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February 5, 2013

Via Electronic and U.S. Mail

Jane Murray, Secretary
NH Site Evaluation Committee
New Hampshire Department of Environmental
Services
29 Hazen Drive
Concord, NH 03301

Re: Timbertop Wind, I, LLC Petition for Jurisdiction;
Docket No. 2012-04

Dear Ms. Murray:

Enclosed please find an original and 1 copy of *Motion to Deny or Dismiss
Petition*.

A complete copy of the foregoing has been provided by electronic mail to
all persons on the Committee's official service list in this proceeding. Please do
not hesitate to contact me if you have any questions.

Very truly yours,

Justin C. Richardson
jrichardson@uptonhatfield.com

JCR/sem
Enclosure(s)
cc: Docket No. 2012-04 Service List

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Timbertop Wind I, LLC Petition for Jurisdiction

Docket No. 2012-04

MOTION TO DENY OR DISMISS PETITION

NOW COME the Towns of New Ipswich and Temple, New Hampshire, by and through Upton & Hatfield, LLP, and move to deny or dismiss Timbertop Wind 1, LLC's Petition for Jurisdiction as follows:

I. MOTION TO DENY JURISDICTION

A. The Committee has the authority to deny Timbertop Wind 1, LLC's Petition without a hearing.

1. Timbertop Wind 1, LLC petitions for jurisdiction "pursuant to RSA 162-H:2, XII" for a proposed 15 MW wind energy project. Because Timbertop Wind 1, LLC's project is well below the 30 MW threshold for jurisdiction,¹ it is subject to RSA 162-H only if "the Committee determines [the project] requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1" (emphasis added).

2. Timbertop Wind 1, LLC bears the burden of proof to demonstrate that its project requires a certificate. *Site 202.19 (a)*. New Ipswich and Temple request that the Committee review and deny the Petition for Jurisdiction on the merits on February 19, 2013, without a time consuming, expensive and unnecessary hearing process proposed by Timbertop Wind 1, LLC.

3. A hearing is not required to deny Timbertop Wind 1, LLC's petition. Under RSA 541-A:31, a hearing is required only if "it is considered a contested case or, if the matter is one

¹ See RSA 162-H:2, VII (a).

for which a provision of law requires a hearing only upon the request of a party”. RSA 541-A:31, I. A “contested case” is defined as a “proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for a hearing.” RSA 541-A:1, IV (emphasis added).

4. RSA 162-H does not require that the Committee provide Timbertop Wind 1, LLC notice or a hearing before it denies its Petition for Jurisdiction. Unlike a determination to issue or deny a certificate, there is no statutory provision in RSA 162-H which requires that the Committee hold a hearing before denying Timbertop Wind 1, LLC’s Petition.² This means that Timbertop Wind 1, LLC must meet its burden of proof by setting forth sufficient facts in its Petition. *See Site 203.01 (a)* (A petition for a declaratory ruling “shall set forth” the “statutory and factual basis for ruling, including any supporting affidavits or memoranda of a law.”).

B. Timbertop Wind 1, LLC has not met its burden to show that a certificate is required “consistent with the findings and purposes set forth in RSA 162-H:1”

5. Timbertop Wind 1, LLC’s Petition fails to meet its burden to demonstrate that a certificate is required “consistent with the findings and purposes set forth in RSA 162-H:1”. Its Petition entirely ignores the Legislature’s findings and purposes under RSA 162-H:1 and instead focuses on a single allegation (based on speculation and hearsay) that the Towns of New Ipswich and Temple have adopted overly stringent zoning ordinances or are unable to apply their zoning ordinances fairly.

² In some cases, a hearing may be required under other statutes. For example, RSA 541-A:39 requires the Committee to consider the views expressed by the Towns of New Ipswich and Temple. Arguably, this would require that the Committee hold a hearing or conduct hearing-like procedures to consider the views or information presented by the Towns. The Towns therefore reserve the right to request a hearing in the event that the Committee does not deny Timbertop Wind 1, LLC’s Petition on February 19, 2013.

6. The Towns oppose and deny Timbertop Wind 1, LLC's allegation. As the Petition itself notes, the only approval sought by Timbertop Wind 1, LLC was approved by the Town of New Ipswich. However, the Legislature did not provide for exemption from local zoning merely by allegation of practical difficulty or hardship. The Legislature could have created a "hardship" or similar standard under RSA 162-H:2, VII, but it did not.³ Instead, the Legislature directed the Committee to determine whether a project requires a certificate "consistent with the findings and purposes set forth in RSA 162-H:1". The findings and purposes to be considered include the following:

- "a significant impact upon the welfare of the population";
- "the location and growth of industry";
- "the overall economic growth of the state";
- "the environment of the state, and the use of natural resources."
- "undue delay in the construction of needed facilities"⁴
- "full and timely consideration of environmental consequences";
- "full and complete disclosure to the public of such plans";
- "all environmental, economic, and technical issues are resolved in an integrated fashion, all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles."

³ See, e.g., *In the Matter of Good Lander & Tamposi*, 161 N.H. 490, 500 (2011) ("We interpret legislative intent from the [statutes] as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

⁴ Emphasis is added here: Timbertop Wind 1, presents no information to suggest its project should be evaluated as "needed facilities" under RSA 162-H:1. According to PSNH's most recent Integrated Resource Plan, PSNH requires no new Class I RECs to serve its territory. Timbertop Wind 1, LLC offers no information to suggest PSNH or others in the market need its energy. Again, Timbertop Wind 1, LLC, bears the burden of proof to show that its project requires a certificate for these or other purposes under RSA 162-H:1.

7. Timbertop Wind 1, LLC's Petition provides no information that demonstrates its project is required under RSA 162-H:1. It presents no information to suggest that a certificate is required for "the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state and the use of natural resources." RSA 162-H:1. There is no suggestion that its proposal is required for the local or regional industry, economy or employment. The project is not required for electric reliability or other purposes.

8. Timbertop Wind 1, LLC's project is simply an ordinary small wind project that has been proposed to provide income and tax benefits for its shareholders. While the free market and free enterprise are important, Timbertop Wind 1, LLC's project is not large enough to meet the threshold for mandatory jurisdiction under RSA 162-H:1, and its Petition fails to demonstrate that its project requires a certificate under RSA 162-H:1.

9. There is no reason to begin a time consuming and expensive legal process that would burden both the Towns and the Committee. As a result, the Towns of New Ipswich and Temple respectfully request that the Committee deny Timbertop Wind 1, LLC's Petition on February 19, 2013.

II. MOTION TO DISMISS FOR FAILURE TO COMPLY WITH RULE 203.01.

10. Timbertop Wind 1, LLC's Petition requests that the Committee make a declaratory ruling that its project is subject to RSA 162-H. However, under Site 203.01, a request for a declaratory ruling "shall set forth" the "statutory and factual basis for ruling, including any supporting affidavits or memorandum of law." *Site 203.01*. Timbertop Wind 1, LLC's Petition fails to provide an adequate statutory and factual basis for the Committee to make a jurisdictional ruling under Rule 203.01 and should therefore be dismissed.

11. “The law of this state is well settled that an administrative agency must follow its own rules and regulations, and the agency’s interpretation of its own regulations is erroneous as a matter of law when it fails to embrace the plain meaning of its regulations.” *Appeal of Union Telephone Company*, 160 N.H. 309, 317 (2010); *Appeal of Nashua*, 121 N.H. 874, 876 (1981). Furthermore, an agency cannot engage in *ad hoc* rulemaking by ignoring its rules and ruling on a case by case basis. *Appeal of Nolan*, 134 N.H. 723 (1991).

12. The Committee has adopted regulations governing declaratory rulings as required by RSA 541-A:16, I(d). It must give force and effect to those rules, which require that Timbertop Wind 1, LLC “shall set forth” the “statutory and factual basis for ruling, including any supporting affidavits or memorandum of law.” While Timbertop Wind 1, LLC has provided newspaper articles and minutes of meetings, this information is inadequate to make a factual or legal determination that its project requires a certificate consistent with the findings and purposes set forth in RSA 162-H:1. It provides no information showing how a certificate is required for “the welfare of the population”; “the location and growth of industry”; or “the overall economic growth of the state”. There is no information to suggest its project is required “to assure that the state has an adequate and reliable supply of energy” or for reliability purposes.

13. Timbertop Wind 1, LLC’s project is an ordinary 15 MW wind energy project. It has not sought approval for its project from either New Ipswich or Temple, as required by law. The only approval it sought for a meteorological tower in New Ipswich, it readily obtained. While it may be convenient for Timbertop Wind 1, LLC to avoid review under local Zoning Ordinances, or to avoid the need to apply for a variance from their terms under RSA 674:33, Timbertop Wind 1, LLC has failed to provide the Committee with an adequate statement of the “statutory and factual basis for ruling” that its project requires a certificate. As a result, the

Towns of New Ipswich and Temple request that its Petition be dismissed for failure to comply with Site 203.01 (a).

III. TIMBERTOP WIND 1, LLC'S PETITION VIOLATES RSA 541-A:39.

14. RSA 541-A:39 requires that:

In addition to any other requirements imposed by this chapter, each agency shall give notice to and afford all affected municipalities reasonable opportunity to submit data, views, or comments with respect to the issuance of a permit, license, or any action within its boundaries that directly affects the municipality. Such actions shall include those which may have an affect on land use, land development, or transportation; those which would result in the operation of a business; or those which would have an immediate fiscal impact on the municipality or require the provision of additional municipal services.

15. Timbertop Wind 1, LLC asks this Committee to make a determination that would eliminate the Towns' ordinances and regulations intended to protect land use, health and safety, and transportation. The Towns and their citizens would be forced to surrender their legal authority, and their only legal recourse would be to participate in time consuming, expensive, and unnecessary proceedings before the Committee. As a result, a determination that a certificate is required would "have an immediate fiscal impact on the municipality" and "have an effect on land use, land development, or transportation" and other criteria under RSA 541-A:39. The Committee must therefore "give notice to and afford all municipalities reasonable opportunity to submit data, views or comments".

16. Timbertop Wind 1, LLC provides no description of its proposed facilities, no description of its access roads, transmission facilities, fire and safety requirements, or other aspects of its project as would be required for site plan approval. The Towns of New Ipswich and Temple can only speculate as to the nature of the project over which Timbertop Wind 1, LLC petitions the Committee to assert jurisdiction.

17. Under RSA 541-A:39, this Committee is required to provide the Towns a

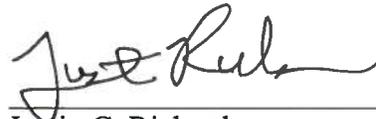
“reasonable opportunity to submit data, views, or comments” before it makes a determination that a project requires a certificate. Timbertop Wind 1, LLC’s petition fails to provide any meaningful description. As a result, Timbertop Wind 1, LLC’s petition fails to comply with RSA 541-A:39 and should therefore be denied or dismissed.

WHEREFORE, the Towns of New Ipswich and Temple, New Hampshire respectfully request that the Site Evaluation Committee deny or dismiss the Petition for Jurisdiction at its meeting on February 19, 2013 and grant such other relief as justice may require.

Respectfully submitted,

**TOWNS OF NEW IPSWICH AND
TEMPLE, By their Counsel,**

UPTON& HATFIELD, LLP



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Dated: February 5, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Site Evaluation Committee’s official Service List in this proceeding.



Justin C. Richardson