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STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

January 12, 2017 - 12:37 P.M.
Public Utilities Commission
21 South Fruit Street
Concord, New Hampshire

IN RE: SEC DOCKET NO. 2016-03
NORTHERN PASS TRANSMISSION - EVERSOURCE;
Joint Application of Northern Pass
Transmission LLC and Public Service of New
Hampshire d/b/a Eversource Energy for a
Certificate of Site and Facility
(Petition for Declaratory Ruling)

**PRESENT FOR
SUBCOMMITTEE:**

SITE EVALUATION COMMITTEE:

Chmn. Martin Honinberg <i>(Presiding Officer)</i>	Public Utilities Commission
Cmsr. Kathryn M. Bailey	Public Utilities Commission
Paul Dexter, Esq.	Public Utilities Commission
Cmsr. Jeffrey Rose	Dept. of Resources & Economic Development
Dir. Elizabeth Muzzey	Dept. of Cultural Resources, Div. of Hist. Resources
Act'g Cmsr. Clark Freise	Dept. of Environmental Services
Cmsr. Victoria Sheehan Patricia Weathersby	Department of Transportation Public Member

Also Present for the SEC:

Michael J. Iacopino, Esq. (Brennan...
Pamela G. Monroe, SEC Administrator
Marissa Schuetz, SEC Program Specialist

COURT REPORTER: Cynthia Foster, LCR No. 14

1 PRESIDING OFFICER HONIGBERG: We're going
2 to resume and begin consideration of Docket
3 2016-03 which is a Petition for Declaratory
4 Ruling. I'll note that Paul Dexter from the
5 Public Utilities Commission is sitting in for
6 Commissioner Scott who is recused.

7 So we need to decide how to proceed with
8 the Petition. There was a Motion to Dismiss
9 filed by representatives of Northern Pass.
10 We've received public comment from, I don't have
11 the specific number, but it's on the order of 10
12 to 20. Some towns, some individuals. I would
13 say that without exception the public comment
14 was supportive of the Petition and supportive of
15 the legal positions articulated therein.

16 I guess I would ask if there are
17 representatives of the Petitioners who wish to
18 speak in response to the Motion to Dismiss
19 assuming I think as they should that those
20 issues are in play, and I see at least two of
21 those representatives, Ms. Pacik and Ms.
22 Manzelli. Are there other Petitioners who are
23 here or is it just Attorneys Pacik and Manzelli?
24 All right. So would either or both of you want

1 to speak?

2 MS. MANZELLI: I think I'm on. Thank you.
3 My name is Amy Manzelli. I'm from the law firm
4 of BSM Environmental & Land Law here today
5 representing the Forest Society, one of the
6 named Petitioners in the Petition.

7 As a preliminary matter, with respect to
8 the Motion to Dismiss, the position of the
9 Forest Society is that the motion is without
10 merit, but we do believe that we have the 10-day
11 objection period within which to file an
12 objection. So we hope that one of the outcomes
13 of today is that we would be afforded that time
14 to file the objection.

15 PRESIDING OFFICER HONIGBERG: Is it your
16 view that the Committee would be unable or it's
17 not able to act on its own?

18 MS. MANZELLI: It's my view that the
19 Petitioners have requested a three-member
20 subcommittee and that such an appointed
21 three-member subcommittee would be the
22 authorized body to take any action on the
23 Petition, whether the action would be to grant
24 this Motion to Dismiss or reach the ultimate

1 question asked.

2 PRESIDING OFFICER HONIGBERG: Okay.

3 MS. MANZELLI: I do have a couple summary
4 points here. I wanted to touch on the
5 jurisdiction issue. When you look at the rules
6 and you look at the Administrative Procedure Act
7 that applies here, the plain language makes
8 clear that this is an appropriate decision,
9 appropriate question for the SEC to be
10 considering. The words are, "Any person can ask
11 the question about matters within the SEC's
12 jurisdiction, specific application of any
13 statutory provision or rule or order of the
14 agency." That part is from the Administrative
15 Procedure Act.

16 So when you put that together, is it
17 appropriate to ask the SEC whether the SEC's
18 authority extends so far as to make a decision
19 on a municipal license or permit? Yes. It's
20 entirely appropriate to ask the SEC to make a
21 ruling on its own jurisdiction on that issue.

22 I wanted to address whether this legal
23 question is already at issue in the Northern
24 Pass docket. No. This issue has not been

1 raised in the Northern Pass docket. What was
2 contained in the Application that started the
3 Northern Pass docket were a series of blank
4 excavation applications from the New Hampshire
5 Department of Transportation, so not even
6 excavation Applications from a town or a city,
7 and then a statement that there was, quote, "A
8 separate request for permits from the
9 municipally maintained highways has been filed
10 with the SEC," end quote.

11 Now, I could have missed it, but we looked
12 hard, and we have not found such a separate
13 request for permits within the Application.
14 Again, I could have missed it, but I don't see
15 any motion or any other pleadings that has been
16 filed to the SEC, the Subcommittee, deciding
17 that issue, that case, asking for a ruling on
18 this legal issue. So I don't think that it's at
19 issue in the Northern Pass case.

20 Moreover, this is an issue that cuts across
21 every docket that the SEC would consider
22 regarding electric lines. So that includes the
23 Northern Pass case, of course; that includes
24 Seacoast Reliability, might include the

1 Merrimack docket that came before you, and it
2 would include any docket in the future which I'm
3 just guessing there will be more dockets in the
4 future involving electric transmission or
5 distribution lines. This legal question arises
6 in the context of all of those cases, and it is
7 not economical to answer this question on a case
8 by case basis, to ask the question for each
9 case, to come to an answer in each case. It's a
10 legal question that is independent of the
11 specific facts of any given case. The only fact
12 that matters is does a case involve municipally
13 maintained roads. So it's not at issue in the
14 Northern Pass docket, and it shouldn't be
15 because it's an issue that cuts across every
16 docket that involves electric lines.

17 With respect to --

18 PRESIDING OFFICER HONIGBERG: Hang on. I
19 think someone has a question Ms. Manzelli.

20 COMMISSIONER BAILEY: If that's the case,
21 and it cuts across every docket that involves
22 transmission lines or electric lines, why hasn't
23 this ever been raised before?

24 MS. MANZELLI: I think the answer is

1 because of the scope of the Northern Pass
2 project and given the scope of this project,
3 questions have arisen, legal questions related
4 specifically to that case and legal questions
5 that cut across all cases, that have not been
6 needed to be asked and answered before.

7 COMMISSIONER BAILEY: I think there was a
8 wind case where there were some transmission
9 lines that were being erected, and the
10 municipalities were against it, and this was
11 before I was on the Site Evaluation Committee,
12 but I just kind of think I know about it, and
13 maybe I don't know it well enough, but it seems
14 like the same question would have been relevant.
15 Lempster.

16 MS. MANZELLI: I, too, was not involved in
17 that case so I can't speak to that case. It
18 sounds like there might be others here who
19 could.

20 PRESIDING OFFICER HONIGBERG: Ms. Manzelli,
21 as a factual matter, isn't there testimony filed
22 in the Northern Pass docket that alludes to this
23 problem or makes this argument that Northern
24 Pass can't proceed without municipal approvals

1 on municipally maintained lands?

2 MS. MANZELLI: I think I would definitely
3 agree with the first way you phrased it that
4 alludes to this problem. I'm not sure that the
5 Prefiled Testimony specifically asks the
6 question and asks the SEC for a ruling on that
7 issue.

8 PRESIDING OFFICER HONIGBERG: But it makes
9 the argument, whether it asks for a ruling in
10 advance in some way. It makes the argument and
11 this argument has been made in numerous filings
12 with us, public comments and otherwise, that
13 Northern Pass can't proceed without municipal
14 approval to put their facilities on municipal
15 lands.

16 MS. MANZELLI: And two things on that
17 point. First of all, I think there's a legal
18 and a procedural difference between someone
19 saying something in testimony alleging either a
20 point of law or a fact and requesting a ruling
21 on that issue. People say a lot of things at
22 public testimony, pre-Application information
23 meetings, even at the adjudicatory hearings, but
24 that's qualitatively different than asking for a

1 ruling.

2 PRESIDING OFFICER HONIGBERG: Is there
3 anything preventing the parties in Northern Pass
4 from making a request; and, second part of that,
5 won't the Northern Pass Subcommittee necessarily
6 have to decide this question?

7 MS. MANZELLI: The second point I wanted to
8 make is that there is nothing in the procedural
9 schedule and there's been nothing in the
10 technical sessions so far that would lead, at
11 least that would lead this party, the Forest
12 Society, to believe that the SEC has the
13 intention of taking up this legal issue within
14 the Northern Pass Docket.

15 PRESIDING OFFICER HONIGBERG: That wasn't
16 the question I asked you. Is there anything
17 preventing one of the Northern Pass parties from
18 filing a motion of some sort on this, and even
19 without that, won't the Northern Pass
20 Subcommittee necessarily have to deal with this
21 issue?

22 MS. MANZELLI: The way that we read the
23 rules, the proper procedure is to file a
24 Petition for Declaratory Ruling. The rules do

1 not seem to contemplate asking this type of
2 question within a particularized docket, and I
3 think it's because it's a legal issue that
4 applies to many different cases, not
5 specifically the Northern Pass docket.

6 My final point that I wanted to make is
7 going back to the procedural rules, 203.01, we
8 read that to require this question to be asked
9 of the SEC rather than asking this question
10 directly to the Superior Court. We read that as
11 obligating the Forest Society to exhaust its
12 administrative remedies so why not go to court?
13 Because the rules say we have an administrative
14 remedy and the law is you have to exhaust those
15 administrative remedies.

16 I would welcome any further questions, but
17 that does complete my planned remarks for today.

18 PRESIDING OFFICER HONIGBERG: Is it fair to
19 say that Northern Pass agrees with you that you
20 would not be able to go to court right now based
21 on their filing. I think they made a pretty, I
22 think part of their argument --

23 ATTY. MANZELLI: I think they're here, and
24 they should speak for themselves.

1 PRESIDING OFFICER HONIGBERG: Anyone have
2 other questions for Attorney Manzelli? All
3 right.

4 MS. MANZELLI: Thank you very much.

5 PRESIDING OFFICER HONIGBERG: Attorney
6 Pacik, do you want to say anything separately?

7 ATTY. PACIK: No, in terms of the
8 procedural issues that Attorney Manzelli raised,
9 we do agree with that, but I have nothing to
10 add.

11 PRESIDING OFFICER HONIGBERG: I know there
12 are representatives of Northern Pass here.
13 Would one of you like to speak briefly?

14 MR. GLAHN: I'll try to get close to the
15 microphone.

16 PRESIDING OFFICER HONIGBERG: And you're
17 already too far away. I can guarantee it. Make
18 sure it's on.

19 MR. GLAHN: Thank you. I'm Bill Glahn, and
20 I'm with Tom Getz who represent Northern Pass
21 and PSNH in this proceeding. Let me answer
22 Commissioner Honinberg's question first which is
23 of course there's nothing that prevents this
24 from being raised in the Northern Pass docket.

1 In fact, if this were to be raised in a docket
2 or in a court proceeding that wasn't a
3 particularized docket or it wasn't an actual
4 controversy in question, then it couldn't be
5 raised at all.

6 So our position on this is really simple.
7 It's that you can raise this in a docket over
8 which the Commission already has exerted
9 jurisdiction. That's what the Campaign for
10 Ratepayers Rights case says. That the rule and
11 the statute don't give you the right to start a
12 separate docket in the SEC to call this one-stop
13 shopping center proceeding together unless it's
14 specifically to rule on the question of whether
15 something is an energy facility or it is a
16 sizable addition to one. Once you open the door
17 the right way, come into this proceeding that
18 way, then you can find a Petition for
19 Declaratory Ruling, and you can address an issue
20 in connection with the specific docket.

21 Now, the Society's lawyer argues that well,
22 this crosses over several dockets. Well, in
23 fact, if it got raised in the Northern Pass
24 docket, and it was decided there, and the matter

1 was appealed to the Supreme Court, it would be
2 binding on every subsequent docket on the
3 question that they raised which is does 162-H
4 preempt the right of towns to make certain
5 decisions with respect to the crossing of roads
6 in those towns. And that decision, one way or
7 the other, if it gets decided that way, will be
8 binding in every subsequent SEC proceeding.

9 So I want to be brief and not repeat what
10 we've said in our pleadings, but that would,
11 that's our position. Just one other point is
12 that the Society really has no ability to speak
13 to this issue as a new docket at all because
14 they are not a Petitioner as defined within the
15 statute. Some of these towns are. And in the
16 Northern Pass docket, since the Society is an
17 Intervenor, they could move for a Declaratory
18 Judgment ruling in that proceeding, but there's
19 nothing that requires them to do it under the
20 rule, and, in fact, because of the Campaign
21 case, they can't do it just under the rule.
22 They've first got to put the key in the door the
23 right way and invoke this Commission's
24 jurisdiction.

1 PRESIDING OFFICER HONIGBERG: Mr. Glahn,
2 isn't there an efficiency argument to be made
3 here that we get this issue presented that does
4 cut across multiple dockets, get it resolved
5 separately once and for all because it's
6 obviously a very significant issue to certain of
7 our Petitioners here?

8 MR. GLAHN: Well, it may be, Commissioner
9 Honinberg, but just because it may be important
10 to decide it in a number of dockets doesn't mean
11 that you have jurisdiction to open a separate
12 docket to decide it. You're an agency of very
13 limited jurisdiction for very specific purposes.

14 PRESIDING OFFICER HONIGBERG: Assume we
15 disagree with you on the jurisdictional
16 question, assume that we think we do have
17 jurisdiction to consider this. I know you have
18 other reasons why it should be dismissed, but
19 assume we have jurisdiction. Respond to the
20 efficiency argument.

21 MR. GLAHN: Well, yes, of course, if the
22 purpose here is simply to get the issue of
23 preemption decided and decide it fairly quickly,
24 well, then, perhaps, but in what context? If

1 you've created a docket, and I know you're
2 assuming you have jurisdiction, but if you've
3 created a docket which isn't a real docket for
4 the issue, that is, there's no real controversy,
5 well, then the Supreme Court is not to going to
6 take the case anyway. If the Supreme Court
7 wants to decide this issue now, it can do so on
8 an interlocutory appeal when you make the
9 decision that if you make a decision one way or
10 the other early on, preemption or no preemption,
11 one side or the other could take the position we
12 want an interlocutory appeal of that, and if the
13 Supreme Court wants an appeal of that they'll
14 decide it in that context.

15 If not, I mean, I suggest to you that the
16 reason this docket is filed and the Petitioners
17 have never answered this question, didn't answer
18 it here today, why do they need the separate
19 docket? And I think the reason they want the
20 separate docket set because they think if they
21 get a decision in that docket it's a final
22 decision whereas if they get it in the NPT
23 docket it won't be, and one of the reasons it
24 won't be is because the issues that the towns

1 are raising might in fact all be resolved in
2 their favor in the NPT docket. The Supreme
3 Court won't decide in the first instance whether
4 a statute preempts another one if, for example,
5 this Committee decided that Northern Pass should
6 not be given a certificate or, alternatively,
7 that the issues that the towns raised with
8 respect to safety in the Northern Pass docket
9 are resolved. Then there's no real controversy
10 any longer.

11 PRESIDING OFFICER HONIGBERG: Does anyone
12 have any questions for Mr. Glahn? Mr. Getz, did
13 you want to say something?

14 MR. GETZ: Thank you, Mr. Chairman. I just
15 wanted to point out one issue. If you turn to
16 page 82 of the Application, Volume 1, and
17 several pages after that lays out the request
18 for authority from the SEC to cross local roads
19 and so that question is before the SEC.

20 MR. GLAHN: I suppose I'd just add one
21 thing, Commissioner Honinberg. Just so our
22 position is clear, we're not saying this issue
23 can't be decided. This issue clearly can be
24 decided, and it can be decided in the Northern

1 Pass docket. We're simply saying that it
2 shouldn't be and isn't allowed to be decided as
3 a separate docket of this Commission.
4 Otherwise, what will happen is every time a
5 party has an issue that they think is important
6 as a legal matter that somehow implicates an
7 energy facility, they'll start a separate
8 docket, and you'll be required to have a hearing
9 on that.

10 I mean, I think it's very clear from the
11 rule that you have the right to make declaratory
12 rulings on matters over which you have
13 jurisdiction. You do have jurisdiction over
14 this issue in the Northern Pass docket and you
15 can make the decision there.

16 PRESIDING OFFICER HONIGBERG: Mr. Dexter?

17 MR. DEXTER: On the issue of whether or not
18 the Committee has jurisdiction and this would be
19 to both attorneys that have spoken, the Petition
20 asks for a Declaratory Ruling stating that RSA
21 231:160, that under RSA 231:160 that only
22 municipalities have the authority to authorize
23 so on and so forth. That statute deals with
24 municipal permits and municipal authority. I'd

1 like to hear from both sides why they think that
2 the SEC has jurisdiction over the applicability
3 or enforceability or breadth of a municipal
4 permit.

5 MR. GLAHN: Well, I think I'd start with
6 this, Commissioner Dexter. I think this issue
7 has already been decided. It was decided by the
8 Hampton case in 1980 which is in that case the
9 Supreme Court said, essentially, it would be
10 incredible to think that the legislature passed
11 a statute that for certain projects gives this
12 Committee the right to make decisions for the
13 State, and after all, municipalities are simply
14 subdivisions of the State, and then allow every
15 town to undo that decision with respect to their
16 municipal permits. If that were the case, you
17 would essentially be engaged in Kabuki theater
18 because no matter what you did, every town could
19 undo it, and the simple answer to the preemption
20 issue is that it's specifically covered by RSA
21 162-H:16,II which says your decision on siting
22 issues will be final. There's no direct
23 conflict between the statutes here if you think
24 about it because what it is is the

1 municipalities remain able to make decisions
2 over all crossings of their roads within the
3 towns with one exception. Where an energy
4 facility falls within the jurisdiction of this
5 Committee, and this Committee considers it for
6 the State as a whole, taking into account all of
7 the considerations that need to go into a
8 project like that, across town lines. Then you
9 preempt their jurisdiction. Otherwise, they
10 retain their jurisdiction.

11 PRESIDING OFFICER HONIGBERG: Ms. Manzelli,
12 do you remember Mr. Dexter's question?

13 ATTY. MANZELLI: Let me make sure. Why
14 would the SEC question municipal process
15 regarding the permit in licensing of poles on
16 municipal roads.

17 MR. DEXTER: Why is that in the SEC's
18 jurisdiction to determine the enforceability of
19 the breadth, the expansiveness, of a municipal
20 ordinance or permit or requirement.

21 MS. MANZELLI: Right. I think that what,
22 first of all, let me back up.

23 I think it's important to note that the
24 Northern Pass and the Forest Society and the

1 Petitioners agree on two important points. From
2 what I'm hearing today, we agree that the SEC
3 does have jurisdiction to answer the question
4 that we've asked. We also agree that the scope
5 of municipal review of utility use of municipal
6 roads is narrow. The municipalities don't have
7 the power to say, you know what? I don't like
8 Northern Pass. I'm saying no to this
9 Application. Or I don't like Seacoast
10 Reliability. I'm going to say no. I'm going to
11 hold up the whole thing. That's what the
12 Hampton case stands for. You can't, the towns
13 don't have veto power just because they don't
14 like a project.

15 Now, going back to your question, what
16 we're asking is whether there's anything in your
17 statute in 162-H that would stand for the
18 proposition that the authority of the SEC
19 preempts the authorization of the
20 municipalities. I think these statutes are in
21 direct conflict because there's nothing in 261
22 and there's nothing in 162 that clearly answers
23 this question. The language that the other
24 attorney used is, quote, "with one exception."

1 Those words aren't in either one of those
2 statutes. The road statute doesn't say unless
3 the project has to go to the SEC, and if the
4 project goes to the SEC, well, then the
5 municipalities don't have this licensing
6 permitting authority. Does that answer your
7 question?

8 MR. DEXTER: No. No. And so now both
9 sides are in agreement that the SEC should
10 decide this question, and I'm not hearing
11 anything that answers why. Why is this a
12 question for the SEC and not for some other
13 authority that would determine the breadth and
14 enforceability or scope of a municipal permit.
15 I'm hearing a lot of reasons, practical reasons
16 why, but I haven't heard any --

17 MS. MANZELLI: Let me take another swath at
18 that, if I could.

19 I think your question presumes that there
20 is a municipal permit, and that we're asking the
21 SEC to render some sort of judgment on the
22 validity of that municipal permit, but what
23 we're asking is whether there's going to be a
24 municipal permit. In other words, who is going

1 to say yes or no or what are the conditions
2 under which this municipally maintained road
3 would be used by the utility. Is it the SEC
4 that's going to say yes and under these
5 circumstances this is how the road is going to
6 be used? In which case there would be no
7 quote/unquote municipal permit. Or is it the
8 municipality who is going to go through that
9 decision-making process and decide yes, this is
10 how the road needs to be used, here is the
11 municipal permit. I think that's the best I can
12 do on your question.

13 PRESIDING OFFICER HONIGBERG: Mr. Glahn, I
14 assume you want to take a crack at this as well?

15 MR. GLAHN: Well, particularly because
16 Commissioner Dexter apparently is still confused
17 about what our position is, and I don't mean to
18 say, perhaps you should be confused because I
19 didn't explain it well enough. We are in some
20 disagreement with respect to jurisdiction, and
21 that is that we believe you can decide this
22 issue if you want to, but you can only decide it
23 where there's a real controversy, and you can
24 decide it in a docket where you have already

1 properly exerted jurisdiction. So you can't do
2 it in a separate docket but you can do it in the
3 Northern Pass docket because there is a real
4 controversy.

5 Now, you could also, I suppose, a court
6 could decide this issue as well. Where we
7 disagree in some respects, and maybe this is, if
8 I haven't answered your question adequately on
9 this one, please tell me, but we dispute the
10 idea that you should or could decide this as a
11 general matter. There is no general
12 controversy. They don't, people don't have
13 standing to raise it in that situation and it's
14 not ripe. In other words, if I came into this
15 Committee tomorrow and said, you know what, an
16 energy facility may be built in the future --

17 I thought the red light means it's on, but
18 I guess it means it's off.

19 PRESIDING OFFICER HONIGBERG: Off the
20 record.

21 (Discussion held off the record)

22 MR. GLAHN: I hope you heard most of that,
23 but you can't decide a general issue. If I came
24 into the Committee tomorrow and said an energy

1 facility may be built in the future, I'm a town
2 administrator, and I want you to decide whether
3 we've got authority over that energy facility or
4 not, you have no authority any more than a court
5 would have any authority to decide that issue
6 because there isn't a real live controversy.

7 So put that aside for a minute because they
8 want two issues decided. They want a general
9 issue decided and they want a specific issue
10 decided. On the specific issue, in the Northern
11 Pass proceeding, does this Committee have the
12 authority to decide that RSA 162-H preempts town
13 authority on citing of power lines. That issue
14 could be decided in the Northern Pass docket,
15 and probably should be given the way they've
16 raised it, but they still have not explained why
17 they need to do it in some other proceeding as
18 opposed to there.

19 PRESIDING OFFICER HONIGBERG: Commissioner
20 Bailey.

21 COMMISSIONER BAILEY: Let me take a stab at
22 this. I understand what you just articulated.
23 But, Ms. Manzelli, your Petition asks us for a
24 ruling pursuant to 231:160. And I think what

1 Mr. Dexter is asking is why would we make a
2 ruling pursuant to 231:160. How is that in our
3 jurisdiction.

4 MS. MANZELLI: I see your point. The
5 underlying premise of the question is is there
6 anything in RSA 162-H that would divest the
7 municipalities of the authority that they have
8 pursuant to 231:160. So it's not do the
9 municipalities in general have any authority
10 pursuant to this statute. I think we all agree
11 that they do; that this set of statutes
12 authorizes them to issue permits and licenses
13 for certain use of municipally maintained roads.

14 The question arises when you have a project
15 that implicates municipally maintained roads and
16 is coming before the SEC. That's where the
17 question arises. So I see your point. This is
18 not as, the question presented is not as well
19 stated as it should have been, and it should be
20 is the there anything in RSA 162 that would
21 preempt this municipal authority.

22 PRESIDING OFFICER HONIGBERG: Mr. Glahn, I
23 want to ask you a question I asked Ms. Manzelli
24 about whether this group can act on the Petition

1 and decide how to proceed. Could the full SEC
2 act today if it wanted to dismiss the Petition?

3 MR. GLAHN: Yes. Seems to me you always
4 have jurisdiction to decide whether you have
5 jurisdiction. If you don't think you do, then I
6 suppose the only way to address that question is
7 to ask a court whether the SEC has jurisdiction
8 over this type of an issue, but I would think
9 that when a Petition is filed -- let's take a
10 good example.

11 Suppose that the Society for Protection of
12 New Hampshire Forests alone came to this
13 Committee and said someone's building an energy
14 project, and it's an energy facility that's
15 subject to your jurisdiction. You could dismiss
16 that Petition because the Society for Protection
17 of New Hampshire Forests is not a Petitioner
18 defined within the statute. So they don't have
19 the right to Petition on anything in that basis.

20 PRESIDING OFFICER HONIGBERG: You're
21 answering a more substantive question. I'm
22 trying to get a pure process question out there.

23 MR. GLAHN: Let me try to answer it this
24 way. Their assumption is that they have a right

1 to bring this under your rules. Your rule
2 specifically provides that you only have an
3 obligation to entertain a Petition for
4 Declaratory Ruling on a subject matter within
5 your jurisdiction. So I think that implies that
6 on any Declaratory Ruling, and I'm not
7 stipulating that you can start a proceeding in
8 this Commission by simply filing a Declaratory
9 Ruling Petition under your rules unless you've
10 got the jurisdiction to do it, but I think, I
11 would stipulate or I would argue, Commissioner
12 Honinberg, that you always have a right to
13 decide whether you have any jurisdiction to
14 decide something.

15 PRESIDING OFFICER HONIGBERG: So you would
16 disagree with her that this has to be assigned
17 to a three-person subcommittee and that's the
18 only body that could act on it?

19 MR. GLAHN: Well, I'll let Mr. Getz, I'm
20 not as familiar with the subcommittees of this
21 Committee.

22 MR. GETZ: Mr. Chairman, I think it's all
23 contained in your Rule 203.02. The Committee
24 may dismiss a Petition for Declaratory Ruling

1 that fails to set forth factual allegations,
2 involves a hypothetical situation, does not
3 implicate the legal rights of the Petitioner and
4 is not within the Committee's jurisdiction.
5 We've laid some of this out in the Objection and
6 Motion to Dismiss. I think it's clear that you
7 can dismiss if you find any of those things are
8 lacking here.

9 PRESIDING OFFICER HONIGBERG: Ms. Manzelli,
10 do you have access to the statute, RSA 162-H?

11 MS. MANZELLI: I apologize. I do not have
12 that in front of me right now. But it's coming.
13 Yes, as a matter of fact I do.

14 PRESIDING OFFICER HONIGBERG: Pull up
15 162-H:4-a.

16 MS. MANZELLI: Yes.

17 PRESIDING OFFICER HONIGBERG: Read the
18 first line.

19 MS. MANZELLI: The Chairperson may
20 establish subcommittees to consider and make
21 decisions on Applications, including the
22 issuance of certificates or to exercise any
23 other authority or perform any other duty of the
24 Committee under this chapter except that no

1 subcommittee may approve the budgetary
2 requirements of the committee or approve any
3 support staff positions or adopt initial or
4 final rulemaking proposals. Do you want me to
5 continue?

6 PRESIDING OFFICER HONINBERG: No. I think
7 that's sufficient because the third word you
8 read, the word "may," does it continue to be
9 your view that only a subcommittee can take
10 action on the Petition that you filed? Because
11 I've got to tell you, I disagree with it.

12 MS. MANZELLI: Well, I'm sensing that.

13 PRESIDING OFFICER HONINBERG: You've known
14 me for a long time, Ms. Manzelli.

15 MS. MANZELLI: I know. I know. I concede
16 to your position. May I make a couple other
17 points?

18 PRESIDING OFFICER HONINBERG: Why not?

19 MS. MANZELLI: Whether the SEC has
20 jurisdiction to consider this issue to me seems
21 very analogous to whether the SEC has
22 jurisdiction to consider the issue in what I
23 call Antrim 1, older of the Antrim cases,
24 regarding whether who was going to approve the

1 subdivision. That case called for a
2 subdivision, and there was a lot of controversy
3 regarding whether it was going to be part of the
4 SEC decision-making process or whether it was
5 going to be outside of the SEC decision-making
6 process. As I understand it, the issue was
7 briefed, the issue was argued, but a decision
8 was made on that case on alternate grounds and
9 the issue was not reached.

10 But that doesn't matter for this case
11 because it proves the point that the SEC has the
12 jurisdiction to consider and determine whether
13 its jurisdiction preempts or doesn't preempt
14 municipal processes.

15 The other thing I wanted to make sure is
16 clear that is that we are requesting our ten
17 days to file a written objection to this Motion
18 to Dismiss.

19 PRESIDING OFFICER HONIGBERG: And I assume
20 by the way you're arguing that that it's your
21 view that you have a right to that.

22 MS. MANZELLI: I'm not certain either that
23 there's a right to file a Motion to Dismiss or
24 that there's a right to file an Objection to a

1 Motion to Dismiss.

2 PRESIDING OFFICER HONIGBERG: I tend to
3 agree with both of those statements, but I think
4 it remains, I believe it remains the Committee's
5 right and authority to act today if it views it
6 appropriate.

7 I do want to ask about your Antrim Wind
8 argument just there. Haven't you just proved
9 too much? Didn't you just establish that the
10 way to raise this issue is in a docket where the
11 issues are relevant?

12 MS. MANZELLI: I don't think that the
13 subdivision issue is an issue that is relevant
14 to every single electric transmission and
15 distribution line docket. I thought that that
16 was a unique circumstance.

17 PRESIDING OFFICER HONIGBERG: Does anyone
18 have other questions for Counsel? It seems like
19 the answer is no for now, but it's not
20 inconceivable that as we discuss it someone may
21 want to turn to you and ask a question. So
22 don't go far.

23 Yes, parties' Counsel. Do you have a
24 question for Attorney Iacopino?

1 Mr. Roth, I know you don't have any
2 official status in this matter, but you're
3 certainly a party in the Northern Pass docket as
4 Counsel for the Public. Is there anything you
5 wanted to say in this proceeding?

6 MR. ROTH: You may find this unusual, but
7 no.

8 PRESIDING OFFICER HONIGBERG: I'm going to
9 invite members -- I knew all I had to do was say
10 something and Commissioner Bailey was ready.
11 Commissioner Bailey.

12 COMMISIONER BAILEY: In the statute that
13 you had Attorney Manzelli read, I heard
14 something about a rulemaking, and that that has
15 to be considered by the full Committee. Is this
16 a rulemaking? For our attorney.

17 PRESIDING OFFICER HONIGBERG: Attorney
18 Iacopino.

19 MR. IACOPINO: No, it's not a rulemaking.
20 It's a Request for Declaratory Ruling which is
21 considered separately in our rules and in the
22 statute.

23 COMMISIONER BAILEY: Okay. Thank you.

24 PRESIDING OFFICER HONIGBERG: I'll note for

1 the record to the extent that people aren't
2 aware of it, when this proceeding was initiated,
3 we went through the process of having Attorney
4 Iacopino retained to represent the SEC and
5 provide counsel to us.

6 All right. Does someone want to open a
7 discussion on this and make any comments or
8 suggestions or observations? Attorney
9 Weathersby.

10 MS. WEATHERSBY: If I could just ask a
11 question before we turn to the next part here.
12 For Attorney Glahn. You indicated that there is
13 no sort of live controversy here. This was
14 taken separately, and that it was this
15 hypothetical, but we have at least two dockets
16 that presently exist where this is an issue so
17 how do you reconcile the fact that this is a
18 real live issue. It's not just someone saying
19 oh, you know, maybe there'll be a wind farm in
20 my town some day and I want to get a ruling just
21 in case. This is, there's a real going on here.

22 MR. GLAHN: I think you misunderstood my
23 position a bit. The Petitioners in this new
24 docket have said they want two decisions. They

1 want a decision on this question as it pertains
2 to Northern Pass, and they want a decision
3 generally as it could apply to future
4 proceedings. You can't do that. You can't come
5 into a court or an administrative agency and say
6 we want a decision on a future issue that isn't
7 a real live controversy. I'm not saying there
8 isn't a live controversy. What I'm saying is
9 that live controversy doesn't exist in this
10 separate docket. It exists in the Northern Pass
11 docket. And if you have other dockets in which
12 that is going on, it exists in those dockets as
13 well, if they want to raise the issue there.
14 But they've got to raise it in a place, A, that
15 you have jurisdiction over, and, B, in a way
16 that implicates real rights of the parties in
17 that proceeding.

18 MS. WEATHERSBY: Then if it's dealt with in
19 each separate docket, don't we risk having
20 conflicting decisions based on different
21 committees, one ruling one way or one ruling the
22 other, assuming it doesn't go to the Supreme
23 Court for a decision? You know, this is going
24 to take a while. Meanwhile, these dockets are

1 continuing.

2 MR. GLAHN: But I think, with respect,
3 you've just answered your own question because
4 if you decide it as a general matter, what you
5 said is we'd have conflicting decisions. You
6 see you would have to make a decision in, let's
7 say you decide in this docket we have
8 jurisdiction in the separate docket, and we make
9 a decision here. Then it doesn't apply to the
10 other dockets if there's not, if it doesn't, if
11 it can't say well, we're making this ruling for
12 all purposes for all dockets. I could certainly
13 virtually guarantee you that that issue will get
14 appealed to the Supreme Court one way or the
15 other. Because the question they're asking is
16 really a pure question of law. It is does one
17 statute preempt the other. We have very strong
18 views on that, but that's not issue that's
19 directly before you today, and if people want my
20 view on that, I'm happy to give it, but that's
21 not responsive to your question. Does that
22 help?

23 MS. WEATHERSBY: It helps. I think that it
24 could very well happen that Northern Pass rules

1 on this one way or perhaps Seacoast rules on it
2 another, and because neither isn't necessarily
3 precedent setting for the next one, it does
4 create issues.

5 MR. GLAHN: In effect, it would be
6 precedent setting for the next one. Okay?
7 Because let's say that, let's say, I think this
8 is a purely hypothetical situation, but I'll
9 pose it. Let's say this issue gets decided in
10 the Northern Pass docket, and none of the
11 parties appeal that to the Supreme Court. Well,
12 the SEC has now made a decision that at least
13 from the SEC's point of view is that one statute
14 does or doesn't, is or isn't preempted by the
15 other. In any other docket you have because
16 it's a pure question of law, people would cite
17 that as authority and there would be no
18 particular basis for the Committee to reach a
19 different ruling in that docket on the pure
20 question of law. So it wouldn't be decided
21 differently in every docket because the issue
22 that they're raising is not one that depends
23 upon the specific facts of any particular
24 docket.

1 PRESIDING OFFICER HONIGBERG: Mr. Glahn, I
2 don't want to get too technical with you, but if
3 one subcommittee rules one way and there's no
4 binding decision from the Supreme Court, a
5 second Subcommittee is free to disagree with the
6 first. It's precedent, yes, it would be cited,
7 it would be argued saying don't depart from the
8 prior ruling, there's really no reason to do so,
9 but the second group could in fact, is free to
10 disagree and provide its reasons, and you have
11 conflicting decisions which are not ideal but
12 eventually it would get decided by the Supreme
13 Court or multiple subcommittees would do it.
14 That's a side. It's a side argument, it's a
15 side show. But to say that it is precedent does
16 not necessarily mean that it is binding. Only
17 if our friends on the other side of the river
18 were to rule would it be then binding on us.

19 MR. GLAHN: But yes, of course, I agree
20 with you as a matter of law, but it seems to me
21 that given the fact that the question is a pure
22 question of law that any person going before
23 another Subcommittee would cite that decision.

24 PRESIDING OFFICER HONIGBERG: I don't think

1 we disagree. Attorney Dexter?

2 MR. DEXTER: So then what in your view,
3 Attorney Glahn, what in your view then is the
4 role of a Declaratory Ruling before this
5 Committee? Because I hear what you're saying is
6 that it has to be a case in controversy. It has
7 to be a specific case. Then why have rules for
8 Declaratory Rulings?

9 MR. GLAHN: Because then the Declaratory
10 Ruling applies after you've taken jurisdiction
11 over a matter. So exactly the point that
12 someone in the Northern Pass docket, it's the
13 question Commissioner Honinberg was asking
14 earlier, anybody in the Northern Pass docket
15 could now ask you to rule on this because you're
16 already taken jurisdiction. People have put the
17 key in the door the right way. You've
18 established a proceeding in front of the
19 Committee. Now your Declaratory Ruling
20 proceedings, now your Declaratory Ruling rule
21 applies, and that was the decision that the New
22 Hampshire Supreme Court reached in the Campaign
23 for Ratepayers Rights case which is that you
24 can't start a proceeding by a rule or by RSA 541

1 if this Committee's jurisdiction already hasn't
2 properly invoked. So your rules are fine, and
3 anybody in Northern Pass could now file a
4 request for a Declaratory Ruling on this legal
5 issue in that docket.

6 MR. DEXTER: So is the sum total of
7 controversy here today which docket we decide
8 this in?

9 MR. GLAHN: I think so. I think so. One
10 qualifier, if I may. That is a proper way to
11 frame the question. However, it is our view
12 that you can't decide it in an independent
13 docket. So that it has to be decided within the
14 Northern Pass docket or it can't be decided at
15 all, and by "it," I mean a controversy that's
16 real and they've raised a real issue. The real
17 issue they've raised is do the towns have any
18 authority over the siting of the Northern Pass
19 line. That's another way to frame their
20 question, and that properly can be raised in the
21 Northern Pass proceeding.

22 PRESIDING OFFICER HONIGBERG: Mr. Glahn, I
23 want to follow up on something you said just a
24 moment ago, and I think you said it earlier as

1 well. That if this proceeding were not to go
2 forward that the parties to Northern Pass could
3 file for a Declaratory Ruling within the
4 Northern Pass Docket. That strikes me as not
5 right. It seems like there would be other
6 procedural vehicles to raise the issues in
7 Northern Pass and not a Declaratory Ruling
8 because a Declaratory Ruling is in some ways an
9 anticipatory type of filing, and that it carries
10 with it at least connotations and maybe
11 practical and procedural requirements that
12 really shouldn't apply within a docket where
13 there are parties and schedules and motions and
14 hearings that are taking place. Mr. Getz, you
15 want to address that?

16 MR. GETZ: Please, Mr. Chairman, and
17 Attorney Dexter as well on this issue, and I
18 think it's the fundamental difference between a
19 request for a Declaratory Ruling, whether you
20 call it a motion or a petition, and I think you
21 addressed this, and there's a PUC case, Giffin
22 Solar, that addresses this issue about is a
23 particular project, is a particular undertaking
24 subject to the agency's jurisdiction as opposed

1 to a request for an advisory opinion in general
2 which we address this issue in our motion, and I
3 think that's really where we are is we think you
4 need, that the proper request is in Northern
5 Pass make a ruling about preemption where the
6 Petitioners would like you to make a general
7 finding for all cases for all time that the SEC
8 does not preempt local control.

9 So I think that's the distinction here and
10 in terms of device, you've already got a docket.
11 I agree with you. I don't think it really is a
12 motion or Petition for Declaratory Ruling.
13 We've already raised it. And it's coming before
14 you. Whether they want to advance it or you
15 want to treat it in some other way, you can
16 choose your device.

17 MR. GLAHN: I understood your question a
18 little bit differently, Mr. Honinberg, so I want
19 to dispute my co-counsel here, but whether it's
20 called a motion or petition or please decide
21 this, I think in the Northern Pass docket
22 someone would say we want you to address this
23 question. Our view is you, Committee, you can't
24 make any rulings, you can't issue this

1 certificate and preempt the ability of the towns
2 to deal with crossings in the town. They could
3 ask the question that way.

4 PRESIDING OFFICER HONIGBERG: Director
5 Muzzey?

6 DIRECTOR MUZZEY: I'll hold on my question
7 for now. Thank you.

8 PRESIDING OFFICER HONIGBERG: It looks like
9 Ms. Pacik would like to speak.

10 MS. PACIK: Thank you. Danielle Pacik from
11 the City of Concord. I'm legal counsel. I do
12 want to just note that this is a real issue for
13 municipalities including Concord. The reason
14 we'd like to have it decided in a Declaratory
15 Ruling action versus the Northern Pass case is
16 that we will all get, hopefully, a decision
17 sooner, we'll get a final decision and we'll
18 know how to proceed.

19 We recognize that there are some
20 limitations especially with the licenses for
21 public right-of-way crossings in terms of what a
22 municipality can look at when viewing it, but we
23 do want an Application filed with the different
24 municipalities at some point, and the reason

1 being is that a permit is then reviewed, it's
2 then issued and in the permit there are certain
3 requirements that are set forth in 231:161. For
4 example, the permit will say that the Applicant
5 is required to pay taxes, and the taxes aren't
6 just for the property but actually for the
7 right-of-way crossing which is different, and we
8 are required to have that language. The
9 Applicant is also required to renew the request
10 ever year so that the cities can continue to
11 monitor where there are poles and licenses in
12 local highways. This is a facility that will
13 likely be in the area, if it is approved, for
14 between 20 and 100 years, long after the Site
15 Evaluation Committee is reviewing it, and we
16 need these permits at the municipality so we can
17 continue monitoring them and taxing them.

18 PRESIDING OFFICER HONIGBERG: Commissioner
19 Bailey?

20 COMMISSIONER BAILEY: And why wouldn't it be
21 appropriate to raise all those issues in the
22 Northern Pass docket? I mean, it's clearly, Mr.
23 Getz pointed in the Application on page 82,
24 crossing local highways, and they put it out

1 there that they were asking for this and that
2 they believe that municipalities were preempted.
3 So why wouldn't it be raised by you who disagree
4 with that contention in Northern Pass and why
5 shouldn't we deal with it there?

6 MS. PACIK: I suppose it could be raised in
7 the Northern Pass proceedings. We think it
8 makes sense to do a separate Declaratory Ruling
9 because of the importance. One of the issues
10 with raising it in the Northern Pass proceeding
11 is that it could take a while to get a decision
12 and what we could have end up having is a
13 situation where it doesn't ultimately get
14 decided until the very end. It's decided
15 against the municipalities and then we're faced
16 with a situation where the project goes forward,
17 we may not be able to get a stay of the project
18 even if it's appealed, and then there's a
19 question of what are you supposed to do. So it
20 makes sense to have a separate proceeding.

21 There was a suggestion by Attorney Glahn that if
22 you allow this in this proceeding, then what's
23 to stop every party with every issue from filing
24 a new declaratory judgment action, and I would

1 say there is a cost associated with it. I think
2 it was \$3000 to file this action. I do not
3 foresee every issue coming before the Committee.
4 Primarily, the big important issues, I think,
5 would be brought separately.

6 PRESIDING OFFICER HONIGBERG: Okay. Are
7 there other questions for counsel? Ms.
8 Manzelli, did you want to say something else?

9 MS. MANZELLI: Yes. Thank you. I just
10 wanted to offer in closing, our read of the
11 rules and the statute and our experience before
12 the various subcommittees leads me to the
13 conclusion that neither the rules nor the
14 statute contemplate or are just set up well for
15 the SEC to answer questions of this nature. I
16 don't want to characterize the process as a
17 machine, but I will. The machinery is set up to
18 evaluate the standards in H:16. Whether there's
19 an unreasonable adverse effect on aesthetics, on
20 wetlands, on air, et cetera. The process does
21 not lend well to evaluating these sorts of legal
22 questions.

23 And I would analogize again to that first
24 Antrim case where, with all due respect, all

1 parties involved fumbled a little bit with how
2 and when to ask this question about subdivision,
3 and if I recall correctly there might have even
4 been some fighting about even how to ask the
5 question, and, ultimately, it was decided that
6 there would be sort of a bifurcated trial phase
7 or adjudicatory hearing phase about the issue.

8 So I think that is a very important reason,
9 along with the fact that there are multiple
10 projects that implicate this legal issue, why
11 this question should be answered substantively
12 and should be answered in a freestanding
13 subcommittee.

14 Now, to Attorney Dexter's question, I think
15 what is before you today is whether this
16 Committee sitting here today will appoint a
17 three-person subcommittee as requested by the 19
18 petitioning municipalities and the Forest
19 Society and the Appalachian Mountain Club and
20 whether the Petitioners will be afforded the
21 10-day period to respond in writing to the
22 Motion to Dismiss. I really thank you for all
23 of your time today.

24 PRESIDING OFFICER HONIGBERG: All right.

1 Does anybody have further questions or want to
2 start a discussion on this? Don't make me call
3 on someone.

4 MR. DEXTER: I have one question.

5 PRESIDING OFFICER HONIGBERG: Attorney
6 Dexter.

7 MR. DEXTER: Was the request for the
8 three-person subcommittee contained in the
9 Petition or was that something that was just
10 raised today?

11 PRESIDING OFFICER HONINGBERG: Director
12 Muzzey.

13 DIRECTOR MUZZEY: I have a procedural
14 question. If the Committee does consider
15 whether or not the Petitioners have ten days to
16 answer, does that mean that we will need to
17 reconvene after we have received that
18 information to make our decision.

19 PRESIDING OFFICER HONINBERG: Yes.
20 Whatever body is going to decide, it would have
21 to meet to deliberate and make its decision,
22 whether that be the full committee or a
23 subcommittee.

24 DIRECTOR MUZZEY: Thank you.

1 PRESIDING OFFICER HONIGBERG: Commissioner
2 Bailey?

3 COMMISSIONER BAILEY: Attorney Iacopino, can
4 you give many some legal advice about whether we
5 have to wait ten days for responses to the
6 Motion to Dismiss?

7 MR. IACOPINO: I would recommend that if
8 your inclination was to rule one way or the
9 other on the Motion to Dismiss the Petition that
10 you should allow the time for objection.
11 However, the Committee can on its own motion
12 determine what to do with the Petition for
13 Declaratory Ruling that was filed. In other
14 words, any member of the Committee can make a
15 Motion to Dismiss it, if you believe that's
16 appropriate, or to assign it to a subcommittee
17 or to take any one of the other options that are
18 available to you on your own motion. And,
19 again, there is no, as the Chair pointed out,
20 there is no requirement that any particular
21 matter be assigned to a subcommittee. That is
22 always in the discretion of the Chair. The
23 statute says that he may appoint a Subcommittee.

24 PRESIDING OFFICER HONIGBERG: Attorney

1 Dexter.

2 MR. DEXTER: Is it anticipated a response
3 submitted in ten days to the Motion to Dismiss
4 would differ in any way from the Petition
5 itself? Is there any new information,
6 arguments, facts that you can think of that
7 might come in that answer?

8 MS. MANZELLI: Speaking not for the city of
9 Concord but only for the Forest Society, with
10 all due respect I don't know. The reason why we
11 need the ten-day period is I have not had
12 sufficient time to analyze the Motion to Dismiss
13 or what the response would be.

14 PRESIDING OFFICER HONIGBERG: Director
15 Muzzey?

16 DIRECTOR MUZZEY: Could we be reminded of
17 the date the motion came in?

18 MR. IACOPINO: January 9th.

19 .

20 MS. MANZELLI: My understanding is that the
21 objection would be due next Thursday.

22 DIRECTOR MUZZEY: I couldn't hear you in
23 all that.

24 MR. IACOPINO: January 9th.

1 PRESIDING OFFICER HONIGBERG: So ten days
2 from that is next Thursday. That is the 19th.

3 DIRECTOR MUZZEY: That is next Thursday.

4 PRESIDING OFFICER HONIGBERG: Director
5 Muzzey?

6 DIRECTOR MUZZEY: Hearing the complexity of
7 this issue and the many opinions and assertions
8 about it, my recommendation would be that we do
9 wait the ten days in order to get the additional
10 information.

11 PRESIDING OFFICER HONIGBERG: Should I take
12 that as a motion?

13 DIRECTOR MUZZEY: Yes. For purposes of
14 discussion.

15 PRESIDING OFFICER HONIGBERG: Does anyone
16 want to second that motion?

17 MR. DEXTER: I'll second it.

18 PRESIDING OFFICER HONIGBERG: Is there any
19 discussion? Mr. Dexter?

20 MR. DEXTER: I tend to agree, but I work in
21 the building, and I don't know the logistics of
22 dragging everybody down here in ten days and is
23 that a significant concern? I imagine it is.

24 PRESIDING OFFICER HONIGBERG: I have some

1 familiarity with the logistics, and I think if
2 that's the decision of the Committee, it will
3 make sense to appoint a subcommittee because the
4 logistics of getting three people together are
5 exponentially simpler than getting 7, 8 or 9
6 people together. Ms. Monroe, is that a fair
7 statement from your experience as the
8 Administrator of the SEC?

9 ADMINISTRATOR MONROE: Yes.

10 PRESIDING OFFICER HONIGBERG: The statute
11 regarding subcommittee size provides that any
12 party in interest in a matter where a
13 three-person subcommittee has been designated
14 has a right to insist on a 7-person
15 subcommittee. That could throw a monkey wrench
16 into the works if someone were to do that so I'm
17 not sure if that's a good thing. I assume, Ms.
18 Manzelli, since you asked for three, it wouldn't
19 be you, right?

20 MS. MANZELLI: Correct.

21 PRESIDING OFFICER HONIGBERG: Right. I'm
22 really looking at Mr. Getz and Mr. Glahn.

23 MR. GLAHN: We have no objection to 3
24 versus 7. I would state, obviously, we don't

1 think you need the Subcommittee, but on the
2 other hand we don't have an objection.

3 PRESIDING OFFICER HONIGBERG: We're not
4 there yet. I'm just laying out the issues.
5 Someone asked about the logistics. We haven't
6 even rated on --

7 MR. GLAHN: Can we pick our three?

8 PRESIDING OFFICER HONINBERG: No, you may
9 not. We haven't even voted on Director Muzzey's
10 motion yet.

11 Is there further discussion or questions or
12 comments people want to make? Attorney
13 Weathersby.

14 MS. WEATHERSBY: So extending the time for
15 reply to the Motion to Dismiss would certainly
16 be appropriate if the Committee is thinking it
17 may well dismiss, but if the Committee is
18 thinking that we may accept it, then it doesn't
19 really matter what they say. I mean it does.
20 I'm sorry, but --

21 MS. MANZELLI: I agree. I agree.

22 MS. WEATHERSBY: We welcome your comments.
23 So I'm wondering if there's sort of an informal
24 poll where we can get a sense of where people

1 are going or is that just putting us in
2 jeopardy.

3 PRESIDING OFFICER HONIGBERG: I think in
4 the context of Director Muzzey's motion, I think
5 it would be an odd thing to do, to do a straw
6 poll on how people feel about the concept of
7 dismissal because that would feel strange to me.

8 MS. WEATHERSBY: Trying to save us from
9 coming back if we didn't need to.

10 PRESIDING OFFICER HONIGBERG: I think
11 Attorney Weathersby speaks as the only standing
12 public member right now since that would mean
13 she would have to serve on everything that gets
14 named. Every three-person subcommittee right
15 now.

16 Any other comments or questions?
17 Considerations? Commissioner Bailey?

18 COMMISSIONER BAILEY: I really don't know
19 where I am at here so I'm thinking out loud
20 which is I think what we're supposed to do
21 maybe. Deliberating. So I was a little bit
22 persuaded by the municipal argument that if they
23 find out at the end of Northern Pass that
24 they're preempted and then they can't get the

1 project stayed and they were right, and they
2 should be allowed to get the permits, then
3 they've sort of lost time.

4 On the other hand, our rules say the
5 Petition for Declaratory Ruling shall set forth
6 the follow information, the exact ruling being
7 requested and the exact ruling was for us to
8 opine on RSA 231:160 which I don't believe we
9 have jurisdiction to do, and I think that the
10 request may seek advice as to how the Committee
11 would decide a future case which is Northern
12 Pass because the issue was raised in Northern
13 Pass. So I'm not, I'm not sure that we couldn't
14 deal with this without the Motion to Dismiss and
15 figure it out today.

16 PRESIDING OFFICER HONIGBERG: I think
17 there's little doubt that that's true. I think
18 everyone's conceded that. I think Director
19 Muzzey has made a motion for separate reasons.
20 Director Muzzey, want to speak to that?

21 DIRECTOR MUZZEY: I do want to speak to the
22 idea that a decision on this would determine how
23 the Committee would decide the Northern Pass
24 project. We don't have any information before

1 us as to what the future decisions of those
2 towns and cities will be on that permitting
3 process. We don't know whether they will
4 approve or disapprove. So it cannot have a
5 bearing on the SEC's decision of the Northern
6 Pass project without having that knowledge ahead
7 of time.

8 COMMISIONER BAILEY: I can come up with a
9 case where it could. If the Committee for
10 Northern Pass decided that RSA 162-H preempts
11 these municipal regulations or laws.

12 DIRECTOR MUZZEY: That's true. That is
13 very true.

14 COMMISIONER BAILEY: The other thing I'm
15 worried about is assigning this to a committee
16 of three people. I mean, this is a huge
17 question that is before Northern Pass and to
18 have three people decide a major issue in the
19 Northern Pass case doesn't seem right to me.

20 PRESIDING OFFICER HONIGBERG: Attorney
21 Iacopino, I have a question about your view of
22 the subcommittee authority and process. Would
23 it be possible to have a three-person
24 subcommittee consider the Motion to Dismiss, and

1 if the Motion to Dismiss is denied, then refer
2 the matter to a subcommittee of 7 or the
3 Northern Pass Subcommittee itself? And if you
4 don't want to answer that on the fly, would you
5 like to take a break to consider the question?

6 MR. IACOPINO: I can tell you right off the
7 bat. I don't think there's any explicit text in
8 either the statute or the rules that answers
9 that question. So I would like to take a break
10 if you want me to answer it and look at some of
11 the text that surrounds what I'm aware exists.

12 PRESIDING OFFICER HONIGBERG: I think it
13 would be wise for us to take a break. We
14 understand that there is a motion pending by
15 Director Muzzey, but we're going to break, and
16 we will not be discussing that motion or
17 anything else as a group. I can assure of that.
18 We just need to take a few minutes to give
19 Attorney Iacopino a chance to take a look at the
20 statute and rules. So with that, we'll --

21 Certainly, Commissioner Bailey, you may ask
22 another question.

23 COMMISSIONER BAILEY: While we're on the
24 break, can somebody and maybe somebody in the

1 room already knows the answer to this, but can
2 somebody find out if the Lempster case
3 established a precedent for this.

4 PRESIDING OFFICER HONINBERG: We'll just
5 leave that question out there and let people
6 think about that. If somebody can find an
7 answer, you can offer it up when we return.

8 MR. IACOPINO: I have the answer to that
9 right off the bat.

10 PRESIDING OFFICER HONINBERG: All right.
11 Attorney Iacopino feels like he can answer that
12 question.

13 MR. IACOPINO: There's nothing, in my
14 recollection, there's nothing in the Lempster
15 order that addressed the issue. The Town of
16 Goshen intervened because of the transmission
17 poles in the town were going to be raised by 20
18 feet. They settled with Iberdrola at the time,
19 and there was no reason at that point in time
20 for there to be an order of any, that I
21 remember, anything in the order or the decision
22 and order in the Lempster case addressing this
23 issue about RSA 231:160.

24 DIRECTOR MUZZEY: Do you have a memory of

1 whether or not this came up in any way for the
2 Groton Wind Farm? I know there were discussions
3 about the transmission of that power or the
4 distribution of it.

5 MR. IACOPINO: I think the Groton Wind only
6 involved state highways where the transmission
7 line went. I don't think it involved locally
8 maintained roads. Because they actually used
9 the separate right-of-way, they were originally
10 going to go down the dirt road that went up and
11 they then moved that into the woods which I
12 assume was not on a town right-of-way. I don't
13 know actually off the top of my head. But my
14 recollection of any dispute in that being only
15 once it got down to Route 25 which is the state
16 highway.

17 DIRECTOR MUZZEY: So the potential issue
18 was avoided by not using the town maintained
19 road.

20 MR. IACOPINO: I don't know if that was the
21 purpose of it or if there was some other reason
22 why the Applicant preferred not going down the
23 road. I do know there was a lot of opposition
24 by the folks who lived on the road to that

1 transmission line being on the road.

2 DIRECTOR MUZZEY: Thank you.

3 PRESIDING OFFICER HONIGBERG: Now, we're
4 going to break for 15 minutes and return at 2
5 o'clock.

6 (Recess taken)

7 PRESIDING OFFICER HONINBERG: I'm going to
8 turn the microphone over to Attorney Iacopino
9 who was asked a question before the break.

10 MR. IACOPINO: Mr. Chairman, in answer to
11 your question, it is my opinion that as
12 Chairperson of the Committee, you would have the
13 authority to assign to a three-person
14 subcommittee the decision as to how to rule on
15 the Motion to Dismiss because that is a matter
16 that's not otherwise referenced in the statute,
17 and at that point, once that ruling was
18 accomplished one way or another by that
19 Subcommittee, obviously depending in part on
20 what that ruling was, you could assign a
21 Subcommittee or the entire Committee to go
22 forward substantively on the Petition if it
23 survived that process.

24 PRESIDING OFFICER HONIGBERG: Thank you,

1 Attorney Iacopino. So the motion is from
2 Director Muzzey to not rule today on or not take
3 any action today on the Petition and to allow
4 the Petitioners to respond to the Motion to
5 Dismiss. Is there further discussion of
6 Director Muzzey's motion? Mr. Dexter?

7 MR. DEXTER: So just so I understand. If
8 the Committee were to decide on the Motion to
9 Dismiss today and not take the ten days and let
10 the Petitioner respond, would the next step then
11 today be to decide the Petition or would that
12 then have extra time and procedure for arguments
13 to be addressed such as preemption.

14 PRESIDING OFFICER HONINBERG: I'm not sure
15 I understand the first part of that question. I
16 think there was a, I think, you may have the
17 procedural posture a little bit mucked up, but
18 the back end of the question, if the Petition is
19 not dismissed today or some other day, it will
20 have to be decided by this body or a
21 subcommittee of this body, and there will be a
22 schedule set and presumably briefing, and if
23 parties believe factual development is required
24 there will be arguments about that, but, yes,

1 this isn't a one-step process.

2 With respect to the earlier part of your
3 question, I think Attorney Iacopino has
4 confirmed that this body can act to dismiss the
5 Petition today on its own motion, not in
6 response to the Applicant's Motion to Dismiss.
7 So that was the part of what you said that I
8 wasn't quite sure about. I think it could
9 conceivably rule on the Motion to Dismiss
10 essentially denying counsel an opportunity to
11 respond, and that's a third thing the Committee
12 could do today. Did I touch all of the
13 procedural bases of your question?

14 MR. DEXTER: Yes.

15 PRESIDING OFFICER HONIGBERG: Attorney
16 Glahn, yes.

17 MR. GLAHN: May I ask a question?

18 PRESIDING OFFICER HONINBERG: Why not. We
19 may not answer it but go for it.

20 MR. GLAHN: From what Mr. Iacopino said,
21 would the Subcommittee still have the ability,
22 let me say it a different way.

23 By the response, by allowing the response
24 to the Motion to Dismiss, have you made the

1 decision that either the Subcommittee or the
2 Committee could not dismiss on its own motion?
3 Or could not dismiss the Petition not on the
4 Motion to Dismiss but on its own motion? Just
5 as, for example, the Supreme Court might allow a
6 response to a Motion for Summary Affirmance but
7 might dismiss the matter without deciding the
8 motion.

9 PRESIDING OFFICER HONIGBERG: I think the
10 answer to your question based on what Attorney
11 Iacopino has said and my understanding of the
12 rules and the statute, the Committee can act on
13 its own motion.

14 MR. GLAHN: Okay. Thank you.

15 PRESIDING OFFICER HONIGBERG: Is there
16 further discussion of Director Muzzey's motion?
17 All right. I will say that I intend to vote
18 against it. I believe that on the motion of
19 ourselves that the appropriate way to deal with
20 this Petition is to dismiss it today because the
21 issues necessarily have been raised, will be
22 raised and will be adjudicated in the Northern
23 Pass docket, and having multiple proceedings
24 related to Northern Pass going at the same time

1 is a procedural problem, it's bad administrative
2 law, and it has the significant potential,
3 despite what Attorney Pacik said, to create
4 multiple versions of this with respect to, for
5 example, the width of the road up north or other
6 issues that people feel very strongly about and
7 will want to have declaratory rulings filed
8 about with multiple dockets and multiple
9 decisions being issued. That seems like a very
10 bad process to follow. I will be voting against
11 the motion.

12 Anyone else want to say anything?

13 Commissioner Bailey then Commissioner Freise.

14 COMMISSIONER BAILEY: Just to add that I
15 was thinking about the same thing so for what
16 that's worth.

17 PRESIDING OFFICER HONINBERG: Commissioner
18 Freise?

19 COMMISSIONER FREISE: I think this is
20 already in argument and why we would then set up
21 a parallel path, waiting longer to get to that
22 decision I don't see being valuable.

23 PRESIDING OFFICER HONIGBERG: Anyone else
24 want to say anything before we proceed? All

1 right. The motion from Director Muzzey has been
2 seconded by Attorney Dexter. Are you ready for
3 the question? All in favor please say aye? Any
4 opposed? No?

5 SPEAKERS: No.

6 PRESIDING OFFICER HONIGBERG: Were there
7 any ayes? So are all, is it unanimous no?

8 COMMISSIONER BAILEY: Yes.

9 PRESIDING OFFICER HONIGBERG: I'm sorry. I
10 was surprised. All right. Further discussion
11 on how we should proceed today? Somebody?
12 Anybody? Commissioner Sheehan?

13 COMMISSIONER SHEEHAN: I would make a
14 Motion to Dismiss. I do think this is
15 unnecessary and redundant and can be handled
16 within the Northern Pass Application.

17 PRESIDING OFFICER HONIGBERG: Is there one
18 of the rules within Site 203.02 that you would
19 refer to in support of your motion?

20 COMMISSIONER SHEEHAN: I think specifically
21 because this issue has been raised in the
22 existing Northern Pass docket.

23 PRESIDING OFFICER HONIGBERG: Would that be
24 Subsection 2? How the Committee would decide a

1 future case?

2 COMMISSIONER SHEEHAN: 2. Yes.

3 PRESIDING OFFICER HONIGBERG: Is there a
4 second for Committee Shaheen's motion?

5 DIRECTOR MUZZY: Second.

6 PRESIDING OFFICER HONIGBERG: Any
7 discussion of the motion? Director Muzzey.

8 DIRECTOR MUZZEY: I know this was discussed
9 earlier when Commissioner Bailey and I were
10 talking. In particular, I'm looking at Section
11 2, seeks advice as to how the Committee would
12 decide a future case, and I continue to believe
13 that whether or not the Site Evaluation
14 Committee proceeds with town permits in this
15 question does not necessarily decide how the
16 Committee will decide a future case. And so
17 while I agree with Commissioner Shaheen's
18 motion, I don't feel that it needs to be
19 necessarily based on part 2.

20 PRESIDING OFFICER HONIGBERG: Other
21 comments or discussion?

22 MS. WEATHERSBY: I would agree with
23 Director Muzzey concerning that, and as I think
24 about all this I think there's a couple of

1 things that come clear in that the issue clearly
2 needs to get addressed. No question. And it's
3 a question of when is it proper to address the
4 question, and I think that under 203.01,
5 Declaratory Rulings, we can take it up now and I
6 don't think it involves a hypothetical situation
7 or advice as to how the Committee will decide a
8 future case, and I think it makes sense to
9 address it sooner than later so that everyone
10 knows how to proceed both in Northern Pass, also
11 in Seacoast and any other future dockets that
12 may be opened for future projects because I do
13 think it cuts across all dockets involving
14 transmission lines. And I'm concerned about the
15 issues I discussed with Attorney Glahn
16 concerning judicial efficiency and consistency.

17 So I think for me I would prefer not to
18 dismiss it but to accept it and perhaps
19 consolidate it with the Northern Pass docket?
20 So that it would get addressed early separately
21 but as part of that proceeding early on in the
22 process, February, March, I think would
23 accomplish what needs to be accomplished.

24 PRESIDING OFFICER HONIGBERG: I guess I

1 would respond to that by saying that is
2 unnecessarily complicated. All of the parties
3 in Northern Pass know how to file motions and
4 requests, and they can file appropriate
5 pleadings within that docket to have issues
6 addressed, and whether there's a ruling in March
7 or April or May or whether there's no ruling
8 until the Final Order is issued, it's going to
9 get appealed at the same time. It's going to
10 get resolved by the Supreme Court at the same
11 time. The odds of the Supreme Court, I mean,
12 I'd never say never, but it is highly unlikely
13 that the Supreme Court would take an
14 interlocutory ruling from the Northern Pass
15 Subcommittee in the spring when the hearing on
16 the merits is going to start. I mean, it's
17 possible, but it doesn't seem likely so an
18 early, quote, unquote, early resolution of that
19 issue I don't think is necessary or even
20 feasible within that docket.

21 There are all kinds of issues that are
22 present in Northern Pass that the parties want
23 to get addressed. There's concerns about the
24 width of the road. There are concerns, I can't

1 even think of all the things that people have
2 alluded to in that docket that I expect to get
3 litigated in the Northern Pass docket, despite
4 Attorney Pacik's optimism. I fully expect that
5 if we were to take this up and even if we then
6 referred to it the Northern Pass Subcommittee
7 and say deal with this right away, there would
8 be a follow-on of 2 or 3 or 4 or 5 other similar
9 Petitions, somehow with a satellite schedule and
10 separate procedures necessary when we've got a
11 docket to rule on all of the issues that are
12 relevant to Northern Pass. It doesn't, it just
13 doesn't seem like, like I said earlier, it seems
14 like bad administrative law.

15 MS. WEATHERSBY: I agree it could become
16 cumbersome, but here's my concern. The Seacoast
17 Reliability Project will be, hearings on that
18 come before the hearings on Northern Pass, and
19 this issue will come up perhaps there, but it
20 sounds like it will, and so I'm concerned that
21 then that sort of takes on a life of its own and
22 gets ruled on there and then it's part of
23 Northern Pass, and what's really final, what's
24 not. I think it would be more efficient, and

1 perhaps we don't do it as part of Northern Pass.
2 Perhaps we do it separately. And just like
3 here's our ruling and everyone can move forward.
4 Otherwise, we're going to have this hodgepodge
5 of decisions and things will happen in one
6 docket that will affect --

7 PRESIDING OFFICER HONIGBERG: Doesn't that
8 risk adhere in the system? Didn't we have the
9 same concerns, and you and I both sat on the
10 Northern Pass Applications and then you sat on
11 Seacoast Reliability with respect to the
12 questions of waivers? I mean, each of those
13 rule waivers had to be litigated within that
14 docket and certainly the potential is and was
15 there for there to be inconsistencies. Maybe
16 those inconsistencies would make sense whether a
17 rule would be more or less applicable in certain
18 circumstances. But there's little doubt that
19 the first one that dealt with the waiver in one
20 instance had to do, I think it was Antrim Wind,
21 there was a decision in Antrim Wind about how to
22 require the filing of certain documents by the
23 Applicant. That was informative for the
24 Northern Pass Subcommittee and then was then

1 informative for the Seacoast Reliability Project
2 as I recall. Am I getting that history right,
3 Attorney Weathersby? Because you said all on
4 all of them.

5 MS. WEATHERSBY: No. You're correct.
6 Certainly the way an issue is decided in one
7 docket is discussed in future dockets and does
8 provide guidance.

9 PRESIDING OFFICER HONIGBERG: So it's
10 there. It's there for everything a body like
11 the SEC does when it has multiple projects to
12 consider. There's always the possibility of
13 differing interpretations by different groups.
14 Different arguments are made. Facts may be
15 different. There may be perfectly valid reasons
16 for differing results but the same issues may
17 arise in multiple Applications. I don't see
18 that setting up satellite litigation over every
19 issue that potentially might cross over and
20 affect multiple Applications makes sense to have
21 a separate proceeding for. That's actually what
22 rules are for, and if you want to pass a rule,
23 you can do that, but once you make decisions,
24 those decisions are precedent. If they get

1 confirmed by the Supreme Court or whatever the
2 Supreme Court says, that becomes binding until
3 the statute changes.

4 MS. WEATHERSBY: How do you address the
5 timing issue as far as this won't get addressed
6 until pretty far down into the, many months to
7 come in Northern Pass.

8 PRESIDING OFFICER HONINBERG: I think
9 that's what happens in litigation all the time
10 over land use, what rights people have, whether
11 they can proceed with development in the face of
12 litigation. I think the Northern Pass people if
13 they were to get a certificate that included, I
14 think in your hypothetical, it would include a
15 ruling that the towns are preempted from acting.
16 Whatever appeal they took, I think Northern Pass
17 would be at risk if it were to initiate
18 construction without getting a Final Order of
19 the Supreme Court. They may be willing to do
20 that. There may be good and valid reasons to do
21 that, but they would be proceeding at their own
22 risk, and the towns' rights would be protected
23 because they will be raised these issues before
24 the Site Evaluation Committee, litigated them,

1 no doubt filed cogent motions for rehearing and
2 be queued up to proceed in the Supreme Court.

3 MS. WEATHERSBY: And then there's the other
4 possibility that the SEC determines that the
5 permits, the municipal permits would be required
6 in which case perhaps not all of them could be
7 obtained, then there would have to be route
8 changes and has series, if it's not preempted
9 and I'm not suggesting one way or another right
10 now, it opens up this whole other Pandora's box
11 of what happens to the Application. I think
12 it's something that's much better dealt with
13 sooner than later.

14 PRESIDING OFFICER HONIGBERG: I think the
15 company proceeds at its own risk. In
16 circumstances like that if it is confident in
17 its position, and it proceeds, that's a decision
18 it can make. It may be wrong and if it is wrong
19 it will pay a significant price, but that's
20 their risk and their decision to make, I think.

21 Other comments, questions, discussion on
22 Commissioner Shaheen's motion, I believe it is?
23 Seeing none. Are you ready for the question?
24 All in favor say aye? Are there any opposed?

1 MS. WEATHERSBY: Opposed.

2 PRESIDING OFFICER HONIGBERG: The motion
3 carries 7 to 1. Off the record.

4 (Discussion off the record)

5 PRESIDING OFFICER HONIGBERG: So 7 to 1.
6 Is there anything else we need to do today with
7 respect to this docket or any other?

8 ADMINISTRATOR MONROE: No.

9 PRESIDING OFFICER HONIGBERG: Director
10 Muzzey moves we adjourn and Commissioner Bailey
11 seconds. All in favor say aye? We are
12 adjourned.

13 (Hearing ended at 2:20 p.m.)

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C E R T I F I C A T E

I, Cynthia Foster, Registered Professional Reporter and Licensed Court Reporter, duly authorized to practice Shorthand Court Reporting in the State of New Hampshire, hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes of the hearing for use in the matter indicated on the title sheet, as to which a transcript was duly ordered;

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this transcript was produced, 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.

Dated at West Lebanon, New Hampshire, this 16th day of January, 2017.

Cynthia Foster, LCR