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

*[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*

1                   *ensued.]*

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

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

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

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

22                   CMSR. BAILEY: Thank you, Mr.  
23 Chairman.

24                   I have read the Business Intervenor

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

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

21 From there, various Subcommittee  
22 members discussed their thoughts on that. In  
23 response to something Ms. Weathersby said in  
24 favor of continuing the deliberations, I shared

1 my thinking about what she had said, as part of  
2 the deliberative, conversational process, on  
3 the record, before making my decision on that  
4 issue. Those are the thoughts the Business  
5 Intervenor Group believes demonstrate that I am  
6 impartial -- that I am not impartial.

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

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

21 I don't believe the three sentences,  
22 which apparently demonstrate to the Business  
23 Intervenor Group that I am impartial *[sic]*,  
24 meet that standard. Those sentences were taken

1 from deliberations about a process mechanism.  
2 The Subcommittee had already decided  
3 unanimously that the Applicant had not met its  
4 burden -- or, indicated unanimously that the  
5 Applicant had not met its burden to allow us to  
6 make a finding necessary in order to grant the  
7 Certificate. We were discussing whether, under  
8 the statute, we needed to deliberate the  
9 remainder of the elements also required to  
10 grant the Certificate.

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

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

20 CMSR. BAILEY: I am not.

21 CHAIRMAN HONIGBERG: All right. I  
22 believe that it is still an issue for the  
23 Subcommittee, other than Commissioner Bailey,  
24 to consider whether we believe it would be



1 appropriate for Commissioner Bailey to recuse  
2 herself from further participation in this  
3 docket.

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

8 Mr. Way.

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

18 So, I would make a motion to deny.

19 CHAIRMAN HONIGBERG: Is there a  
20 second?

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

23 CHAIRMAN HONIGBERG: Any further  
24 discussion on that aspect of the motion that's

1 directed at Commissioner Bailey?

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

7 Is there any further discussion?

8 *[No indication given.]*

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

13 *[Multiple members indicating*  
14 *"aye".]*

15 CHAIRMAN HONIGBERG: Are there any  
16 opposed?

17 *[No indication given.]*

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

21 MS. WEATHERSBY: Abstain.

22 CHAIRMAN HONIGBERG: All right. Now,  
23 let's turn to the request directed at you, Ms.  
24 Weathersby.

1 MS. WEATHERSBY: Thank you, Mr.  
2 Chairman. Thank you for this opportunity to  
3 address the concerns outlined in the Motion for  
4 Recusal of the Business Intervenors Group.

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

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

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

15                        When it came time to consider the  
16          Applicant's Motion for Rehearing, I reviewed  
17          the Motion, the objections, the applicable law,  
18          and the rules. I then expressed my opinion  
19          about the merit or lack of the Applicant's  
20          claim that the Subcommittee could or would  
21          change its decision if it continued  
22          deliberations and considered all of the factors  
23          of RSA 162-H:16. My statements were my  
24          impartial opinion about the merits of the

1 Applicant's argument, and were based on a  
2 consideration of all evidence, testimony, and  
3 pleadings presented over many months.

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

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

20 That said, if the Subcommittee feels  
21 as though the Motion has merit, or even if my  
22 recusal would remove an appealable issue or  
23 otherwise aid in this process, I will willingly  
24 recuse myself from further deliberation on this

1 Application to assist that process.

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

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

10 Mr. Wright.

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

16 And I would move that we deny the  
17 Motion.

18 CHAIRMAN HONIGBERG: Is there a  
19 second?

20 MS. DANDENEAU: I'll second.

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

23 Any further discussion regarding Ms.  
24 Weathersby's further participation?

1                                    *[No indication given.]*

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

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

7                                    CHAIRMAN HONIGBERG:   Any opposed?

8                                    *[No indication given.]*

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

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

24                                   I believe the first one -- well, I'm

1 going to ask counsel maybe to do something  
2 quickly, which is to remind us of the standard  
3 of review on a motion for rehearing under New  
4 Hampshire administrative law and under our own  
5 statute and rules.

6 Off the record.

7 *[Brief off-the-record discussion*  
8 *ensued.]*

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

13 *[Referring to the microphone.]*

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

21 The purpose of rehearing is to have  
22 the Committee determine if they have overlooked  
23 or mistakenly conceived anything in your  
24 original decision. Ultimately, that means that



1           you missed something or do you think that you  
2           were mistaken about something in your original  
3           decision.

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

17                      Ultimately, the Supreme Court  
18          determines if your decision was unlawful or  
19          unreasonable. And both of those issues you  
20          should keep in mind. Clearly, if you believe  
21          that you've done something that is unlawful,  
22          that would be something that would be  
23          mistakenly conceived. If you believe that  
24          you've done something unreasonable, or even if

1           there is a more reasonable way to do something,  
2           it's up to the Committee to determine that.

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

8                       CHAIRMAN HONIGBERG:  Thank you,  
9           Mr. Iacopino.

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

18                      Would anyone like to start the  
19           discussion on that issue?

20                               *[No indication given.]*

21                      CHAIRMAN HONIGBERG:  Seeing no hands  
22           immediately, I'll remind everyone that what  
23           happened, at least the way I remember it, is  
24           that we deliberated on the first two criteria.

1 We concluded during deliberations on the second  
2 criterion that the Applicant had failed to meet  
3 its burden of proof.

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

12 I'm going to repeat something I said  
13 at the time, that I think is picked up and  
14 argued by Counsel for the Public, among others.  
15 That while it might -- while it was probably a  
16 better administrative practice to continue  
17 deliberations, the statute does not require the  
18 continuation of deliberations in those  
19 circumstances. And the statute on that I think  
20 is actually fairly clear. It's worded in such  
21 a way that the only way we could grant a  
22 certificate would be to deliberate on all four  
23 and make the required findings. But, if the  
24 Subcommittee was going to vote to deny, if it

1 found that it could not -- that the Applicant  
2 could not meet one of the criteria, an  
3 applicant -- a certificate could not be issued,  
4 and there would be no need to continue  
5 deliberations. That continues to be my view.

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

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

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

20 Anyone? Commissioner Bailey.

21 CMSR. BAILEY: No.

22 CHAIRMAN HONIGBERG: No. I'm sorry.

23 Who wanted to speak?

24 MR. WAY: I guess I --

1                   CHAIRMAN HONIGBERG: Mr. Way. I'm  
2                   sorry.

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

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

22                   So, I think, from my standpoint, it  
23                   was reasonable. I haven't seen any new  
24                   information that would make me rethink that at

1 this point. Although, I'm always open, and  
2 would be interested to hear what everybody else  
3 says.

4 CHAIRMAN HONIGBERG: Anyone?  
5 Commissioner Bailey.

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

8 CHAIRMAN HONIGBERG: Sure.

9 *[Short pause.]*

10 CHAIRMAN HONIGBERG: All right.  
11 Commissioner Bailey.

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

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

21 But the rule says "The committee or  
22 subcommittee, as applicable, shall make a  
23 finding regarding the criteria stated in RSA  
24 162-H:16, IV, and Site 301.13 through 17",

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

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

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

23                       CHAIRMAN HONIGBERG:  Any other  
24          thoughts regarding this issue?

1 Mr. Wright.

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

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

16 CHAIRMAN HONIGBERG: Ms. Weathersby.

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



1                   CHAIRMAN HONIGBERG: I'm not sure  
2                   that's --

3                   MS. WEATHERSBY: All right.

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

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

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

23                  Other thoughts?

24   *[No indication given.]*

1 CHAIRMAN HONIGBERG: All right. Does  
2 anyone want to make a motion?

3 Before we do, how about something  
4 else?

5 MS. WEATHERSBY: I do have a thought.  
6 Because, along with that Administrative Rule  
7 202.28, the other administrative rule that was  
8 pointed out to us that I think just bears  
9 discussion was the 301.17, which says "In  
10 determining whether a certificate shall be  
11 issued for a proposed energy facility, the  
12 Committee shall consider whether the following  
13 conditions should be included in the  
14 certificate". And there's a whole bunch of  
15 possible certificate conditions that are really  
16 typically included in a decision when -- in a  
17 certificate when the certificate is issued.

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

24 I read that as being conditions that

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

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

11 MS. WEATHERSBY: Yes.

12 CHAIRMAN HONIGBERG: Okay. Other  
13 thoughts on that?

14 *[No indication given.]*

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

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

1 was different in 17 or 20 different ways",  
2 which is the implication of an argument like  
3 that.

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

16 Anyone else? Mr. Way.

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

21 You know, when we're -- particularly  
22 when we're talking about orderly development  
23 and the need or at least a desire to have some  
24 conditions, I think what we were talking about

1 is that the burden of proof wasn't met. And it  
2 wasn't about that we had a finding that there  
3 was an undue interference with orderly  
4 development. I think, in a lot of ways, we  
5 were saying that the burden of proof in many  
6 areas just simply wasn't provided.

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

13 I mean, certainly, I can read between  
14 the lines on what conditions might be good or  
15 not good. But, in reality, I really need that  
16 base foundation of facts for which we can then  
17 proceed. And I think that's the problem we  
18 had. When we didn't feel that there was enough  
19 information, whether it be on tourism, whether  
20 it be on conforming land use, whether it be on  
21 property values, we simply said that we didn't  
22 have enough confidence, we didn't have what we  
23 felt was good information for us, in some  
24 cases, to make a decision.

1           So, it's hard for me then to envision  
2           how we put conditions onto that, that set of  
3           facts.

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

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

24          If we find that the statutory

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

5 CHAIRMAN HONIGBERG: Commissioner  
6 Bailey.

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

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

16 CHAIRMAN HONIGBERG: Mr. Oldenburg.

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

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

23 MR. WAY: Second.

24 CHAIRMAN HONIGBERG: Mr. Way seconds.

1 Ms. Weathersby.

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

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

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

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

17 Mr. Iacopino, help us out here.

18 MR. IACOPINO: I think Mr. Oldenburg  
19 is only discussing that one subset of the  
20 Motion. I don't think it was his intention  
21 that the entire Motion be denied. And I mean,  
22 you can take a vote on it, or you can choose  
23 not to vote and just have one vote at the end  
24 of your consideration on the entire Motion.



1           But, you know, if you do take a vote,  
2           and then later on somebody wants to make a  
3           motion to go the other way, you can do that,  
4           too. I mean, that's one of the problems with  
5           public deliberations, is that things -- the  
6           sands can shift and you may have to, you know,  
7           make changes.

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

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

1 all.

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

4 Mr. Way.

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

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

11 MR. OLDENBURG: I will withdraw the  
12 motion.

13 CHAIRMAN HONIGBERG: All right.

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

17 CHAIRMAN HONIGBERG: Yes. All right.

18 So, do people want to have further  
19 discussion on this very specific issue about  
20 the argument that the Subcommittee was required  
21 to deliberate on all four statutory criteria?  
22 And we'll do a little straw poll and see where  
23 people are.

24 *[No indication given.]*

1 CHAIRMAN HONIGBERG: All right.  
2 Let's assume that the -- how many agree, I'm  
3 going to put Commissioner Bailey on one side,  
4 who agrees with Commissioner Bailey and who  
5 agrees with Mr. Oldenburg regarding things, I  
6 think you are articulating that, right? How  
7 many are with Commissioner Bailey right now and  
8 believe we should be deliberating all of the  
9 statutory criteria?

10 *[Indication given.]*

11 DIR. WRIGHT: I am.

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

15 *[Indication given.]*

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

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

24 I think Mr. Way and Ms. Weathersby

1 started the discussion. Does anyone want to  
2 pick that discussion up and move it along or  
3 carry it in a different direction?

4 Commissioner Bailey.

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

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

21 CHAIRMAN HONIGBERG: Other thoughts?  
22 Ms. Weathersby.

23 MS. WEATHERSBY: I think one of the  
24 Applicant's arguments is that, even if we

1 didn't feel as though we had enough information  
2 based on their expert, we could have taken  
3 experts from other parties and Counsel for the  
4 Public and relied on their information, assumed  
5 it to be true, and crafted conditions based on  
6 that.

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

22 So, relying on another expert's  
23 reports, we still wouldn't really have had  
24 information that we then could have crafted

1           some other solution. So, I just don't -- by  
2           crafting new conditions. So, I just don't find  
3           that that argument by the Applicant to be very  
4           persuasive.

5                         CHAIRMAN HONIGBERG: Other thoughts?  
6           Mr. Wright.

7                         DIR. WRIGHT: Thank you, Mr. Chair.

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

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

22                        I don't believe that we were given an  
23          adequate base of information, similar to what  
24          Mr. Way said, to know where we're starting from

1 in bad. There's no question, a lot of the  
2 things that are listed and offered up by the  
3 Applicant would have made things better, but  
4 better than what? Where are we -- are we  
5 starting from the apocalyptic hellscape  
6 envisioned by many of the intervenors or are we  
7 in a place where things are -- they're mild  
8 effects that could be mitigated by modest  
9 conditions or supplements to the economy?

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

20 Mr. Oldenburg.

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

1 meet."

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

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

12 CHAIRMAN HONIGBERG: Mr. Way.

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

17 Now, when I look back at some of the  
18 testimony and the questions and answers that we  
19 were able to have with the witnesses, frankly,  
20 I was somewhat -- not somewhat, but I was  
21 impressed a lot of times by the Construction  
22 panel, and their willingness to be able to  
23 consider conditions. But I think we had a lot  
24 more information by which to craft those



1 conditions or asked, for example, Mr. Bowes  
2 "would you consider a condition of such and  
3 such?"

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

20 CHAIRMAN HONIGBERG: Ms. Weathersby.

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

1 mitigate that interference.

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

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

16 Picking up property values, I think,  
17 like the tourism issue, that was a place where  
18 we felt that the Applicant's expert witness's  
19 presentation and testimony and reports had been  
20 so undercut by the cross-examination and the  
21 evidence that was presented by others that we  
22 just didn't find him credible. And so, to me,  
23 property values and tourism land in similar  
24 places to what I said earlier. I don't know

1           how bad it is, so I don't know how much better  
2           I need to make it that it's not unreasonable  
3           anymore.

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

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

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

1 right."

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

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

23 And so -- but when we looked at the  
24 issue overall, I think we found that there

1 would be a benefit. But we have to consider  
2 those other views as well.

3 CHAIRMAN HONIGBERG: Commissioner  
4 Bailey.

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

21 And so, that's why I put this in the  
22 same campus, property values and tourism,  
23 because we really didn't know. There wasn't a  
24 lot of information on the record about the

1 negative impacts on businesses during  
2 construction. So, how do you mitigate that?

3 CHAIRMAN HONIGBERG: Ms. Weathersby.

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

20 CHAIRMAN HONIGBERG: Let's talk a  
21 little bit more about land use. Mr. Way, you  
22 started us off I think a little bit on land  
23 use. I think, Mr. Oldenburg, during  
24 deliberations, you talked about land use some.

1           Anyone want to pick this discussion  
2           up a little bit to talk about the conditions  
3           issue there?

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

6           MR. WAY: I've got to learn.

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

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

1 standard, I don't think that's true.

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

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

16 CHAIRMAN HONIGBERG: Other thoughts?  
17 Mr. Wright.

18 DIR. WRIGHT: I would just also  
19 raise, I think a number of us, as Committee  
20 members, brought this up during the  
21 deliberations, you know, just because it's a  
22 right-of-way, doesn't mean it should continue  
23 to be used for that purpose. Does it become a  
24 point in time where you reach, I don't want to



1 say that "tipping point" word again, but it  
2 just, to me, there seemed to be so much  
3 reliance on the fact that we were -- at least  
4 part of the line was in an existing  
5 right-of-way, that it just that was the end of  
6 the argument. And I don't think some of us  
7 felt that way. And I don't -- again, I don't  
8 know how we could condition anything beyond  
9 that. So, --

10 CHAIRMAN HONIGBERG: Mr. Oldenburg.

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

23 So, in some of the land use issues,  
24 especially in the new right-of-way, I didn't

1 get a pervasive feeling that anything could be  
2 done to mitigate those, any condition.

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

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

11 Other thoughts? Commissioner Bailey.

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

23 MR. WAY: And if I could? I think,  
24 during the questioning and answering, we tried

1 to give every opportunity to have that happen,  
2 to give us more information, help us out, help  
3 us to understand, give us information on the  
4 extent. But it just didn't seem to be  
5 forthcoming. There was a party line, I think,  
6 that was spoken and stuck to. But that didn't  
7 give us the information that we needed as those  
8 having to consider the Project.

9 CHAIRMAN HONIGBERG: Commissioner  
10 Bailey.

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

24 But I don't think it was -- we didn't

1 have enough information to come up with those  
2 conditions.

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

7 *[No indication given.]*

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

10 Off the record.

11 *[Brief off-the-record discussion*  
12 *ensued.]*

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

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

21 *[No indication given.]*

22 CHAIRMAN HONIGBERG: I'll start.  
23 This is an argument for lawyers. And in many  
24 ways, I think this is an argument for the

1 Supreme Court that the Applicant is setting up  
2 on the -- on the off chance that the Applicant  
3 wasn't successful in front of the Subcommittee,  
4 the Applicant's motion sets up an argument to  
5 make to the Supreme Court about whether the  
6 rules properly implement the statute, whether  
7 they are clear enough for companies like the  
8 Applicant in seeking certificates. Whether we,  
9 specifically in this case, applied those rules  
10 in a way that is fair and not arbitrary. So,  
11 there's a number of issues that lawyers spend a  
12 lot of time learning about in Administrative  
13 Law class in law school, and then those who  
14 practice before regulatory bodies make to those  
15 regulatory bodies, and then carry to the  
16 Supreme Court if they're unsatisfied with the  
17 result.

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

1 it needed to make, and failed.

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

6 Commissioner Bailey.

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

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

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

1 and they can convince us of that and we should  
2 stop.

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

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

15 Ms. Weathersby.

16 MS. WEATHERSBY: So, I think part of  
17 the Applicant's argument is that the Committee,  
18 during its deliberations, didn't define  
19 "region", didn't define "unreasonable",  
20 "interference". And I'm not sure that that's  
21 our role. I think that we're not necessarily  
22 required to define those terms. Rather, we're  
23 required to follow the rules as they're set  
24 forth, with the definitions that are in them,

1 and the statute, and come up with a decision.

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

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

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

18 CHAIRMAN HONIGBERG: Well, and would  
19 you agree with me, Ms. Weathersby, that we're  
20 not -- this isn't an objective test that an  
21 Applicant has to check a bunch of boxes? They  
22 do when filing their application. But, in  
23 terms of doing what needs to be done to have a  
24 certificate granted, there's not a formula.



1 That, if they have done these seven things,  
2 check, check, check, check, check, check,  
3 check, it's approved. This is a subjective  
4 process. And the statute is loaded with  
5 subjective terms --

6 MS. WEATHERSBY: Yes.

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

13 MS. WEATHERSBY: Correct.

14 CHAIRMAN HONIGBERG: Other thoughts?

15 *[No indication given.]*

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

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

22 *(Recess taken at 10:35 a.m. and*  
23 *the deliberations resumed at*  
24 *10:56 a.m.)*

1 CHAIRMAN HONIGBERG: All right.

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

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

15 But I think, in my view, and I think  
16 Mr. Way will probably agree with this, it was a  
17 way for us to think about land use, and deal  
18 with the Applicant's presentation that said  
19 "well, as long as you're putting a transmission  
20 line in a transmission corridor, you can never,  
21 under any circumstances, be changing the use."  
22 And I think that was one of the places where we  
23 talked about that.

24 And I think that there are some

1 others. But, ultimately, that phrase isn't the  
2 legal phrase. The legal phrase is whether  
3 there is affect on land use and whether that  
4 change or that effect is unreasonable in the  
5 larger context. That's where I -- how I was  
6 thinking about it.

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

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

19 And I think that's true with a lot of  
20 things as we went through this process, a lot  
21 of the questioning. We asked questions of both  
22 sides when their argument would no longer hold  
23 water, at what point would it fail? And so, I  
24 think that was simply just a tool.

1           And I think one of the other issues  
2           that they had talked about, maybe, Ms.  
3           Weathersby, you can answer this, too, is when  
4           we're looking at some of the non-conforming  
5           requirements that had been used in other  
6           instances that we took as more of an advisory.  
7           That wasn't a condition that we were implying  
8           on -- that we were applying as a test, but it  
9           was something that helped us to grasp the  
10          issue.

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

21                   CHAIRMAN HONIGBERG: Also, with  
22          respect to arguments about making up criteria  
23          and being too subjective, I mean, I think as I  
24          said earlier, there's an inherently subjective

1 aspect to this with the language in the statute  
2 about "unreasonable" that automatically  
3 requires the exercise of some judgment about  
4 whether something is or isn't unreasonable.

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

20 Commissioner Bailey.

21 CMSR. BAILEY: And the ultimate  
22 decision of each Committee or Subcommittee  
23 members -- the ultimate decision of each  
24 Subcommittee that forms the basis for the

1 majority opinion is and was based on facts that  
2 we found in the record.

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

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

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

1 Commissioner Bailey.

2 CMSR. BAILEY: I agree.

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

5 Yes, Mr. Wright. Sorry.

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

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

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

21 Mr. Way.

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

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

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

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

23 CHAIRMAN HONIGBERG: Other thoughts?

24 I think, from a substantive standpoint, I know



1           that the statute directs us to consider the  
2           municipal views. It does not tell us that the  
3           municipal views are dispositive. I think the  
4           decision that we made follows that directive  
5           from the Legislature. I think, if it were up  
6           to the municipalities, nothing would happen in  
7           large infrastructure projects like this.

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

22                         Other thoughts on municipalities? I  
23          think someone mentioned, I think it was mainly  
24          Ms. Weathersby's discussion, about how zoning

1 laws and land use -- local land use laws, how  
2 those doctrines that exist in land use law  
3 might inform us here. So, I think that was  
4 something they complained about in this Motion,  
5 that we were relying on local rules. I don't  
6 get the sense that we did that.

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

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

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

24 MS. WEATHERSBY: Is there where we

1 talk about the "deviating from precedent"  
2 concerning putting transmission -- using  
3 transmission corridors, if it's constructed in  
4 an existing right-of-way, since we've always  
5 said that's a good land use principle?

6 Is this where we would talk about  
7 that or is that --

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

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

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

15 CMSR. BAILEY: I agree largely with  
16 what has been said. But, in the Rule 301.09,  
17 which is the rule that describes what the  
18 applicant is required to file with us, in order  
19 for us to reach our decision under 301.15 on  
20 effects on orderly development, it says "Each  
21 application shall include the information  
22 regarding the effects of the proposed energy  
23 facility on the orderly development of the  
24 region, including the views of municipal and

1 regional planning commissions and municipal  
2 governing bodies regarding the proposed  
3 facility, if such views have been expressed in  
4 writing, and master plans of the affected  
5 communities and zoning ordinances".

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

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

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

16 MS. WEATHERSBY: Sure. Part of land  
17 use was the Applicant's -- land use issue was  
18 that the Applicant has argued that, because the  
19 Project would be in an existing right-of-way,  
20 it's consistent with land use. It's not  
21 something they've argued all along, and they  
22 faulted us for on appeal. And that our  
23 precedent has been, if it's an existing  
24 right-of-way, therefore it's proper siting.

1           I certainly disagree with that. I  
2 think in -- well, first, it's not entirely in  
3 an existing right-of-way, the proposed Project.  
4 It's also using state highways as utility  
5 corridors, which is different than at least the  
6 applications I've sat on in the past.

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

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

15           CHAIRMAN HONIGBERG: Commissioner  
16 Bailey.

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

1 CHAIRMAN HONIGBERG: Mr. Way.

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

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

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

24 CHAIRMAN HONIGBERG: All right. I

1 think we've -- yes, Mr. Wright. Sorry.

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

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

14 I think one of the things they point  
15 to is a perception from deliberations that we  
16 thought Dr. Chalmers didn't look at properties  
17 along the line. I know that he did. And I  
18 remember him testifying that he got out and  
19 looked at the properties from the street. But  
20 I also remember that the overwhelming majority  
21 of his report is based on work done by others  
22 having to do with what would be arguably  
23 comparable situations with specific properties  
24 in subdivisions, and that he relied on maps

1 more than he did on his own measurements or own  
2 views of those properties, the ones that are  
3 along the proposed line.

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

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

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

21 CMSR. BAILEY: I agree exactly with  
22 what you just said. I also -- I don't think  
23 that we didn't understand what Mr. Chalmers was  
24 saying. And with regard to the analysis that



1 he did of the impacts, based on his street  
2 view, there was information from another party,  
3 I don't remember who it was, that suggested  
4 that standing on the street and looking at the  
5 impact of the Project sort of behind someone's  
6 house isn't the same as standing in the house.  
7 And I don't know how they would have gotten  
8 into the house. But he didn't -- he didn't  
9 even acknowledge that there would be a  
10 difference. And so, I think that that was  
11 another piece of the evidence that we weighed.

12 CHAIRMAN HONIGBERG: Other thoughts?

13 Mr. Way.

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

22 I think also, too, I looked at, as I  
23 recall, one quote attributed to me that where I  
24 thought there would be "no impact to property

1 values", I don't think that was what I meant to  
2 imply as we were going through deliberations.  
3 Obviously, I understand that there's going to  
4 be some impact to property values.

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

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

14 CHAIRMAN HONIGBERG: Ms. Weathersby.

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

23 I also think we've been faulted  
24 for -- or, another argument of the Applicant is

1           that they were not required -- the rules don't  
2           require them to ascertain the impact on  
3           commercial properties, condominiums, second  
4           homes, vacant land, underground portions,  
5           etcetera. And perhaps our rules don't spell  
6           out all the different types of real estate, but  
7           our rules do require them to inform us as to  
8           the effects on real estate values in general.  
9           And those subsets, in my mind, are real estate  
10          values. It was important to me to understand  
11          how a second home, with a big -- that's on a  
12          view lot, would be affected as compared to a  
13          home in a subdivision. So, I think that that  
14          analysis of Dr. Chalmers was lacking.

15                        I think they have also said that Dr.  
16          Chalmers did, in fact, address those types of  
17          real estate that I just listed off. And I  
18          think, in some instances, he did. But, again,  
19          I don't think the analysis was not thorough,  
20          and didn't leave us with a good sense of the  
21          impact on the real estate values of those  
22          properties -- of commercial properties, other  
23          than the ones where the Project would directly  
24          impact it, like the concrete fellow -- concrete

1 business in Concord, for example, but didn't  
2 analyze how it might affect a bed & breakfast,  
3 for example. Condominiums, yes, they, kind of  
4 after much nudging, did assess McKenna's  
5 Purchase, but not others.

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

9 CHAIRMAN HONIGBERG: Commissioner  
10 Bailey.

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

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

19 MR. IACOPINO: I don't have an  
20 opinion as to what you need to address. But I  
21 would tell you that, as a committee, you are  
22 free to determine whether you find an expert  
23 witness's testimony to be credible or not  
24 credible, and to be reliable or not reliable.

1           The two terms, although they certainly are  
2           close to synonymous, they are not entirely  
3           synonymous. And "reliability" may apply more  
4           in a specific instance.

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

10                      But they're both within your purview  
11           to decide.

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

22                      MR. IACOPINO: Right. The classic  
23           example is the witness who wears glasses and  
24           doesn't have them on at the time when they see

1 something. The person may not be lying, but  
2 they may not be credible, because they didn't  
3 have their glasses on.

4 CHAIRMAN HONIGBERG: My Cousin Vinny.

5 [Laughter.]

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

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

13 CHAIRMAN HONIGBERG: Other thoughts  
14 on property values?

15 [No indication given.]

16 CHAIRMAN HONIGBERG: All right.  
17 Let's talk tourism. I think some of the issues  
18 are similar. And I think that many of us found  
19 the Applicant's tourism expert to not have done  
20 enough work or be relying on work that was  
21 valuable or useful in reaching the conclusions  
22 that he reached. So, again, I think -- I think  
23 the consensus, and the order reflects this, is  
24 that we didn't find his testimony credible.

1 And to make the distinction you just made,  
2 Commissioner Bailey, not because he was lying,  
3 but because the work that was done wasn't good  
4 enough for us to agree or find his conclusions  
5 credible, ultimately.

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

8 Mr. Way.

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

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

19 And with tourism, it struck me that  
20 they were very far off the mark there, compared  
21 to some of the other experts for the Applicant,  
22 which I considered to be very credible and  
23 reliable. But for property values, and, in  
24 particular, on tourism, it just didn't convince

1 me.

2 And as Commissioner Bailey said, I  
3 don't think there was any misleading  
4 information there, it just it wasn't done.  
5 There wasn't the outreach, there wasn't the  
6 data from the surveys. I thought there was  
7 inaccurate comparisons between projects. It  
8 all summed up to something that really didn't  
9 give us much information to work with.

10 CHAIRMAN HONIGBERG: Commissioner  
11 Bailey.

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

16 CHAIRMAN HONIGBERG: We could be,  
17 yes.

18 CMSR. BAILEY: Okay.

19 CHAIRMAN HONIGBERG: Because there's  
20 complaints about the decision-making process on  
21 a number of the specific issues we talked  
22 about. And I've forgotten off the top of my  
23 head if this is one they specifically made, but  
24 feel free.



1 CMSR. BAILEY: Okay. Well, one of  
2 the complaints is that the rules didn't require  
3 the witness or the tourist expert to conduct  
4 surveys or hold listening sessions. And that's  
5 true. But in his attempt to persuade us that  
6 there wouldn't be an impact on tourism, he  
7 conducted surveys and he showed us what the  
8 surveys were. And he also conducted listening  
9 sessions. And we determined that those surveys  
10 that he conducted weren't adequate to prove the  
11 point he was trying to make.

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

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

23 Any other thoughts on tourism?

24 *[No indication given.]*

1 CHAIRMAN HONIGBERG: The Applicant  
2 also has raised issues with our discussion of  
3 construction and the effects of construction on  
4 the surrounding area.

5 Commissioner Bailey.

6 CMSR. BAILEY: I don't understand  
7 their argument. Because 301.15, which is the  
8 rule that says the "Criteria relative to a  
9 finding of undue interference", says that we  
10 have to, "in determining whether a proposed  
11 energy facility will unduly interfere with the  
12 orderly development of the region, the  
13 Committee shall consider: The extent to which,  
14 [among other things], construction of the  
15 proposed facility will affect land use,  
16 employment, and the economy of the region."  
17 So, that's why we talked about construction in  
18 this section.

19 We probably would have talked about  
20 it again, had we gone on to, you know, safety  
21 and some of the other criteria in the statute.  
22 But I think, I mean, the rule says we're  
23 required to consider the impact of  
24 construction.

1           So, again, I think the argument's  
2           meritless.

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

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

21          But, ultimately, we didn't have to  
22          discuss everything related to construction,  
23          because we didn't get into that as part of the  
24          deliberations.

1 Other thoughts on construction?

2 Mr. Oldenburg.

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

17 So, if this was going to impact the  
18 region, so every DOT project impacts the  
19 region. And we saw examples I brought up is we  
20 had closed a bridge for over six months up in  
21 Stewartstown. So, the fact that they were  
22 going to close roads, local roads, at least  
23 temporarily during that time, I thought if they  
24 could -- if they could work out the details, I

1 didn't, which I struggle with, the details, on  
2 the local roads, that I didn't think it would  
3 affect the region any more than any other  
4 roadway project.

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

12 CHAIRMAN HONIGBERG: Anyone else?  
13 Ms. Weathersby.

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

1 did.

2 CHAIRMAN HONIGBERG: Mr. Way.

3 MR. WAY: I'd agree with that.

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

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

23 So, there's all -- there's all the  
24 degree of intertwining here. And I think the

1 more we would have gotten into this, the more  
2 that intertwining would have -- in the criteria  
3 would have faded.

4 CHAIRMAN HONIGBERG: Anyone else have  
5 any thoughts on construction?

6 *[No indication given.]*

7 CHAIRMAN HONIGBERG: I think the next  
8 issue to discuss is an argument by the  
9 Applicant that the written order reflects  
10 deliberations that took place outside of the  
11 public and are therefore in violation of RSA  
12 91-A. I think, put -- to explain that a little  
13 bit, the Applicant says that there are things  
14 in the order that we, when we were deliberating  
15 in public, didn't talk about explicitly. And  
16 so, therefore, that means we must have done  
17 something behind the scenes that violated RSA  
18 91-A.

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

24 I guess I'll ask counsel to see if I

1 articulated that well enough for us to discuss  
2 it.

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

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

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

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

20 I generally write the order. It is  
21 then submitted to all of the Committee members,  
22 with an explicit email or cover letter that  
23 says "this is" -- "you only respond to me if  
24 you have corrections or changes, or you think



1           there is something that I got wrong." And they  
2           respond to me. And to the extent that, and  
3           usually the responses tend to be grammatical or  
4           stylistic, in terms of language, but sometimes  
5           there is something substantive that I forgot to  
6           put in the order or something like that.

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

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

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

23                       MR. IACOPINO: That's correct.  
24          That's correct.

1                   CHAIRMAN HONIGBERG:  And you have  
2                   access to all the testimony, just as we do  
3                   during the deliberations, and all the exhibits,  
4                   just as we do during deliberations?

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

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

18                  MR. WAY:  I don't agree.

19                  CHAIRMAN HONIGBERG:  Commissioner --

20                  MR. WAY:  I don't agree.

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

23                  CMSR. BAILEY:  I don't agree either.

24                  I think that you can find some form of

1 discussion about every single thing that is in  
2 the written order in our public deliberations.  
3 It may not be word-for-word, but it's not  
4 supposed to be word-for-word. The written  
5 order is supposed to be the final decision.  
6 And we all read the written order, and we all  
7 decide whether we're going to sign it as is or  
8 not before we do that.

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

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

22 Any other thoughts on this topic?

23 *[No indication given.]*

24 CHAIRMAN HONIGBERG: All right. I

1 see no interest in further discussing it.

2 *[Chairman Honigberg conferring*  
3 *with Atty. Iacopino, and then*  
4 *Atty. Iacopino conferring with*  
5 *Admin. Monroe.]*

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

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

24 I think that that was my reaction to

1 that argument. But I don't know if anybody has  
2 any different views or other views they want to  
3 express on this?

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

7 MR. WAY: What page is that?

8 MR. IACOPINO: I don't know that.  
9 Hold on a second.

10 MS. WEATHERSBY: Thirty-nine.

11 MR. IACOPINO: Thirty-nine.

12 *[Short pause.]*

13 CHAIRMAN HONIGBERG: Commissioner  
14 Bailey.

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

1 what we relied on. We didn't just say  
2 something arbitrarily.

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

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

16 Any other thoughts? Ms. Weathersby.

17 MS. WEATHERSBY: I agree with you. I  
18 think it goes back to this sort of two-part  
19 decision-making, where we have the  
20 deliberations, where it is more of a  
21 discussion. And we're not presenting a case  
22 with "these are the 12 reasons that support my  
23 analysis". And, you know, it's a discussion to  
24 see how we feel the Applicant has measured up

1           against various criteria. And then we go into  
2           the order, where a little more flesh gets put  
3           on those bones.

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

12                        CHAIRMAN HONIGBERG: Other thoughts?

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

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

22                        CHAIRMAN HONIGBERG: Anyone else?

23          Ms. Weathersby.

24                        MS. WEATHERSBY: I just want to

1 clarify, when I said "two-part decision-  
2 making", it's a two-part order-making. The  
3 decision is made, and then the order itself is  
4 the process. I didn't mean to suggest  
5 otherwise.

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

10 Any other thoughts?

11 *[No indication given.]*

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

17 (Lunch recess taken at 11:47  
18 a.m. and concludes the

19 ***Deliberations Morning Session.***

20 The Deliberations continues  
21 under separate cover in the  
22 transcript noted as

23 ***"Deliberations Afternoon Session***  
24 ***ONLY" .)***



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**C E R T I F I C A T E**

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.

---

Steven E. Patnaude, LCR  
Licensed Court Reporter  
N.H. LCR No. 52  
(RSA 310-A:173)