THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

RE: Petition of Timbertop Wind 1, LLC for Jurisdiction	)	**Docket No. 2012-04**

RESPONSE OF COUNSEL FOR THE PUBLIC
TO PETITION FOR JURISDICTION

Counsel For The Public hereby responds to the Petition for Jurisdiction Over Renewable Energy Facility Proposed By Timbertop Wind 1, LLC (the "Petition"). Counsel for the Public requests that the Petition be denied.

1. On February 14, 2013, Counsel for the Public was appointed by Attorney General Michael A. Delaney pursuant to RSA 162-H:9.

2. The petitioner, Timbertop Wind 1, LLC ("Petitioner") seeks jurisdiction by the Site Evaluation Committee over an as yet not fully defined project of approximately 15 MW of wind generation to be constructed in the Towns of New Ipswich and Temple (the "Project").

3. Under the standard followed by the Committee in *Petitions of Laflamme and Jones (In re Clean Power Development, LLC)*, N.H. Site Eval. Comm., no. 2009-03 ("*Laflamme and Jones*"), and subsequently followed in *Petition for Jurisdiction (In re Antrim Wind Energy, LLC)*, N.H. Site Eval. Comm., no. 2011-02 ("*Antrim Jurisdiction*"), jurisdiction over this project is not required or appropriate. [1]

[1] The *Lempster* order is not discussed herein because jurisdiction was not disputed by any party in that case and thus its precedential value is weak.

4. Where a project falls below the 30 MW threshold for mandatory jurisdiction, upon an appropriate petition, the Committee may treat a renewable project as an "energy facility," subject to its jurisdiction, if the Committee determines it "requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1." RSA 162-H:2, XII.

5. In the two previous cases cited, the Committee looked to the statutory purposes of jurisdiction under the chapter and identified several factors to be considered.

A. The Balance Between the Environment and the Need for New Energy.

In *Laflamme and Jones*, the Committee found that New Hampshire "produces more energy than it consumes." *Laflamme and Jones*, Order, dated April 7, 2010. Nevertheless, without specifically in keeping with the "findings and purposes" of the chapter, the Committee went on to find that the proper balance between the environment and the need for energy was achieved because the Clean Power Development project was a renewable energy project. *See also Antrim Jurisdiction*, Order, dated August 10, 2011, at 22-23. Nowhere in chapter 162-H findings and purposes is there expressed a particular State need to permit renewable energy sources in derogation of other important State and local concerns. Instead, the findings and purposes deal only with the need for energy weighed against the environmental impacts of the particular means of generating it considered in the context of regional economic development. Thus, the fact that the Project will produce renewable energy is of little importance in a jurisdictional inquiry. The chapter presupposes an energy project, of whatever type, that implicates important Statewide or regional concerns. Nowhere does the Petition allege that there is a Statewide need for this proposed energy project or even that there is a particular regional environmental or economic benefit of the project as weighed against its impacts.

Similarly, the Petition says nothing of any significance about the environmental impacts of the project's construction and operation. It is thus not possible for the Committee to make any sort of assessment about whether jurisdiction is necessary to assure that there will be an appropriate balance of energy need as against environmental impacts.
As such, the Petition does not satisfy the first factor.

This factor would appear to be a critical gateway issue. For without a significant Statewide or regional concern, there is no purpose to the assertion of any jurisdiction by the Committee and the Petition should be denied without further consideration of any other factors.

B. Undue Delay.

The issue of undue delay presupposes the need for the energy to be produced by the facility. The Petition does not allege that the Petitioner's project will be unduly delayed by following the local processes. Therefore the application of this factor does not support an exercise of jurisdiction.

C. Full and Complete Disclosure.

The Petition does not suggest that the process required on the local level will not provide full and complete disclosure of the issues at stake consistent with the policies and findings of chapter 162-H. As found in *Laflamme and Jones*, moreover, the local processes will be public proceedings and open to all. In all likelihood, the project's plans and designs and submissions to the local officials will all be publically available. *See Laflamme and Jones*, Order, at 9. Consequently, the application of this factor does not support the exercise of jurisdiction.

D. Significant Aspect of Land Use Planning.

In light of the comprehensive scope of the applicable zoning ordinances, it appears that both towns' processes would treat the consideration of the project as a significant aspect of land use planning in a manner substantially similar (albeit not identical) to the process employed by the Committee. As the Committee found in *Laflamme and Jones*, the Towns here, like the City of Berlin in that case, will use an "integrated review process to consider those issues of land use planning that relate to this Project." *Id*. at 9. Many of the considerations will be "very similar to the considerations that would be addressed by this Committee." *Id* at 10. The local regulations provide for review of the project's impacts in many important ways, including, visual appearance and shadow flicker, noise, safety, and environmental impacts on wildlife and avian species, storm water and erosion control. The local regulations also provide for specific criteria on design, manufacture and construction of facilities, financial assurance, financial, technical and managerial capability, decommissioning, and enforcement of the rules. In some ways, the local regulations provide clearer standards for a project applicant than that provided by chapter 162-H. At a minimum, the local regulations in this case are more faithful to the findings and purposes of chapter 162-H than were the local regulations that the Committee found sufficient in *Laflamme and Jones*.

The Petitioner does not argue that the local regulations do not treat the consideration of wind projects as a significant aspect of land use planning. Instead, the Petitioner complains that in essence they do too good of a job at it by "incorporating standards inconsistent with SEC precedent…" The quarrel is that the regulations *may be* too protective of public health and safety and the environment.

As is clear from *Laflamme and Jones*, Committee jurisdiction is not mandated in any case where the local regulations are not identical to Committee process and result. In neither case is success of the applicant assured – in both cases the standards or requirements may lead to a denial of permission to build. All that is required in the jurisdictional context is that the "findings and purposes" and "the goals of the statute" can be identified in the local process, not that the result be predictably identical as the Petitioner suggests. *See Laflamme and Jones*, Order, at 7; *Antrim Jurisdiction*, Order, at 25 (lack of local regulation makes it impossible to tell whether it would "sufficiently assure adherence to the purposes and findings" in chapter 162-H). The Committee has not required identical treatment, only that whatever treatment is provided by local regulation will be at least as protective of the goals of chapter 162-H as chapter 162-H is of itself. While certain of the New Ipswich and Temple standards may be somewhat more stringent, the Petitioner has not alleged that it would not be possible ever to meet them and that as a result the stringency becomes exclusionary. *Accord North Country Envtl. Servs., Inc. v. Town of Bethlehem*, 150 N.H. 606, 620 (2004) (local control that is applied in good faith and without exclusionary effect should be allowed); *Town of Pelham v. Browning-Ferris Indus. of N.H., Inc.*, 141 N.H. 355, 364 (1996) (same); *Antrim Jurisdiction*, Dissent from Jurisdictional Order, dated August 23, 2011 at 2 (dissenters, including then-Chairman Getz, would allow local control where no evidence of lack of good faith). Significantly, even if the stringency of local regulation might serve to block *this* project, if it is not exclusionary in *every* case, there is no basis to conclude that the local process is inconsistent with the findings and purposes of chapter 162-H. Neither strict uniformity of treatment nor success in every case are among the findings and purposes of chapter 162-H.

As a result, this factor does not provide a basis for the assertion of jurisdiction.

6. Where the Petitioner has not shown that the jurisdictional criteria that the Committee has developed and followed "require" an assertion of jurisdiction in this case, the Petition should be denied.

WHEREFORE, Counsel for the Public respectfully requests that the Committee not grant the Petition.

Respectfully submitted,
COUNSEL FOR THE PUBLIC

By his attorneys

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