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STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

May 31, 2018 - 1:10 p.m.  
Public Utilities Commission  
21 South Fruit Street  
Concord, New Hampshire

IN RE: SITE EVALUATION COMMITTEE:  
DOCKET NO. 2018-01 Petition of  
the Antrim Wind Opponents for  
Declaratory Ruling  
(Hearing on the Merits)

PRESENT: SITE EVALUATION COMMITTEE:  
Chrmn. Martin P. Honigberg Public Utilities Comm.  
(Presiding as Chairman of SEC)  
Cmsr. Robert R. Scott Dept. Environ Services  
Patricia Weathersby Public Member

ALSO PRESENT:  
Pamela Monroe - SEC Administrator

COUNSEL TO THE COMMITTEE: Michael Iacopino, Esq.  
(Brennan Lenehan)

COURT REPORTER: Susan J. Robidas, N.H. LCR No. 44

1     **APPEARANCES:**     Reptg. Antrim Wind, LLC:  
2                             Barry Needleman, Esq. (McLane, Graf)  
3                             Rebecca Walkley, Esq. (McLane, Graf)

4     Reptg. Antrim Wind Opponents:  
5                             Eric A. Maher, Esquire

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MOTION MADE BY MR. SCOTT:	41
Motion to Waive filing fee for declaratory ruling be denied.	
SECONDED BY MS. WEATHERSBY	41
VOTE TAKEN	41

## 1 P R O C E E D I N G S

2 CHAIRMAN HONIGBERG: Good

3 afternoon, everyone. We are here in Site  
4 Evaluation Committee Docket 2018-01, which is  
5 a Petition for Declaratory Ruling by various  
6 individuals and organizations interested in  
7 the Antrim Wind Project that was recently  
8 certificated by the SEC. I, as the Chair of  
9 the SEC, appointed a three-person  
10 subcommittee: Commissioner Scott from the  
11 Department of Environmental Services is to my  
12 left; Patricia Weathersby, who's a public  
13 member of the SEC, is to my right; also I  
14 identified the SEC's counsel, Mike Iacopino,  
15 who's over there in the witness box; and to  
16 his right is Pam Monroe, the SEC's single,  
17 full-time employee and the Administrator.

18 This petition was filed by an  
19 attorney who is here. Would you please enter  
20 an appearance.

21 MR. MAHER: Yes. Good afternoon.  
22 Eric Maher, on behalf of the Petitioners.  
23 That was Eric Maher, in case you didn't hear.

24 CHAIRMAN HONIGBERG: Yeah, that was

1 well-timed. And I know that there's folks  
2 here from Antrim Wind who have filed  
3 something.

4 Mr. Needleman.

5 MR. NEEDLEMAN: Mr. Chair, Barry  
6 Needleman, on behalf of Antrim Wind, from the  
7 McLane Law Firm, together with Rebecca  
8 Walkley to my right, and then various members  
9 of the Antrim Wind team.

10 CHAIRMAN HONIGBERG: All right.  
11 Mr. Maher, there's a lot of other folks here.  
12 They all -- you're representing all of them  
13 here today; is that correct?

14 MR. MAHER: I believe so. There's  
15 some faces I do not recognize.

16 CHAIRMAN HONIGBERG: There may be  
17 others here. But as far as you know, your  
18 clients are here, or a subset of them are  
19 here.

20 MR. MAHER: A subset of them. That  
21 is correct.

22 CHAIRMAN HONIGBERG: We've not  
23 received any other filings from anyone else  
24 seeking to participate, so I'm assuming that

1 everyone else is here for some other reason,  
2 either as a member of the press or is wanting  
3 to follow along as a member of the public.

4 All right. We have a number of  
5 requests within the document you filed, Mr.  
6 Maher. The first I think we need to take up  
7 is the Motion to Waive. And I think there's  
8 two different issues. The one with respect  
9 to prefiled testimony, it's not even clear to  
10 me that a Petition for Declaratory Ruling  
11 requires prefiled testimony. It seems like  
12 that rule is directed at applications or  
13 other types of requirements. So it's not  
14 clear that a waiver is necessary.

15 MR. MAHER: That was my  
16 understanding as well, Mr. Chairperson. But  
17 in an abundance of caution, I wanted to keep  
18 my "powder dry," so to speak, in the event  
19 that we wished to submit testimony related to  
20 this petition.

21 CHAIRMAN HONIGBERG: All right.  
22 Off the record.

23 (Discussion off the record)

24 CHAIRMAN HONIGBERG: We haven't

1           been deliberating in this, so we haven't had  
2           a discussion about it. But that was my  
3           reaction to that issue. You agree with that.

4                     MR. MAHER: Correct. Yes.

5                     CHAIRMAN HONIGBERG: All right. Do  
6           we want to discuss these as we go through  
7           them?

8                     COMMISSIONER SCOTT: Sure.

9                     MS. WEATHERSBY: Sure.

10                    CHAIRMAN HONIGBERG: Commissioner  
11           Scott.

12                    COMMISSIONER SCOTT: I agree. And  
13           that was my reading, that if you were an  
14           Applicant, you would have to bring in a  
15           new -- something forward to us, you'd have to  
16           have prefiled testimony, but not in this type  
17           of forum.

18                    CHAIRMAN HONIGBERG: And there may  
19           be other types of filings that require  
20           prefiled testimony. I just don't think this  
21           is one of them.

22                    Ms. Weathersby.

23                    MS. WEATHERSBY: I would agree.

24           Rule 202.22 indicates the Applicant's

1           prefiled testimony and exhibits are to be  
2           filed. And Site 102.08 defines an Applicant  
3           as "any person seeking to construct and  
4           operate an energy facility within the state."  
5           So I don't think that Mr. Maher's clients  
6           fall under that category, and I don't think  
7           they need to file prefiled testimony.

8                         CHAIRMAN HONIGBERG: All right.

9           The second issue is the request to waive the  
10          filing fee for the Petition for Declaratory  
11          Ruling. I understand, Mr. Maher, that you  
12          disagree with the proposition that there  
13          should have to be a declaratory ruling. But  
14          assuming that it is, I have a hard time  
15          seeing any authority of this body to waive a  
16          statutory filing fee. If the filing fee were  
17          set forth in the rules, the rules had some  
18          provision like that, maybe. And we'd have to  
19          go through the waiver standard to see if it  
20          makes sense to do so. I don't see any  
21          authority to file -- or to waive a filing  
22          fee, the statutory filing fee. Thoughts?

23                         MR. MAHER: I think our position is  
24          set out in our objection, and it is -- I



1 believe it's part in this board's -- in this  
2 Commission's discretion to be able, even in  
3 the absence of express authority under the  
4 statutes, to waive a filing fee for  
5 submission of a petition pursuant to this  
6 Commission's rules, particularly given the  
7 public interest that we have asserted here  
8 and the number of applicants -- or  
9 Petitioners whose interests are going to be  
10 directly impacted by this project. We  
11 believe that necessitates a waiver for --

12 CHAIRMAN HONIGBERG: Boy, I think  
13 that would be a really tough sell. Because a  
14 lot of people are interested and it's really  
15 important, you shouldn't have to pay the  
16 filing fee? I don't think that's how that  
17 works. That's not a legal standard. I get  
18 that you think it should be within our  
19 discretion.

20 Commissioner Scott, looks like you  
21 wanted to say something.

22 COMMISSIONER SCOTT: Yeah. So I'm  
23 looking at 162-H:8-a. Can you elaborate on  
24 your statement? So you agree the statute

1 explicitly doesn't give us this authority,  
2 but you're suggesting we can do it anyways.  
3 Help me a little bit more. I know you  
4 cite Brown in your filing, right, the Brown  
5 case?

6 MR. MAHER: Yeah. And I believe  
7 that there is -- there has to be -- there is  
8 a constitutional right to be able to present  
9 your grievances. Ad I think that in this  
10 circumstance, under these circumstances, a  
11 \$3,000 filing fee is an excessive hurdle for  
12 private parties, non-applicants, to submit  
13 and file to raise issues associated with the  
14 procedures implemented in a pre-existing  
15 docket. I believe that, you know, my clients  
16 do have a constitutional right to seek  
17 redress. At this point in time, the  
18 available means of redress is through this  
19 Commission, and for that reason we believe  
20 that there is a constitutional -- that the  
21 Commission here is authorized under the  
22 Constitution to waive that filing fee.  
23 Obviously, the Constitution trumps any  
24 statute.

1                   CHAIRMAN HONIGBERG: The Brown case  
2                   had an "inability to pay" phrase after the  
3                   part that you quoted. It then went on to say  
4                   "in a circumstance where the parties are  
5                   unable to pay." Isn't that a part of the  
6                   Brown analysis?

7                   MR. MAHER: I think it's a matter  
8                   of public interest, and I think -- I do not  
9                   believe that "inability to pay" is the sole  
10                  determinant as to whether or not a filing fee  
11                  should be waived or creates a constitutional  
12                  bar. Yeah, I think that public interest is  
13                  but one -- is one component and I think an  
14                  inability to pay is one component to be  
15                  considered by this Commission.

16                  CHAIRMAN HONIGBERG: Well, there's  
17                  been no demonstration of inability to pay.  
18                  There's nothing you've filed to indicate that  
19                  your clients would be unable to pay the fee.  
20                  Am I right about that?

21                  MR. MAHER: That's correct.

22                  CHAIRMAN HONIGBERG: So you are  
23                  relying solely on a public interest argument  
24                  informed by a view that the Constitution

1 ensures or guarantees a right to seek  
2 redress.

3 MR. MAHER: That's correct.

4 CHAIRMAN HONIGBERG: I'm not buying  
5 it.

6 Ms. Weathersby.

7 MS. WEATHERSBY: I think the  
8 statute's clear, and it says, "The Applicant  
9 shall pay the fee." I understand the reasons  
10 why the Petitioners don't want to pay the  
11 fee. But I could see this occurring in any  
12 application where there's opposition, every  
13 time there's a disagreement with a decision  
14 made by the Administrator, that they file one  
15 of these and don't pay the fee and -- so  
16 there is a public interest in pretty much any  
17 of the Committee's decisions.

18 I also think that the Applicants,  
19 if they don't want to pay the fee, can go  
20 another route, and that's to go to superior  
21 court where the fee is much less, but --  
22 correct in that? I have that correct?

23 CHAIRMAN HONIGBERG: I have the  
24 same sense.

1           Mr. Maher, is there anything that's  
2 preventing you from going to superior court  
3 to complain about the alleged activity that  
4 violates the certificate?

5           MR. MAHER: Yes. It's the Doctrine  
6 of Exhaustion of Administrative Remedies,  
7 that this avenue has been offered by the  
8 Commission as part of our -- of the  
9 Commission's decision rejecting our prior  
10 Motion for Reconsideration. I do not believe  
11 it to be beyond the scope of possibility that  
12 if I were to go to superior court instead of  
13 coming back and taking this Commission's  
14 suggestion, that I would be subject to a  
15 Motion to Dismiss for failure to exhaust  
16 administrative remedies before I got to the  
17 court. And just as an aside, I prevailed on  
18 that argument numerous times in declaratory  
19 judgment actions, that a party has failed to  
20 exhaust their administrative remedies. I did  
21 it just recently in front of Judge Colburn  
22 over at Hillsborough County South in a matter  
23 involving an appeal of an AOT permit directly  
24 to the superior court, where I said you have

1 an available remedy before the water council,  
2 and Judge Colburn agreed.

3 So, ultimately, it's that this  
4 procedure was what was suggested and offered  
5 by the Commission, and we took it. And  
6 again, to sort of go back to our Motion to  
7 Waive, the reason why we filed this petition  
8 was because we are trying to get a  
9 determination that the original docket, the  
10 Antrim 2 docket, remains open. If the docket  
11 were not considered closed, we would never  
12 have been subjected to a \$3,000 filing fee.

13 CHAIRMAN HONIGBERG: Let's talk  
14 about that for a minute. A docket remains  
15 open in superior court for every case they've  
16 ever had in one sense, that if something is  
17 filed related to that docket, that's where  
18 the clerks will put it. But if someone wants  
19 to bring an action challenging it, they have  
20 to file a new case or some collateral attack  
21 on it. Once the appeals are done, which is  
22 the case here, the docket is closed for  
23 purposes of further litigation but may remain  
24 open in a technical sense to receive whatever

1 filings come in. And that's what happens in  
2 municipalities, that's what happens at the  
3 Public Utilities Commission, and that has  
4 been the case of what happens at the SEC, at  
5 least in its prior incarnation. And here, it  
6 presumably will be the case going forward,  
7 that compliance paperwork will be filed and  
8 will have the application docket on it. But  
9 that's not -- that doesn't reopen every issue  
10 for litigation. That's unwieldy. That's not  
11 any administrative process that can go  
12 forward. So I could agree with you that we  
13 have to have -- but we then have to have a  
14 discussion about what it means for a docket  
15 to be, quote, unquote, open.

16 Now, the notion of an open and closed  
17 docket in this context, it's closed because a  
18 certificate was issued, an appeal was taken,  
19 and in this instance, between the time that  
20 my order issued and today, the Supreme Court  
21 affirmed. So it doesn't get any more final  
22 than that. I mean, there may be motions for  
23 hearing that get filed. I think there may  
24 have been something in the press on that.

1 MR. MAHER: We did file a Motion  
2 for Reconsideration --

3 CHAIRMAN HONIGBERG: So it will  
4 continue on. It still has a life in that  
5 regard. But if the Supreme Court denies your  
6 motion -- or accepts your motion and then  
7 reaffirms itself, the matter's over. The  
8 litigation is over about the merits of the  
9 Application. Would you agree with that?

10 MR. MAHER: Yes, but we're not  
11 seeking to re-litigate matters of the merits  
12 of the Application.

13 CHAIRMAN HONIGBERG: Really?

14 MR. MAHER: No. I think what we're  
15 seeking here is to have an open adjudicative  
16 process with regard to matters of compliance  
17 with the terms of the certificate. We're not  
18 seeking to alter the terms of the  
19 certificate. We're not seeking to reopen.  
20 You know, we haven't filed a motion to reopen  
21 the record with regard to any determinations  
22 as to aesthetics or noise or shadow flicker  
23 or any of the other components. This is a  
24 matter of compliance. And in the context of,



1 to use your example of planning boards, when  
2 it comes to matters of compliance, that that  
3 is -- there's no new docket that's open to  
4 consider matters of compliance --

5 CHAIRMAN HONIGBERG: What's the  
6 statutory filing fee in municipalities?

7 MR. MAHER: For determinations of  
8 compliance with a -- it would depend upon the  
9 municipality. But I have not, in my  
10 experience as a municipal attorney which I  
11 practice, a substantial amount of my practice  
12 is devoted to, I can't recall of a filing fee  
13 associated, maybe with the exception paying  
14 for abutters or to have abutters noticed if a  
15 substantial period of time has elapsed  
16 between when an application was granted and  
17 when the issue of compliance arose. But  
18 again, there's a separate statutory authority  
19 with regard to site plan approvals where a  
20 planning board can consider revocation of  
21 recorded plats under Chapter 674. But  
22 regardless --

23 CHAIRMAN HONIGBERG: Do those go  
24 back to the original granting of the site

1 plan then? Does it carry the 1955 docket  
2 then when a new matter is challenged to undo  
3 it? I would say no, it's going to be a new  
4 matter.

5 So we're trying to run an  
6 administrative body that doesn't exist except  
7 for the individuals who sit on it and one  
8 administrator. It's administratively  
9 attached to the PUC, but it's not like a  
10 stand-alone agency that has the ability to do  
11 the kinds of things that other agencies of  
12 state government can do. But we're part of a  
13 state government. We function within state  
14 government. So we have to come as close as  
15 we can, given our limitations, to the way the  
16 rest of state government works. And if you  
17 bring an action, if you bring a complaint at  
18 the banking department or the insurance  
19 department, and staff looks at it and agrees  
20 with you, they'll -- they'll take action:  
21 Notice of violation. If that's not cured,  
22 they'll seek a suspended license or a  
23 suspended permit or whatever is appropriate.  
24 And if the action continues, there may be an

1 appeal to the commissioner or whatever entity  
2 we're talking about. At the Department of  
3 Environmental Services where Commissioner  
4 Scott works, and where Ms. Monroe used to be,  
5 there are any number of boards and entities  
6 within the Department of Environmental  
7 Services that might hear those interim  
8 matters having granted permits or whatever.

9 And you said, I think, that you've  
10 done an alteration of terrain matter  
11 recently. If, however, staff disagrees after  
12 investigation and determines there's no  
13 action going to be taken, you don't have an  
14 appeal right within the agency usually. You  
15 have to do something else. It's not your --  
16 you don't have a private right of action to  
17 bring it to the attention of the  
18 commissioner. This body's rules allow you to  
19 bring a Petition for Declaratory Ruling, and  
20 that's the only vehicle we have. That's as  
21 close as we can come to matching what happens  
22 elsewhere. We can't keep dockets open to  
23 litigate everything after a certificate is  
24 issued. It just won't work that way.

1 MR. MAHER: And again, we're not  
2 suggesting that we re-litigate every issue  
3 that might arise.

4 CHAIRMAN HONIGBERG: You're asking  
5 to be able to litigate all aspects of  
6 compliance.

7 MR. MAHER: In instances where  
8 there are concerns associated with compliance  
9 and ones that are demonstrated, that are  
10 clearly demonstrated in the record.

11 CHAIRMAN HONIGBERG: So you're only  
12 going to litigate the good ones then.

13 MR. MAHER: I wouldn't bring one in  
14 bad faith.

15 CHAIRMAN HONIGBERG: But that's the  
16 goal here. The goal here -- and don't kid  
17 yourself that we don't know what's going on.  
18 Your clients don't want this project to be  
19 built. They will look for opportunities to  
20 stop it. So that's just the reality. No  
21 one's going to bring anything in bad faith  
22 because you won't let them do that.

23 MR. MAHER: That's correct. But  
24 that's not to say my client have ever

1 suggested bringing anything in bad faith.

2 CHAIRMAN HONIGBERG: Nor was I  
3 suggesting that they did. But that's what  
4 their ultimate goal is. And so they want to  
5 be able to litigate anything that might give  
6 them an opportunity to do that. It's  
7 perfectly understandable. That's what  
8 opposing abutters want to have happen when  
9 they're unhappy with things in every  
10 municipality.

11 MR. MAHER: Might I make one  
12 retort, is that in the context of  
13 municipalities, all the deliberations, all  
14 determinations that are made by the planning  
15 board are done in public session. That's not  
16 done by the town's planning director.

17 CHAIRMAN HONIGBERG: Those  
18 investigations by the building code  
19 administrator, those aren't public events.

20 MR. MAHER: No, but I'm talking  
21 about in terms of matters of revocation and  
22 recorded plats which is pursuant to a  
23 statute, that's done in accordance with a  
24 hearing. Those deliberations are done in

1 public session. Those are done in the open  
2 pursuant to RSA Chapter 91-a.

3 CHAIRMAN HONIGBERG: As is  
4 everything done at the SEC in public. We are  
5 not allowed to deliberate in private, and we  
6 don't. So everything is done publicly. If  
7 there's a suspension -- but I think the  
8 Administrator could probably issue a notice  
9 of violation, but that's probably as far as  
10 she could go. Beyond that, everything would  
11 have to go through the SEC.

12 MR. MAHER: And I think that's the  
13 crux of our ultimate, as to why we brought  
14 this Petition for Declaratory Ruling, was  
15 that we believe that there was a  
16 determination that was made outside of  
17 statutory authority, that was not made by the  
18 Commission itself, that was not subject to  
19 public deliberation. That's sort of the crux  
20 of our concern here is when matters of  
21 compliance are being made outside of the  
22 public body when the issues of concern are  
23 raised.

24 CHAIRMAN HONIGBERG: Commissioner

1 Scott.

2 COMMISSIONER SCOTT: If I could, I  
3 want to go back to your statements on the  
4 constitutionality of a fee under 162-H:a. So  
5 I don't want to paraphrase you wrong, but I  
6 just want to make sure I understand your  
7 position.

8 Are you saying that the fee in the  
9 statute is unconstitutional, period, or it's  
10 just unconstitutional if there's an inability  
11 to pay? Can you help me with that?

12 MR. MAHER: I believe under these  
13 circumstances, as if applied, then the  
14 imposition of the statutory fee would be  
15 unconstitutional because it would present an  
16 untenable bar to presenting grievances and  
17 matters of significant public concern to the  
18 Commission, as applied.

19 COMMISSIONER SCOTT: So help me  
20 with the "bar" part. So is it because of an  
21 inability to pay? Tease that out for me,  
22 please.

23 MR. MAHER: Sure. I'd have to  
24 discuss with my clients as to whether or not

1           they do, in fact, have an inability to pay.  
2           That was not the reason or the impetus for  
3           our Motion to Waive.

4                        COMMISSIONER SCOTT:  And if I  
5           could, as the Chair mentioned, that's not in  
6           the record.

7                        MR. MAHER:  That is correct.  That  
8           inability to pay has not been presented.  I  
9           will agree with you on that one.

10                      The issue is that, considering that  
11           my clients are being, in their view, forced  
12           to file a separate action in a matter in  
13           which they believe should have been  
14           considered in a pre-existing docket, in which  
15           had they submitted that they would not have  
16           been subjected to a filing fee, that the  
17           public interest and public good necessitates  
18           the waiver of that filing fee in this  
19           instance, and that the failure to do so would  
20           present, as I said, an untenable bar, one  
21           that would be an affront to the Constitution.

22                      COMMISSIONER SCOTT:  And again,  
23           since ability to pay is not before us, one  
24           more time, so how is that -- or the word you



1 just used, "untenable bar," and if I  
2 paraphrased that wrong, I apologize -- how is  
3 that an insurmountable hurdle that bars --

4 MR. MAHER: I think it's just an  
5 affront to the public interest to require 104  
6 concerned citizens, all of whom are deeply  
7 concerned about the potential impact this  
8 project will have, all of whom are deeply  
9 concerned as to how issues of compliance are  
10 going to be resolved by this Commission, to  
11 require them, on each and every occasion, or  
12 even in just this one instance, to submit a  
13 \$3,000 filing fee, particularly when they  
14 have a good-faith basis for arguing that the  
15 underlying reason for why they have to file a  
16 separate action is incorrect, I think it's an  
17 affront to justice.

18 COMMISSIONER SCOTT: And we've kind  
19 of alluded to it. Are there not filing fees  
20 for the courts also?

21 MR. MAHER: All of which are  
22 subject to waiver.

23 COMMISSIONER SCOTT: Okay. I see.

24 CHAIRMAN HONIGBERG: Not for the

1 public interest.

2 MR. MAHER: Not for -- I'd have to  
3 look into that further. I can see --

4 CHAIRMAN HONIGBERG: If a hundred  
5 well-intentioned people go in there and say  
6 this is really important, the court's going  
7 to say, "Where's your affidavit of  
8 indigence?"

9 MR. MAHER: But in the same  
10 respect, the filing fee to get in front of  
11 the superior court is only \$275.

12 CHAIRMAN HONIGBERG: Ms.  
13 Weathersby.

14 MS. WEATHERSBY: I think the  
15 standard that seems to be being applied by  
16 Attorney Maher, the affront to justice, is  
17 the wrong standard. It's really the  
18 Constitutional aspects of the access to  
19 justice. And the \$3,000 filing fee is steep,  
20 but it was a fee that was set by the  
21 legislature. And I haven't heard anything  
22 that says that paying that fee denies them  
23 access to justice, which is the standard, not  
24 an affront to justice.

1                   CHAIRMAN HONIGBERG: How does it  
2 work with the alteration of terrain permits?  
3 If you've got a complaint about an alteration  
4 of terrain permit and you make it to the  
5 Department of Environmental Services and they  
6 disagree, what do you do next?

7                   MR. MAHER: You go to the water  
8 council.

9                   CHAIRMAN HONIGBERG: And if you  
10 don't like what the water council did, what  
11 do you do then?

12                  MR. MAHER: I believe it's  
13 immediately appealable to the Supreme Court.

14                  And I will say at the water council  
15 you do get a full hearing in accordance with  
16 RSA Chapter 541-A.

17                  CHAIRMAN HONIGBERG: That's in the  
18 context of an abutter who's complaining about  
19 a permit that's been granted?

20                  MR. MAHER: Any aggrieved party.  
21 But in the last case that I did deal with, it  
22 was an abutter that was challenging the  
23 issuance of an AOT.

24                  CHAIRMAN HONIGBERG: Isn't that the

1 analogue to the granting of the certificate  
2 here, which is precisely the process that was  
3 just followed? The abutters objected to the  
4 granting of a certificate. It was granted.  
5 It was directly appealable to the Supreme  
6 Court.

7 MR. MAHER: I would have to look at  
8 the specific chapter related to the  
9 alteration of terrain permits, as well as RSA  
10 Chapter 21-O, as to the process that is  
11 available in the context of determining  
12 compliance with conditions in an AOT permit.

13 But again, as is set forth in our  
14 petition, we are -- our analogue is municipal  
15 planning boards, as we believe that is  
16 analogous, almost like a sister body to what  
17 the SEC is. And in the context of  
18 determining compliance with conditions, Sklar  
19 says -- the Sklar decision out of the New  
20 Hampshire Supreme Court says that  
21 determination of compliance with a condition  
22 shall be subject to a public hearing.

23 CHAIRMAN HONIGBERG: Attorney  
24 Needleman, do you want to be heard on this?

1                   MR. NEEDLEMAN: I would make, just  
2                   on this particular issue, two points, Mr.  
3                   Chair. First of all, I don't believe an  
4                   administrative body has the authority to  
5                   decide the constitutionality of a statutory  
6                   provision. I'm not positive about that, so  
7                   I'm not going to say definitively. But I'm  
8                   pretty sure that's the case.

9                   Second of all, I think that  
10                  everyone seems to be struggling with the  
11                  framework here. And I think you're  
12                  struggling because what's happening is the  
13                  Petitioners are trying to put a square peg in  
14                  a round hole. When you look at RSA 541-A,  
15                  and you look at the definition of a  
16                  declaratory ruling, it says "an agency ruling  
17                  as to the specific applicability of any  
18                  statutory provision or any rule or order of  
19                  the agency." Declaratory rulings are for a  
20                  limited purpose under the statute. And the  
21                  basis, in part, of our Motion to Dismiss goes  
22                  to this issue, which is the predicate for the  
23                  filing here. And a lot of the things that  
24                  are being requested here simply don't fit

1           within the context of the declaratory ruling.  
2           So when the Petitioners say, "We're being  
3           denied access to justice because we have to  
4           pay the \$3,000 fee," the answer is because  
5           you're taking the wrong path, in part.

6                         CHAIRMAN HONIGBERG: Well, then,  
7           that implicates what the Administrator told  
8           Mr. Maher and what we issued in an order in  
9           response to something that Mr. Maher filed,  
10          where we invited a motion for -- or a  
11          Petition for Declaratory Ruling. What should  
12          we have said in response to those?

13                        MR. NEEDLEMAN: Well, to the extent  
14          you invited a Petition for Declaratory  
15          Ruling, my understanding was you were  
16          inviting it within the meaning of RSA 541-A,  
17          which is as I just articulated. And I would  
18          submit that if you look at the prayer for  
19          relief that's contained in the petitioners'  
20          request, they're asking for a whole range of  
21          things that don't even come close to fitting  
22          within the confines of that definition under  
23          541-A. And that, again, is more indication  
24          of why this is simply not appropriately

1 before you.

2 CHAIRMAN HONIGBERG: Then let me  
3 put my question a different way then. What,  
4 in your view, should Mr. Maher and his  
5 clients do to raise their concerns about  
6 compliance with the certificate?

7 MR. NEEDLEMAN: I think they do  
8 what any other citizen would do in the state  
9 if they had concerns about compliance with  
10 any type of permit that's been issued by the  
11 state. They would raise the concerns with  
12 the agency, and the agency would hear the  
13 concerns and address them as exactly what  
14 happened here. And if they weren't happy,  
15 they would pursue the paths that were  
16 allotted to them under law. In this case,  
17 that path is not a declaratory ruling, it's  
18 what you suggested earlier. If they really  
19 feel as if they've been aggrieved and the  
20 decision was not correct, I think the correct  
21 path is superior court. I think we said that  
22 in our papers.

23 CHAIRMAN HONIGBERG: Commissioner  
24 Scott.

1                   COMMISSIONER SCOTT: Mr. Chair, I'm  
2 not --

3                   (Court Reporter interrupts.)

4                   COMMISSIONER SCOTT: I'm curious,  
5 as a way to move forward, what your thoughts  
6 were. I at least digested the discussion on  
7 the waiver of the fee. And I'll say for the  
8 record I'm not compelled with the argument.  
9 I guess one question I have is if we agree  
10 with what I'm saying, then if there's no fee,  
11 there's no declaratory ruling filing;  
12 correct? I think as a legal matter, I guess  
13 I'm wondering how to crack this, you know,  
14 how to eat this elephant. And I think it's  
15 one bite at a time. There's a lot of things  
16 that the petitions are requesting.

17                  MS. WEATHERSBY: I guess I would  
18 agree with Commissioner Scott. I think that  
19 the statute requires the fee to be paid,  
20 unless the Constitution trumps. And I  
21 haven't heard a compelling argument  
22 concerning the lack of access to justice or  
23 another constitutional reason why the fees  
24 should be waived. There's no evidence on the



1 record that they -- of the inability to pay.  
2 So I think, since they did bring the  
3 declaratory judgment action, that they do  
4 need to pay the fee for us to proceed.

5 CHAIRMAN HONIGBERG: I'm troubled  
6 by the following prospect, and that is the  
7 declaratory ruling is in fact the wrong  
8 vehicle, and by steering them in that  
9 direction we've done them a disservice. If  
10 in fact we should have said, no, we don't  
11 have the ability to review this, or if you  
12 have a problem with the Administrator's  
13 opinion, you have to go to superior court,  
14 maybe we should have said that. I am not  
15 persuaded that we can or would even be able  
16 to keep dockets open for anyone who's  
17 interested to file things when they believe  
18 that something isn't right. That's an  
19 unworkable administrative process. So I'm  
20 not 100 percent sure what our options are.

21 I guess I'd like to confer with our  
22 counsel for a few minutes before we proceed.  
23 So we're going to take a break and meet with  
24 our lawyer. While we're away -- let's to off

1 the record.

2 (Recess was taken at 1:44 p.m.  
3 and the hearing resumed at 2:02.)

4 CHAIRMAN HONIGBERG: Thank you for  
5 your patience while we got a couple of things  
6 clarified with our lawyer.

7 I think where I am is that I don't  
8 see the ability to waive the filing fee. I  
9 don't think we have it. I think Mr.  
10 Needleman is right. I don't believe we have  
11 the authority, the power to declare a  
12 statute, or even one of our own rules,  
13 unconstitutional. And I'm not persuaded by  
14 Mr. Maher's arguments on that. If you agree  
15 with that, we'll then move on to what do we  
16 do now.

17 So what are people thinking about  
18 the filing fee question? Commissioner Scott.

19 COMMISSIONER SCOTT: I admitted  
20 this before we consulted with our attorney  
21 here, but I concur with that assessment.  
22 Whether the \$3,000 is an affront or not I  
23 think is a discussion for the legislature. I  
24 don't see where that's our venue. So,

1           anyway, so I think the filing fee is  
2           statutorily required.

3                   CHAIRMAN HONIGBERG:   Ms.  
4           Weathersby.

5                   MS. WEATHERSBY:   I would agree.

6                   MR. MAHER:   Might I make a  
7           suggestion?

8                   CHAIRMAN HONIGBERG:   Sure.

9                   MR. MAHER:   If the Commission is  
10          inclined to deny the Motion to Waive, which  
11          as I have ears can see they're inclined to  
12          do, is keep the matter open for 10 days.  I  
13          will consult with my clients as to whether or  
14          not they are financially capable of  
15          submitting the filing fee and submit it  
16          within that 10-day period, failing which the  
17          petition will be dismissed.

18                   CHAIRMAN HONIGBERG:   I was thinking  
19          two weeks, but it's the same idea.

20                   MR. MAHER:   Okay.  I'll take two  
21          weeks.

22                   CHAIRMAN HONIGBERG:   I mean,  
23          seriously, that was going to be my next  
24          suggestion.  Now, there may be things in here

1           that are appropriate for declaratory ruling.

2                       The other processes that we talked  
3           about as being possibilities, we don't see  
4           them right now within our rules -- or at  
5           least I don't see them within the rules --  
6           but we have the ability to write new rules.  
7           And we can always ask the legislature to  
8           change the fee statute. I think those who  
9           spent time in the legislature know how happy  
10          the legislature is to receive requests to put  
11          fees in place. But it's possible they may be  
12          more receptive to a suggestion that there's a  
13          fee out there that's higher than maybe makes  
14          sense, and some specific fee should be put in  
15          place for something lower.

16                      So I just floated two weeks. Mr.  
17          Maher seemed extremely happy with that  
18          suggestion.

19                      Ms. Weathersby, Commissioner Scott,  
20          what are your thoughts on that?

21                      COMMISSIONER SCOTT: I'm fine with  
22          two weeks. I guess I would ask the attorney.

23                      So I know this is on the fly for  
24          you, but I can't imagine you haven't thought

1 of the possibility. So would you be filing  
2 anything other than what you've already  
3 filed? I mean, would this be your motion,  
4 plus fee? Or have you thought that far?

5 MR. MAHER: I think, you know, if  
6 we are operating within this docket at this  
7 point in time, it's leave the pleadings as  
8 they are. And I would just submit a fee to,  
9 in light of the denial of the Motion to Waive  
10 at that period of time and just have that go  
11 toward what we've filed already. So, no  
12 additional pleadings, I don't envision, at  
13 this point in time.

14 COMMISSIONER SCOTT: Okay.

15 CHAIRMAN HONIGBERG: Mr. Needleman.

16 MR. NEEDLEMAN: Mr. Chair, thank  
17 you. I wonder if I could suggest an  
18 alternate path. I'm only thinking about the  
19 fact that what's been suggested is  
20 understandable, but at the same time it's now  
21 creating a situation where we're going to  
22 have additional delay and uncertainty  
23 associated with the project. I'm assuming  
24 that it's certainly possible that counsel and

1 his clients may have consulted about the  
2 possibility of this sort of outcome, and I'm  
3 wondering, instead, whether we could take a  
4 break and they could have that consultation  
5 now and make some sort of representation so  
6 we might be able to move forward and not lose  
7 more time in this docket.

8 CHAIRMAN HONIGBERG: Mr. Maher.

9 MR. MAHER: I have 104 separate  
10 clients in this matter. Each one of those  
11 Petitioners has agreed to be my client. I  
12 would like to -- I don't even have a majority  
13 of them in the room today, and that was in  
14 light of the order of notice that did state  
15 that there wasn't going to be any argument or  
16 testimony offered unless asked for by the  
17 Commission. I would like the opportunity to  
18 consult with them prior to committing them  
19 one way or the other. And I know I'm not  
20 able to do so right now.

21 CHAIRMAN HONIGBERG: Mr.  
22 Needleman -- Commissioner Scott.

23 COMMISSIONER SCOTT: I can let him  
24 finish. But I was just going to suggest that

1 time, which understandably is of concern for  
2 the certificate holder, that Attorney Maher  
3 originally suggested 10 days, that maybe 10  
4 days is more appropriate.

5 CHAIRMAN HONIGBERG: I'm hearing  
6 that. I'm even thinking a week. But Mr.  
7 Needleman, you wanted to add something?

8 MR. NEEDLEMAN: Thank you for that.  
9 I was just going to add that if the Committee  
10 is inclined to go with that plan, could we at  
11 least look ahead and set the next date when  
12 you would gather, if you were going to  
13 gather, as expeditiously as possible?

14 CHAIRMAN HONIGBERG: I would say  
15 probably. Since we're dealing with only  
16 three instead of seven, it certainly reduces  
17 the level of complication. So we will --  
18 before we leave today, before we adjourn  
19 today, we'll take a look at calendars and see  
20 if we can identify a date when we can all get  
21 back together.

22 Are we back to 10 days, which is  
23 what you were originally offering up, Mr.  
24 Maher?

1 MR. MAHER: I'll go back to 10  
2 days, yes.

3 CHAIRMAN HONIGBERG: Thank you.

4 With that, for now, I guess, Mr.  
5 Needleman, we will not rule on the Motion to  
6 Dismiss. I know there are issues you raised  
7 within it that are separate from the filing  
8 fee. We'll take that -- assuming that Mr.  
9 Maher gets the money, we'll take up the  
10 Motion to Dismiss.

11 Mr. Iacopino, Ms. Monroe, other  
12 than looking at calendars, is there anything  
13 we need to do?

14 MR. IACOPINO: I think you've all  
15 expressed your opinions, but maybe you should  
16 take a formal vote on the Motion to Waive.

17 CHAIRMAN HONIGBERG: Commissioner  
18 Scott.

19 COMMISSIONER SCOTT: I move that  
20 the Motion to Waive the filing fee for the  
21 declaratory ruling be denied.

22 MS. WEATHERSBY: Second.

23 CHAIRMAN HONIGBERG: Any further  
24 discussion?



1 [No verbal response]

2 CHAIRMAN HONIGBERG: Seeing none,  
3 all in favor say "aye."

4 [All members indicating "aye".]

5 CHAIRMAN HONIGBERG: Any opposed?

6 [No verbal response]

7 CHAIRMAN HONIGBERG: The "ayes"  
8 have it.

9 Good enough, Mr. Iacopino?

10 MR. IACOPINO: Good enough.

11 CHAIRMAN HONIGBERG: All right.

12 We're going to break for a few minutes and  
13 get a look at calendars. To the extent it's  
14 unclear, we're talking a calendar day for Mr.  
15 Maher to get back to us on the filing fee.  
16 So we're going to break for a few minutes and  
17 take a look at calendars, I guess off the  
18 record.

19 (Discussion off the record.)

20 CHAIRMAN HONIGBERG: All right.

21 Everybody had a chance to review calendars  
22 and discuss availability. We're going to set  
23 aside Monday morning, June 18th, starting at  
24 9 a.m., here at Public Utilities Commission.

1                   Anything else we need to do before  
2 we leave?

3                   [No verbal response]

4                   CHAIRMAN HONIGBERG: Thank you all.  
5 We will adjourn.

6                   MR. MAHER: Thank you.

7                   (Whereupon the hearing was adjourned at  
8 2:15 p.m.)

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I, Susan J. Robidas, a Licensed  
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Susan J. Robidas, LCR/RPR  
Licensed Shorthand Court Reporter  
Registered Professional Reporter  
N.H. LCR No. 44 (RSA 310-A:173)

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