorthand Court Reporter, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of these proceedings taken at the place and on the date hereinbefore set forth, to the best of my skill and ability under the conditions present at the time.

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

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Steven E. Patnaude, LCR
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(RSA 310-A:173)