

March 4, 2013

THOMAS B. GETZ  
T 603.695.8542  
F 603.669.8547  
TGETZ@DEVINEMILLIMET.COM

**VIA HAND DELIVERY**

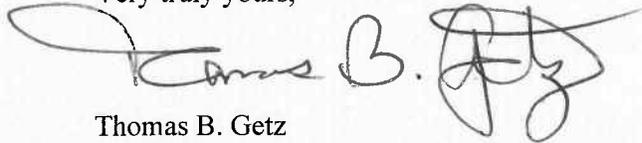
NH Site Evaluation Committee  
c/o Jane Murray, Secretary  
NH Department of Environmental Services  
29 Hazen Drive, P.O. Box 95  
Concord, NH 03302-0095

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

Dear Ms. Murray:

Enclosed please find an original and 18 copies of Timbertop Wind I,  
LLC's Objection to Towns' Motion for Reconsideration.

Very truly yours,

  
Thomas B. Getz

TBG:aec

Enclosures

cc: Service List (Electronically)

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2012-04  
Timbertop Wind I, LLC  
Petition for Jurisdiction**

**OBJECTION TO TOWNS' MOTION FOR RECONSIDERATION**

On February 25, 2013, the Towns of New Ipswich and Temple filed a pleading in which they “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.” Motion for Reconsideration, p.1. In closing, they “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.” *Id.*, p.4.

The Towns allege that the Committee Chairman, Department of Environmental Services Commissioner Thomas Burack, committed legal error in denying the Towns’ motions to dismiss and deny jurisdiction. They argue that “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.” *Id.*, p.2.

As explained below, Timbertop Wind I, LLC (Timbertop) requests that the Chairman deny the motion for reconsideration. The Towns are mistaken in at least two fundamental regards. First, the law does not require that the Committee, through a majority of a quorum, deliberate and determine to commence an adjudicative proceeding. Second, the Chairman was authorized to rule on the motions to dismiss and to deny jurisdiction.

**I. PROCEDURAL POSTURE**

The Towns’ pleading is styled as a motion for reconsideration. They do not invoke RSA 541:3 as authority for their motion nor do they refer to it as a motion for rehearing. Presumably, their characterization is intentional. Inasmuch as the Towns are not seeking rehearing, the provisions of Site 202.29 do not apply. Furthermore, the Chairman’s disposition of the preliminary motions does not constitute an order or decision that would trigger rehearing. See RSA 541-A:1, XI, which defines order to mean “the whole or part of any agency’s final disposition of a matter, other than a rule, but does not include an agency’s decision to initiate,

postpone, investigate or process any matter, or to issue a complaint or citation.” See also RSA 541-A:35, which pertains to final decisions and orders, the purpose of which is to provide the New Hampshire Supreme court with “an adequate basis upon which to review the decision of the administrative agency.” *Petition of Support Enforcement Officers I and II*, 147 N.H. 1, 9 (September 25, 2001).

The Towns’ motion for reconsideration, therefore, is a motion governed by Site 202.14. Consequently, pursuant to subsection (f) objections are due within 10 days, and pursuant to subsection (h) the presiding officer, i.e., Commissioner Burack, shall rule upon the motion.

## II. ADMINISTRATIVE PROCEDURE ACT

The Towns base their allegation of legal error on RSA Chapter 541-A, the Administrative Procedure Act. They contend that only the Committee can “approve or deny” a petition or “commence an adjudicative proceeding” pursuant to RSA 541-A:29 and 39. With respect to approving or denying the petition for jurisdiction, the Chairman has done neither. The Chairman, acting in his role as presiding officer and pursuant to the plain language of Site 202.14 (j), ruled upon the motions to dismiss and the motion to deny jurisdiction by denying them. The decision whether to assert jurisdiction, that is, determine whether the Timbertop Wind I project requires a certificate, is the province of the Committee as expressed in RSA 162-H:2, XII. Disposition of the matter on the merits will be undertaken through an adjudicative proceeding, consistent with past practice, and as required by Site 202.01.

With respect to commencing an adjudicative proceeding, the Committee, acting through the Chairman, commenced an adjudicative proceeding by issuing the January 18, 2013 Order and Notice of Public Meeting. That Order set a deadline for petitions to intervene, provided for public comment, set a deadline for objections to intervention, and scheduled a public meeting. The Order also set forth the authority for hearing and indicated that the “Committee must determine if it is consistent with the findings and purposes of RSA 162-H:1 to assert jurisdiction over the proposed facility and require that the Petitioner file an application for a certificate of site and facility.” This Order is consistent with orders that the Committee routinely issues, under the signature of the presiding officer, commencing an adjudicative proceeding. See, e.g., SEC Docket No. 2012-01, Order and Notice of Prehearing Conference, Site Visit and Public Information Hearing (issued March 20, 2012). As explained below, through the ministerial act of issuing the January 18, 2013 Order, the Chairman properly commenced the adjudicative proceeding required by law regarding a petition for jurisdiction.

The New Hampshire Supreme Court in *Petition of Support Enforcement Officers I and II*, 147 N.H. 1,5 (September 25, 2001) noted that the Administrative Procedure Act “provides that the adjudicative proceeding requirements of RSA 541-A:31-:36 apply in ‘contested cases.’” The

Court also noted that a “‘contested case’ is 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 hearing.’” The Court found that “‘there are three ways that a hearing can be ‘required by law’: 1) a statutory requirement, (2) an agency rule requirement, or (3) a due process constitutional requirement.’”

As the Towns point out, the Committee is an “agency” pursuant to RSA 541-A:1, II. The Committee’s “agency rule requirement” Site 202.01 states that “the committee... shall conduct an adjudicative proceeding, regarding an application or petition, or when determining whether to suspend or revoke a certificate, in accordance with the administrative procedure act, RSA 541-A, and these rules.” Site 102.13 defines petition to include “a request to the committee to rule on the applicability of this chapter to a particular proposed bulk power supply facility or energy facility.” Accordingly, a petition for jurisdiction constitutes a contested case in which a hearing is required by law and, necessarily, an adjudicative proceeding is commenced. The adjudicative proceeding was commenced by means of the January 18, 2013 Order.

In further support for the Chairman’s issuance of the January 18, 2013 Order commencing this adjudicative proceeding, Timbertop observes that the Committee treats the petition for jurisdiction as a precursor to, and part and parcel of, an application for a certificate for a renewable energy facility of 30 MW or less. RSA 162-H:6-a sets forth numerous duties for the chairperson, including in subsection III, the authority to accept an application. The statute invests extensive administrative authority in the chairperson with respect to applications by renewable energy facilities, which should be interpreted to extend to petitions for jurisdiction to be treated as a renewable energy facility.

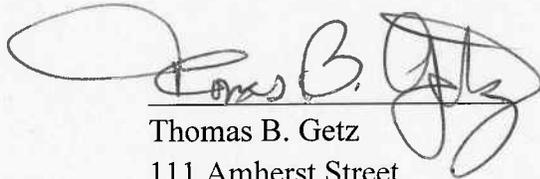
Finally, the Towns conclude that when RSA 541-A:31, I says that an agency shall commence an adjudicative proceeding, it is speaking in the very technical sense in this instance of the Committee acting through the majority of a quorum. Agency is a general, all-inclusive term that captures the broad spectrum of entities subject to the Administrative Procedure Act. With respect to RSA 541-A:29 and 31, the provisions should be read as describing what is required of an agency, but not necessarily describing how an agency meets those requirements. Specifically, the provisions should not be read in a restrictive sense that only the Committee members acting as a majority of a quorum, pursuant to RSA 91-A, can act to commence an adjudicative proceeding. The agency is complying with the requirement that it shall commence an adjudicative proceeding in a contested case when the chairperson/presiding officer acts on its behalf.

### III. CONCLUSION

The Towns misconstrue the actions the Chairman took at the hearing on February 19, 2013, and they misconstrue as well the Chairman's authority for the actions he did take. Accordingly, Timbertop requests that the Chairman deny the Towns' motion for reconsideration. At the same time, if the Committee were inclined to obviate any potential procedural argument going forward, at the next available meeting or hearing in this proceeding it could ratify the Chairman's issuance of the Order commencing this adjudicative proceeding and his denial of the motions to dismiss and deny jurisdiction.

Respectfully submitted,

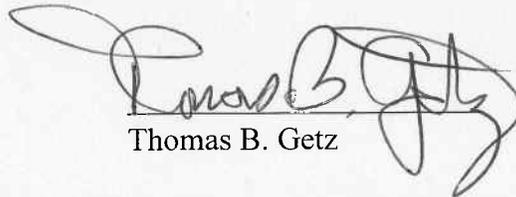
Timbertop Wind I, LLC  
By Its Attorneys  
Devine, Millimet & Branch



Thomas B. Getz  
111 Amherst Street  
Manchester, NH 03101  
603-695-8542  
[tgetz@devinemillimet.com](mailto:tgetz@devinemillimet.com)

### CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of March, 2013 a copy of the foregoing Objection was sent by electronic or U.S. mail, postage prepaid, to persons named on the Service List of this docket, excluding Committee members.



Thomas B. Getz