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May 28, 2013

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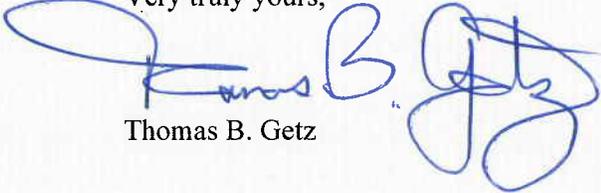
NH Site Evaluation Committee
c/o Jane Murray, Secretary
NH Department of Environmental Services
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

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

Dear Ms. Murray:

Enclosed for filing in the above-referenced proceeding, please find an original and 18 copies of Timbertop Wind I, LLC's Brief.

Very truly yours,


Thomas B. Getz

TBG:aec

Enclosures

cc: Service List (Electronically)

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**Docket No. 2012-04
Petition For Jurisdiction Over Renewable Energy Facility**

BRIEF OF TIMBERTOP WIND I, LLC

NOW COMES Timbertop Wind I, LLC (“Timbertop”), by and through its attorneys, Devine, Millimet & Branch, P.A., and submits the following Brief in support of its Petition for Jurisdiction filed with the New Hampshire Site Evaluation Committee (“SEC” or “Committee”) on December 21, 2012.

INTRODUCTION

Timbertop respectfully requests this Committee assert jurisdiction, pursuant to RSA 162-H:2, XII, over the proposed 15 MW wind facility it seeks to construct in the towns of New Ipswich and Temple in Hillsborough County, New Hampshire. The Timbertop project as currently configured would comprise five 3-MW turbines, with two turbines planned to be located in New Ipswich and three turbines in Temple (the “Facility”).

Timbertop contends that SEC jurisdiction is necessary as the Facility is proposed to be constructed in two towns, each with its own land use regulations and review process. Thus, subjecting Timbertop to separate reviews at the town level would result in undue delay in construction and fail to resolve all issues in an integrated fashion. Moreover, the applicable zoning ordinances that have been adopted by the towns impose substantive requirements inconsistent with SEC precedent and state law and therefore do not maintain a proper balance between the environment and the need for new energy facilities. For these and other reasons more fully set forth below, SEC jurisdiction is required.

BACKGROUND AND PROCEDURAL HISTORY

Timbertop is a 100% wholly-owned subsidiary of Lavaca Wind, LLC, which is an affiliate of Pioneer Green Energy, LLC (“Pioneer”). Pioneer specializes in complex wind and solar projects. The Timbertop project is managed by Pioneer Vice President and Founder Adam Cohen, who manages development activities in the Company’s Eastern Unit, which currently includes projects in New Hampshire, Connecticut, Pennsylvania and Maryland.

Timbertop has completed extensive development work for the project to date.¹ It has leased 600 acres for potential development, and preliminary civil work, such as, surveying, identifying access roads, and delineating wetlands, is underway. Timbertop received approval for a meteorological tower from the New Ipswich Planning Board for Binney Hill in March 2009 and for a second tower for Kidder Mountain from that Board in August 2011.

A full year of avian, bat and breeding bird surveys has been completed. Wind data collection from Binney Hill began in November 2010; environmental survey work began in April 2011; and the project entered the ISO interconnection queue in May 2011. Public Service Company of New Hampshire’s distribution circuit # 3235 has been identified as the point of interconnection. PSNH completed the system impact study in April, 2012, which it forwarded to the New England Independent System Operator (“ISO”). Timbertop and the ISO executed the Interconnection Facilities Study Agreement in August, 2012, which is required to permit the physical and electrical interconnection of Timbertop to the grid. In September, 2012, Comsearch issued a Microwave Report, which found that the project would not pose an obstruction to Federal Communications Commission (“FCC”) licensed microwave paths. The Federal Aviation

¹ A detailed description of the development work completed by the company and involvement with the Towns of New Ipswich and Temple for the project is provided in Timbertop’s Petition for Jurisdiction (“Petition”).

Administration (“FAA”) issued determinations of no hazard to navigation for the proposed turbine locations in November, 2012.

Despite Timbertop’s initial work with New Ipswich, the Town amended its large wind energy systems (“LWES”) ordinance in March 2012, making it significantly more restrictive than the previously existing ordinance. That same year, the Town of Temple enacted a similarly restrictive LWES ordinance. Both the New Ipswich amendment and Temple ordinance appear to have been enacted in direct response to the Timbertop project. *See* Towns’ May 13 Filing, Dekker and Freeman, p. 7, and Kieley and Lowry, p.22.²

On December 21, 2012, Timbertop filed its Petition requesting that the SEC exercise jurisdiction over the siting, construction and operation of the Facility pursuant to RSA 162-H:2, XII. The Boards of Selectmen for the Towns filed a Motion to Deny or Dismiss the Petition (the “Motion to Dismiss”) on February 5, 2013. The Petitioner objected to the Motion to Dismiss in a timely manner. A meeting of the SEC was held on February 19, 2013, to resolve the issue of the Motion to Dismiss. That same date, the Motion to Dismiss was orally denied by the Chairman of the SEC and Presiding Officer. On February 25, 2013, the Towns filed a Motion for Reconsideration, and on March 20, 2013, Counsel for the Public filed a Response of Counsel for the Public to Motion for Reconsideration. On April 19, 2013, the Committee issued an order memorializing the reasons for denial of the Motion to Dismiss and denying the Motion for Reconsideration. Thereafter, Timbertop filed an Assented-to Motion for Deliberations on April 25, 2013, which was granted by this Committee on May 8, 2013.

² Mr. Dekker and Ms. Freeman state: “Although somewhat skeptical that there would be sufficient wind in New Ipswich to support a LWES, the Board believed that wind farms are an important land use, and decided to write a zoning amendment making Large Wind Energy Systems (LWES) an allowed use in town.” They go on to say: “Almost two years later, the Board had come to appreciate that wind energy could be viable in our region. Recognizing that the existing ordinance had been developed in some haste without a full understanding of the issues, the Board felt it would be advisable to review the previously approved LWES ordinance to determine if it was sufficiently protective of the health, safety, and welfare of the community.”

TOWNS' MAY 13 FILING

On May 13, 2013, the Towns submitted documentary evidence (“Towns’ May 13 Filing”). The filing includes statements from Mr. Dekker and Ms. Freeman on behalf of the Town of New Ipswich, from Mr. Kieley and Ms. Lowry on behalf of the Town of Temple, and from Ms. Linowes on behalf of both Towns. In addition, the filing includes maps and photographs of the Towns, reports and studies with respect to sound, articles on community responses to wind turbines, raptor migration data, renewable portfolio standard information, and information about automatic lighting systems.

Mr. Dekker and Ms. Freeman state that their purpose is to: (1) provide an overview of the experience and qualifications of the New Ipswich Planning Board; (2) explain the basis for the ordinance; (3) explain how certain standards can be exceeded; and, (4) explain that the Towns are willing to conduct joint hearings. Mr. Kieley and Ms. Lowry state that their purpose is to: (1) provide an overview of the Temple Planning Board; (2) provide an overview of Temple’s important historical, natural and recreational resources; and (3) explain how “review of a proposed LWES under the Temple Zoning Ordinance can be completed provided that adverse impacts on the community and values protected by the Zoning Ordinance are avoided.”

The thrust of the Towns’ May 13 Filing appears to be that they are competent, well-meaning individuals who adopted ordinances based on certain information. Timbertop does not allege otherwise. This proceeding, however, as discussed further below, is not about the competence or motives of the Planning Board members. This case is about the ordinances they adopted and the procedures they employ, and whether the ordinances and procedures meet the statutory standards of RSA 162-H:1. The collection of articles about sound impacts, community responses to wind turbines, raptor migration, renewable portfolio information, and automatic

lighting systems may have informed their thinking but they are not relevant to, and should be accorded no weight in, determining whether the Towns' ordinances maintain the proper balance between the environment and the need for new energy facilities, or whether the Town's procedures avoid undue delay or resolve issues in an integrated fashion.

STANDARD OF REVIEW

RSA 162-H:2, XII provides that the Committee may assert jurisdiction over a renewable energy facility, which shall include electric generating station equipment powered by wind, with a nameplate capacity from 5 MW to 30 MW that the SEC "determines requires a certificate, consistent with the findings and purposes of RSA 162-H:1." *See* Jurisdictional Order for Antrim Wind Energy, LLC, SEC Docket 2011-02 at p. 17 ("Antrim Order"). Thus, in order to assert jurisdiction, the Committee must determine whether a certificate is required to meet one of the following criteria:

- (1) Maintain a balance between the environment and the need for new energy facilities in New Hampshire;
- (2) Avoid undue delay in the construction of needed facilities and provide full and timely consideration of environmental consequences;
- (3) Ensure that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans;³ and
- (4) Ensure that the construction and operation of energy facilities are treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

See RSA 162-H:1; Jurisdictional Order for Community Energy, Inc. and Lempster Wind, LLC, SEC Docket 2006-01 at 7; and Order Denying Motion to Deny or Dismiss, p. 3, issued April 19, 2013, in this proceeding.

³ Timbertop does not dispute that the public would be afforded full and complete disclosure of the plans for the facility under either the SEC or municipal review process. Therefore, this criterion is not addressed below.

ARGUMENT

1. Pioneer has presented sufficient information to allow the Committee to assert jurisdiction over the Timbertop project.

As a threshold matter, Timbertop has presented sufficient information to allow the Committee to assert jurisdiction over the Timbertop Project. As this Committee has previously made clear, it “does not require a detailed description of the Project to decide whether the exercise of jurisdiction over the Project is consistent with the findings and purpose articulated in RSA 162-H:1.” Antrim Order at 20. Likewise, the Committee does not require “the extensive permitting documents and engineering drawings that normally accompany an Application for Site and Facility.” *Id.* Rather, the Committee’s jurisdiction is ripe for adjudication as long as it has “sufficient facts to determine if the exercise of the Committee’s jurisdiction is consistent with the findings and purpose articulated in RSA 162-H:1.” *Id.*

In its Petition and subsequent Response to Joint Petition to Intervene and Objection to Motion to Deny or Dismiss, Timbertop provided sufficient information from which the Committee can make a determination as to whether jurisdiction over Timbertop’s project is appropriate. Timbertop has provided the following:

- (1) Minutes for both the New Ipswich and Temple planning boards involving any discussion to the Timbertop Project;
- (2) New Hampshire Certificate of Formation for Timbertop;
- (3) Lease agreements with Walter Maki and Jeremy Bradler for the proposed location of the Timbertop Project;
- (4) Avian and Bat Survey;
- (5) System Impact Report;
- (6) Microwave Report;
- (7) FAA Determinations; and

(8) Proposed Site Plan Concept Map, with turbine locations, access roads and wetlands.

Included within each of these documents, most notably the planning board minutes, are detailed descriptions of Timbertop's project. Such descriptions include a summary of the development and surveying efforts to date, the expected height, size and location of the wind turbines, including information regarding the surrounding properties. The above-referenced documents, as well as the affirmative steps Timbertop has taken towards its goal of developing this project, provide the SEC with information sufficient to issue a jurisdictional order.⁴ In fact, in its denial of the Towns Motion to Dismiss, the SEC stated that "the [Timbertop] Petition and the supplemental information filed by the Petitioner more than adequately provides a statutory and factual basis required for consideration of jurisdictional issues by the Committee." *See* Order Denying Motion to Deny or Dismiss the Petition and Denying Motion for Reconsideration Filed by Boards of Selectmen of the Towns of Temple and New Ipswich (April 19, 2013) at 4. Accordingly, Timbertop has met its burden to provide "sufficient facts to determine if the exercise of the Committee's jurisdiction is consistent with the findings and purpose articulated in RSA 162-H:1."

2. Need is not an element of a decision on jurisdiction.

Contrary to the assertions of the Towns and Counsel to the Public, Timbertop is not required to prove a "need" for the proposed Timbertop project for the purpose of establishing SEC jurisdiction. They mistakenly focus on the characteristics of the Timbertop facility when the correct focus is on the characteristics of the Towns' ordinances and procedures for review of the Timbertop facility.

⁴ These documents certainly meet the SEC's requirements in the Antrim Order, which were limited to a description of the environmental conditions; the existence of wildlife in the area; the nature of the project area and its relation to the rural conservation district; information regarding the proximity of abutters; and the expected height, size and location of the wind turbines. *Id.*

RSA 162-H:1, “Declaration of Purpose” reads as follows:

The legislature recognizes that the selection of sites for energy facilities, including the routing of high voltage transmission lines and energy transmission pipelines, will have 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. Accordingly, *the legislature finds that it is in the public interest to maintain a balance between the environment and the need for new energy facilities in New Hampshire; that undue delay in the construction of needed facilities be avoided* and that full and timely consideration of environmental consequences be provided that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which 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. The legislature, therefore, hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities. (emphasis added)

The Towns and Counsel for the Public read the word “need” in isolation and out of context. They mistakenly construct an independent substantive requirement where there is none. The SEC rejected a similar attempt in the Groton Wind proceeding. Intervenors in that case, relying on language in the Purpose section, argued that the SEC should conduct a general balancing of environmental issues and the need for the facility. The SEC held:

The Intervenors’ balancing argument mistakenly conflates the general language of the Declaration of Purpose, RSA 162-H:1, with the specific findings required under RSA 162-H:16. The Legislature’s desire for a “balance between the environment and the need for new energy facilities in New Hampshire” is achieved by the statutory scheme adopted in RSA 162-H, and part and parcel of that balance is the requirement that the Site Evaluation Committee, or Subcommittee as the case may be, make specific enumerated findings in order to issue a certificate of site and facility.

See, Application of Groton Wind, SEC Docket No. 2010-01, Decision Granting Certificate (May 6, 2011) at p.29.

In Groton Wind, the SEC also addressed Counsel for the Public’s contention that the applicant had failed to demonstrate the need for the project. The SEC observed that “RSA 162-

H:16 does not require a finding of need. Formerly, RSA 162-H16, V required a finding that construction was needed to meet the present and future need for electricity but the Legislature repealed that requirement.” *Id.* P. 30. Moreover, in this proceeding the theory that a petitioner must meet the much higher and expressly repealed standard that a particular facility is “needed” in order for the SEC to make the preliminary decision whether to assert jurisdiction strains credulity when a certificate may be issued without a showing of need.

The Supreme Court of New Hampshire has held that “[a] legislative declaration of purpose is ordinarily accepted as a part of the act . . . unless incompatible with its [the statute’s] meaning and effect.” Opinion of the Justices, 113 N.H. 201, 203 (1973). The Court further noted that the “announced purpose of a statute is not conclusive as to its meaning but it is nevertheless entitled to weight” *Id.* More indicative of the Legislature’s intent with respect to the issue of need is its decision in 2009 to repeal that part of 162-H:16 requiring an applicant to prove that its facility is “required in order to meet the present and future need for electricity” in order to obtain a certificate. Thus, to read “need” as a requirement for jurisdiction solely based on language included in the “Declaration of Purpose” clause would be incompatible with the statute’s meaning and effect, because such a reading espouses a standard for jurisdiction that is not required for obtaining an actual certificate. *See City of Rochester v. Corpening*, 153 N.H. 571, 573, 907 A.2d 383 (2006) (“We interpret statutes in the context of the overall statutory scheme and not in isolation.”)

Rather than creating a requirement for a petitioner to show that a facility is “needed,” the “Declaration of Purpose” employs precatory, nonbinding language that expresses the desire of the Legislature in establishing the SEC as a “procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy

facilities.” In determining whether the SEC should assert jurisdiction, the question is not whether a facility is needed to satisfy the factors in the “Declaration of Purpose,” but, rather, whether SEC jurisdiction is required to achieve the objectives articulated in the “Declaration of Purpose.” Therefore, Timbertop’s purported inability to display a “need” for its project has no bearing on whether the SEC’s jurisdiction over the issue would satisfy the overall goals articulated in the “Declaration of Purpose.”

Assuming for the sake of argument that the reference to need in RSA 162-H:1 had any bearing on a petition for jurisdiction, the reference is more properly interpreted as a general statement of the state’s desire and need for new sources of renewable energy, which reflects the SEC’s approach in recent decisions. In the Clean Power Development case, the SEC recognized “that the State of New Hampshire maintains a need for new, clean and renewable energy sources.” *See* Clean Power Development, SEC Docket No. 2009-03, Final Order Denying Petitions (April 7, 2010) at p. 8. More recently, in the Antrim Wind Energy case, the SEC noted that it was “cognizant of the need for new clean and renewable energy sources.” *See*, Antrim Wind Energy, SEC Docket No. 2012-01, Decision and Order Denying Application (April 25, 2013) at p.70. These recognitions apply to Timbertop as well.

The historic structure of the SEC should also be taken into account when examining the “need” argument. During the time when an express finding of need was required for bulk power supply facilities, the process had two steps. The SEC made the specified findings in RSA 162-H:16, IV. The Public Utilities Commission then issued a certificate if it found that construction of the facility was “required to meet the present and future need for electricity,” and would “not adversely affect system stability and reliability factors.” Assigning to the SEC a responsibility to determine need is contrary to the historic structure of the SEC and inconsistent with the

Legislature's determination to restructure the electric industry. The historic role of the SEC itself did not extend to need but instead included a finding that operation of a facility was "consistent with the state energy policy established in RSA 378:37." That requirement was repealed in 2009 as well.

Finally, the Towns also offer the opinion of Ms. Lisa Linowes, Executive Director of the Industrial Wind Action Group, as part of their May 13, 2013 Filing. Ms. Linowes asserts at p. 3 of her statement that Timbertop "is not needed 'to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles' within the meaning of RSA 162-H:1." At the same time, however, when asked whether the Legislature intended that the SEC consider need when determining whether a project below 30 MW requires a certificate, she stated that is a legal question, but that "I do not believe that the Legislature intended that the need or lack of need for additional RECs be considered." *Id.* Ms. Linowes is correct that the Legislature did not intend that need be considered. As discussed above, the Legislature did not intend that the SEC specifically determine as part of a jurisdictional inquiry whether a particular renewable energy facility below 30 MW was needed.

3. Asserting jurisdiction over the project is necessary to maintain the proper balance between the environment and the need for new energy facilities in New Hampshire.

SEC jurisdiction in this instance would provide the proper balance between the environment and the need for new energy facilities because the New Ipswich and Temple ordinances incorporate standards inconsistent with RSA 162-H: 16, IV, SEC precedent, and RSA 674:63, which sets limits on municipal authority for small wind energy systems (SWES). As discussed below, the Towns' ordinances impose unwarranted standards for large wind energy systems (LWES) with respect to height, setbacks, sound, environmental impact, and visual impact. Because the Towns' ordinances are significantly more restrictive and impose

unreasonable and conflicting requirements when compared to the benchmarks of state law, Timbertop requires a certificate from the SEC.

a. Height Restrictions

The Towns have adopted inconsistent height ordinances. New Ipswich employs a subjective standard, i.e., “due consideration shall be given to the scale of the turbines in relation to the surrounding landscape.” Temple, however, employs an objective standard that flatly precludes turbines in excess of 450 feet. RSA 674:63, II provides that a municipality shall not restrict tower height “through application of a generic ordinance or regulation on height that does not specifically address allowable tower height or system height of a small wind energy system.”

The SEC has granted certificates of site and facility to Lempster Wind, Granite Reliable Power, and Groton Wind, all of which employed turbines of approximately 400 feet. In the recent Antrim Wind proceeding, the applicant proposed turbines nearly 500 feet in height. The SEC denied Antrim Wind a certificate based on aesthetic grounds, focusing on the visual impact on particularly sensitive areas, but it expressed no inherent objection to the height of the turbines.

The New Ipswich height ordinance appears to be in part a visual restriction, which focuses solely on scale, while its visual impact ordinance deals with dominance within a visual context that includes a number of factors. Conceivably, a project could pass visual muster but be denied on the basis of height alone. The Temple ordinance employs an arbitrary height standard with no apparent relationship to safety or some other cognizable concern.

b. Setback restrictions

The Towns have adopted inconsistent setback standards. New Ipswich employs a nominally subjective standard, i.e., setbacks “shall be sufficient to protect people, domestic and farm animals, public and private property, and utilities from Debris Hazard.” Temple, however,

employs an objective standard that requires tower bases to be set back at least 2,000 feet from adjacent property; an adjacent landowner may waive this setback but not below 1.5 times turbine height.

RSA 674:63, III prohibits towns from “[r]equiring a setback from property boundaries for a tower greater than 150 percent of the system height.” Temple’s 2,000 foot setback requirement, however, is roughly 5 times the structure height of the Lempster, Granite Reliable and Groton towers, and 4 times the structure height proposed in Antrim. In Lempster, the SEC closely examined the issue of ice throw and approved setbacks at least 1.1 times the turbine height from any non-participating landowner’s property line, 1.5 times turbine height from public roads, and three times turbine height from a non-participating landowner’s occupied building. In the Groton proceeding, the applicant entered into an agreement with the Town of Groton that used the setbacks adopted in the Lempster proceeding. The SEC found that no credible evidence was produced that ice throws posed a danger to human health and safety under those conditions.

While the Town of New Ipswich requires that setbacks be sufficient to protect people, animals, and property, it also requires that “ice throw or ice shedding from the LWES shall not cross the Project Boundary.” The ordinance then states that the applicant “has the burden of proof to demonstrate to the Planning Board that the setback is sufficient to meet these standards.” The critical question concerns, which standards? Is an applicant required to show, as has been the case with the SEC in the past, that there is no unreasonable adverse effect on public safety, or is an applicant required to show that there is no possibility that a piece of ice of any size could cross the applicant’s property line? New Ipswich’s standards are unreasonably vague and fail to maintain the proper balance between the environment and the need for new facilities.

c. Sound Restrictions

The Towns have adopted nominal noise level/sound pressure level limits of 33 dBA “anywhere at any time on a Non-participating (*i.e.* adjoining) Landowner’s property.” However, by adding a “plus 5 dB design margin to the predicted Noise Levels” the Towns have effectively implemented a 28 dBA limit. This effect was pointed out to the New Ipswich Planning Board in a December 9, 2011 letter from Timbertop’s sound expert, Robert O’Neal, submitted at the Planning Board meeting on December 12, 2011, and filed as part of Timbertop’s Petition. Mr. O’Neal also observed that no data or observations had been provided to support the statement in New Ipswich’s (and Temple’s) ordinance that “existing Background Noise levels in New Ipswich are less than 30 dBA.” The Town’s consultants, Stephen Ambrose and Robert Rand, in a letter to the Planning Board dated December 22, 2012, state that environmental background sound levels quieter than 30 dBA are typical for rural areas, but they do not point to any data collected for New Ipswich. Similarly, they dismiss but do not directly address Mr. O’Neal’s point about the 5 dB design margin.

The New Hampshire Legislature has prohibited “[s]etting a noise level limit lower than 55 decibels, as measured at the site property line” in RSA 674:63, IV for SWES. Although this standard does not apply directly to Timbertop’s project, it reflects a clear policy intent by the Legislature to set reasonable noise level limits for wind projects. Therefore, the 55 dBA baseline set under RSA 674:63, IV provides a compelling basis for assessing the reasonableness of the Towns’ ordinances. The Legislature’s 55 dBA benchmark supports a conclusion that the Towns’ ordinances are inappropriate and improperly shift the balance contemplated among the purposes and findings of RSA 162-H:1 against the development of new facilities.

In the Towns' May 13 Filing, Mr. Dekker and Ms. Freeman attempt to distinguish the New Ipswich ordinance from RSA 674:63, and they assert that noise levels from an LWES are not comparable to noise from a SWES. They cite to the work of Messrs. Rand and Ambrose in a document entitled "Wind Turbine Noise, An Independent Assessment." Mr. Dekker and Ms. Freeman state that the "characteristics of the sound from each [an LWES and an SWES] are entirely different." They then go on to quote Messrs. Rand and Ambrose at length from a September 10, 2010 column.

Messrs. Rand and Ambrose do not say that the sound characteristics of an LWES and a SWES are entirely different. Rather, they say that as turbine size increases the sounds produced are louder. Assuming that this is true, a constant sound level requirement protects the public regardless of the size of the turbine, inasmuch as the turbine would simply need to be sited further from the property line in order to meet the sound standard. To the extent Mr. Dekker and Ms. Freeman conclude that it is reasonable to have a stricter standard for large turbines, they misconstrue Messrs. Rand and Ambrose's column and fail to recognize that the size of the turbine, whether it is 100 kW, 1 MW, or 3 MW, is not relevant to the listener; it's whether it can be heard.

The Towns' sound levels are also well below those required by the SEC. For example, in Lempster Wind, the SEC, after extensive testimony and cross examination, including testimony by Mr. O'Neal on behalf of Counsel for the Public, adopted a general limit of 55 dBA at the property line of nearby homeowners, subject to certain other conditions such as a 45 dBA limit at the outside façade of residences on summer nights. In Groton Wind, LLC, SEC Docket No. 2010-01 ("Groton"), the SEC applied the same standard, except that it applied a summer night time standard of 40 dBA for a nearby campground. The SEC revisited this issue again recently

with respect to Antrim Wind, in which Mr. O’Neal testified on behalf of the applicant. The SEC approved a 45 dBA or 5 dBA above ambient limit outside facades of residences during daytime and 40 dBA or 5 dBA above ambient at nighttime. In doing so, it rejected the recommendation of Counsel for the Public’s witness, Mr. Tocci, to set a sound standard of 30 dBA or 10 dBA above baseline, which is comparable to the Towns’ ordinances.

The Towns’ sound restrictions run contrary to the Legislature’s benchmark requirement for small wind facilities and SEC precedent. In addition, New Ipswich’s decision with respect to sound relies on anecdotal and incomplete evidence, is premised on an undocumented assumption of background noise levels, misstates the work of its consultants, and, in adopting its consultants’ recommendation to employ a sound level to avoid predicted widespread complaints, uses a technique that is not an official EPA technique and that employs unsupported adjustments or corrections. Mr. O’Neal’s December 9, 2011 Letter supports these conclusions but perhaps the most telling passage of his letter deals with setbacks. He points out that the New Ipswich’s sound ordinance would require that a single wind turbine would need to be more than two miles from a Non-Participating Landowner’s property, creating a four-mile wind buffer around each turbine. He concluded that “[w]ith these types of setbacks, it is unlikely that any wind energy developer will be able to design a project in New Ipswich.”

d. Environmental Impacts

The Towns’ ordinances adopt a number of standards under the heading of Environmental Impact. With respect to wildlife, the ordinances require an applicant to demonstrate that there will be no “significant adverse Impact on area wildlife and wildlife habitat.” With respect to avian and bat species, the ordinances require that the development and operation of an LWES not have an “adverse Impact on bird or bat species.” With respect to ground and surface water, the

ordinances require that an LWES “not adversely affect the quality or quantity of ground and surface waters.”

RSA 162-H:16, IV (c) provides that the SEC, in order to grant a certificate of site and facility, must find that a facility “[w]ill not have an *unreasonable adverse effect* on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.” (emphasis added) The Towns have clearly adopted more restrictive standards. Under their standards, it is conceivable that the prospect of insignificant harm to a bird or bat species could be deemed to be non-compliant with the ordinance. As a result, the balance contemplated by RSA 162-H:1 would not be achieved. In essence, they have constructed a strict liability standard that would require an applicant to demonstrate no impact; an impracticable standard. The Legislature’s use of the unreasonable adverse effect standard acknowledges the potential for some adverse effect, which the Towns would not permit. The Towns’ standards are not compatible with the Legislature’s standards and thus do not maintain the proper balance under RSA 162-H:1.

e. Visual Impact

With respect to visual impact, the ordinances require that an LWES be “designed and constructed so as not to cause adverse visual impacts.” In addition, the Towns require the use of Automatic Obstruction Lighting Systems, which they define as a “lighting system that provides continuous 360-degree surveillance of the airspace around a wind farm from the ground level to above aircraft flight altitudes, automatically activating obstruction lighting when aircraft are detected at a defined outer perimeter and course of travel.”

As with the standards the Towns adopted for environmental impact, the standard they have adopted for visual impact is more restrictive than that set out by the Legislature in RSA

162-H:16, IV (c). Under the Towns' standard it is conceivable that the potential appearance of a single turbine above tree top could be deemed adverse. The Towns' approach does not represent the balance required by RSA 162-H:1, which is inherent in the use of the modifier "unreasonable" with respect to adverse effects in the findings required under RSA 162-H:16.

As for the use of automatic lighting obstruction systems, such a requirement exceeds any FAA specification for wind projects. See FAA Advisory Circular AC 70/7460-1K CHG 2, Chapter 13. Marking and Lighting Wind Turbine Farms. Chapter 1. Administrative and General Procedures provides for requests for modifications and deviations from the marking and lighting standards, but the specified permissible modifications and deviations do not include automatic obstruction lighting systems. In addition, RSA 674:63, V prohibits "[s]etting electrical or structural design criteria that exceed applicable state, federal or international building or electrical codes or laws." In the Towns' May 13 Filing, Dekker and Freeman relate that they selected the lighting system in its ordinance based on communications with a system manufacturer. They blithely indicate that if such systems are not commercially available, "we expect that the project would seek a variance to install a similar system consistent with the spirit of the LWES ordinance."

4. Committee Jurisdiction would avoid undue delay.

The New Hampshire Supreme Court addressed the Legislature's intent in creating the Site Evaluation Committee in *Public Service Company of New Hampshire v. Town of Hampton*, 120 N.H. 68 (1980). The Court held:

A fair reading of RSA 162-F [predecessor to 162-H] reveals a legislative intent to achieve comprehensive review of power plants and facilities site selection. The statutory scheme envisions that all interests be considered and all regulatory agencies combine for the twin purposes of avoiding undue delay and resolving all issues "in an integrated fashion." By specifically requiring consideration of the views of municipal planning commissions and legislative bodies, the legislature assured that their concerns would be

considered in the comprehensive site evaluation. Thus, the committee protects the “public health and safety” of the residents of the various towns with respect to the siting of power plants and transmission lines.

Pursuant to RSA 162 H:6-a, the SEC is required to exercise its review within an eight-month timeframe, assuring that the Timbertop project is reviewed without undue delay as is required under the findings and purposes set forth in RSA 162-H:1. The Towns’ processes provide no such assurance. The Towns have conceded throughout the course of this proceeding that Timbertop will need to seek variances from their respective ordinances in order to complete its project. Thus, municipal jurisdiction will necessarily require a two part review process – variance approval by each Town’s zoning board and site plan review by the planning boards of each Town.

With respect to variances, the Towns do not appear to be in accord, which would lead to undue delay. Mr. Dekker and Ms. Freeman at p. 3 of their statement say that an LWES could obtain a variance provided it “would not have an *unreasonable adverse impact* on the use and enjoyment of adjacent properties.” Mr. Kieley and Ms. Lowry, however, indicate at p. 2 of their statement that a variance could be obtained provided the LWES “demonstrates that it would not have an *adverse impact[s]* on residential properties and the values that the Zoning Ordinance is intended to protect.” These are two markedly different standards, reflecting likely irreconcilable mindsets.

Given the scope of review and controversy surrounding the Timbertop project thus far, it is difficult to imagine that these boards would complete their review in a single standard evening hearing. Although the New Ipswich and Temple planning boards each meet twice a month, their respective zoning boards each meet just once a month. Thus, even if the two zoning boards

agreed to joint hearings, it will very likely take multiple months for Timbertop to complete the zoning review process before it can even begin site plan review.

Further, any appeal of a zoning decision of either town will be subject to the thirty-day rehearing requirement of RSA 676:2. Thus, Timbertop or any interested party would have thirty days to request rehearing of the zoning board(s) decision and the zoning board would not hear that motion until its next regularly scheduled meeting. Timbertop or another interested party would then have another thirty days to appeal to the Superior Court and, following the Superior Court's order, the decision could be further appealed to the Supreme Court. The planning board process must similarly be appealed to the Superior Court prior to Supreme Court review. Thus, even if the zoning and planning appeals were consolidated, the municipal approval process could easily take a number of years to run its course. Certainly such a process would not "avoid undue delay in the construction of needed facilities."

5. SEC Jurisdiction would ensure that the construction and operation of energy facilities are treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

SEC review of the Timbertop project is necessary under the circumstances inasmuch as the facility is proposed to be constructed in two towns and conducting separate reviews at the town level would result in a duplicative, inefficient and untimely process. In the Antrim decision, the SEC noted that "[c]ommittee jurisdiction assures consolidation of all land use planning issues into a single proceeding, subject to a single appeal to the New Hampshire Supreme Court." Antrim Order at 26. The SEC has a well-developed regulatory scheme established to address the siting, construction and operation of a renewable energy facility. *Id.* Not only does the prospect of the Timbertop project being subjected to both zoning and site plan

review in both Towns for the same project result in duplicative and unnecessary review, it also leaves open the possibility of conflicting results.

In addition to the conflict of the Towns' ordinances with SEC precedent and state law benchmarks, the ordinances are incompatible with one another in important ways. For instance, Temple elected to adopt objective height and setback standards, while New Ipswich adopted subjective height and setback standards. As a result, turbine selection and placement decisions that would be permissible in one town might not be permissible in the other. Such potentially incompatible requirements pose significant obstacles to the development of renewable energy facilities, lead to undue delay, and promote wasteful litigation. SEC review of Timbertop, however, will ensure resolution of environmental, economic and technical issues in an integrated fashion.

The Towns point to the joint review provision of RSA 674:53 as a means for resolving issues in an integrated fashion. Mr. Dekker and Ms. Freeman, at p. 26, state that such a review would have a single record, joint hearings and the same timeframes. They also say that their ordinances are "essentially identical" and that the only significant differences are with respect to height and setbacks. They further state that they "expect that the Boards would reach the same results applying the same standards in each Town."

Tower height and setbacks are fundamental design issues for developers of wind facilities and differences between the Towns on these issues evince an unlikelihood of resolving technical issues in an integrated fashion. But even with respect to areas where the Towns have adopted similar language, such as with respect to environmental and visual impacts, each Town will interpret the facts and the ordinances independently and issue separate decisions. They may use a joint hearing process but such a process hardly rises to the level of resolving all issues in an

integrated fashion. Moreover, the expectation of two current New Ipswich Planning Board members that the New Ipswich and Temple Zoning and Planning Boards would reach the same results falls well short of ensuring such an outcome, which would be the case with the SEC.

SEC jurisdiction ensures that all environmental, economic and technical issues related to land-use planning will be resolved in an integrated fashion. Additionally, the SEC's jurisdiction would not preclude the Towns from raising land-use planning issues, or any other concerns, during the adjudicative process because pursuant to RSA 162-H: 16, IV(b), the SEC is required to consider the views of municipal and regional planning commissions, as well as municipal governing bodies, when determining whether to grant a certificate. *See* RSA 162-H: 16, IV(b); *see also* Antrim Order at 27. Therefore, SEC jurisdiction will provide an integrated venue for all interested parties to address land-use concerns in an integrated fashion.

CONCLUSION

Timbertop requires a certificate. As the SEC framed the issue in the Antrim Order at p. 28, "adequate protection of the objectives and purpose of RSA 162-H requires the Committee to assert jurisdiction over the project." SEC jurisdiction is required here because: (1) the Towns' ordinances, in numerous instances, do not maintain a balance between the environment and the need for new energy facilities; (2) the Towns' processes do not avoid undue delay; and, (3) the Towns' processes do not resolve all environmental, economic, and technical issues in an integrated fashion.

If either of the Towns fail to meet any one of these three objectives, then SEC jurisdiction is required. As noted herein, the Towns' ordinances fail the balancing test with respect to height, setbacks, sound, environmental impacts, including wildlife, avian species and ground water, and

visual impacts, anyone of which would be a sufficient basis for SEC jurisdiction because anyone of these standards could provide the basis for denying site plan approval.

The Towns' rejoinder with respect to the restrictive nature of their ordinances is that if the ordinances have the practical effect of prohibiting construction then a developer can pursue variances. See, Dekker and Freeman, p. 23, and Kieley and Lowry, p.26. Mr. Dekker and Ms. Freeman, at p. 25, incorrectly state that:

In effect, the New Ipswich Zoning Ordinance provides a goal to be met by the project, but the variance criteria allow the Zoning Board of Adjustment to consider whether exceeding the standards set by the Ordinance would have an adverse effect on nearby residences. This is very similar to the findings that are made by the Committee when it considers whether or not a proposed energy facility would have an 'unreasonable adverse effect' on noise.

Interestingly, at the same time they intimate the ease with which variances might be obtained, they tout the fact that an LWES is an allowable use "thus relieving potential applicants from the burden of having to go to the ZBA for a variance."

The suggestion that Timbertop can simply seek variances ignores the strict requirement imposed by statute and case law with respect to granting variances. As Peter Loughlin has noted in his practice guide, "[i]t should be clear...that it is not easy to obtain a variance and it should not be." Loughlin, 16 N.H. Practice, Land Use Planning and Zoning, Section 24.21, p. 426 (2012). Unlike the standards set forth in RSA 162-H, variances are intended solely as a safety valve in order "to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." *Id.*, at 24.02 (citing *Ouimette v. Somersworth*, 119 N.H. 292 (1979) et al.).

For purposes of an SEC determination of jurisdiction, the Towns in their May 13 Filing, and Counsel for the Public during the February 19, 2013 hearing, suggest that Timbertop must show the exclusionary effect of the ordinances, that greater stringency alone is not sufficient for

SEC jurisdiction. This approach wrongly equates the standard for a variance with the standard for SEC jurisdiction. The issue is not whether the Towns ordinances are so stringent that they would, for instance, result in an unnecessary hardship to an LWES. The issue is whether the Towns have adopted ordinances that do not properly balance the environment and the need for new energy facilities. As explained above, the Towns have substantially shifted the balance against the development of new energy facilities.

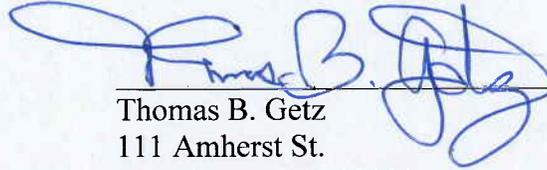
As for avoiding undue delay, and resolving all environmental, economic and technical issues in an integrated fashion, the Towns fail on both counts as described above. Furthermore, SEC jurisdiction would be more efficient, more timely, more comprehensive, and more in tune with the comprehensive intent underpinning the creation of the SEC. This is particularly true given the nature of the ordinances in each town with which Timbertop would be required to comply. As noted in the Antrim Order at pp. 26-27, the SEC: “has a well-developed regulatory scheme designed to address the siting, construction and operation of renewable energy facilities;” “is required to exercise its review within an eight month timeframe;” and “is statutorily required to give due consideration to the views of municipal and regional planning commissions and municipal governing bodies.”

Accordingly, Timbertop Wind I, LLC contends that its proposed renewable energy facility requires a certificate, and therefore SEC jurisdiction, consistent with the purposes and findings of RSA 162-H:1, as provided by RSA 162-H:2, XII.

Respectfully submitted,

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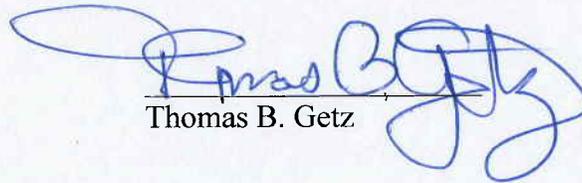
Dated: May 28, 2013



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2013 a copy of the foregoing Brief was sent by electronic mail to persons named on the Service List of this docket, excluding Committee Members.



Thomas B. Getz