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STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

June 18, 2018 - 9:18 a.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.  
Iryna Dore, Esq.  
(Brennan Lenehan)

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

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**APPEARANCES:** Reptg. Antrim Wind Opponents:  
Eric A. Maher, Esquire  
Lisa Linowes  
Richard Block

Reptg. Antrim Wind, LLC:  
Barry Needleman, Esq. (McLane, Graf)  
Rebecca Walkley, Esq. (McLane, Graf)  
Henry Weitzner, Walden Green Energy

Reptg. Town of Antrim:  
Justin Richardson, Esq.  
(Upton & Hatfield)

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

2 CHAIRMAN HONIGBERG: All right.  
3 We're here in Docket 2018-01, which is a  
4 Petition for Declaratory Ruling regarding  
5 Antrim Wind Project. Let's take appearances  
6 from the lawyers who are here and  
7 representatives.

8 MR. MAHER: Good morning. Eric  
9 Maher, on behalf of the Antrim Wind Opponents.  
10 Next to me is the Honorable Nancy Gertner.  
11 Also with me at the table is Lisa Linowes and  
12 Richard Block.

13 CHAIRMAN HONIGBERG: Welcome, Judge  
14 Gertner. Are you going to be speaking today or  
15 just observing?

16 HON. JUDGE GERTNER: I will be  
17 speaking if he needs help, which the odds are  
18 he doesn't need help. But I may be speaking.  
19 One can never control me.

20 CHAIRMAN HONIGBERG: Mr. Needleman.

21 MR. NEEDLEMAN: Barry Needleman from  
22 McLane Middleton, here on behalf of the  
23 Applicants, and with me is Rebecca Walkley from  
24 my office.

1                   CHAIRMAN HONIGBERG: Does anyone else  
2 need to enter an appearance?

3                   [No verbal response]

4                   CHAIRMAN HONIGBERG: All right. Mr.  
5 Maher, I don't think we're going to do the  
6 Motion to Dismiss first. I think we're going  
7 to find out what your case is. So how do you  
8 want to proceed?

9                   MR. MAHER: Well, I believe that the  
10 relief sought in the petition is relatively  
11 straightforward here. We are essentially  
12 seeking a declaratory ruling as the process  
13 that is going to be employed when making  
14 determinations of compliance with regard to the  
15 Antrim Wind Project in Antrim. It is my  
16 clients' contention that in order to satisfy  
17 the statute, both RSA 162-H and RSA Chapter  
18 541-A, that when an issue of compliance is  
19 raised in good faith by the opponents, or any  
20 person, for that matter, the matter should be  
21 docketed and scheduled for an adjudicative  
22 hearing where that matter of compliance can be  
23 determined by the Commission. And we believe  
24 that the statutory authority for that is set

1           forth in, if you'd bear with me a second...

2                   CHAIRMAN HONIGBERG: While you're  
3           looking for that, am I correct, then, you don't  
4           intend to introduce any evidence other than  
5           what's in the petition documents? I mean, my  
6           perception is that this is a paper case.

7                   MR. MAHER: Agreed. I think it's an  
8           issue of law procedure rather than issue of  
9           facts. The only exception being what's been  
10          submitted with our petition are the matters  
11          which precipitated this declaratory ruling,  
12          which are the issues of Antrim Wind's current  
13          compliance with the findings and condition in  
14          its certificate.

15                   CHAIRMAN HONIGBERG: And you were  
16          looking for something. I interrupted you.

17                   MR. MAHER: Oh, that statute is  
18          162-H:4, III.

19                   CHAIRMAN HONIGBERG: All right. It  
20          doesn't seem like there's anything for you all  
21          to do then.

22                   Mr. Needleman, you look like you  
23          were reaching for your microphone.

24                   MR. NEEDLEMAN: Could I respond to

1 the one point Mr. Maher made?

2 CHAIRMAN HONIGBERG: You may.

3 MR. NEEDLEMAN: So, without getting  
4 into any of the arguments I have, or most of  
5 the arguments I have regarding the Motion to  
6 Dismiss, and focusing only on that one point, I  
7 think Mr. Maher is actually missing a critical  
8 part of the statute, and if you focus on that,  
9 I think it's determinative of this issue. It's  
10 RSA 162-H:12, I. And 162-H:12, I was amended  
11 in 2014, and if you look at the pocket parts  
12 where it talks about the amendment in 2014, the  
13 legislature inserted into the first sentence,  
14 "or the Administrator as designee." And when  
15 you read it, it talks about enforcement of  
16 certificates. It says, "Whenever the Committee  
17 or the Administrator as designee determines  
18 that any term or condition of a certificate,"  
19 et cetera. So the legislature made it  
20 unequivocally clear that when creating a  
21 certificate, the Subcommittee can designate  
22 enforcement regarding terms or conditions to  
23 the Administrator as their designee. So that  
24 provision alone I think flies in the face of

1 all the arguments that the Petitioners are  
2 making.

3 CHAIRMAN HONIGBERG: Does this rise  
4 and fall on whether the certificate does in  
5 fact make such a delegation?

6 MR. NEEDLEMAN: Well, it does, and  
7 that gets into my other arguments because, as  
8 we made the point in our papers, we don't  
9 believe there is any delegation. We think it's  
10 plain on its face that it wasn't delegated.  
11 But to the extent you want to set that argument  
12 aside and consider whether there may have been  
13 a delegation, the answer is it's unequivocally  
14 clear that the Committee has the authority to  
15 do that. So, either way, I think the  
16 Petitioners don't have a case here.

17 CHAIRMAN HONIGBERG: Mr. Maher.

18 MR. MAHER: It appears that Counsel  
19 for Antrim Wind is attempting to modify the  
20 certificate by allowing for a delegation of  
21 authority where there's been no such delegation  
22 of authority in this instance.

23 CHAIRMAN HONIGBERG: I think he  
24 agrees with you there's been no delegation. He



1 just said that.

2 MR. MAHER: And I think without that  
3 delegation, without that delegation authority,  
4 even assuming that it was lawful to do so, the  
5 Administrator still doesn't have the authority  
6 to make such compliance determination. That  
7 authority has never been delegated. And to do  
8 so, the Committee would have to reconvene and  
9 modify their certificate.

10 CHAIRMAN HONIGBERG: What's wrong  
11 with looking at this, I think the way the  
12 Applicant does, which is to say that the  
13 Administrator accepted a filing. That's all  
14 she did. And you've complained about whether  
15 it -- whether they're in compliance. We can  
16 talk about whether they're in compliance. But  
17 this process doesn't expect, or the statute  
18 doesn't set up a situation where there's a  
19 continual review by anyone other than the  
20 Committee and the Administrator of what's  
21 happening with the Project. If someone  
22 believes there's a problem, they bring it to  
23 the Administrator. The Administrator can  
24 investigate as appropriate and take action if

1           appropriate, but that action is to bring it to  
2           the Committee. If the Administrator doesn't  
3           think there's a problem, but people still do,  
4           they bring a declaratory ruling action or they  
5           sue. Why isn't that what the legislature set  
6           up here? That seems pretty straightforward,  
7           and that's what happens in other agencies.

8                       MR. MAHER: Well, I don't believe  
9           that is in fact what happens at other agencies.  
10          I mean, in preparation for this hearing, you  
11          know, I've done my own research and found that  
12          there's actually decisions from the Public  
13          Utilities Commission in this regard, where a  
14          complaint was brought, the Commission Staff  
15          found that the base, the underlying basis of  
16          the complaint was unsubstantiated, but the  
17          Commission still determined that the  
18          complainant still had an additional avenue of  
19          recourse, which is further review of the  
20          Commission, which was subject to a full  
21          adjudicative hearing.

22                      CHAIRMAN HONIGBERG: And Commission  
23          has rules for such hearings.

24                      MR. MAHER: But I do believe that in

1 the context of the Site Evaluation Committee --

2 CHAIRMAN HONIGBERG: Yeah, I think  
3 that was not a good analogy for you because the  
4 PUC specifically had that kind of authority in  
5 its statute and its rules to resolve complaints  
6 pursuant to those rules. I don't remember the  
7 site, off the top of my head, but there were  
8 just new rules -- or an amendment to that  
9 statute this session to recognize that  
10 authority and its continued vitality. So I'm  
11 not sure that's your best example.

12 MR. MAHER: Well, the other piece of  
13 this is that RSA 162-H:12 has to be reconciled  
14 with the authorization and delegation of  
15 authority in RSA 162-H:4, and that is that the  
16 obligation for the Committee, not anybody  
17 else -- it's non-delegable, it's a  
18 non-delegable duty -- for the Committee to  
19 ensure compliance with the conditions of a  
20 certificate. And I believe that if there is a  
21 -- if the Commission or the Committee's  
22 Administrator makes a decision that, you know,  
23 there's no issue here, that there has to be a  
24 further level of review to the Committee in

1 order for the Committee to be able to execute  
2 its obligations under statute to ensure  
3 compliance with the condition. The matter  
4 cannot die, you know, with the -- at the  
5 Administrator's level. It has to require  
6 additional review by the Committee itself.

7 CHAIRMAN HONIGBERG: I'm going to  
8 ask, Commissioner Scott, because you have  
9 experience as both a division director at DES  
10 and as a Commissioner, how do things work in  
11 the Air Resources Division for things like  
12 this? Because there's air permits and  
13 enforcement authorities at Staff. What happens  
14 there?

15 COMMISSIONER SCOTT: So, generically,  
16 if you're aggrieved by a decision at one of the  
17 divisions, you go to the Council and you can  
18 make the case there. So you have an  
19 adjudicative body there if you don't like --  
20 for enforcement action, we have a hearings  
21 officer. And ultimately, then you go to court.

22 CHAIRMAN HONIGBERG: But if someone  
23 gets a permit and a member of the public says  
24 they're not operating in compliance with their

1 permit, what happens then?

2 COMMISSIONER SCOTT: Then we'll take  
3 enforcement action. You're saying if they --

4 CHAIRMAN HONIGBERG: What if Staff  
5 disagrees that there's a problem? Staff looks  
6 at it and says it's okay to us.

7 COMMISSIONER SCOTT: Then they need  
8 to -- they can appeal that to the Council, if  
9 they have to. Basically, that's really the  
10 only recourse. There's no -- you can sue to  
11 compel the agency if you're aggrieved by the  
12 agency not taking action and you feel there's a  
13 legal case. You can sue in that respect.

14 CHAIRMAN HONIGBERG: Ms. Weathersby.

15 MS. WEATHERSBY: Thank you. I think  
16 we all want to be sure that there's a mechanism  
17 for the public who have a concern about a  
18 project to have a place to go. And I see that  
19 initially it's going to go to the  
20 Administrator, who investigates the complaint.  
21 If she determines there's merit to it, then she  
22 starts the enforcement of action under our  
23 rules. What the rules aren't clear on is if  
24 she disagrees, what to do next. And after a

1 good-faith investigation into the complaint, if  
2 she determines it's without merit, it's pretty  
3 much closed at the Committee level. But we  
4 want to be sure there's a place we can go to  
5 appeal the Administrator's decision so that the  
6 Committee can have the final determination. I  
7 think personally that the proper place would be  
8 to bring a new declaratory judgment action  
9 before this Committee, but I don't like that  
10 avenue because of the \$3,000 every single time.  
11 And, you know, if it was \$500 or something,  
12 something that wasn't such a bar, I think we'd  
13 all be like, okay, that's the process.

14 So I guess I feel like the sticking  
15 point is the fee that we've asked to be  
16 addressed. And if you set the fee aside, I  
17 think that the process works pretty well,  
18 where we have inability to waive the fee.  
19 But it seems as though we can't keep this  
20 docket open forever. You know, 40 years from  
21 now it's being decommissioned, we don't open  
22 a 2015 docket to address is it excavated at  
23 3-1/2 feet or 4 feet down. I think it would  
24 be a new action at that point. And I think

1           that's probably a better procedure, as I've  
2           been thinking about it. But I do hate that  
3           they have to pay \$3,000 every single time.

4                       CHAIRMAN HONIGBERG: This is a repeat  
5           of the discussion we had last time we were  
6           together. And, yeah, I think we're bound by  
7           the statute that we've been given. We don't  
8           have the ability to change that statute or  
9           waive a provision of the statute. We're stuck  
10          with what we have. And they could have sued.  
11          It would have been a lot cheaper. I think Mr.  
12          Maher thinks it might have gotten kicked back  
13          in various ways that courts kick things out.  
14          But that's what he said last time, and that was  
15          his concern.

16                       So, coming here made sense. What  
17          you've said may well make sense. But we're  
18          living in this reality and have to deal with  
19          it. I'm prepared to address or deal with the  
20          merits of the claim. It may well be that Mr.  
21          Needleman is correct that this thing should  
22          be dismissed for a variety of reasons, but I  
23          think we should talk about the merits of it.  
24          They're here. They made the argument that

1           it's substantively not in compliance.  
2           They've made the argument that the  
3           Administrator can't make a decision on  
4           anything. I think they may be right, but I  
5           think on these facts it doesn't matter  
6           because, having looked at the record, not  
7           having been involved in the case, I think the  
8           expectation was that the Applicant was going  
9           to notify the Administrator. The  
10          Administrator was going to accept that  
11          filing. That's pretty much what was  
12          expected. I mean, you guys were both on that  
13          Subcommittee.

14                       Off the record.

15                       (Discussion off the record)

16                       CHAIRMAN HONIGBERG: Commissioner  
17                       Scott.

18                       COMMISSIONER SCOTT: So I concur.  
19           I'd like to maybe look at the merits. It  
20           sounds like -- well, I think I understand the  
21           moving party is suggesting that the  
22           Administrator didn't have authority to make any  
23           substantive ruling. I think the Applicant's  
24           attorney, I think rightly so, is saying that



1           delegation never did occur. She was  
2           recognizing that the filing was made, which is  
3           one of the conditions, that the Applicant must  
4           make a filing. If that were to be our  
5           interpretation as the SEC, I assume you still  
6           want, Mr. Maher, us to rule on the merits as  
7           does that filing -- is it a compliant filing or  
8           not; correct?

9                       MR. MAHER: Well, yes, and that's  
10           really been the impetus of this entire action  
11           is to get the Commission -- to get the  
12           Committee, excuse me, to review Antrim Wind's  
13           compliance here. And I might quibble with  
14           whether or not there was in fact a  
15           determination made by the Administrator as to  
16           compliance. And I agree that the certificate  
17           only allows her to be the receiver of documents  
18           and not one to determine compliance, and I  
19           believe that was done here. But ultimately  
20           what we want is a means by which for the  
21           Committee to be able to rule on matters of  
22           compliance out in the open; otherwise, absent  
23           that decision, my clients have no further  
24           procedural rights. If we don't have a decision

1 by the Committee, we have no to right of  
2 appeal, we have no rights to review what went  
3 into that determination. Our procedural rights  
4 are null at that point in time. And I think,  
5 again, to reiterate, there needs to be a  
6 process in place because that is what the  
7 statute requires. RSA 541-A regarding the  
8 Administrative Procedures Act, requires  
9 adjudicative hearings in the context of  
10 contested cases. And I believe that this rises  
11 to the level of a contested case.

12 CHAIRMAN HONIGBERG: You're pleading  
13 made an allusion, I think, assuming a contested  
14 case, because you complained about ex parte  
15 communications, as I recall. You didn't make  
16 any claim based on alleged ex parte  
17 communications, but you made a reference to  
18 that. Am I right about that?

19 MR. MAHER: Yes, and --

20 CHAIRMAN HONIGBERG: Because you  
21 assume that the oversight process between --  
22 oversight process of the Administrator is  
23 somehow a contested case, that all of the  
24 intervenors still are parties to the

1 Applicants' construction. I mean, that's the  
2 only way ex parte makes sense; right?

3 MR. MAHER: That's correct. And --

4 CHAIRMAN HONIGBERG: But that's not  
5 what is expected under this statute. This  
6 isn't in continuing litigation forever and ever  
7 while the Applicant constructs its project.  
8 That's not what happens here.

9 MR. MAHER: I think it's a matter of  
10 ensuring that when matters are filed with the  
11 Committee, that the other interested parties  
12 that are involved are notified as such. And  
13 the problem is that, in this instance, we  
14 weren't notified. Antrim Wind didn't provide  
15 any service or wasn't -- there was no filing  
16 that was made to the service list in this  
17 instance.

18 CHAIRMAN HONIGBERG: That's because  
19 the contested case was over. That's why they  
20 didn't serve anybody because the contested case  
21 was over. But my understanding is that the  
22 Administrator posted the documents in the  
23 docket, which seems like a logical filing place  
24 to put post-certificate documents.

1           MR. MAHER: Well, that is correct.  
2           They were posted. But because they weren't  
3           provided by Antrim Wind, you know, you rely  
4           upon -- we didn't get that information until  
5           weeks after it had been tendered. There was no  
6           means by which for us to raise a challenge in a  
7           seasonable manner. We had to rely upon when we  
8           actually obtained actual knowledge of that.

9           CHAIRMAN HONIGBERG: And so you're  
10          here with your declaratory ruling, and I think  
11          we can take on the merits of whether the filing  
12          complied.

13          Mr. Needleman, you looked like you  
14          wanted to say something.

15          MR. NEEDLEMAN: Well, I did want to  
16          make one point in response to Mr. Maher's  
17          argument about not having any rights.

18          The statute is quite clear as to  
19          the manner in which the Subcommittee can  
20          construct a certificate. And the  
21          Subcommittee can do it one of two ways: They  
22          can impose a term or a condition, and then  
23          they can reserve for themselves the  
24          determination as to whether an Applicant is

1           complying with that term or condition; or,  
2           pursuant to 162-H:12, they can designate to  
3           the Administrator, as designee -- that's the  
4           language -- to make that determination.  
5           That's how the legislature allowed the  
6           Committee to do this. So if the Committee  
7           elects to designate to the Administrator the  
8           determinations with respect to terms or  
9           conditions, then that's where the final  
10          decision resides. And that's just the way  
11          the legislature constructed it. And for the  
12          Petitioners to say, well, they're somehow  
13          being deprived of a right to challenge that,  
14          it's just not correct, to the extent they  
15          want to challenge that determination at that  
16          point. Whether it's made by the  
17          Administrator or whether it's made by the  
18          Committee, they have the same rights they've  
19          always had, which is to file a Declaratory  
20          Judgment Petition in Superior Court, which,  
21          again, as we pointed out last time, is  
22          manifestly different from a Declaratory  
23          Ruling Petition.

24                           CHAIRMAN HONIGBERG: Commissioner

1 Scott.

2 COMMISSIONER SCOTT: I want to go  
3 back to Mr. Maher's statements. So in the -- I  
4 just want to kind of run this to ground as far  
5 as open docket, not open docket, and what would  
6 need to be done. There's a lot of conditions  
7 in the certificate. For instance, the town --  
8 the Applicant was required to provide the Town  
9 with copies of its proposed construction plans  
10 and that type of thing. So were you served --  
11 did you expect to be -- everybody on the  
12 service list to get copies of that or -- where  
13 does this end, I guess? The Administrator  
14 decides to do a compliance inspection. She  
15 wants to see that the turbine pads are going to  
16 be where, you know, where they're supposed to  
17 be. Is she required, in your view, to publicly  
18 notice her, whether a conversation or her  
19 visit? I'm trying to understand how the  
20 mechanics of that would even work.

21 MR. MAHER: I think it is a very low  
22 burden on the Applicant to CC people on the  
23 service list and provide those documentations,  
24 important documentations which are going to put

1 the public on notice as to when construction,  
2 and to use your example, is going to commence.  
3 It's a very burden, in this sense that --

4 CHAIRMAN HONIGBERG: Can you answer  
5 the rest of Commissioner Scott's question? The  
6 Administrators wants to do a compliance visit  
7 to see if a pad is being put where a pad is  
8 supposed to be.

9 MR. MAHER: I don't think so. I'm  
10 thinking through the administrative rules, and  
11 I'm thinking through how the -- what the  
12 practice is in other context using other boards  
13 and committees as a basis. If it were the  
14 Commission, the Committee itself that went out  
15 to the site, obviously, yes, it's a requirement  
16 of 91-A. But I think if there were any  
17 subsequent -- when there's a filing that is  
18 being made to the SEC proper, something that is  
19 going to be reviewed and become part of the  
20 record, I think that is when the public needs  
21 to be notified. If there's any action that's  
22 going to be taken afterwards by the  
23 Committee -- by the Administrator after the  
24 fact, I think that needs to be -- the

1 Applicants have to be notified. But I think  
2 when it comes to just inspection, I think back  
3 to matters of planning boards, zoning boards,  
4 et cetera, where there's been compliance review  
5 by, say, the planning director where that  
6 doesn't happen. But if there's any subsequent  
7 action being done at the Committee level, then,  
8 yes, it does, meaning you have to notify folks.

9 (Attorney Maher and Ms. Linowes confer.)

10 MR. MAHER: Ms. Linowes wishes to be  
11 heard.

12 CHAIRMAN HONIGBERG: Ms. Linowes,  
13 what would you like to say?

14 MS. LINOWES: Thank you,  
15 Mr. Chairman. I wanted to raise the case with  
16 regard to Groton Wind. In that situation,  
17 Groton Wind notified DES when there was a  
18 change in alteration of terrain because they  
19 had physically relocated several of the  
20 turbines, and obviously they did relocate the  
21 operations and maintenance building. That  
22 became a matter of public record, which was  
23 available. And so in a situation like that,  
24 there would be a record of changes. But that



1           being said, that was a very visible --  
2           particularly with the O&M building, that was a  
3           very visible relocation. Some of the turbines  
4           that were moved were more than, I believe,  
5           50 feet. But it was a very physical  
6           relocation. I don't think the intervenors or  
7           the people that participated in that proceeding  
8           were expecting to be notified. But they  
9           certainly saw what happened and raised it. But  
10          I don't think there's an expectation of people  
11          being notified of every case. However, that  
12          being said, I do think that records of  
13          post-construction bird and bat studies,  
14          post-construction noise studies, those types of  
15          factors -- or those documents I think should be  
16          at least accessible to people who want to try  
17          to track that kind of thing.

18                         CHAIRMAN HONIGBERG: Ms. Weathersby.

19                         MS. WEATHERSBY: I agree that all  
20                         that information should be made readily  
21                         accessible to the public, but there is a  
22                         process for that, in that the Administrator  
23                         posts everything on the web site.

24                         MS. LINOWES: I think that's what

1 he's saying.

2 MS. WEATHERSBY: So the Administrator  
3 goes out and makes a determination that the  
4 pads are in the right place or we've received a  
5 new study, that all gets posted. I don't see  
6 that everything needs to be copied throughout  
7 the years. And as parties change and  
8 representation change and -- it just gets  
9 cumbersome. I think there's one place that  
10 everything is posted in this filing cabinet and  
11 people have access to. If they have an issue,  
12 they raise it with the Administrator.

13 MR. MAHER: And I don't want the  
14 Committee to lose sight of really the crux of  
15 our concern here is that when we do learn of a  
16 compliance-related issue and do in fact raise  
17 it, it's the availability or ability for  
18 interested parties to get that before the  
19 Committee proper -- for a ruling by the  
20 Committee proper. That is the underlying --  
21 that's the underlying concern that we have  
22 here. And the underlying basis of that is that  
23 we did in fact raise a concern and it never got  
24 before the Committee proper and that was

1           because it was determined procedurally  
2           improper. We had to file this Petition for  
3           Declaratory Ruling and pay \$3,000 to get it  
4           here. You know, it's not that -- and I want to  
5           step back and really stress the underlying  
6           importance of these compliance-related matters  
7           being resolved by the Committee itself.

8                         These are matters of intense  
9           complexity. I mean, the Committee is made up  
10          of individuals from an eclectic background  
11          because of the complexity of these issues.  
12          No one person is expected or I don't think  
13          could possibly have the array of knowledge  
14          and experience sufficient to make a  
15          compliance-related determination in every  
16          instance. And so when a matter is raised by  
17          the Applicants in good faith as to  
18          compliance, that should be brought to the  
19          body with that broad spectrum of knowledge  
20          and experience and ruled upon by that body  
21          with that knowledge and experience.

22                         CHAIRMAN HONIGBERG: I'm going to  
23          circle back to good faith. Don't let me  
24          forget.

1                   Mr. Needleman, you wanted to say  
2 something?

3                   MR. NEEDLEMAN: Everything you just  
4 heard was a policy argument. It was not a  
5 legal argument. The legal argument is: What  
6 is the authority granted under the certificate?  
7 Was the authority properly granted, and was it  
8 properly executed? And the answer to every one  
9 of those questions is yes. And it may well be  
10 that the Petitioners in this case would like  
11 there to be a different process. But this is  
12 the process, and it was followed correctly, and  
13 it is what the legislature laid out.

14                   As far as the issue of sort of  
15 perpetual notification, again, what the  
16 Petitioners are missing here is that their  
17 rights came into existence when they were  
18 granted intervenor status in a contested  
19 case, and those rights were terminated when  
20 that contested case ended. They don't have  
21 perpetual rights different from any other  
22 members of the public to have access to  
23 information. And unquestionably, the public  
24 is entitled to information about how this

1 process progresses, and exactly as Ms.  
2 Weathersby said, that information is being  
3 furnished consistent with how the Committee  
4 has done it in the past.

5 MR. MAHER: If I might just show one  
6 correction. There's nowhere in the certificate  
7 where that authority has been delegated to the  
8 Administrator. Mr. Needleman is making an  
9 academic argument of would the Administrator  
10 have had this authority had it been delegated.  
11 I know of no condition in the certificate that  
12 authorizes the Administrator to make  
13 compliance-related determinations.

14 CHAIRMAN HONIGBERG: Mr. Needleman.

15 MR. NEEDLEMAN: There is nothing  
16 academic about this. This condition, which is  
17 the only one we're talking about, says, quote,  
18 The Applicant shall provide documentation  
19 demonstrating the debt and/or equity financing  
20 required for the construction of the Project is  
21 in place to the Committee's Administrator,  
22 period. There was a requirement to provide  
23 information. The information was provided.  
24 That's all there is to this.

1                   CHAIRMAN HONIGBERG: That does go  
2 directly to the merits of the complaint. Is  
3 there -- just before you respond to that, is  
4 there another condition that you think that the  
5 Applicant is not complying with?

6                   MR. MAHER: No, that is the  
7 condition.

8                   CHAIRMAN HONIGBERG: Go ahead.

9                   MR. MAHER: But that doesn't  
10 authorize the Administrator to make a  
11 compliance-related determination when a  
12 compliance challenge has been raised. As Mr.  
13 Needleman acknowledged earlier, that makes the  
14 Administrator the proper recipient of  
15 documentation. But the sufficiency of that  
16 documentation has not been -- the determination  
17 of sufficiency of that documentation hasn't  
18 been delegated here, and that's really what  
19 we've challenged. It's not that they haven't  
20 provided documentation. They have. We're  
21 saying that it's insufficient and that it's  
22 materially altered what their representations  
23 were.

24                   CHAIRMAN HONIGBERG: Mr. Needleman.

1           MR. NEEDLEMAN: And that's the "straw  
2 man" here. They are inserting a requirement  
3 that doesn't exist, and then they are attacking  
4 that straw man. There was no requirement that  
5 the Committee imposed that anyone make a  
6 determination about the sufficiency of that  
7 information. That determination was already  
8 made in the docket, and the conditions  
9 specifically contemplate "debt and/or equity  
10 financing." So the determination in the docket  
11 about how the financing was going to occur was  
12 made. And instead of the Committee  
13 constructing this condition, as they have in  
14 many circumstances where somebody had to make a  
15 determination about the sufficiency of it, in  
16 this case the Committee simply said we want the  
17 information provided. There isn't going to be  
18 a determination in this case about the  
19 sufficiency. They could have done that. This  
20 Committee has done that many, many times.

21           CHAIRMAN HONIGBERG: Hang on, Mr.  
22 Maher. Mr. Richardson, who's your client here?

23           MR. RICHARDSON: Thank you, Mr.  
24 Chairman. Justin Richardson for the Town of

1 Antrim. And the Town hasn't taken a position  
2 on this matter, but I think I do have some  
3 experience I think that might help the  
4 Committee.

5 As I hear it, one of the things  
6 you're struggling with is this \$3,000 filing  
7 fee and how could that possibly -- that could  
8 form a real barrier to access to justice. I  
9 think that the statute which has changed  
10 since the 1990s when I was Counsel for the  
11 Public, or served as Counsel for the Public,  
12 and there were often motions or requests for  
13 enforcement that resulted in action being  
14 taken by the Committee, and now there's an  
15 Administrator. And the statute -- and I  
16 believe the statute that Attorney Needleman  
17 referenced, I think 162-H:12, provides that  
18 the Administrator has the option to enforce a  
19 certificate. But at the same time, the  
20 Committee still holds the same authority to  
21 bring its own enforcement actions. And what  
22 that means, in my view, is that one avenue,  
23 such as in the Groton case, is for an agent  
24 or board, like the town in that case, to file



1 a request of the Committee, and then the  
2 Committee has the authority to monitor and  
3 enforce the certificate. And it can make a  
4 discretionary action to open up a proceeding  
5 to consider what the issues are, and it can  
6 do that without requiring a Declaratory  
7 Ruling Petition to be filed. And so I  
8 think -- but both the decision by the  
9 Administrator and the decision by the  
10 Committee as to whether to bring its own  
11 enforcement action are discretionary  
12 prosecutorial matters. You know, the police  
13 officer isn't required to write a ticket if  
14 you're going 66, thank goodness. But that's  
15 not reviewable. But this Committee can, if  
16 it sees a matter that concerns it and it  
17 receives information from the public, it  
18 could on its own decide to do that. So I  
19 think ultimately you can get to the merits  
20 and you don't have to worry about the impact  
21 of the filing fee requirement because in  
22 important cases you have your own authority  
23 to consider information that's provided to  
24 you to monitor and enforce any certificate.

1           And where this, you know -- but the types of  
2           determinations made by the Administrator in  
3           this case and when the Committee addresses  
4           its own consideration of the merits of what's  
5           in the petition, that's really a purely  
6           discretionary matter. It's important to know  
7           why, because the Committee could say, well,  
8           look, it's true, you've pointed out a  
9           violation, hypothetically, not looking at  
10          this case. And let's say it's the police  
11          officer saying you're going 66 when the speed  
12          limit is 65. The administrative official can  
13          simply say, look, this is de minimus, it's  
14          not material, it's being corrected, it  
15          doesn't require a complex enforcement  
16          proceeding.

17                        I think that is ultimately why --  
18          you know, what the reason I'm here is to find  
19          out what is the Committee's interpretation of  
20          its own certificate, because it could say,  
21          look, it's been complied with, or the  
22          argument that Attorney Maher makes about what  
23          were the representations made during the  
24          proceeding, you know, what does this mean.

1 That's all things that this Committee can do  
2 even without a Petition for Declaratory  
3 Ruling. The question is, and the  
4 Administrator kind of said, well, I think it  
5 complies. Really the only question left is  
6 what does this Committee think, and in light  
7 of that, does it feel it's appropriate to  
8 open a proceeding or not.

9 CHAIRMAN HONIGBERG: Well, in your  
10 view, then, should this have been presented to  
11 the Committee by the Administrator? The  
12 Administrator would have received this and  
13 would have said, "I've received these,  
14 Committee. Does this comply with the  
15 condition?" Is that how you think this statute  
16 works?

17 MR. RICHARDSON: I think the  
18 Administrator can do that as an employee of the  
19 agent, can approach the Chairman, because it's  
20 not involving public prosecutorial rights, not  
21 vested property rights in this case. I think  
22 that can happen outside of a proceeding.

23 CHAIRMAN HONIGBERG: I wasn't saying  
24 formally or informally. But do you think

1           that's what's supposed to happen?

2                       MR. RICHARDSON: I think so. I think  
3           that's probably what happened. I mean, I don't  
4           know. I haven't, you know, asked for those  
5           records or anything like that.

6                       I think what the declaratory ruling  
7           brings is effectively a forum and opportunity  
8           to bring it before the Committee when the  
9           Administrator disagrees or even when the  
10          Committee disagrees. I suppose someone could  
11          try to appeal it, but I think you'd run into  
12          the prosecutorial discretion to say, you  
13          know, if this Committee finds, I think as  
14          Antrim Wind argues, that, you know, this was  
15          just a filing requirement, the determination  
16          about financial capability was made in the  
17          proceeding, not by the Administrator, you  
18          know, when this certificate condition was  
19          presented. But I mean, that's all arguments  
20          on the merits, and I'm interested to hear  
21          what the Committee has to say to that. But I  
22          think, you know, the reason I'm speaking is  
23          just because I feel that the issue of the  
24          filing fee is overlooking the Committee's own

1 inherent authority to monitor and enforce any  
2 certificate whether or not a request is  
3 filed.

4 CHAIRMAN HONIGBERG: Mr. Maher, you  
5 had wanted to say something earlier that got  
6 lost in the haze.

7 MR. MAHER: Well, first, I just  
8 wanted to address something that Mr. Needleman  
9 said, and then I would like to respond to what  
10 Mr. Richardson said.

11 First, Mr. Needleman alluded to a  
12 "straw man," that we're trying to have a  
13 condition imposed that's not or that doesn't  
14 exist in the certificate. But I want to  
15 remind the Committee that the default is that  
16 the Committee is the group that's responsible  
17 for determining matters of compliance  
18 unless -- and this is even arguable as to  
19 whether or not it complies with the  
20 statute -- unless that authority has been  
21 expressly delegated to the Administrator. So  
22 in the absence of an expressed delegation,  
23 that authority starts and stops at the  
24 Committee at this point in time.

1           To address Mr. Richardson's point  
2           with regard -- the Committee as a government  
3           body, I mean, it's bound by the strictures of  
4           RSA Chapter 91-A. If in the exercise of its  
5           prosecutorial discretion those deliberations  
6           are being played out in public, you know, and  
7           a noticed public hearing, I think the  
8           concerns are certainly tempered. They're not  
9           obviously completely eliminated. But  
10          ultimately what we want to have is the  
11          ability to raise these issues to the  
12          Committee, again, the group that -- the  
13          collective group with the collective  
14          knowledge.

15                   CHAIRMAN HONIGBERG: Ms. Weathersby.

16                   MS. WEATHERSBY: Seems like there's a  
17          very easy middle step here, in that once  
18          something is filed, you know, like a financing  
19          commitment here, a financing plan here, or a  
20          bird and bat study, whatever, it's filed and  
21          notice is on the web site. Someone disagrees  
22          with it, asks the Administrator, Hey, can you  
23          bring this to the Committee because we're not  
24          sure. So, you know, just could you have this

1 reviewed. She'll maybe look into it if there's  
2 an enforcement action. If she doesn't think  
3 there's anything to it, she wouldn't bring it  
4 to us. The person can then bring a declaratory  
5 judgment action. If she's not sure, she can  
6 say, Hey, Committee, would you look at it.

7 So, making that request is really  
8 an easy middle step that I think could solve  
9 a lot of these. I don't know. I think that  
10 could be a -- I don't think we even need a  
11 rule for that. It's just --

12 CHAIRMAN HONIGBERG: The SEC could  
13 meet every third Monday of every month or every  
14 other month or something like that. Is that  
15 what you mean? There would be a standing  
16 meeting where things could be raised?

17 MS. WEATHERSBY: I don't think that's  
18 necessary. I mean, I don't think these will  
19 come up very often, hopefully. Everybody's  
20 acting in good faith that Pam would look into  
21 any -- a filing would come in, get posted. If  
22 there's a concern, a request would be made to  
23 Pam, Hey, can you have the Committee look at  
24 this. She could get it together and do it.

1           Maybe that requires every Thursday or the last  
2           Thursday of the month. I don't know. Just in  
3           case so these are dealt with timely. I don't  
4           think we'd need to, but...

5                         CHAIRMAN HONIGBERG: You raised "good  
6           faith," and I want to circle back to that.

7                         Early in this hearing, Mr. Maher,  
8           you made a reference to, I don't know exactly  
9           what the phrasing was, but it was complaints  
10          made in "good faith" by members of the public  
11          or abutters. I don't see a way for the  
12          Administrator or anyone else on the Committee  
13          to judge someone's good faith when a  
14          complaint is made. I mean, until something  
15          else happens, they all look the same. They  
16          all look good. Now, maybe over time you  
17          develop some history with a project or  
18          certain individuals and can make a judgment  
19          about that. There may be projects -- in  
20          fact, I can think of a certificated project  
21          that has a "frequent flyer" complainer about  
22          everything related to that project. But on  
23          their face, complaints that come in about  
24          certificated projects all look good, and so



1           you can't make a judgment about good faith up  
2           front like that. You only learn about that  
3           after the investigation, after the inquiry is  
4           made. So I don't think that can be a  
5           decision point up front in determining how a  
6           complaint is brought before the  
7           Administrator, the Committee or any other  
8           part of this process. And I don't think you  
9           meant ultimately for it to be that. I just  
10          want to disabuse people of the notion that we  
11          have any way of knowing who's acting in good  
12          faith up front.

13                   All right. Have we talked all this  
14                   process out to death at this point? Do we  
15                   want to talk about the merits of the claim:  
16                   Are they in compliance? Is the Applicant in  
17                   compliance with its condition, the one  
18                   condition that Mr. Maher and his clients are  
19                   complaining about?

20                   Commissioner Scott.

21                   COMMISSIONER SCOTT: Yes, I would.

22                   CHAIRMAN HONIGBERG: Oh, that's all  
23                   you wanted to say?

24                   COMMISSIONER SCOTT: No. I think,

1 Mr. Maher, what strikes me on the  
2 certificate -- and I'll read from it. It's  
3 been read from it already. "The Applicant  
4 shall provide documentation demonstrating that  
5 debt and/or" -- and that's really where I get  
6 hung up -- "equity financing required for the  
7 construction of the Project is in place," et  
8 cetera et cetera.

9 That "and/or" to me, just on its  
10 plain face, not even looking beyond that,  
11 seems to allow a large variation of debt to  
12 equity. So why should we as a Committee go  
13 beyond the plain text of that?

14 MR. MAHER: Well, I think there's a  
15 strong level of precedent in this. And I look  
16 to the 1808 Corp. v. Town of New Ipswich  
17 decision in which the certificate -- the  
18 conditions in a certificate of approval, in the  
19 context of a land use approval, must be read  
20 and interpreted in light of the representations  
21 made by the Applicant throughout the  
22 proceedings. And it's very clear that the  
23 representations made both in the Application,  
24 the prefiled testimony on the record, you know,

1 at the live hearings on the merits, was that  
2 there was going to be a significant amount of  
3 debt-related financing and a much smaller level  
4 of equity-related financing. Here we've had  
5 a -- there's no debt financing anymore. It's  
6 all going to be a hundred percent straight  
7 equity. And while the representations made by  
8 Antrim Wind was that the level of debt  
9 financing, which I believe was going to be  
10 around \$55 million, might be a little bit more,  
11 might be a little bit less, under no  
12 circumstances was it envisioned to be a hundred  
13 percent equity. It's just not. So that  
14 condition in the certificate of approval must  
15 be read in light of the representations that  
16 were made by the Applicant at the hearing. And  
17 also, it is apparent that the Committee -- the  
18 Subcommittee relied upon those representations  
19 in making its decision and its findings and in  
20 its analysis of the certificate, particularly  
21 in the financing, in the realm of financing.  
22 It made express reference to Antrim Wind's  
23 representation. So I think that the condition  
24 and approval has to be read in the context of

1           what has actually been represented in this  
2           instance.  And the fact that under no  
3           circumstances was a hundred percent equity ever  
4           posed to the Committee, that is a material  
5           deviation from their application.

6                   CHAIRMAN HONIGBERG:  Does it make it  
7           better, worse or leave it the same?

8                   MR. MAHER:  I think it makes it  
9           worse.

10                  CHAIRMAN HONIGBERG:  Why?

11                  MR. MAHER:  A level of debt financing  
12           adds an additional layer of oversight with  
13           regard to the project at that point in time.

14                  CHAIRMAN HONIGBERG:  So owners don't  
15           care, but the creditors do?

16                  MR. MAHER:  I think that when it  
17           comes to lending, if they were to lend the  
18           money, that there would be additional  
19           requirements, conditions and oversight.  In the  
20           context of a hundred percent equity, the  
21           terrain could be completely altered and the  
22           owner could at any point in time walk away.

23                  CHAIRMAN HONIGBERG:  Commissioner  
24           Scott.

1                   COMMISSIONER SCOTT: So I've heard  
2                   your argument. So what you're telling me is I  
3                   have to look at the transcript, let's say,  
4                   where you're right, they were fairly  
5                   unequivocal, could be this, could be that. Do  
6                   you agree with that kind of --

7                   MR. MAHER: I think they said -- the  
8                   words they used was "could be more, could be  
9                   less." But it was, I believe, an \$11 million  
10                  equity, \$55 million debt. I might have the  
11                  specific numbers wrong, but somewhere around  
12                  there.

13                  COMMISSIONER SCOTT: So how do you  
14                  square that with then why didn't the  
15                  Commission -- what is this? What do you call  
16                  it? The certificate. If that was the case,  
17                  why would the certificate not say "debt and  
18                  equity." I think what you're making the case  
19                  for, or what I heard you say is there has to be  
20                  a component of both because that was what was  
21                  alluded to. Then why does the condition say  
22                  "or"? Why would the "or" be in there if you  
23                  had to have both?

24                  MR. MAHER: I think it's providing an

1 element of wiggle room in this instance where  
2 there was going to be -- there was envisioning  
3 of the 11/55 split being inexact, that there  
4 might be more, might be less. Again, I think  
5 it goes back to the nature of the letters that  
6 were to be presented, which are, you know, you  
7 could have a letter for debt financing and a  
8 letter for equity financing, but not -- you  
9 know, you might not have it both represented in  
10 the same document.

11 Again, I also want to point out  
12 that the letter, or the letters that have  
13 been provided, none of them are from the  
14 Applicants specifically. They're from an  
15 international parent company not bound by the  
16 certificate, not bound by anything in this  
17 instance. It's a piece of paper at this  
18 point in time. And again, that underlines  
19 the ultimate concern here.

20 The other aspect of this is that  
21 it's been made clear that this isn't even the  
22 company that's going to be constructing this  
23 thing. It's going to be TransAlta. I mean,  
24 they've already announced the sale. We have

1 TransAlta on the letters of credit that have  
2 been submitted to the Commission. So we have  
3 letters from a different entity that's not  
4 even going to be the entity constructing and  
5 operating this thing, you know, supposedly  
6 committing some level of funding, not  
7 actually committing or saying they're going  
8 to provide some level of funding. That is  
9 different than what was presented in the  
10 certificate. I mean, these are all issues --  
11 and keep in mind that there were other  
12 parties to this matter, namely, Counsel for  
13 the Public, that relied upon that proposed  
14 financing when it was structuring its  
15 arguments. You know, Counsel for the Public  
16 could have solicited an expert when it comes  
17 to financing of utility projects, but they  
18 didn't in this instance. And that was raised  
19 by Counsel for the Public in a letter to the  
20 SEC's Administrator when those letters came  
21 in. They relied upon this, and ultimately  
22 they didn't submit testimony to allow the  
23 Committee to make a well-informed decision as  
24 to whether a hundred percent equity proposal

1 was sufficient under RSA Chapter 162-H.

2 CHAIRMAN HONIGBERG: Commissioner  
3 Scott.

4 COMMISSIONER SCOTT: Attorney Maher,  
5 do you not agree that the potential change of  
6 ownership is a requirement -- that's required  
7 to have its own docket? Should it be filed  
8 before us? And if it's not filed before us,  
9 the new owner can't, if there is one, can't  
10 construct anything? Do you agree with that?

11 MR. MAHER: I would agree with that.  
12 And I would think that it's our expectation  
13 that that docket would be opened shortly just  
14 because of the number of representations that  
15 have been made up to this point in time  
16 involving TransAlta. But until we know who's  
17 actually going to be constructing this thing,  
18 that's why we asked for a suspension of the  
19 certificate until that period of time, until we  
20 know who is exactly going to be constructing  
21 this thing, what is their operational  
22 capabilities. It makes no sense to allow  
23 Antrim Wind to construct this thing, have the  
24 terrain completely altered at this point in



1 time and then have TransAlta come in after the  
2 fact. What is the public and the Committee  
3 going to do at that point in time? The damage  
4 is done. The time for consideration of  
5 TransAlta's suitability to take over this  
6 project, to construct this project, is now  
7 rather than later.

8 CHAIRMAN HONIGBERG: I think you need  
9 to look at the statute.

10 Ms. Weathersby.

11 MS. WEATHERSBY: Sure. So right now  
12 Antrim Wind can build this if they meet the  
13 certificate conditions, regardless of  
14 TransAlta. They can go ahead and begin once  
15 all their prerequisites are in place. So the  
16 fact that TransAlta or somebody else may come  
17 in in a year or two from now, or 10 or whatever  
18 and there'll be a change of control is slightly  
19 irrelevant. If there's imminent change of  
20 control, they do need to come before this  
21 Committee. And believe me, there's a thorough  
22 review of their finances, managerial  
23 capability, technical capability, financial  
24 capability. It's all part of the analysis to

1           determine whether or not this project -- this  
2           certificate can transfer to a new owner. So we  
3           have a very thorough examination of financing  
4           then.

5                         Another point is it's -- I'm hung  
6           up a little bit because it seems to me as  
7           though a hundred percent equity financing is  
8           actually more secure. I mean, there's not --  
9           first of all, they only had letters of  
10          commitment -- they didn't have letters of  
11          commitment. They had letters of interest  
12          from banks. Now we have a commitment for a  
13          hundred percent equity financing. So they'd  
14          have -- they're using all their own money.  
15          It's a bigger commitment on their part.  
16          There's no debt service, you know, at first  
17          blush. Obviously I'd need to know more. But  
18          at first blush, it seems as though it may be  
19          a more secure financing arrangement.

20                         And then, to the last point of it,  
21          there's additional oversight with a  
22          third-party lender. There's a lot of  
23          oversight on this project between SEC and the  
24          members of the public. Thinking that Key

1 Bank or somebody isn't going to give an awful  
2 lot of oversight I think is a little bit  
3 misplaced.

4 CHAIRMAN HONIGBERG: Mr. Needleman,  
5 at one point it looked like you wanted to grab  
6 the microphone.

7 MR. NEEDLEMAN: I think what I wanted  
8 say has been covered at this point. Thank you.

9 Actually, Mr. Chair, if I may.

10 CHAIRMAN HONIGBERG: You may.

11 MR. NEEDLEMAN: There was one point  
12 that Mr. Maher made that I did want to speak  
13 to, and I'm only going to do it briefly.

14 The state of the record, as Mr.  
15 Maher represented, is not how we view it. We  
16 think that the record as to what occurred  
17 during the proceeding and the representations  
18 that were made about the manner in which this  
19 project would be financed were different.  
20 And we provided an exhaustive description of  
21 that to the Committee in our January 31st and  
22 March 14th letters regarding this issue the  
23 first time that these petitioners raised  
24 concerns about this. And I didn't intend to

1 get into the merits of any of that, and I  
2 won't now. But I want the record to reflect  
3 that we have spoken to those precise issues,  
4 and we disagree with his characterization.

5 CHAIRMAN HONIGBERG: Mr. Maher.

6 MR. MAHER: The record speaks for  
7 itself. I know that Mr. Needleman and I might  
8 have disagreements as to what is said. We  
9 provided copies of the pertinent excerpts from  
10 the transcript from the hearing on the merits  
11 and citations and provisions in the  
12 Applications regarding financing. So it speaks  
13 for itself in that regard, and the Committee  
14 can make its own determination.

15 But what troubles me is that, if  
16 you review the letters that were submitted,  
17 it was not RWE, the parent company, that  
18 submitted, that made any type of commitment  
19 at all. It was an American subsidiary, of  
20 which we have, to my knowledge, no  
21 information or knowledge as to what assets  
22 they actually have. So, to the extent that  
23 it is a commitment, I might -- I would  
24 quibble with the Committee in that regard.

1           But regardless, I think in this  
2 instance where there is, and our position is,  
3 a discrepancy between what has been  
4 represented by AWE and what is in the record  
5 itself, that should be -- whether or not  
6 that's good for the public, bad for the  
7 public, you know, no change at all, that's  
8 not -- that's a matter that should be  
9 resolved at the Subcommittee level, again,  
10 with the breadth of knowledge -- or by the  
11 people with the full breadth of knowledge  
12 here. And that's a matter that should be  
13 raised with the Subcommittee in this  
14 instance. They're the ones that have all of  
15 the knowledge in having presided over the  
16 application in this instance.

17           MR. NEEDLEMAN: Mr. Chair.

18           CHAIRMAN HONIGBERG: Mr. Needleman.

19           MR. NEEDLEMAN: The Subcommittee did  
20 address this issue. It was exhaustively  
21 addressed during the proceedings. The  
22 Subcommittee took all the evidence on the  
23 financial capabilities, and the Subcommittee  
24 drafted, in light of that evidence, a very

1 broad condition that specifically contemplated  
2 up to a hundred percent equity financing, as  
3 Mr. Scott pointed out. There is no ambiguity  
4 here. None.

5 CHAIRMAN HONIGBERG: All right.  
6 We're going to take a 10-minute break. We'll  
7 be back -- say 15 minutes. We'll be back at  
8 10:30.

9 (Brief recess taken at 10:15 a.m. and  
10 hearing resumed at 10:35 a.m.)

11 CHAIRMAN HONIGBERG: We're back on  
12 the record.

13 Commissioner Scott.

14 COMMISSIONER SCOTT: Mr. Maher, I'd  
15 like to pick up where we left off. You had  
16 introduced a new aspect, I believe not part of  
17 your petition, where you talked about the -- my  
18 characterization -- you complained that the  
19 filing in question was from an American  
20 subsidiary and not AWE; is that correct?

21 MR. MAHER: Yes, that's correct.

22 COMMISSIONER SCOTT: So help me with  
23 that. What's wrong with that? Well, let me  
24 back up.

1           I'm holding that page of the  
2           certificate -- I don't expect you'd be able  
3           to read it from here -- with the conditions  
4           on it. Again, my view is it's fairly  
5           permissive, it's fairly broad, just saying  
6           "shall provide documentation," et cetera.  
7           What's wrong with what they filed, more  
8           explicitly?

9           MR. MAHER: I think -- is this on?  
10          Yeah, I think it's because we know nothing  
11          about this American subsidiary. We don't know  
12          how it's capitalized. We don't know what  
13          assets it has. We don't know whether it even  
14          has the funds to finance this project. We  
15          don't know what other obligations it has which  
16          impact its ability to finance this project.  
17          There's a host of unknowables associated with  
18          this American subsidiary that's not in the  
19          record. And I believe, in light of these  
20          unknowns, this is a matter that should be  
21          resolved by the Committee. The matter should  
22          be reopened for a determination as to what  
23          impact, if anything, this change has on the  
24          financing and the public protections set forth

1 in 162-H. This is a matter that should be  
2 analyzed by the Committee that heard the  
3 evidence in this case.

4 COMMISSIONER SCOTT: Am I correct  
5 that that's not in your petition?

6 MR. MAHER: No, it is not. I think  
7 you know, the underlying spirit as to why we  
8 would want to have an open proceeding in this,  
9 an adjudicative proceeding, is set forth in our  
10 petition. But that specific aspect of our  
11 argument is not set forth in the petition, but  
12 it goes to why this should be subject to a  
13 compliance review at an adjudicative  
14 proceeding.

15 COMMISSIONER SCOTT: And therefore,  
16 again, you're saying that is the reason why --  
17 that is a reason why this is a non-compliant  
18 filing; is that correct?

19 MR. MAHER: That's correct.

20 COMMISSIONER SCOTT: Despite the  
21 language of the certificate.

22 MR. MAHER: Well, that's one of the  
23 reasons. I mean, the fundamental reason is  
24 that it is different from what they represented



1 below as to it's a hundred percent equity  
2 financing.

3 COMMISSIONER SCOTT: And Mr.  
4 Needleman, can you enlighten us on why this is  
5 compliant?

6 MR. NEEDLEMAN: Eric Shaw, the CEO of  
7 the American subsidiary, was here to testify.  
8 So I'm not sure what we're talking about here.  
9 All the information was presented in the  
10 record.

11 CHAIRMAN HONIGBERG: Mr. Needleman,  
12 both Ms. Weathersby and Commissioner Scott were  
13 on that Subcommittee, I was not. Can you  
14 describe to me the corporate structure and  
15 where the various entities fall within that  
16 structure?

17 MR. NEEDLEMAN: No.

18 CHAIRMAN HONIGBERG: Can you come  
19 close?

20 MR. NEEDLEMAN: And the reason I  
21 can't is I had it all in my head at one point,  
22 and it's gone out of my head at this point. If  
23 that's something that's of some importance to  
24 you, it's a little bit out of the ordinary, but

1 I might ask one of my clients here, Mr.  
2 Weitzner, who probably could simply describe  
3 that, to do that for you.

4 CHAIRMAN HONIGBERG: I assume there's  
5 no objection from the other side if Mr.  
6 Weitzner answers that question for me. It may  
7 be completely academic and irrelevant to the  
8 decision, but I'm interested now. Is that all  
9 right?

10 MR. MAHER: Yes. Yeah, that would be  
11 okay.

12 CHAIRMAN HONIGBERG: Mr. Weitzner.

13 MR. WEITZNER: Yes, hi. So the  
14 letters came from RWE Principal Investments and  
15 Walden Green Energy. Walden Green Energy is  
16 the owner of Antrim Wind Energy and is jointly  
17 owned by RWE and Walden Green Energy  
18 Management. RWE -- and when we say "RWE," the  
19 entity that wrote the letter -- is a subsidiary  
20 of RWE AG, the German Utility.

21 MR. NEEDLEMAN: And the subsidiary,  
22 the American subsidiary, was the one where the  
23 CEO of that subsidiary, Mr. Shaw, was here  
24 testifying.

1 CHAIRMAN HONIGBERG: Thank you.

2 MS. WEATHERSBY: Point of  
3 clarification.

4 CHAIRMAN HONIGBERG: Go ahead.

5 MS. WEATHERSBY: So the letter came  
6 from RWE Principal Investments. Is that an arm  
7 of RWE, or RWE's subsidiary?

8 MR. WEITZNER: That's an arm of RWE  
9 Supply and Trading, which is then fully owned  
10 by RWE AG.

11 CHAIRMAN HONIGBERG: Am I correct  
12 that there was a letter of credit required for  
13 some, to guaranty some aspect of this? A  
14 letter of credit went to benefit the town?

15 MR. NEEDLEMAN: You're thinking about  
16 the decommissioning requirement that the  
17 Committee imposed.

18 CHAIRMAN HONIGBERG: Okay. And  
19 that's been provided?

20 MR. NEEDLEMAN: Yes. And I believe  
21 the Town sent a letter to the Committee saying  
22 it had been provided to its satisfaction.

23 CHAIRMAN HONIGBERG: Is that right,  
24 Ms. Monroe?

1 MS. MONROE: Yes, that is correct.  
2 And the letter from the Town, as well as the  
3 irrevocable letter of credit, is posted on the  
4 web site.

5 CHAIRMAN HONIGBERG: Okay. Thank  
6 you.

7 MR. MAHER: I just would like to make  
8 note for the record, the letter of credit came  
9 from TransAlta. And that's where sort of these  
10 issues dovetail for us, in terms of the  
11 transfer of ownership.

12 CHAIRMAN HONIGBERG: It's a letter of  
13 credit. Do you have some doubts about the  
14 validity of the letter of credit?

15 MR. MAHER: No. I think it's the  
16 involvement of TransAlta has risen to the level  
17 that now they're submitting letters of credit  
18 and other documentation securing the funding or  
19 aspects of performance in this letter. This is  
20 why, in our opinion, the issue of equity  
21 financing and the issue of the transfer of  
22 ownership dovetail together, because although  
23 at present the letters are coming from entities  
24 somehow related to the Applicant, there's no

1 assurance and there is no knowledge as to what  
2 that is going to present in the future, which  
3 is why I believe that now is an appropriate  
4 time to address both of those issues.

5 CHAIRMAN HONIGBERG: Ms. Weathersby.

6 MS. WEATHERSBY: I was going to ask  
7 Attorney Needleman if you could tell us  
8 generally the status of things with TransAlta  
9 and Antrim Wind.

10 MR. NEEDLEMAN: Sure. But before I  
11 do, again, just to clarify, I am fairly  
12 certain, and I'll ask one of my clients to  
13 confirm, the letter of credit is not from  
14 TransAlta.

15 MR. WEITZNER: The letter of credit  
16 is from CIBC. So it's CIBC's credit that is  
17 determining the quality of the letter of  
18 credit. It is in the name of TransAlta, but it  
19 is for the benefit of Antrim Wind Energy and,  
20 as required, the Town of Antrim. So that money  
21 is always in place whenever, if ever,  
22 decommissioning needs to be performed.

23 CHAIRMAN HONIGBERG: Right. Mr.  
24 Needleman.

1                   MR. NEEDLEMAN: Yes. And Ms.  
2                   Weathersby, to address the rest of your  
3                   question, TransAlta and Antrim Wind are in the  
4                   process of preparing a Joint Petition for  
5                   Transfer of Ownership to submit to the  
6                   Committee, which will look very much like other  
7                   joint petitions. It will include a couple of  
8                   pieces of prefiled testimony focusing on the  
9                   topics you talked about earlier. And the hope  
10                  is that we will be able to submit that joint  
11                  petition at some point in the not too distant  
12                  future for the Committee's consideration.

13                  CHAIRMAN HONIGBERG: Mr. Maher, I  
14                  think Ms. Linowes wants to say something. You  
15                  want to confer with her first?

16                  MR. MAHER: Yes, please. Thank you.

17                  (Discussion off the record.)

18                  MR. MAHER: Ms. Linowes will speak to  
19                  that.

20                  MS. LINOWES: Mr. Chairman, thank you  
21                  for allowing me to speak. What I want to say  
22                  with regard to Mr. Weitzner is he said that the  
23                  letter of credit was from CIBC -- that is  
24                  Canadian Imperial Bank of Commerce. The bank

1 obviously did not put up the credit  
2 associated -- or the assets on which that  
3 letter of credit was based; it was TransAlta,  
4 according to the documentation. Our argument  
5 or concern is that RWE, the parent company, the  
6 multi-billion-dollar energy company, does not  
7 appear to be part of the Antrim Wind process.

8 And the one other thing I wanted to  
9 point out is the two letters that were  
10 supplied by Antrim with regard to the credit  
11 in December. The RWE PI Walden Holdings,  
12 LLC, that is -- Mr. Shaw had signed that and  
13 testified. He also testified during the  
14 hearings that that entity, which was formed  
15 in 2015, was for the purpose of holding the  
16 contractual agreements between Walden Green  
17 and RWE Principal Investments. Again, one  
18 individual with an entity has very little in  
19 the way of assets may be owned by RWE, the  
20 parent company. But the fact that that  
21 letter was not signed by a principal of RWE,  
22 the parent company, is problematic. That  
23 company, this LLC, does not have \$60 million  
24 or \$65 million to build this project. Thank

1           you.

2                         CHAIRMAN HONIGBERG: All right. How  
3 would the members of the Subcommittee like to  
4 proceed? I think we probably have everything  
5 cued up at this point.

6                         Commissioner Scott.

7                         COMMISSIONER SCOTT: So I think where  
8 we were when we were talking about the merits  
9 at the core of this, maybe I signaled from some  
10 of my questions I feel the certificate was, you  
11 know, my words, is fairly permissive as far  
12 broad and scope. So I'm not seeing anything  
13 that would cause me to want to do anything  
14 further with the certificate. I guess I  
15 could -- what I'm unclear is procedurally would  
16 I move that we -- I'm not sure what I would  
17 move at this point. I'm not finding merits to  
18 the complaint.

19                         CHAIRMAN HONIGBERG: So you disagree  
20 with Mr. Maher's petition. You don't think we  
21 should grant -- well, let's put it a different  
22 way. You believe that the Applicant is in  
23 compliance with its certificate? Is that what  
24 you're saying?



1                   COMMISSIONER SCOTT: I believe the  
2                   certificate is worded very broadly, and none of  
3                   the arguments have swayed me that the filing is  
4                   not in compliance with the certificate.

5                   CHAIRMAN HONIGBERG: So your motion  
6                   would be to rule, in response to a request for  
7                   declaratory ruling, that the Applicant is in  
8                   compliance with its certificate?

9                   COMMISSIONER SCOTT: To the extent  
10                  that we're agreeing there's --

11                  CHAIRMAN HONIGBERG: On this issue.

12                  COMMISSIONER SCOTT: Yes. Correct.

13                  CHAIRMAN HONIGBERG: All right. You  
14                  want to make that motion then as I articulated  
15                  it and we fumbled it around?

16                  COMMISSIONER SCOTT: Yes.

17                  CHAIRMAN HONIGBERG: Ms. Weathersby,  
18                  do you understand the motion sufficiently to  
19                  second it, or should we try to hash it out a  
20                  little bit more?

21                  MS. WEATHERSBY: I understand and  
22                  second it.

23                  CHAIRMAN HONIGBERG: I agree with  
24                  you, Commissioner Scott. I think that the

1 "either/or" language in the certificate is  
2 probably dispositive of the debt-equity  
3 question. I think all the other issues that  
4 have been raised with respect to the  
5 involvement of another entity, most of which is  
6 prospective, are not ripe. So I'm prepared to  
7 support that motion.

8 Is there any further discussion?

9 MS. WEATHERSBY: I would support it  
10 as well. I agree with you. I think that there  
11 are valid concerns about the sale of Antrim  
12 Wind Energy, but those will all get flushed  
13 out. And I take some comfort as well in the  
14 letter of credit that's there. If for some  
15 reason this project, you know, gets started and  
16 doesn't get finished, it will get -- there's an  
17 irrevocable letter of credit in place that will  
18 get things restored. I also take comfort, at  
19 least initially, that it's still the RWE and  
20 Walden entities that are -- you know, they may  
21 rearrange things a little bit, but they're the  
22 same folks committing the equity at this point.

23 CHAIRMAN HONIGBERG: Anything else  
24 you want to say, Commissioner Scott? Further

1 discussion?

2 [No verbal response]

3 CHAIRMAN HONIGBERG: All right.

4 Seeing none, all in favor of Commission Scott's  
5 motion say "aye."

6 [All Committee members indicating "aye".]

7 CHAIRMAN HONIGBERG: Any opposed?

8 [No verbal response]

9 CHAIRMAN HONIGBERG: All right. The  
10 "ayes" have it.

11 There's a request that the  
12 certificate be suspended because of the  
13 contract of a prospective sale of the  
14 project. I think that we may have  
15 sufficiently dealt with that. But to the  
16 extent there's any ambiguity, can I have a  
17 motion on that?

18 MS. WEATHERSBY: I move that we deny  
19 the request to suspend the certificate until,  
20 was it until the sale?

21 CHAIRMAN HONIGBERG: I think just  
22 suspend.

23 MS. WEATHERSBY: Deny to suspend the  
24 certificate presently.

1                   CHAIRMAN HONIGBERG: Is there a  
2 second?

3                   COMMISSIONER SCOTT: I agree.  
4 Second.

5                   CHAIRMAN HONIGBERG: Any further  
6 discussion?

7                   [No verbal response]

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

10                  [All Committee members indicating "aye".]

11                  CHAIRMAN HONIGBERG: Any opposed?

12                  [No verbal response]

13                  CHAIRMAN HONIGBERG: All right. The  
14 "ayes" have it.

15                  I'm just going to go through what I  
16 understand to be the other issues raised in  
17 the petition. I think the delegation  
18 question has largely been resolved because  
19 we've reached the merits of the question. Is  
20 there disagreement about that?

21                  MR. MAHER: I think in this instance.  
22 But I think the issue still remains as to  
23 what's the process for compliance review going  
24 to be in the future. And I think Member

1 Weathersby had a suggestion that if there's a  
2 compliance-related matter that's raised at the  
3 Administrator level, that that could then be  
4 brought to the Committee's level where that  
5 matter would be considered by the Committee in  
6 some form of open forum. That seemed like an  
7 attractive option. I think it's a good balance  
8 of addressing certain issues as they arise and  
9 ensuring that my clients have some form of  
10 opportunity to observe the Committee's  
11 deliberations out in the open. And I thank Mr.  
12 Richardson for the suggestion, which I think  
13 was a workable one.

14 CHAIRMAN HONIGBERG: Mr. Needleman.

15 MR. NEEDLEMAN: I'm not quite sure  
16 that's what Mr. Richardson was suggesting, but  
17 I'll let him speak for himself. I have more of  
18 just an institutional concern about that  
19 because it sounds like on the one hand this is  
20 some sort of an amendment to the certificate on  
21 the fly, potentially. On the other hand, it  
22 sounds like some sort of amendment to the  
23 Committee's procedural rules on the fly about  
24 how these things are managed. And I think

1 either one of those would be problematic.

2 CHAIRMAN HONIGBERG: I have the same  
3 reaction, that I feel like we're amending the  
4 rules on the fly, which this body doesn't have  
5 the authority to do. I'd be much more  
6 comfortable having the full committee discuss  
7 this in the context of a full committee  
8 meeting.

9 Mr. Richardson, is there anything  
10 you wanted to clarify or supplement in what  
11 you said earlier?

12 MR. RICHARDSON: I'm going to  
13 apologize. I was reading another document when  
14 I heard Attorney Maher reference my name and  
15 what I said. I didn't hear what he said that I  
16 said, so I'm now --

17 CHAIRMAN HONIGBERG: I think he said  
18 that you were brilliant. That's definitely how  
19 I heard it.

20 MR. RICHARDSON: I got that part, but  
21 then I couldn't figure out why. I wanted to  
22 write it down in case I forget it.

23 CHAIRMAN HONIGBERG: We'll give you a  
24 chance to demonstrate it again.

1           MR. RICHARDSON: I mean, I'm of the  
2 view I think that the rulings on the merits  
3 seem to cover what we were here to do today.

4           The only other thing I would add,  
5 just for informational purposes, because the  
6 Committee may not be aware of it, but the  
7 standby letter of credit is governed by the  
8 International Standby Practices Act of 1998  
9 which provides that it's a contract between  
10 the bank and the Town of Antrim. So it  
11 doesn't matter to us who the Applicant is on  
12 the form that gets submitted to the bank.  
13 It's enforceable.

14           The other thing that the Committee  
15 members may not be aware of is the Town  
16 agreement which imposes all of the  
17 obligations to decommission the facility and  
18 the fact that the letter of credit is  
19 required and what has to happen in the event  
20 of a compliance issue, that's all recorded at  
21 the registry of deeds. So there is no risk  
22 that a new buyer could come in and claim they  
23 weren't subject to the certificate conditions  
24 or anything like that. The Town -- and

1 others might argue this. But the Town argued  
2 that until everything is decommissioned, the  
3 Town has a lien on the physical assets and  
4 the rights associated with the Project. So  
5 there's a very strong protection in place  
6 that a new buyer is going to have to come in  
7 and assume all of the obligations under the  
8 existing certificate. And I just want the  
9 Committee members to be aware that the Town  
10 took that role very seriously. We think  
11 we've covered that piece of it to make sure  
12 everyone is protected.

13 CHAIRMAN HONIGBERG: Thank you, Mr.  
14 Richardson.

15 COMMISSIONER SCOTT: On the process  
16 side, I'm not prepared at this point to agree  
17 to a new process. And I think I agree that, to  
18 the extent we were to do that, I think it  
19 should be by rules, and that would have to be  
20 the whole committee. It strikes me as were we  
21 to adopt this some kind of periodic meeting,  
22 that we're really binding the whole committee  
23 in future certificates or proceedings, which I  
24 don't think this subcommittee is in a position



1 to do.

2 CHAIRMAN HONIGBERG: Actually, the  
3 statute, I believe, one of the few things that  
4 the full committee has to do is rules, and I  
5 don't think rules can be promulgated by a  
6 subcommittee.

7 COMMISSIONER SCOTT: That's what I'm  
8 getting at. I think there ought to be a rule  
9 if we're going to do that. Not suggesting we  
10 couldn't do that. And other than the \$3,000, I  
11 understand that. We talked about it a couple  
12 times. But I think we've been fairly firm as a  
13 subcommittee, anyways, that the law requires  
14 that \$3,000, that it is what it is. Maybe we  
15 can change the law or take it to court if you  
16 think it's unconstitutional. But that aside,  
17 to me, the right venue is if you're aggrieved  
18 by a compliance issue, that you file a  
19 complaint and then we do what we're doing. I  
20 think that's the process. I'm not convinced  
21 that's a problem.

22 CHAIRMAN HONIGBERG: Ms. Weathersby.

23 MS. WEATHERSBY: Sure. I wasn't  
24 suggesting that we, the Subcommittee,

1           unilaterally change our rules, nor would that  
2           be permissible. But I don't -- and maybe it's  
3           a question for legal counsel. I don't see any  
4           prohibition to the suggestion that Attorney  
5           Maher gave both of us credit for, which is very  
6           generous, of having an added step that, hey, if  
7           there's something that the Administrator has  
8           decided that the public takes issue with, that  
9           they can ask, write to the Administrator and  
10          say, hey, would you mind taking a look at that  
11          or bringing it to the Committee. I mean, I  
12          don't think there's -- she can do with it what  
13          she wants with it until we amend our rules.  
14          But I don't think there's anything stopping a  
15          request being made to bring something before  
16          the Subcommittee or the full Committee, or her  
17          doing it herself if she's uncertain about  
18          whether something's in compliance or not in  
19          compliance.

20                   CHAIRMAN HONIGBERG: Is that question  
21                   for counsel?

22                   MS. WEATHERSBY: I guess that's a  
23                   question for counsel. There's nothing stopping  
24                   someone from asking for an issue to be reviewed

1 by the Committee.

2 MR. IACOPINO: I know that our  
3 Administrator is always happy to speak to any  
4 concerned parties, and I know that she does  
5 that on a regular basis. And certainly I'm  
6 sure she would consider any request, whether  
7 it's in this docket or whether it's with this  
8 project or some other project, to look into any  
9 complaints made. And then we have a statutory  
10 process that we follow if in fact there's a  
11 determination that somebody is not in  
12 compliance. But I'm sure that she's willing to  
13 speak to anybody. But I guess I should let her  
14 tell you that about the issues. And she's  
15 always willing to discuss concerns of the  
16 parties.

17 CHAIRMAN HONIGBERG: Now that you've  
18 been backed into a corner, Ms. Monroe...

19 MS. MONROE: Yes, that is the case.  
20 I guess the open question is if they don't  
21 agree with my determination, I think what is  
22 the process. And I think you've laid that out.

23 MR. IACOPINO: Section 12 of the  
24 statute governs the enforcement of conditions

1 and certificates.

2 CHAIRMAN HONIGBERG: I guess this is  
3 a question I'll direct to the lawyers. Are  
4 there other rulings this Subcommittee needs to  
5 make today beyond what we've already done?

6 MR. IACOPINO: I do not believe so.

7 CHAIRMAN HONIGBERG: I'll entertain a  
8 motion to adjourn.

9 COMMISSIONER SCOTT: So moved.

10 MS. WEATHERSBY: Second.

11 CHAIRMAN HONIGBERG: All in favor say  
12 "aye."

13 [All Committee members indicating "aye".]

14 CHAIRMAN HONIGBERG: We are  
15 adjourned.

16 (Hearing adjourned at 10:58 a.m.)

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C E R T I F I C A T E

I, Susan J. Robidas, a Licensed  
Shorthand Court Reporter and Notary Public  
of the State of New Hampshire, do hereby  
certify that the foregoing is a true and  
accurate transcript of my stenographic  
notes of these proceedings taken at the  
place and on the date hereinbefore set  
forth, to the best of my skill and ability  
under the conditions present at the time.

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

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Susan J. Robidas, LCR/RPR  
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Registered Professional Reporter  
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				<b>50 (1)</b> 25:5 <b>541-A (2)</b> 5:18;18:7
				<b>6</b>
				<b>65 (1)</b> 34:12 <b>66 (2)</b>