



**Upton
& Hatfield**^{LLP}
ATTORNEYS AT LAW

Concord Office

10 Centre Street
PO Box 1090
Concord, NH
03302-1090
603-224-7791
1-800-640-7790
Fax 603-224-0320

Attorneys At Law

Gary B. Richardson
John F. Teague
James F. Raymond
Barton L. Mayer
Charles W. Grau
Bridget C. Ferns
Heather M. Burns
Lauren Simon Irwin
Matthew R. Serge
Michael S. McGrath*
Marilyn Billings McNamara
Lisa M. Hall
James A. O'Shaughnessy

Hillsborough Office

8 School Street
PO Box 13
Hillsborough, NH
03244-0013
603-464-5578
1-800-672-1326
Fax 603-464-3269

Attorneys At Law

Douglas S. Hatfield
Margaret-Ann Moran
Steven J. Venezia*

North Conway Office

23 Seavey Street
PO Box 2242
North Conway, NH
03860-2242
603-356-3332
Fax 603-356-3932

Attorney At Law

Robert Upton, II

Portsmouth Office

159 Middle Street
Portsmouth, NH 03801
603-436-7046
1-877-436-6206
Fax 603-431-7304

Attorneys At Law

Russell F. Hilliard
Justin C. Richardson

www.upton-hatfield.com
law@upton-hatfield.com

*Also admitted in MA

Please respond to the Portsmouth office

February 25, 2013

Via Electronic 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 *Motion for Reconsideration*.

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 FOR RECONSIDERATION

NOW COME the Towns of New Ipswich and Temple, New Hampshire, by and through Upton & Hatfield, LLP, and move for reconsideration of the February 19, 2013 decision by the Chairman of the Site Evaluation Committee (“Committee”) to: (a) deny New Ipswich and Temple’s request for a ruling on the merits; and (b) to commence an adjudicative proceeding as follows:

I. SUMMARY

1. At the Committee’s meeting to consider Timbertop Wind 1, LLC’s *Petition for Jurisdiction* on February 19, 2013, the Chairman of the Committee, without a vote of the Committee: (a) denied the Towns’ request to deny the Petition on the merits; and (b) ordered that an adjudicatory hearing be commenced.

2. Both decisions violate RSA 541-A:29 & RSA 541-A:31 which vest the Committee with the sole and exclusive authority to determine whether to: (a) commence an adjudicative proceeding; or (b) rule on the merits of a petition. In deference to the Chairman, the Committee failed to rule on the issues as required by law.

3. The Towns request that the Committee deliberate and rule on the Towns’ and Counsel for the Public’s requests that the Timbertop Wind 1, LLC’s Petition be denied on the merits, before considering whether to commence an adjudicative proceeding as required by RSA 541-A:29 and RSA 541-A:31.

II. THE CHAIRMAN LACKS THE AUTHORITY TO DENY A REQUEST FOR A RULING ON THE MERITS AND TO COMMENCE AN ADJUDICATIVE PROCEEDING

4. The Towns do not believe that the Chairman intended to exceed his authority. Rather, his decision reflects the desire to follow the procedures the Committee may have used in other cases. However, even “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way”. *Cf. Pennsylvania Coal v. Mahon*, 260 US 393, 416 (1922). In this case, the law required that the Committee, not its Chairman, deliberate and determine whether to grant or deny the Petition on the merits, and whether to commence an adjudicative proceeding. RSA 162-H:2, VII & XII; RSA 541-A:29 & 31.

5. Unfortunately, this did not occur. Instead, the Chairman concluded that he had the sole authority to determine the issues under Site 202.14, and, could therefore deny the Towns’ request and commence an adjudicative proceeding.

6. The Towns timely objected and, as best as can be recalled, at least 4 members of the Committee indicated an agreement that there was no reason to commence an adjudicative proceeding. No member of the Committee, except the Chairman, suggested that an adjudicative proceeding is necessary. However, the Committee mistakenly believed that the Chairman had correctly stated his authority and it made no decision as to the merits or as to whether an adjudicative proceeding should be commenced.

7. The Chairman’s ruling was legal error. RSA 541-A:31 states that:

541-A:31 Availability of Adjudicative Proceeding; Contested Cases; Notice, Hearing and Record. –

I. An agency shall commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case or, if the matter is one for which a

provision of law requires a hearing only upon the request of a party, upon the request of a party.

II. An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.
(emphasis added.)

8. Under RSA 541-A, an agency is defined as a “state board, commission, department, institution, officer, or any other state official or group, other than the legislature or the courts, authorized by law to make rules or to determine contested cases.” RSA 541-A:1, II. In this case, it is the Committee that “is authorized by law ... to determine contested cases.” *See generally* RSA 162-H. There is no authority for the Chairman to order an adjudicative proceeding be commenced without a vote of the Committee. These rulings can only be made by the Committee under RSA 162-H and RSA 541-A:31.

9. Similarly, RSA 541-A:29, provides that:

541-A:29 Agency Action on Applications, Petitions and Requests. –

II. Within a reasonable time, not to exceed 120 days, after receipt of the application, petition or request, or of the response to a timely request made by the agency pursuant to paragraph I, the agency shall:

(a) Approve or deny the application, in whole or in part, on the basis of non adjudicative processes, if disposition of the application by the use of these processes is not precluded by any provision of law; or

(b) Commence an adjudicative proceeding in accordance with this chapter.

(emphasis added).

10. This provision, like RSA 541-A:31, confirms that the decision to “approve or deny” or “commence an adjudicative proceeding” rests solely with the Committee. The Chairman may not do so without a vote of a majority of the Committee.

11. The Committee’s rules, Site 202.14, do not give the Chairman this authority. Site

202.14 only applies once an adjudicative proceeding has commenced. Furthermore, agency rules cannot add to or detract from the substantive authority conveyed by statute. *Appeal of the Town of Deerfield*, 162 NH 601, 604 (2011). Site 202.14 does not give the Chairman the authority to grant or deny motions as to matters that are solely with the Committee's statutory authority under RSA 162-H:2 and RSA 541-A:29 & 31.

12. New Ipswich and Temple request that the Committee consider: (a) whether to deny the *Petition for Jurisdiction* on the merits without a time consuming, expensive and unnecessary hearing process; and (b) whether to commence an adjudicative proceeding as required by RSA 541-A:29 and RSA 541-A:31.

Respectfully submitted,

**TOWNS OF NEW IPSWICH
AND TEMPLE,**

By their Counsel,

UPTON & HATFIELD, LLP



Justin C. Richardson
NHBA #12148
159 Middle Street
Portsmouth, NH 03801
(603) 436-7046
jrichardson@uptonhatfield.com

Dated: February 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to the Committee's official service list in this proceeding.



Justin C. Richardson