

## **Minutes of the Interagency Review Panel's September 12, 2011 Meeting**

The meeting was called to order at 3:03 p.m. by Ken Fletcher.

The following members of the Panel, State Agency staff and the public were present:

### Panel Members

Tim Agnew  
Barbara Alexander  
Kenneth Fletcher  
Fenwick Fowler  
Harrison Horning  
Bruce Van Note

### Staff

Brian Burne, DOT  
Nina Fisher, DOT  
Toni Kemmerle, Esq., DOT  
Todd Pelletier, DOT

### Attorney General's Staff:

Nancy Macirowski  
Jerry Reid

### Members of the Public

Kathy Billings, Bangor Hydro  
Gil Paquette  
Joe Rossignoli, National Grid  
Sharon Sudbay, Maritimes & Northeast Pipeline  
Steve Ward

## **1) Welcome and Introductions**

Meeting called to order by Chairman Ken Fletcher. Introductions were made.

## **2) Review of Draft meeting agenda and action items from meeting held on August 1, 2011**

B. Alexander requested that the minutes reflect on section 5, that she submitted a redline version of the rule for panel consideration as did T. Agnew – these changes were not incorporated in the version of the rules being reviewed.

*Minutes accepted with changes.*

### **3) Review and Final Editing of DRAFT “Bylaws, Administration, and the Energy Infrastructure Proposal and Review Process”**

J. Reid, Assistant Attorney General, Office of the Attorney General and Nancy Macirowski presented their revisions to the bylaws. B. Alexander noted that they did not use the redline version that she and T. Agnew had presented at the last meeting, and was adopted by the Panel. Concern was expressed over now having various differing versions of the document being discussed. B. Alexander asked that at some point, the various versions become integrated into one document.

J. Reid stated that they focused on the procedural issue exclusively, and admittedly had very little concept of what the Panel will be doing. They borrowed from other agencies to present all the options available to the Panel. The process of evidentiary hearings was explained and laid out in detail; the point was made that they are very resource extensive. J. Reid noted that the draft bylaws are rather heavy on the pre-application process. He stated that the Bureau of Purchases [within the Maine Department of Administrative and Financial Services] defers all these steps to the Request for Proposals [RFP] process, which can be very lengthy and detailed, but the regulation is not.

B. Alexander questioned whether there would be situations in which the Panel would be forced into an evidentiary hearing because of a situation requiring action? Could someone demand that kind of hearing? J. Reid responded that legally, “no – but real world pressure could dictate it.

T. Agnew asked what the benefit would be of conducting an evidentiary hearing. J. Reid stated that with an evidentiary hearing, a record is created and public interest may be so intense the Panel would feel the obligation to conduct the most rigorous hearing despite no legal requirement.

S. Ward noted that section 4.4, c of the bylaws indicates that the Panel must follow APA for evidentiary hearings – is that enough of an explanation? J. Reid responded that the explanation could stop there, but there is a benefit to having it spelled out in detail in the Panels’ own set of rules, not just the APA. K. Fletcher asked whether we should spell out that this process for an evidentiary hearing is at the sole discretion of the panel. S. Ward further noted that by including lengthy rules on evidentiary hearings the Panel might be indicating to people that the process would be a fully litigated process. It was questioned as to whether the Panel wanted to send that message.

*Discussion on whether the term “discretionary evidentiary hearing” should be removed all together from the rules:*

There was a discussion as to removing everything from the draft bylaws from section 6.1 forward. B. Alexander expressed concern about removing it completely and indicated she could see a scenario when the Panel may need to use it.

T. Kemmerle expressed that the Panel does not need this level of hearing and argued that nobody has an inherent right to locate energy facilities in a corridor.

B. Alexander argued that if the Panel ever chose to go down the path of an evidentiary hearing and it's not even referenced in the rules, there will be a complaint that the Panel is doing something that they never had the right to do. She stated it should be left in the rules, at the basic level as an option.

S. Ward stated that he does feel there is a need to have a reference in the rules, but the Panel should not devote one-third of its rules to a process that will likely never happen. He expressed that by leaving section 4.4, the Panel would be covered.

T. Kemmerle stated that MaineDOT sees this as granting access to a public Right of Way – evidentiary hearing sounds too similar to litigation, and that is not the role of the Panel. The rules should not give the impression that people can litigate what the Panel decides.

B. Alexander – the rule contemplates conflicting applications, where the Panel may face potential conflict among two entities. Why take away the flexibility of the Panel to have this as an option? At some point, with conflicting proposals, there could be a claim of lack of due process.

K. Fletcher – what authority, powers, process would we have in the evidentiary hearings that we would not necessarily have in the regular hearings? J. Reid – it comes down to witnesses under oath that both the panel and opposing parties would be able to question under oath.

T. Agnew made the motion to keep section 4.4, but eliminate section A and everything from section 6.1 on. A sentence would be added after section 4.4 C (now B) that preserves the discretion to allow the panel to deviate from the APA if necessary. F. Fowler seconded. The AG's office agreed to finalize the exact language of the added provision.

Vote on the motion – unanimous of voting members present.

J. Reid assisted the Panel in its section-by-section review of the latest draft rule. Generally, J. Reid commended the Panel members on their work on the draft and commented that some of the language would need to be more specific and “tightened” regarding the hearing procedure and freedom of access sections. The draft would be reviewed with attention to its interface with the statute. Overall, the draft was typical of those prepared by other boards and commissions.

#### **4) Discussion on Flow Chart**

B. Alexander expressed a problem with the draft bylaws – there appear to be multiple entry levels into the process. She would like to simplify the intake process of how the Panel receives solicitations. The question was raised as to how would we have an

unsolicited process? It was stated that we will always have a standing RFP out there, it is required. H. Horning stated that maybe the panel does not need unsolicited proposals. T. Agnew wanted to preserve the right to put out an RFQ if the panel felt it was needed. Also, an RFP if we have two conflicting proposals. K. Fletcher stated that he did not see the value of an RFQ and questioned whether the Panel really needs that clause.

K. Fletcher shared his views on the process: The Panel is aware of what we have – the interstate corridor. After it is determined how the Panel will conduct itself, the Panel will let it be known that they will entertain letters of intent to utilize the corridor for energy transmission. Then one of two things will happen, no one calls, or somebody(s) calls, and then that's the letter of intent, or we could end up with two or three or four or five. Panel agreed with this scenario. B. Alexander stated that the details will be in the RFP. N. Macirowski explained that the Panel can state the fact that there is an RFP in the rules, but it is not necessary to state the level of detail the Panel is looking for in the letter of intent. She stated that it was not clear to her the step from the LOI to the actual proposal. F. Fowler – the proposal is what comes out of the technical review phase. B. Alexander further explained that the RFP will inform the public as to what the Panel is soliciting and what needs to be submitted for the next steps in the process. The LOI will be the next step in the process.

N. Macirowski suggested that submittal of proposals be added to the flow chart before the Panel signs an MOU – confidentially of proposals submitted before MOU was raised. K. Fletcher indicated the Panel would review that point when reviewing that portion of the rules. K. Fletcher suggested tying MOU to section 2.4 of the rules.

S. Ward noted that there is no notice that the Panel is soliciting from people on the flow chart. Suggests a box indicating “soliciting and notice” and delete solicited RFP box and Unsolicited Proposal box. He also stated that the Panel might not want 3.2.2.1.5 in the LOI and maybe LOI should be a 30,000 feet overview not, 10,000 feet. Further, an indication as to what the state is hoping to charge for use of corridor would be good to know early on. Concerns were raised about a company paying for an appraisal only to have it used by another applicant as well.

## **5) New Business**

None.

## **6) Public comments**

None.

## **7) Closing and Action Items**

Next meeting is scheduled for October 3<sup>rd</sup> – OEIS staff will prepare: changes to the rules and H. Horning will make necessary changes to the flow chart. Jeff Marks from OEIS will try to update the draft rules with T. Agnew's and B. Alexander's changes. Staff will

get a draft out to everybody. Jeff will work with Panel members to ensure sure the rules reflect all the changes to date.

Adjourned – 5:15 pm