

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

**February 19, 2013** - 10:09 a.m.  
N.H. Public Utilities Commission  
20 South Fruit Street Suite 110  
Concord, New Hampshire

In re: **SEC DOCKET NO. 2012-04**  
**TIMBERTOP WIND I, LLC:**  
*Petition for Jurisdiction*  
*over a Renewable Energy*  
*Facility Proposed by*  
*Timbertop Wind I, LLC, to*  
*be Located in Temple and*  
*New Ipswich, New Hampshire.*  
(Public meeting)

**PRESENT:**

Cmsr. Thomas S. Burack  
(Presiding as Chairman of SEC)

Chrmn. Amy L. Ignatius  
(Vice Chairman of SEC)

Acting Cmsr. Philip Bryce  
Dir. Harry Stewart  
Acting Director Craig Wright  
Cmsr. Robert R. Scott  
Cmsr. Michael D. Harrington  
Director Elizabeth Muzzey  
Director Glenn Normandeau  
Interim Dir. Brad Simpkins  
Dir. Meredith Hatfield  
Brook Dupee, Designee  
Randall Knepper, Dir./Safety  
(Designated as PUC Engineer)

**SITE EVALUATION COMMITTEE:**

N.H. Dept. of Environmental  
Services

N.H. Public Utilities Comm.

DRED & Div. of Parks & Rec.  
DES - Water Division  
DES - Air Resources Division  
N.H. Public Utilities Comm.  
N.H. Public Utilities Comm.  
DHR - Div. of Cultural Res.  
N.H. Fish & Game Dept.  
DRED - Div. of Forests/Lands  
Office of Energy & Planning  
Dept. of Health & Human Serv.  
N.H. Public Utilities Comm.

Counsel for the Committee: Michael J. Iacopino, Esq.

COURT REPORTERS: Steven E. Patnaude, LCR No. 52 (A.M. Only)  
Susan J. Robidas, LCR No. 44 (P.M. Only)

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**APPEARANCES:**

<b><i>Counsel for the Applicant:</i></b>	Thomas B. Getz, Esq. (Devine Millimet & Branch)
<b><i>Counsel for the Public:</i></b>	Peter Roth, Esq. Senior Asst. Atty General Department of Justice
<b><i>Counsel for the Towns of New Ipswich &amp; Temple, N.H.:</i></b>	Justin C. Richardson, Esq. (Upton & Hatfield)

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**P R O C E E D I N G**

CHAIRMAN BURACK: Good morning, ladies and gentlemen. My name is Tom Burack. I serve as Commissioner of the Department of Environmental Services, and I also serve as Chair of the New Hampshire Site Evaluation Committee. I will be the Presiding Officer in the matter scheduled before the Committee today. We are here today for a public meeting of the New Hampshire Site Evaluation Committee. The Site Evaluation Committee is established by RSA 162-H. The membership of this Committee includes the commissioners or directors of a number of State agencies, as well as specified key personnel from various State agencies.

At this point, I would like to ask the members of the Committee who are present at this meeting to introduce themselves. And, following the introductions, I will ask Amy Ignatius, Chairman of the New Hampshire Public Utilities Commission, to conduct a brief process by which the PUC Commissioners will designate a PUC engineer to participate in this proceeding.

But, first, let us turn to the introductions, starting to my far right.

DIR. STEWART: Harry Stewart, Water

1 Division Director, Department of Environmental Services.

2 DIR. WRIGHT: Craig Wright, Acting  
3 Director for the Air Resources Division, Department of  
4 Environmental Services.

5 DIR. MUZZEY: Elizabeth Muzzey, Director  
6 of the Division of Historical Resources in the Department  
7 of Cultural Resources.

8 DIR. NORMANDEAU: Glenn Normandeau,  
9 Director of Fish & Game.

10 CMSR. BRYCE: Phil Bryce, Director of  
11 Parks and acting Commissioner of the Department of  
12 Resource and Economic Development.

13 CMSR. SCOTT: Bob Scott, Commissioner  
14 with the New Hampshire Public Utilities Commission.

15 VICE CHAIRMAN IGNATIUS: Amy Ignatius,  
16 Chairman of the Public Utilities Commission.

17 CMSR. HARRINGTON: Mike Harrington,  
18 Commissioner with the Public Utilities Commission.

19 DIR. SIMPKINS: Brad Simpkins,  
20 Department of Resources and Economic Development.

21 MR. KNEPPER: Randy Knepper, Safety  
22 Director for the New Hampshire Public Utilities  
23 Commission.

24 MR. DUPEE: Brook Dupee. I represent

1 the Department of Health and Human Services.

2 DIR. HATFIELD: Meredith Hatfield,  
3 Director of the Office of Energy and Planning.

4 CHAIRMAN BURACK: Thank you all very  
5 much. To my immediate right is Michael Iacopino, who  
6 serves as legal counsel to the Committee for purposes of  
7 this proceeding. And, now, I'm going to turn things to  
8 Chairman Ignatius.

9 VICE CHAIRMAN IGNATIUS: Thank you very  
10 much. There is a requirement under the statute that, when  
11 the full Site Evaluation Committee is sitting on a  
12 proceeding, that there be a Staff engineer designated by  
13 the Commissioners of the Public Utilities Commission to  
14 participate in that proceeding. And, so, this is a matter  
15 just for the three PUC Commissioners here. I would move  
16 that we designate Randall Knepper, who is the Director of  
17 our Safety Division and is an engineer, to serve as the  
18 engineer on this docket.

19 CMSR. HARRINGTON: I'll second the  
20 motion.

21 VICE CHAIRMAN IGNATIUS: All right. All  
22 in favor?

23 (PUC Commissioners indicating "aye".)

24 VICE CHAIRMAN IGNATIUS: Any opposed?

1 (No verbal response)

2 VICE CHAIRMAN IGNATIUS: All right.

3 Thank you very much.

4 CHAIRMAN BURACK: Thank you. Thank you,  
5 Chairman Ignatius. I note that we have the necessary  
6 quorum of the Committee to conduct our business here  
7 today.

8 The agenda for today's public meeting  
9 includes two matters. In Docket Number 2012-04, we will  
10 consider the Petition of Timbertop Wind I, LLC, to  
11 exercise the Committee's jurisdiction over the  
12 construction and operation of a wind energy facility  
13 consisting of five Siemens SWT turbines, each having a  
14 nameplate capacity of 3 megawatts, for a total nameplate  
15 capacity of 15 megawatts.

16 In Docket Number 2010-01, we will  
17 consider issues raised by the Town of Rumney and James  
18 Buttolph, an intervenor, raising concerns associated with  
19 the construction of the Facility under a Certificate for  
20 Site and Facility with Conditions granted to Groton Wind,  
21 LLC, on May 6, 2011.

22 We will begin with Docket 2012-04, the  
23 Timbertop Wind matter. And, I would note that in an  
24 e-mail distributed this past Friday by Attorney Iacopino

1 at my request, we notified the parties that we do not  
2 expect to reach the second matter until 11:00 a.m. or  
3 later. I will open the Timbertop matter with a brief  
4 summary here in just a moment. Before doing so, I just  
5 want to ask and remind folks if they would please either  
6 turn off or mute their cellphones, put them on vibrate,  
7 whatever you need to do, so that we don't have  
8 interruptions of the proceeding. Thank you.

9 Turning now to introduce the Timbertop  
10 Wind matter. On December 21, 2011, Timbertop Wind I, LLC,  
11 filed a Petition for Jurisdiction requesting the Committee  
12 to assert its jurisdiction over the siting, construction,  
13 and operation of a wind energy facility it plans to  
14 construct and operate on Kidder Mountain, in the Towns of  
15 Temple and New Ipswich, Hillsborough County, New  
16 Hampshire. The facility, as currently configured, will  
17 consist of five Siemens SWT wind turbines, with two of  
18 them being constructed and operated in New Ipswich and  
19 three of them being constructed and operated in Temple.  
20 Each term will have a nameplate capacity of 3 megawatts,  
21 for a total nameplate capacity at the facility of  
22 15 megawatts.

23 The Petitioner proposes to interconnect  
24 the Facility to the Public Service Company of New



1 Hampshire distribution circuit number 3235. Ultimately,  
2 the Petition asserts that the Facility will have a  
3 nameplate capacity of more than 5 megawatts, but less than  
4 30 megawatts, and request that the Committee exercise  
5 jurisdiction over the siting, construction, and operation  
6 of this Facility pursuant to RSA 162-H:2, Section XII.

7 Pursuant to RSA 162-H:2, Section XIII, a  
8 wind energy facility is considered to be a "Renewable  
9 Energy Facility". A Renewable Energy Facility that has a  
10 rated nameplate capacity of at least 30 megawatts is  
11 automatically subject to the provisions of RSA 162-H and  
12 the jurisdiction of the Committee. RSA 162-H:2, Section  
13 XII, also provides that a Renewable Energy Facility with a  
14 nameplate capacity of less than 30 megawatts, but greater  
15 than 5 megawatts, may be subject to the Committee's  
16 jurisdiction either through a petition process or on the  
17 Committee's own motion. In this docket, the Petitioner  
18 filed a Petition requesting that the Committee vote to  
19 exercise jurisdiction over the facility.

20 In support of its request the Petitioner  
21 points to the following factors: (1) The exercise of the  
22 jurisdiction by the Committee over the Project will allow  
23 the Petitioner to undergo one review process, as opposed  
24 to two different reviews by two different towns, namely

1 New Ipswich and Temple.

2 And, second, the Towns of New Ipswich  
3 and Temple are not properly equipped to address the issue  
4 of siting, construction, and operation of the Project,  
5 given that their Renewable Energy Ordinances are not  
6 consistent with the findings and purposes set forth in RSA  
7 162-H:1. Specifically, the Petitioner asserts that the  
8 respective Towns' Ordinances (a), and, again, I quote  
9 here, "incorporate standards inconsistent with SEC  
10 precedent and set limits that the Legislature has declared  
11 unreasonable for small wind energy systems." And, (b)  
12 "impose unwarranted standards with respect to sound  
13 limits, setbacks, and certain environmental impacts."

14 Notice of this hearing was issued by the  
15 Committee on January 18, 2013. The notice was posted on  
16 the Committee's website. Notice was published in the  
17 Union Leader, a newspaper with statewide circulation, on  
18 Friday, January 25, 2013, and in the Monadnock Ledger  
19 Transcript on January 29, 2013. A display advertisement  
20 noticing this hearing was also published in The Telegraph  
21 on January 28, 2013. The affidavits attesting to  
22 publication were filed with the Committee on January 31,  
23 2013.

24 The notice of this hearing designated

1 the date of February 8th, 2013 for the filing of Motions  
2 to Intervene in the proceeding. A Joint Petition to  
3 intervene from the Boards of Selectmen of the Towns of New  
4 Ipswich and Temple was filed with the Committee on  
5 January 25, 2013. The Towns urge the Committee to grant  
6 them status of intervenors in this docket. Specifically,  
7 the Selectmen assert that the Committee should grant them  
8 the status of intervenors because (a) the Petition will  
9 impact the rights and interests of the Towns of New  
10 Ipswich and Temple, as represented by their respective  
11 Select Boards, and (b) the interests of justice and the  
12 orderly and prompt conduct of the proceedings would not be  
13 impaired by the intervention. The Committee did not  
14 receive any objections to the Towns' Joint Petition to  
15 Intervene.

16 On February 5, 2013, the Committee also  
17 received a Motion to Deny or Dismiss Petition filed by the  
18 Boards of Selectmen of the Towns of New Ipswich and  
19 Temple. As to its request to dismiss the Petition, the  
20 Selectmen state that the Petition failed to assert why the  
21 Committee's intervention is "required" to accomplish the  
22 purposes of RSA 162-H, as opposed to "merely advantageous  
23 or convenient for its own purposes."

24 Ultimately, the Boards of Selectmen

1 state that the Committee's intervention is not required,  
2 given that the respective Towns' Ordinances allow the  
3 Petitioner to request variances and, upon approval,  
4 construct and operate the Facility without the Committee's  
5 intervention. Finally, the Selectmen urge the Committee  
6 to dismiss the Petition because the Petitioner failed to  
7 provide an adequate statutory and factual basis for the  
8 Committee to make a jurisdictional ruling under New  
9 Hampshire Code of Administrative Rules Site 203.01.

10 On February 14, 2013, the Petitioner  
11 objected to the Towns' Motion to Dismiss and filed  
12 additional information pertaining to the proposed  
13 facility. The Petitioner argues that dismissal is  
14 inappropriate and that the information provided to the  
15 Committee is more than sufficient to state a claim and  
16 permit the Committee to proceed.

17 On February 8, 2013, as Chairman of the  
18 Committee, I forwarded a letter to Attorney General  
19 Delaney inviting him to appoint counsel for the public in  
20 this docket. On February 14, 2013, the Attorney General  
21 appointed Senior Assistant Attorney General Peter Roth as  
22 Counsel for the Public. On February 14, 2013, Mr. Roth  
23 filed a response to the Petition. In his response,  
24 Counsel for the Public asserts that the assumption of

1 jurisdiction by the Committee is inappropriate and  
2 inconsistent with the findings and purposes of RSA  
3 162-H:1.

4 As always, the Committee accepts written  
5 public comment through the conclusion of any proceeding.  
6 In this case, the Committee has received some written  
7 comments, and will continue to receive written comments  
8 throughout the pendency of this matter. These written  
9 public comments are best directed to me as Chairman of the  
10 Committee, care of Jane Murray, Secretary to the  
11 Committee, and she will see to it that they are provided  
12 to all the Committee members who are sitting on this  
13 matter.

14 Because of the quasi-judicial nature of  
15 proceedings before the Site Evaluation Committee, and to  
16 avoid any potential for *ex parte* communications, I must  
17 request that all parties having an interest in these  
18 proceedings, including the Petitioner, all intervenors,  
19 Counsel for the Public, and members of the public and the  
20 press, direct all written submittals to Jane Murray,  
21 Secretary to the Committee, and that any other necessary  
22 communications outside of this hearing that they wish to  
23 have with the Committee be directed through Attorney  
24 Michael Iacopino, and that all these parties refrain from

1 communicating directly with any members of the Committee  
2 regarding any matters now pending or reasonably  
3 anticipated to come before the Committee.

4 The matter before the Committee today is  
5 to determine how we will proceed with respect to the  
6 Petition. More specifically, the Committee is called upon  
7 to determine whether it will exercise jurisdiction over  
8 the Facility. The authority for the hearing is RSA  
9 162-H:2, Section VII(g) and Section XII. Pursuant to the  
10 statute, the Committee's determination of whether to take  
11 jurisdiction over this matter will ultimately be guided by  
12 the findings and purposes set out in RSA 162-H:1.

13 Before I take appearances, I wish to  
14 advise the Committee and the parties that, in my capacity  
15 as Presiding Officer, I have determined, pursuant to New  
16 Hampshire Code of Administrative Rules Site 202.11, that  
17 the Joint Petition to Intervene filed by the Towns of New  
18 Ipswich and Temple will be granted. Each town is clearly  
19 affected by and has a substantial interest in the outcome  
20 of this proceeding.

21 We will begin by taking appearances in  
22 this matter. Thereafter, we will allow the Petitioner the  
23 opportunity to describe the Project and explain the basis  
24 for the Petition, and the manner in which it believes the

1 Committee should proceed. We will then allow the Towns  
2 the opportunity to state their position through their  
3 counsel and how they believe the Committee should proceed.  
4 We will then turn to Counsel for the Public for a similar  
5 presentation. When the parties have concluded their  
6 presentations, we will entertain questions from the  
7 Committee. At that time, if there are any members of the  
8 public who are not otherwise represented by counsel, we  
9 will provide them with an opportunity for brief comments  
10 to the Committee. Thereafter, the Committee will  
11 determine how it should proceed on the pending Motion and  
12 the Petition for Jurisdiction.

13 I would ask all the parties to please  
14 remember that all of our hearings are recorded verbatim by  
15 the court reporter. So, please do not interrupt or speak  
16 over another speaker. I would ask all parties and  
17 Committee members to remember to speak clearly and to use  
18 the microphones. Also, I would request that all persons  
19 in the room, as I mentioned before, silence their cellular  
20 telephones.

21 But let us now proceed to take  
22 appearances.

23 MR. GETZ: Good morning, Mr. Chairman,  
24 members of the Committee. I'm Thomas Getz. I'm a member

1 of the law firm of Devine, Millimet & Branch. And, I'm  
2 here this morning representing Timbertop Wind. And, with  
3 me this morning is Adam Cohen and Paul Harris, from  
4 Timbertop.

5 CHAIRMAN BURACK: Thank you.

6 MR. RICHARDSON: Good morning, Mr.  
7 Chairman. Justin Richardson, with the firm of Upton &  
8 Hatfield, here on behalf of the Towns of Temple and New  
9 Ipswich. With me here at counsel table, I have Mr. John  
10 Kieley, who's the Chair of the Temple Board of Selectmen,  
11 and Elizabeth Freeman, who is the Vice Chair of the New  
12 Ipswich Planning Board. And, should the Committee wish to  
13 ask any questions to them, they're both available to  
14 answer any questions about their respective towns, as the  
15 opportunity arises. There's numerous other  
16 representatives that are here. I couldn't tell you all of  
17 their names. But, if you'd like to recognize them or have  
18 any other questions about particular individuals, they are  
19 here for the Committee.

20 CHAIRMAN BURACK: Thank you, Attorney  
21 Richardson. Attorney Roth.

22 MR. ROTH: Good morning, Mr. Chairman,  
23 members of the Committee. I'm Peter Roth, from the  
24 Department of Justice, Office of the Attorney General, as



1 Counsel for the Public.

2 CHAIRMAN BURACK: Thank you, Attorney  
3 Roth. Attorney Getz, please proceed.

4 MR. GETZ: Thank you, Mr. Chairman. As  
5 explained in the Petition for Jurisdiction filed on  
6 December 21 by Timbertop, the Company seeks to construct a  
7 15-megawatt wind facility in New Ipswich and Temple.  
8 Timbertop believes that SEC jurisdiction over its Project  
9 is necessary because, number one, the ordinances adopted  
10 in New Ipswich and Temple do not maintain the balance  
11 between the environment and the need for new energy  
12 facilities contemplated in RSA 162-H:1.

13 Number two, proceeding in the two towns  
14 would lead to undue delay.

15 And, number three, proceeding in the two  
16 towns would not resolve all environmental, economic and  
17 technical issues in an integrated fashion.

18 The Towns and Counsel for the Public ask  
19 the Committee to dismiss the petition, and Timbertop  
20 replied to those filings on February 14. I won't go into  
21 length at this time repeating the numerous arguments made  
22 in the Petition for Jurisdiction and the responses filed  
23 on February 14. But I would like to address this morning  
24 why Timbertop's request is properly before you and why the

1 Motions to Dismiss should be denied.

2 With respect to why the request is  
3 properly before you, in the Antrim case, in the  
4 jurisdictional order issued August 10, 2011 in Docket  
5 2011-02, the Committee said that "its review of the issue  
6 of jurisdiction is limited to the determination of whether  
7 the exercise of such jurisdiction is consistent with the  
8 findings and purpose set forth in RSA 162-H:1, as opposed  
9 to the comprehensive review that is required for the  
10 issuance of the Certificate of Site and Facility." So,  
11 two very different decisions that need to be made with  
12 respect to jurisdiction, in the first instance, and with  
13 respect to a certificate at a much later point in time.

14 In addition, the Committee said in that  
15 order that it "does not require a detailed description of  
16 the Project to decide whether the exercise of jurisdiction  
17 over the Project is consistent with the findings and  
18 purpose articulated in 162-H:1. The issue of the  
19 Committee's jurisdiction is ripe for adjudication as long  
20 as the Committee has sufficient facts to determine whether  
21 the exercise of its jurisdiction is consistent with  
22 162-H:1." The Committee then went on to list information  
23 it had received as evidence during that proceedings.  
24 Timbertop contends that the information described in its

1     Petition for Jurisdiction, and which it documented last  
2     week, meets the Committee's standard.

3             In the Antrim decision, the Committee  
4     said that "While the information received by it does not  
5     compare to the extensive permitting documents and  
6     engineering drawings that normally accompany an  
7     Application for Site and Facility, it is nevertheless  
8     adequate to make a determination as to whether or not the  
9     Committee should assert its jurisdiction and require the  
10    filing of a detailed application."

11            So, Timbertop's position has three  
12    parts. First, that Timbertop describe sufficient facts in  
13    its petition to merit a hearing. Secondly, that the  
14    documents filed on February 14th will provide the  
15    requisite evidence for the Committee to make a decision on  
16    jurisdiction. And, thirdly, that the position of  
17    Timbertop is that the evidence is adequate for the  
18    Committee to make a determination whether the Committee  
19    should assert jurisdiction.

20            So, on that -- on those grounds,  
21    Timbertop contends that the Motions to Dismiss should be  
22    denied, because Timbertop has stated a claim on which  
23    relief can be granted. Now, there is a -- that's what  
24    gets Timbertop into the door and before you and merits a

1 hearing.

2           There is a second part of getting the  
3 information on the record in a way that the Committee can  
4 make a decision about jurisdiction. As was done in the  
5 Antrim case, there was hearings and testimony. And, what  
6 you see on Page 20 of the Antrim jurisdictional order is a  
7 list of all of the things that were admitted into evidence  
8 and formed the basis for the decision on jurisdiction.  
9 It's our position that you -- that full list is not really  
10 required, that there -- that we have comparable  
11 information that we've already provided, which just needs  
12 to be entered into the record. But the burden, in terms  
13 of facts that need to be asserted to start a case on  
14 jurisdiction, is really much less than what was actually  
15 provided to you in the Antrim case. And, I also note that  
16 the statute really doesn't speak to the issue of  
17 brightness. As a practical matter, we agree that the  
18 Committee should have a good basis for concluding that  
19 this is a real project, in lay terms, that this is not  
20 just a mere concept. And, we think that Timbertop has  
21 proven that and can prove that it is a real project, and  
22 not a mere concept, that you could -- should consider our  
23 Petition for Jurisdiction.

24           So, next, I would like to turn to why we

1 believe the Motions to Dismiss should be denied. RSA  
2 162-H:2, XII, defines a "renewable energy facility" to  
3 include projects smaller than 30 megawatts, but at least  
4 5 megawatts, and the Project before you today is planned  
5 to be 15 megawatts. The provision also says that it's a  
6 project "which the Committee determines requires a  
7 certificate, and consistent with the findings and purpose  
8 set forth in 162-H:1."

9           Timbertop's position is that a  
10 certificate is required because jurisdiction at the town  
11 level is not consistent with the purposes and findings of  
12 162-H:1. And, I briefly addressed that at the beginning  
13 of my remarks. But I'd like to point you to the  
14 Committee's decision in the LaFlamme/Jones case, or  
15 referred to sometimes as the "Clean Power Development  
16 case", which was -- the jurisdictional order in that  
17 proceeding was issued April 7, 2010, in Docket 2009-03.  
18 And, on Page 7, in addressing the legal standard for  
19 requiring a certificate, the Committee said that it "must  
20 determine whether a certificate is needed to: Maintain a  
21 balance between the environment and the need for new  
22 energy facilities in New Hampshire; avoid undue delay in  
23 the construction of needed facilities and provide full and  
24 timely consideration of environmental consequences; ensure

1     that all entities planning to construct facilities in the  
2     state be required to provide full and complete disclosure  
3     to the public of such plans; and, ensure that the  
4     construction and operation of energy facilities are  
5     treated as a significant aspect of land-use planning in  
6     which all environmental, economic, and technical issues  
7     are resolved in an integrated fashion."

8             The order goes on to say: "In  
9     considering whether the project will require Committee  
10    review and a Certificate of Site and Facility, the  
11    Committee must consider the foregoing purposes of the  
12    siting statute. If the Committee finds that review is not  
13    necessary to achieve the goals of the statute, then the  
14    Committee should deny the petitions. However, if the  
15    Committee decides that the goals of the statute are best  
16    met by requiring review, then the petitions should be  
17    granted."

18            In that case, the Committee concluded  
19    that its review was not necessary. Among other things, it  
20    determined that the City of Berlin's processes maintain  
21    the balance between the environment and the need for new  
22    energy would not -- would avoid undue delay, would provide  
23    for full and complete disclosure, and would treat the  
24    Project as a significant aspect of land use planning.

1           The appropriate focus here is on who  
2     should exercise jurisdiction, and that was the focus in  
3     the LaFlamme/Jones case and that was the focus in the  
4     Antrim case. The focus is, should jurisdiction reside  
5     with the Towns or should the Committee assert  
6     jurisdiction? The Towns and Counsel for the Public take a  
7     different approach from Timbertop and from what the  
8     Committee did in LaFlamme/Jones and Antrim. The Towns say  
9     that Timbertop's position is defective because Timbertop  
10    has provided no information that demonstrates its Project  
11    is required. They say that there is no information to  
12    suggest the Project is required to assure that the state  
13    has an adequate and reliable supply of energy.

14           Similarly, Counsel for the Public says  
15    that the Petition for Jurisdiction is flawed, because  
16    "nowhere does it allege that there is a statewide need for  
17    this proposed energy project or even that there is a  
18    particular regional environmental or economic benefit of  
19    the project as weighed against its impacts."

20           The Towns and Counsel for the Public's  
21    argument is misplaced. The appropriate focus is on the  
22    Towns' processes, not on the characteristics of the  
23    Project.

24           To put the issue in context, I think

1       it's helpful to examine RSA 162-H:1, regarding the  
2       Legislature's declaration of purpose, when it established  
3       the procedure for the review of energy facilities and the  
4       statutory scheme it employed. I won't recite the entire  
5       provision of 162-H:1, but this is how it's set up. It  
6       says the Legislature recognizes certain things about the  
7       importance of selecting sites and routing transmission  
8       lines. It then says, "accordingly, the Legislature finds  
9       that it's in the public interest to maintain a balance  
10      between the environment and the need for facilities, avoid  
11      undue delay," *etcetera*. And, then, it says "the  
12      Legislature therefore establishes a procedure for the  
13      review, approval, monitoring enforcement, in the planning  
14      siting, *etcetera*, of energy facilities." So, that  
15      section's about the purpose for why there is a procedure  
16      for looking at these facilities and why there is a Site  
17      Evaluation Committee.

18                       It then goes on, in the definition  
19      section, 162-H:2, to set the general rule for what  
20      projects would be reviewed by the Site Evaluation  
21      Committee. The general rule is, if your 30 megawatts --  
22      greater than 30 megawatts, then you're before the Site  
23      Evaluation Committee. But there's two exceptions to this  
24      general rule. First, projects 30 megawatts or less are



1 subject to the Committee's jurisdiction, if it determines  
2 a certificate is required. Secondly, under RSA 162-H:4,  
3 IV, the Committee may exempt projects from its  
4 jurisdiction if it determines that "existing state or  
5 federal statutes, state or federal rules or municipal  
6 ordinances provide adequate protection of the objectives  
7 of 162-H:1." The focus then is -- the Legislature's  
8 approach to jurisdiction is "which body can better  
9 exercise jurisdiction to achieve the objectives of  
10 162-H:1?" And, that's why Timbertop has focused on the  
11 ordinances in the Towns. And, the issue of the facts and  
12 the characteristics of the Project itself are really only  
13 relevant to the issue of ripeness, and I think that we've  
14 more than established that this is a Project that is ripe  
15 for consideration.

16 Finally, under the Towns' and Counsel  
17 for the Public's approach, the test of jurisdiction is  
18 more stringent than the test for a certificate. The Towns  
19 and Counsel for the Public would require a showing of need  
20 for the energy from the Project, and Counsel for the  
21 Public would also require a showing of net benefits as  
22 weighed against impacts. It does not seem logical that  
23 the Legislature would repeal the requirement under  
24 162-H:16 that an applicant must demonstrate need in order

1 to get a certificate, but intend that a petitioner must be  
2 able to demonstrate need in order for the Committee to  
3 consider jurisdiction in the first instance.

4 So, the Committee asks that the -- or,  
5 Timbertop asks that the Committee deny the Motions to  
6 Dismiss and to deny -- and deny jurisdiction.

7 With respect to next steps, Mr.  
8 Chairman, taking heed of the e-mail sent by Mr. Iacopino,  
9 I did have a conversation with Mr. Richardson and with  
10 Mr. Roth. We have really not come to an agreement on  
11 process. Mr. Richardson did make a reasonable point that,  
12 until you rule on the Motions to Dismiss, whether that's  
13 something you would do orally today or something you would  
14 do later in writing, that would be a date from which we  
15 would be in a position to provide the components of what a  
16 procedural schedule would look like. Also, I think it's  
17 necessary for the Committee to address the arguments made  
18 by the Towns with respect to what a -- what Timbertop  
19 would have to prove. As I've made the point repeatedly  
20 already, it's more the issue of "what's the  
21 characteristics of the Towns' Ordinances and the  
22 processes, and whether they are consistent with the RSA  
23 162-H:1?"

24 What I haven't emphasized today, but I

1 do in the documents is, the fact that this proceeding is  
2 different from other proceedings that you've seen in the  
3 past, because this involves more than one jurisdiction.  
4 And, that's what leads us to believe that issues of  
5 untimely consideration and undue delay would be -- would  
6 arise.

7 So, I guess, with respect to procedure,  
8 we'd just ask that, once a decision is issued, if you  
9 would permit Mr. Richardson, Mr. Roth and myself to have a  
10 conversation to see if we can, and perhaps with Mr.  
11 Iacopino's input, to make a proposal with respect to a  
12 procedural schedule.

13 But I'd be happy to answer any questions  
14 I can or wait until the end of the proceeding.

15 CHAIRMAN BURACK: Thank you, Attorney  
16 Getz. I think we'll hold questions for you for the  
17 moment, and turn next to Attorney Richardson.

18 MR. RICHARDSON: Thank you, Mr.  
19 Chairman. You just heard from Attorney Getz. And, I  
20 think we differ in a couple of fairly important ways in  
21 our reading of the statute. The argument was made that,  
22 if the -- well, that the focus is on what the Towns have  
23 adopted in their Ordinances, and that the Committee should  
24 evaluate which one best meets the objectives of 162-H:1,

1 and which one could, I believe its argued, could better  
2 exercise its jurisdiction. And, I'd like to differ on  
3 that. Because I don't feel that what the statutory scheme  
4 that the Legislature has passed requires or even enables  
5 this Committee to exercise that type of jurisdiction. I  
6 think it's clearly one thing the Committee might consider.  
7 But what I believe the law really directs and finds, as  
8 the state policy, is that energy facilities are extremely  
9 important. They're important for two reasons, and that's  
10 what 162-H:1 says. There are a list of criteria or  
11 purposes that are related to general public welfare, the  
12 economy, jobs, and then there are criteria or purposes  
13 that are related to the adequacy of electric supply. And,  
14 that is what the Legislature has asked this Committee to  
15 consider and to evaluate in deciding whether or not a  
16 certificate is required.

17 Now, "required" is a very strong word.  
18 It doesn't mean that the Committee decides what's best or  
19 balances the probabilities and says "well, is one a little  
20 bit better than the other?" I think the Legislature has  
21 really spoken in very clear terms, that the public welfare  
22 and the state's adequate energy infrastructure require  
23 that projects over 30 megawatts be reviewed by this  
24 Committee, unless they go through the exemption process,

1 of which you're well aware. Below that, it's really up to  
2 the Petitioner, in this case, to demonstrate why review by  
3 this Committee is required looking at those purposes.

4 And, I think that's where we see this Application -- or,  
5 excuse me, this Petition very differently. Because, as I  
6 review it, I don't see anything that presents an argument  
7 that this energy facility is any different than any other  
8 15-megawatt or similarly situated wind project. Every  
9 project involves a lot of challenges. And, every  
10 Applicant I have ever seen come before a planning board  
11 invariably argues at some point that the Town's Ordinance  
12 is too stringent.

13 Now, there is a mechanism under the law  
14 that provides for variances, and that's under RSA 674:33,  
15 and that's available for any applicant. There's also a  
16 procedure for joint review. And, the communities in this  
17 case are willing to do that, and that's under RSA 674:53.  
18 And, we've cited to those. And, I think both of those  
19 processes are available to provide for review.

20 So, if the focus were to be on what the  
21 municipalities have done, and have they created an  
22 ordinance that is too stringent or not stringent enough,  
23 or no ordinance at all, RSA 162-H:1 is a very poorly  
24 worded statute, if that's what we're supposed to be

1 looking at. I think the Legislature knows how to  
2 establish minimum standard laws, it knows how to set a  
3 maximum standard as well. For example, you know, in Sand  
4 & Gravel Applications, there are certain criteria that  
5 towns are not supposed to exceed. There are air emission  
6 statutes over which the towns have no authority  
7 whatsoever. I think the Legislature, had it wanted to  
8 make this Committee into a board that reviewed the  
9 stringency or set the standards for what municipalities  
10 could and couldn't do, it could have written a very  
11 different purpose, it could have written a very different  
12 law than what is in 162-H.

13                   Instead, when, you know, you look at  
14 what 162-H:1 says, I think it's very instructive. And, it  
15 says that and suggests very strongly that it's the  
16 Applicant's burden to show that this project, that there's  
17 a need for the energy, that there's a need due to the  
18 public welfare. In the first -- or, actually, let me  
19 start with one of the last sentences, where, in this long  
20 description, they say that all of these different  
21 purposes, it says "all to assure that the state has an  
22 adequate and reliable supply of energy in conformance with  
23 sound environmental principles." So, that the focus on  
24 the first instance is "why is this project" -- "why is a

1 certificate required in order to provide the state with an  
2 adequate and reliable supply of energy?" That's the  
3 Applicant's burden. And, I'm afraid we do not have any  
4 information in their Petition to show that this energy is  
5 needed, and we don't have any reason to believe, and I  
6 think it's actually not the case, although it's their  
7 burden to show, that there would be a shortage in Class I  
8 renewable energy certificates, I just don't know, and  
9 there's nothing in this Petition that would allow this  
10 Committee to make a determination that there is -- that  
11 review by this Committee is needed for an adequate and  
12 reliable supply of energy.

13 Looking at the specific purposes, the  
14 statute really begins with the fact that there is a  
15 significant impact upon the welfare of the population, the  
16 location and growth of industry, the overall economic  
17 growth of the state, the environment of the state, and the  
18 use of natural resources. And, I think there have been  
19 projects in the North Country that this Committee may have  
20 seen before, those that may have even been above  
21 30 megawatts, I'm not familiar with all of the details,  
22 but the arguments in those cases are fairly compelling.  
23 Where people say "jobs are needed"; "the forest industry  
24 requires that there be wood-fired generating facilities."

1 Those types of arguments can all be made to support a  
2 finding of jurisdiction. But there isn't any of that type  
3 of information here. And, I don't think that there is --  
4 I don't think that that information exists. I think that  
5 there is really nothing to distinguish this project from  
6 really any other 15-megawatt wind project. And, I think  
7 it would set a very bad precedent if this Committee were  
8 to essentially accept and make a jurisdictional  
9 determination based on what's in front of you. Because  
10 every applicant that comes before a town will always say  
11 "well, geez, you know, this is too stringent." "This is,  
12 you know, this standard is unreasonable." And, if they're  
13 able to, instead of going through the variance process,  
14 which is the mechanism that the Legislature has provided,  
15 and which isn't that stringent a standard. I think, at  
16 one point, before the *Simplex* case, there was a  
17 requirement that an "unnecessary hardship" means that a  
18 property owner had to show that they were denied all  
19 reasonable use of their property. That's no longer the  
20 standard. And, when you read 674:33, you can see there's  
21 now considerable flexibility, and there are numerous cases  
22 in New Hampshire, as I'm sure your counsel would advise  
23 you, if the Committee looks in that direction, that show  
24 that applicants can get a variance if a municipality goes



1 too far.

2 Now, Timbertop Wind is making that  
3 argument. They are saying that the Towns have gone too  
4 far. And, I have with me here today both John Kieley and  
5 the representative from New Ipswich, and I've got so many  
6 names that I apologize, Elizabeth Freeman. And, I'm just  
7 a little nervous, so that's -- my memory is prone to fail  
8 me at the wrong moments. But they can answer what the  
9 municipalities were considering and why they adopted the  
10 standards they did. And, I think they can also give this  
11 Committee, if you'd like, assurances that they will act  
12 reasonably based on the evidence submitted before them. I  
13 mean, that is what their role is as representatives on the  
14 planning boards, you know, all state boards, they're able  
15 to do their jobs if they're given the opportunity to do  
16 so.

17 But getting back to what the precedent  
18 would be, I'm afraid the bar would be set too low, and  
19 every project would be coming back in front of you if this  
20 one were allowed to have a finding of need for the  
21 project, of balancing the state review, simply upon an  
22 allegation that the standard is too stringent. That's not  
23 what the Legislature said. They didn't say "take  
24 jurisdiction whenever municipalities adopt a standard that

1     you do not believe, based on a balance of the  
2     probabilities, is more stringent than it ought to be."  
3     What they said was, is that "if there is a compelling need  
4     for energy, if there is something that has -- is needed  
5     for the growth of the economy or industry, you can  
6     determine or you can accept jurisdiction if it is  
7     required, based upon those purposes and findings." And, I  
8     don't think that that burden has been met.

9             The next criteria, and if it -- if there  
10    are questions, please feel free to interrupt me at any  
11    time, and I'll try to go through this as quickly as  
12    possible, because I think the questions from the Committee  
13    are important. We talk about the fact that the  
14    Legislature finds that it's in the public interest to  
15    maintain a balance between the environment and the need  
16    for new energy facilities. I think I've gone over that.  
17    The word "need" is right there. Even on the issue of  
18    "undue delay", and I understand the Applicant's position  
19    to be that "too stringent" means that it would delay their  
20    project. But, again, it has to be "undue delay in the  
21    construction of needed facilities." And, I don't see  
22    anything that distinguishes this project from any other  
23    wind project that's below 30 megawatts.

24             Now, one of the things I think that we

1 also disagree on is the procedure that has to be followed.  
2 This is an expensive process. And, it's also one that  
3 shifts the burden of municipal officials in their role to  
4 protect the local interests, whether it's adequacy of the  
5 state's roads, whether it's public safety, land use, the  
6 environment. And, it's an expensive proposition for the  
7 Towns of New Ipswich and the Towns of Temple to come in  
8 and essentially make all of their arguments in a hearing.  
9 If this were before a local board, the Ordinances provide  
10 for the local boards to hire experts, to advise them  
11 independently, based on the record, the same way this  
12 Committee would. And, the cost of those studies, to make  
13 those determinations, under the Ordinances that you have  
14 in your packages, is typically borne by the Applicant, the  
15 same way it is here. The difference is, is that, if this  
16 Committee accepts jurisdiction, that's a tremendous and  
17 extraordinary expense that the towns are now forced to  
18 provide, in order to represent their citizens out of their  
19 own pockets. And, it's really, I think, more than they  
20 can afford. And, it's unreasonable to ask them to do so  
21 for so small a project, on so small a showing of need.  
22 There hasn't even been an application for a variance in  
23 this case. There have been, I understand, two met towers,  
24 that have both been approved by the Town of New Ipswich.

1       There was also what was called a "preliminary design  
2       review" that was also approved by the Town of New Ipswich  
3       on the project itself. Had the Applicant come forward and  
4       submitted a more detailed design, they probably would have  
5       been grandfathered under the planning statutes under the  
6       old Ordinance, but that didn't happen. But I think that's  
7       significant, because what you're really presented with is  
8       a project that was reviewed, and it was approved, and  
9       there was no litigation. I mean, there was every reason  
10      to believe that, if you give these officials the chance to  
11      do their job, they will do it. The allegation is simply  
12      that the Ordinance is too strict. And, there's a  
13      mechanism to address that, and that's through the variance  
14      process. And, I'm confident that they can do their jobs.  
15      And, there's no information really that I see, there's no  
16      smoking gun that says that the towns are flat out opposed  
17      to this. I mean, they developed these Ordinances based on  
18      conflicting information, and they had experts who advised  
19      them on what the standards ought to be, and they chose the  
20      more stringent standard. There's no doubt about that.  
21      But these are local officials who had conflicting  
22      information, and did what they thought was in their  
23      community's best interest in order to protect the public.  
24      That's what zoning statutes typically require them to do.

1 If they had done it wrong, there is a variance process.  
2 And, there hasn't even been an application for one. And,  
3 I think that's significant, and I think they ought to be  
4 given the chance to do that.

5 Now, there's also, I'll just touch on  
6 this briefly, a procedure for joint review. And, that's  
7 under RSA 674:53. And, what I'll say about that very  
8 briefly is that it requires, the Applicant has a right to  
9 submit a request for joint review, because this project  
10 spans two municipalities. The hearings are then required  
11 to be considered -- or, consolidated together. So that,  
12 if it were a variance request, the ZBAs, the land use  
13 boards in both towns, they're subject to this law. They  
14 would hold a single set of hearings under the same  
15 criteria, and that's 674:33, the variance criteria. They  
16 aren't required to make the same decision. But, consider  
17 for a second that they're doing it based on the same  
18 hearing, the same certified record, under the same  
19 statutory criteria, which would be to determine whether or  
20 not these Ordinances, the same sound standard, imposes an  
21 unnecessary hardship. And, let's assume, hypothetically,  
22 that they came to different conclusions. Well, the entire  
23 certified record is going to go before the superior court,  
24 it's a certified record appeal. The courts address these

1 cases very efficiently and very quickly. And, I can't  
2 imagine for a second that a superior court would uphold a  
3 decision where one community found that there was an  
4 unnecessary hardship and the other didn't. It's going to  
5 be the same project, under the same standard. And, I  
6 think, if given the opportunity to do their job, both  
7 Towns are going to do it fairly, they're going to do it  
8 with an open mind, and they're going to do it based upon  
9 the information that gets submitted.

10 Now, under RSA 541, I believe it's 31,  
11 this Committee is required to conduct a hearing if a  
12 matter is considered a contested case. RSA 162-H does not  
13 require that this Committee hold a hearing based upon an  
14 application or a petition for a certificate. If this were  
15 an application for a project, it would be required to do  
16 so. The Towns are very concerned about the cost of this.  
17 And, they're very concerned about the mere showing or an  
18 allegation that they're too stringent, and that having to  
19 come before this Board in order to defend their Ordinance,  
20 when they haven't even had an application that they have  
21 an opportunity to review or deny. I think it would set a  
22 very bad precedent, and I think it would be the incorrect  
23 conclusion under the law, if they were required to go  
24 through this process and defend their Ordinances, under a

1 trial-type hearing, where there hasn't been an  
2 application. It would simply impose a huge cost upon the  
3 Towns. And, I think it's, under the law and under this  
4 Committee's rules, it's the Applicant's burden -- or, the  
5 Petitioner's burden, I should say, to bring that  
6 information forward and to show why this project is  
7 needed. And, I don't think that that burden has been met  
8 here.

9                   So, let me wrap this up, and then I'll  
10 hold the rest for any questions the Committee may have.  
11 What the Towns would like would be this Committee to make  
12 a decision, today, if possible, and they could make that  
13 decision up or down, "does this project require a  
14 certificate?" We do not believe that the Applicants have  
15 met their burden to provide an adequate explanation of  
16 what the project is all about. Where are the towers?  
17 Where are the access roads? Where are the properties that  
18 it's on? But, more importantly, we don't feel that they  
19 have met their burden to show that review is required in  
20 order to accomplish the purposes of 162-H. And, there's  
21 no information about this project being needed for jobs,  
22 needed for the economy, needed for an adequate supply of  
23 energy. It's not needed for electrical reliability. It's  
24 not needed for the RECs market to function. It's simply

1 an application that's been submitted because the Applicant  
2 believes the standard adopted by the Town is too  
3 stringent. That's not the criteria that the Legislature  
4 has asked this Committee to apply. It's asked the  
5 Committee to evaluate this project, evaluate the need for  
6 it, and decide whether or not a certificate is required.  
7 And, we don't believe that one is. Thank you.

8 CHAIRMAN BURACK: Thank you, Attorney  
9 Richardson. Attorney Roth.

10 MR. ROTH: Thank you, Mr. Chairman. I'm  
11 going to spend a little bit of time discussing some of the  
12 points that were raised in my -- the paper that I filed,  
13 but also to deal with some of the points raised here at  
14 the hearing and within the February, I guess it was the  
15 14th response filed by Timbertop. And, this is a point  
16 where I agree in principle with what -- the first point is  
17 where I agree in principle with what the Towns are saying.  
18 And, that is, the Petition that was brought to you does  
19 not demonstrate that or even allege that there's a -- that  
20 the Petition or the Project is going to be consistent with  
21 a need for additional energy and in balance with its  
22 environmental effects. The previous orders of this  
23 Committee, in both the LaFlamme and Jones and Antrim  
24 cases, both discuss the issue of the need for energy.



1 And, in those decisions, it focused on the need for  
2 renewable energy, as opposed to the need for energy. And,  
3 in fact, in LaFlamme and Jones, they said, you know,  
4 "we're a net exporter of energy", and I don't think  
5 anybody disputes that. And, so, the question then becomes  
6 "is there a need for renewable energy?" And, the first  
7 point that I'd make is that that's not among the criteria  
8 specified in 162-H:1, whether there's a need for renewable  
9 energy versus energy. The statute simply talks about a  
10 "need for energy". So, the fact that it's a renewable  
11 project or not a renewable project is irrelevant to the  
12 jurisdictional analysis.

13 Even if you assumed that there is a need  
14 for renewable energy, that point is really not raised in  
15 the Petition. And, I think that point was fairly covered  
16 by Attorney Richardson. And, then, while I think it's --  
17 I agree with Attorney Getz that we don't have to have a  
18 completely configured project, and all the details and all  
19 the drawings and all the conclusions and opinions, but I  
20 think there does need to be a showing on a jurisdictional  
21 basis, some showing by the Petitioner that the  
22 environmental impacts of this project are going to be, you  
23 know, something or not. And, there's nothing in this  
24 Petition that does that.

1                   So, the first factor that the Committee  
2                   has used in the two previous cases, that is a  
3                   demonstration that it's consistent with the balance of  
4                   need versus the environmental impact, are not met, is not  
5                   met in both scores, both because there's no showing of  
6                   need for energy and there's no information about the  
7                   environmental impacts of the project. Now, there's some,  
8                   you know, they do indicate they have done some studies and  
9                   the like, but there's nothing in the Petition itself that  
10                  you can draw a conclusion and say "oh, yes, this is  
11                  perfectly okay or this is not, and, therefore, we need to  
12                  get involved." I mean, we don't know, for example, how  
13                  much noise the project is going to make. I don't believe  
14                  it's in there anywhere. And, again, I agree with Attorney  
15                  Getz, the detail and, you know, you don't have to make an  
16                  application in order to get jurisdiction, but you do need  
17                  to have something, and that something is missing on this  
18                  first factor.

19                  The second factor that the Committee has  
20                  used typically is whether there's -- the jurisdiction is  
21                  necessary to avoid undue delay. And, I look at the  
22                  Petition itself, and the only reference to "delay" is  
23                  simply, on the first page it says "duplicative,  
24                  inefficient and untimely processes". And, I don't know

1     what "untimely" means, but it's certainly not the same as  
2     the statutory requirement that there be undue delay. It  
3     seems to me that the Petitioner has this idea that this  
4     process guarantees applicants the most efficient and  
5     expeditious process possible, but that's not what the  
6     standard says, that's not what the statute says. It  
7     simply points to that there shouldn't be an unreasonable  
8     delay caused by extraneous forces or, you know, forces  
9     that are intrinsic to the process that's being undertaken.  
10    And, I don't -- there's no allegation in this that the  
11    Town process would create "undue delay" or "unreasonable  
12    delay". It may be slow, but there's no allegation that  
13    it's "undue" or "unreasonable". And, this idea that  
14    "untimely processes", I don't know what that means,  
15    compared to really anything. Usually that means --  
16    "untimely" means, if it's due today, and it comes in  
17    tomorrow, it's "untimely". But what the statute looks for  
18    is "unreasonable delay".

19                   The third factor, I think everybody  
20    agrees that the process would, in terms of disclosure of  
21    -- and the openness of the project and the process, that  
22    the Town's process is equal or better than, in terms of  
23    disclosure and public access, to that which was used in  
24    the City of Berlin for the LaFlamme and Jones. So, I

1 don't think that's really an issue here. But there's  
2 certainly no allegation that disclosure would be better in  
3 this process versus the Town.

4 And, then, the last point is, with  
5 respect to significant aspect of land use planning that  
6 treats issues in an integrated fashion. I think that it's  
7 pretty clear on its face that the Town rules do provide  
8 that it's treated as a significant aspect of land use  
9 planning and deals with the issues in an integrated  
10 fashion. You can see that in many ways it appears that  
11 the Towns, when they wrote their regulations, did so with  
12 an eye towards the SEC's procedure and the SEC's  
13 methodology. And, so, many of the things that you would  
14 look at are going to be looked at in the Town process.

15 I think it's been made clear that, by  
16 Attorney Richardson, that the joint proceedings are  
17 possible, and that appeals and the like, and that provides  
18 the level of integration I think that's necessary as  
19 between the Towns. But I think it may even be a bit of a  
20 stretch to say that "integration" means something more  
21 than the completeness of the process, that is  
22 environmental, technical, and economic issues. It doesn't  
23 say that it must all be done in the same place. I mean,  
24 what if the Applicant said "I've got two projects in two

1 neighboring towns and I'm going to wire them together in  
2 some fashion", you know, is that something that requires  
3 integration? You know, I think that's a bit of a stretch.  
4 And, when you consider what the statute says is, it refers  
5 to "environmental, technical, and economic issues".  
6 Doesn't say, you know, "political and procedural issues",  
7 it says "environmental, technical, and economic issues".

8                   The point about the more stringent  
9 criteria, I think I make the argument pretty clearly that  
10 there's identical criteria as between 162-H and the Towns  
11 are not required, it simply has to have a sort of a "look  
12 and feel" approach. And, to the extent that the  
13 stringency doesn't become exclusionary, and there's no  
14 allegation that that's the case with this particular  
15 Petition, then I think the stringency ought to be  
16 respected. And, I think, you know, what's clear from  
17 Attorney Richardson's point is that, if the stringency is,  
18 you know, I guess, stringency, as a obstacle, assumes in  
19 some fashion that the Town officials will not act  
20 reasonably and in good faith. And, I think that they are  
21 bound to reasonable and sustainable interpretations of  
22 their standards and the facts in front of them. And, in  
23 fact, I think in the Petitioner's reply, the Petitioner  
24 says "we have no reason to believe that the Towns won't

1 act in good faith." So, I think, you know, as far as  
2 stringency as an obstacle or as a block to the process or  
3 the project being successful in the Town, one, it assumes  
4 that it's entitled to and has a guarantee of success,  
5 which I don't think is the case, but it also assumes at  
6 some level that the Town officials won't deal with that  
7 stringency in a fair way.

8 In their response, a number of issues  
9 were raised by the Petitioner. And, it was -- you could  
10 tell it was written by a lawyer, obviously, but "the joint  
11 consideration of the variances is not an adequate remedy."  
12 And, I guess I was somewhat confused by that, because  
13 there's nothing in 162-H jurisdiction that's based on  
14 adequacy of a remedy. And, so, I'm not sure where that  
15 comes from. It sounds like equity jurisprudence, but it's  
16 certainly not anything in 162-H.

17 They said it was "not preventative of  
18 undue delay and inefficient consideration". And, again, I  
19 raise the point, "undue delay" is not the same as "with  
20 utmost haste and greatest efficiency". And, then,  
21 "fundamentally unfair" was placed in there, and that, to  
22 me, sounds like a constitutional argument, but it -- it  
23 may be interesting on an appeal somewhere, but it's not  
24 one of the criteria under the purposes of 162-H. And, I'd

1     also point out, there is really nothing unfair about  
2     appropriate differences in criteria that are based on  
3     reality and on the scale of a project and its impact in a  
4     particular location. There's nothing unfair about a  
5     community being more protective about its goals -- about  
6     the goals and purposes of the law, and particularly one  
7     like this, which is designed for the protection of the  
8     public.

9                     As a said before, there's no guarantee  
10    of identical treatment between these laws. And, it may be  
11    that things will be a little rougher, things will be more  
12    complicated and more expensive. But that -- those kind of  
13    dissimilarities shouldn't be enough to say "yes, in any  
14    case like that, you're going to have jurisdiction." And,  
15    I think Attorney Richardson gets it right, that if this  
16    project comes in, you're essentially opening the door to  
17    not just any 15-megawatt wind project, but any 6-megawatt  
18    hydro project or bio-burning project. You know,  
19    basically, the sky's the limit.

20                    And, in cases like Antrim, where you had  
21    a town that really wasn't prepared, it didn't have an  
22    ordinance, and there was a schism between the town select  
23    board and the town planning board about how it was going  
24    to get done; maybe that's a case where jurisdiction is

1 appropriate. But, here, we don't -- we have a town that  
2 does appear to be prepared and doesn't have that schism.  
3 They seem to be united in their desire to have this done  
4 on a local level.

5 And, then, the last point I wanted to  
6 make is about a point that Attorney Getz made, and I  
7 thought it was an interesting one. And, that's the idea  
8 that "need" is -- the requirement of "need" on a  
9 jurisdictional level is more stringent than what a  
10 certificate requires, because the Legislature removed the  
11 "public good" determination from the certificate, the  
12 certification requirements. That, I think, presents the  
13 fundamental philosophical difference between myself and  
14 the Applicant -- or, the Petitioner, and that is, is there  
15 a presumption in favor of jurisdiction for any case  
16 between 5 and 30 megawatts? And, I submit that there is  
17 no such presumption. And, like Attorney Richardson, it's  
18 going to be the Petitioner's burden to prove that it's  
19 necessary. And, this idea that need should be shown up  
20 front for jurisdiction is, I think, logical to do, when  
21 there is no such presumption, and jurisdiction is not  
22 automatic. And, jurisdiction in a case like that is in  
23 derogation of the local regulatory process. You're  
24 stepping, you know, beyond what the Legislature very



1 clearly and succinctly gave you, and you're stepping into  
2 territory that has been well known to be the realm of the  
3 local officials. So, in that instance, I think it is  
4 important and appropriate for the Legislature to require  
5 some showing of need for the energy. And, I would again  
6 point out that the previous orders in this case have  
7 actually done it that way. So, this isn't new or a  
8 surprise.

9 And, that's all that I have for you on  
10 this point. Thank you.

11 CHAIRMAN BURACK: Thank you very much,  
12 Attorney Roth. I'll now turn to members of the Committee  
13 to see if any Committee members have questions for any of  
14 the counsel?

15 MR. GETZ: Mr. Chairman, I would like an  
16 opportunity for a brief rebuttal. Whether I should do it  
17 now or after questions is at your pleasure.

18 CHAIRMAN BURACK: Let me just see if  
19 there are any other questions at this particular moment?  
20 Chairman -- why don't you go ahead and do your rebuttal,  
21 and then we'll take questions.

22 MR. GETZ: And, I'll try to be brief,  
23 because much of what Mr. Richardson and Mr. Roth have said  
24 is responded, in one way or another, in the filings we've

1       made. But let me start backwards with the presumption,  
2       because I don't think that's addressed anywhere, that  
3       Mr. Roth just talked about. And, we agree that it's  
4       Timbertop's burden to show why there should -- why the  
5       Committee should assert jurisdiction. That the general  
6       rule is that, if you're under 30 megawatts, then you don't  
7       come to the Committee. You have to make a case why the  
8       Committee should take jurisdiction. Again, we have the  
9       wholly different view of what needs to be proved. They  
10      talk about the characteristics of the Project, we talk  
11      about the -- about that the towns, and the fact that  
12      there's two towns involved, and the Ordinances. Clearly,  
13      we have said -- Timbertop does not allege bad faith on  
14      behalf of the towns in designing their Ordinances or in  
15      their capacity to administer their Ordinances. What we do  
16      allege is a bad result, in terms of the Ordinances, that  
17      they are not consistent with the requirements under  
18      162-H:1. They're characterized as "too stringent", I  
19      think that downplays what a burden they are. And, tried  
20      to make that case, in part, by reference to SEC precedent  
21      in previous cases, and by reference to the Legislature's  
22      statute 674:63, which -- with respect to projects, small  
23      wind energy systems smaller than 5 megawatts,  
24      "Unreasonable limits or hindrances to performance shall

1 include...setting a noise level limit lower than 55  
2 decibels." So, we think we are focusing on what should be  
3 focused on.

4 Timbertop may be an ordinary small power  
5 producer, a wind facility, and that's okay. And, Mr. Roth  
6 has expressed concern about all the facilities that might  
7 show up at your door. But these facilities should show up  
8 at your door in situations where the town processes are  
9 not consistent. And, that's what our -- that's what we  
10 allege, that they are not consistent. We don't allege  
11 need for renewable -- for energy, and we don't talk to  
12 environmental impacts and sound impacts, but that's  
13 getting way ahead of the game. That's what we would need  
14 to prove to get a certificate.

15 So, I won't -- well, just one more thing  
16 I would like to talk about, and this is the issue of the  
17 variances and the joint review. We've reviewed -- we've  
18 replied to that in our written filings. But what's  
19 overlooked here is there were ordinances passed in 2010  
20 that, and Timbertop had pursued a local option for a long  
21 time and was prepared to proceed under the 2010  
22 ordinances. It's the 2012 ordinances that made it a  
23 Project that Timbertop concluded could not pursue at the  
24 local level. That it's SEC review would be the

1 appropriate venue to further pursue this Project.

2 So, with that, I'll cut my time. Thank  
3 you.

4 CHAIRMAN BURACK: Thank you, Attorney  
5 Getz. Attorney Richardson or Roth, do you have anything  
6 further you wish to add?

7 MR. RICHARDSON: Only that my clients  
8 have prepared for this meeting a comparison of the two  
9 ordinances, a side-by-side comparison, and I meant to  
10 offer that during my statement to the Committee. We have  
11 it here, if the Committee members would like it. It's  
12 simply the text of the ordinances that are already in your  
13 folders.

14 MR. GETZ: And, we have no objection.

15 CHAIRMAN BURACK: I'm happy to, although  
16 it may not be necessary at this time, but happy to mark  
17 this as the Towns' Exhibit 1.

18 (The document, as described, was  
19 herewith marked as **Towns Exhibit 1** for  
20 identification.)

21 CHAIRMAN BURACK: Let's turn now to --

22 MR. ROTH: I would like to make one  
23 additional remark, if I may?

24 CHAIRMAN BURACK: Please.

1 MR. ROTH: While he's passing out  
2 papers, I'll --

3 (Atty. Richardson distributing  
4 documents.)

5 CHAIRMAN BURACK: Please proceed.

6 MR. ROTH: Attorney Getz actually really  
7 summed it up perfectly a moment ago. He said, what  
8 they're concerned about is "a bad result", and we don't  
9 have any idea what the result is going to be. Because the  
10 process before the Town hasn't been conducted, hasn't even  
11 been attempted. And, what we have instead is a petition  
12 which sort of worries about a bad result, but doesn't say  
13 that it's absolutely impossible for them to make it. And,  
14 the process here doesn't guarantee a good result either.  
15 They could bring this Project here, we could spend months  
16 going over it, and you might deny it. It has happened  
17 before. So, trying to come up with an identical and good  
18 result by coming here is not a basis for jurisdiction.  
19 Thank you.

20 MR. GETZ: Mr. Chairman, if I may, since  
21 my words have been misconstrued?

22 CHAIRMAN BURACK: Please proceed.

23 MR. GETZ: The "bad result" I was  
24 referring to was the Ordinances that resulted from the

1 processes.

2 We are fully aware that, once there's  
3 jurisdiction, if jurisdiction is asserted, we may have to  
4 make our case under all of the findings that are required  
5 under 162-H:16.

6 CHAIRMAN BURACK: Thank you for that  
7 clarification. Let's turn to members of the Committee.  
8 And, I'm going to start with Chairman Ignatius here, and  
9 then we'll go around from right to left.

10 VICE CHAIRMAN IGNATIUS: Thank you. I  
11 have questions for all three of you. So, maybe I'll just  
12 go in the order that you spoke.

13 Mr. Getz, you had said that "This is a  
14 real project. It's not just conceptual." And, I'd like a  
15 little bit of clarity about the parameters of the Project.  
16 Because as I go through the materials, there are an awful  
17 lot of different descriptions of it, they're over a period  
18 of time, and so that may be the case. But, if you can  
19 help me please. The size of the Project you're presenting  
20 today is 15 megawatts and five turbines, correct?

21 MR. GETZ: Yes.

22 VICE CHAIRMAN IGNATIUS: Is that the  
23 expected size for all time or is that part of a phased  
24 plan for development?

1                   MR. GETZ: Well, that's two different  
2 things. I think the Project originally was anticipated in  
3 23, 24 megawatts. As time has developed, like any  
4 project, and it was at one point looking at seven turbines  
5 at 2.3, and we're at five with 3 megawatts, which we think  
6 is a good development from the local's consideration. But  
7 you may be looking at the "Timbertop Wind I", and my  
8 understanding is that there is no indication or no plan to  
9 have a "Timbertop II" with more -- more turbines. That  
10 this is the parameters. This is what's been studied by  
11 ISO was at the 16.1 level. So, to do anything more would  
12 require starting over with the ISO. And, Timbertop has no  
13 plans to do anything more.

14                  VICE CHAIRMAN IGNATIUS: Thank you. So,  
15 in the draft Avian and Bat Survey Report, that talks about  
16 "up to 20 turbines at one and a half megawatts", which  
17 would get you to 30 megawatts, that's not a current plan?

18                  MR. GETZ: That's correct.

19                  VICE CHAIRMAN IGNATIUS: And, as you  
20 mentioned, the seven turbines that you got determination  
21 of no hazard to air navigation, identified seven different  
22 locations, those seven are no longer being sought?

23                  MR. GETZ: Correct. And, there's a map  
24 that's attached to the filing made last week that shows

1 five locations of the five turbines. And, I think that  
2 those five locations are consistent with -- of the seven.  
3 So, it's five remaining of the seven that the "no hazard"  
4 ruling was made on.

5 VICE CHAIRMAN IGNATIUS: Are the only  
6 locations that you're now kind of locked in on are the  
7 five locations that are contained in that map?

8 MR. GETZ: Yes.

9 VICE CHAIRMAN IGNATIUS: There's a  
10 reference to "turbines in Snow Hill", but I couldn't see  
11 that on the map. Where is Snow Hill? And, that's -- I'm  
12 looking at the Radio Report done by Wind Power GeoPlanner.  
13 It refers to the "proposed Snow Hill wind energy project  
14 in Hillsborough County".

15 MR. GETZ: Would you prefer that  
16 Mr. Cohen respond directly to that?

17 CHAIRMAN BURACK: If Mr. Cohen is going  
18 to respond to this, we probably should just have both  
19 Mr. Cohen, and is it Mr. Harris, is that correct? Have  
20 you both just be sworn in here.

21 MR. GETZ: Well, I can say that, you  
22 know, there's no plan for anything on Snow Hill. And,  
23 Mr. Cohen's understanding is that it's a typo in the -- in  
24 that study. That the only plan is for Kidder Mountain,



1 and the five that are on the map on the back of the  
2 February 14 filing. Oh, and Snow Hill actually is a site  
3 in Connecticut that Timbertop is looking at.

4 VICE CHAIRMAN IGNATIUS: All right.

5 MR. COHEN: Sorry about that.

6 VICE CHAIRMAN IGNATIUS: Also, on the --  
7 I think this is in the Avian and Bat Protection -- or,  
8 Survey Report, Draft Report, on Page E1, it refers to the  
9 Project boundaries as "Kidder Mountain, Wildcat Mountain,  
10 Binney Hill, and Emerson Hill in the Town of New Ipswich."  
11 Are all of those locations in play here?

12 MR. GETZ: Binney Hill no longer is.  
13 It's essentially Kidder, and Wildcat is west of Kidder, I  
14 believe.

15 VICE CHAIRMAN IGNATIUS: I didn't  
16 follow. So, is Wildcat also a location?

17 MR. GETZ: Well, Wildcat, I think, was a  
18 name at one time generally given to this Project, that  
19 they're very close proximity, Wildcat and Kidder. But the  
20 Project is, right now, is it's the five turbines on the  
21 map on the back of the filing. And, these surveys were  
22 done sometime ago, with a broader directive to the  
23 consultant to look at all of these issues, which is then  
24 how you cull down to a more discrete project.

1 VICE CHAIRMAN IGNATIUS: And, on that  
2 map, the access road with the turbines is right between  
3 Kidder Mountain and Wildcat, it looks like?

4 MR. GETZ: Yes.

5 CHAIRMAN BURACK: But just, if I may,  
6 for the record, just so we can clarify things. When we're  
7 referring to these maps, you're referring to which  
8 specific site plans attached to which specific filing?

9 VICE CHAIRMAN IGNATIUS: I think we were  
10 looking at the February 14, 2013 submission from the  
11 Petitioner. The last page of that packet has a map that  
12 shows an access road and five turbine locations.

13 CHAIRMAN BURACK: And, that is  
14 Attachment 7, labeled as "Current Map" on the cover sheet  
15 of that? Okay. Just wanted to have a clear record here.  
16 Thank you.

17 VICE CHAIRMAN IGNATIUS: Thank you. Mr.  
18 Getz, another question. Having to do with the situation  
19 of dealing with two ordinances and two municipal  
20 jurisdictions. From the start, you've known that this  
21 Project would cross between two municipalities, correct?

22 MR. GETZ: Well, from the start, I mean,  
23 if you go back, I think, originally, it was going to be  
24 just New Ipswich, and the focus was on Binney Hill in the

1 southern part, and then it shifted to the New  
2 Ipswich/Temple border. So, it's been some time since  
3 there was a possibility of two towns being involved, yes.

4 VICE CHAIRMAN IGNATIUS: And, so,  
5 regardless of what the actual ordinances end up being in  
6 those two municipalities, do you see having two different  
7 jurisdictions to work with is always a conflict or -- and  
8 that any time a project spans two towns, it ought to come  
9 to the Site Evaluation Committee? Or, can you imagine a  
10 way in which a project crossing between two municipalities  
11 could be dealt with at the local level?

12 MR. GETZ: I would say that multiple  
13 jurisdictions doesn't necessarily, *per se*, lead to SEC  
14 jurisdiction, but it can. And, I think, you know, there  
15 was a point, as you make, that there was an idea of going  
16 before two towns, but that was under ordinances that were  
17 amenable. When you have ordinances that are not amenable  
18 to development, and you have multiple towns, then going  
19 forward becomes even more complex. Because then there's  
20 the argument about "you should go for variances", even  
21 though you could have joint hearings, you could end up  
22 with different results. And, that's where we get to the  
23 issue of "undue delay" and back to some of the language  
24 from the Antrim case about why, at the SEC, you have the

1 integrated appeals process that you don't at the town  
2 process. So, it's not necessarily an issue, it depends on  
3 the facts. And, we think that the facts in this case give  
4 us two independent reasons for review; one is the  
5 ordinances themselves, and the other is the undue delay  
6 and proceeding under -- that would come if we proceeded  
7 under them.

8 VICE CHAIRMAN IGNATIUS: Is it your view  
9 that any time a municipality passes an ordinance that is  
10 strict and makes it difficult for development, that that  
11 means that the project should come to the Site Evaluation  
12 Committee?

13 MR. GETZ: Again, it depends on the  
14 facts. It depends on what the ordinance is. And, we  
15 believe these ordinances are so out-of-line with the  
16 Committee's precedent, with the benchmark state law on  
17 small wind projects, that jurisdiction is required. If  
18 the -- you know, hypothetically, if, among other things,  
19 the noise ordinance was a little bit stricter than what  
20 the Committee has found in the past or what -- then, you  
21 know, there's a factual argument to be made, we'd have to  
22 make our case to you. So, it's just not being stricter,  
23 it's making the case of why any particular ordinance is so  
24 strict as to be inconsistent.

1 VICE CHAIRMAN IGNATIUS: You heard  
2 Mr. Roth say that, in the Antrim case, there was  
3 litigation and a real schism between the Planning Board  
4 and the Board of Selectmen regarding wind development.  
5 Are you aware of litigation in either New Ipswich or  
6 Temple on any of the preliminary steps that have been  
7 taken in this case?

8 MR. GETZ: Litigation among the towns  
9 or --

10 VICE CHAIRMAN IGNATIUS: Towards the  
11 project developer. For example, the met tower application  
12 ended up in court in Antrim. You know, any of the sort of  
13 preliminary steps, accusations of improper notice and --

14 MR. GETZ: I'm not aware of anything of  
15 that nature, of the type of thing that happened in Antrim,  
16 happening here.

17 VICE CHAIRMAN IGNATIUS: And, are you  
18 aware of the kind of split within the governmental bodies  
19 in either of the towns? Are they working together or they  
20 have very different views, as we saw in Antrim?

21 MR. GETZ: There may have been  
22 differences of opinions expressed in the papers. I  
23 haven't seen anything of the nature of Antrim, where you  
24 had the Planning Board intervening on its own, with a

1 different position from the Board of Selectmen. So, I  
2 think Mr. Richardson represents the Boards of Selectmen,  
3 but my understanding is the Planning Board members here  
4 are here working with them. So, I don't know if there's  
5 any splits.

6 VICE CHAIRMAN IGNATIUS: Are you aware  
7 of a significant difference of position between New  
8 Ipswich and Temple on these issues? I mean, granted, the  
9 ordinances are not identical. But does it suggest one  
10 that's pro development and one's opposed to development,  
11 for example?

12 MR. GETZ: I guess I would look at what  
13 they have -- they appear to share the same view in  
14 adopting ordinances that we think that are inconsistent  
15 with the statute. But I don't know of any debate among or  
16 between the two towns any greater than what you've  
17 described.

18 VICE CHAIRMAN IGNATIUS: All right.  
19 Thank you. In your February 14th submission, you said  
20 that the -- this is on Page 6, "that the ordinances are  
21 objectively out of line with benchmarks established by  
22 state law and SEC precedent." What state law are you  
23 referring to?

24 MR. GETZ: I'm referring to RSA 674:63,

1 with respect to small wind energy systems. A copy of that  
2 statute is in the original Petition for Jurisdiction, and  
3 there's a discussion of that issue in the original  
4 Petition for Jurisdiction. And, that's where the  
5 reference I made to the 55 decibel sound limit is  
6 contained in that statute.

7 VICE CHAIRMAN IGNATIUS: Thank you.  
8 Mr. Richardson, some questions in follow up to comments  
9 that you had made. First, can you just clarify for me or  
10 confirm for me, for both New Ipswich and Temple, do each  
11 of them have a master plan on file?

12 MR. RICHARDSON: Yes, they would. If  
13 they have zoning ordinances, you have to prepare a master  
14 plan by law before a zoning ordinance can be adopted.

15 VICE CHAIRMAN IGNATIUS: Do each of them  
16 have a planning board?

17 MR. RICHARDSON: Yes.

18 VICE CHAIRMAN IGNATIUS: Do each of them  
19 have a zoning board of adjustment?

20 MR. RICHARDSON: Yes.

21 VICE CHAIRMAN IGNATIUS: Do each of them  
22 have a planner on staff?

23 MR. RICHARDSON: New Ipswich has a  
24 planner on staff -- oh, no. Okay. New Ipswich has a land

1 use administrator, and I understood that to be a  
2 "planner", but apparently there's a distinction. And,  
3 Temple? Temple does not have a town planner.

4 VICE CHAIRMAN IGNATIUS: All right. Or  
5 anyone under contract? I don't mean under direct hire,  
6 necessarily.

7 MR. RICHARDSON: I have both --  
8 representatives of both planning boards here. And, if  
9 you'd prefer to ask the questions to them, we could cut  
10 out the middleman?

11 VICE CHAIRMAN IGNATIUS: Well, I was  
12 okay with the answers, as long as they're -- that they're  
13 accurate. Are we good with those?

14 MR. RICHARDSON: Mr. Kieley, for Temple,  
15 just indicated to me that the Town brings in experts or  
16 planners for particular projects as they need them.

17 VICE CHAIRMAN IGNATIUS: All right.  
18 Thank you.

19 MR. RICHARDSON: And, the answer is the  
20 same for New Ipswich.

21 VICE CHAIRMAN IGNATIUS: Another  
22 question. Mr. Richardson, you talked about the "joint  
23 hearing process", and you described how you -- the  
24 Applicant has a right to that, if requested. But you also



1       conceded that you don't end up with one single decision,  
2       you would end up with one for each municipality, correct?

3               MR. RICHARDSON: That is correct. Each  
4       board retains the ultimate authority to render a decision  
5       over the portions of the project within their boundaries.  
6       But they're required to do so based upon the same hearing  
7       and the same certified record. So, it's consolidated in  
8       that sense, that both boards can be required, and, in  
9       fact, they're willing to conduct the hearings jointly.

10              CHAIRMAN BURACK: And, do they have to  
11       go through that joint process evaluating their own  
12       individual ordinances? I mean, they would get the same  
13       evidence, but they would interpret it according to each of  
14       their governing ordinances, correct?

15              MR. RICHARDSON: They would each be  
16       determining whether or not their specific ordinances, if  
17       it were a variance application, the zoning board of  
18       adjustment is defined as a land use board under RSA 673.  
19       So, when you -- 674 -- excuse me, 673. So, when you look  
20       at what they're required to do, is they would apply the  
21       criteria in RSA 674:33 to their ordinance and decide  
22       whether or not it resulted in an unnecessary hardship,  
23       which is what the statute requires. And, effectively, the  
24       issue would be to -- for the Applicant to present the same

1 information that's effectively, at least in its beginning  
2 stages, in the materials that you have in front of you.  
3 In other words, they would make their case as to why they  
4 felt the ordinance was unreasonable and interfered with  
5 their ability to develop the project. And, then, the  
6 zoning board would be required to make a determination  
7 applying the same criteria in each town, but two different  
8 ordinances. But the sound standards are essentially  
9 identical, based on the information that you have in front  
10 of you, that's in the comparison table, and then also in  
11 the ordinances themselves.

12 VICE CHAIRMAN IGNATIUS: You know, I had  
13 always assumed that, when you get a multi-jurisdictional  
14 project, that that's the very kind of thing that the Site  
15 Evaluation Committee was created to help with. That  
16 you've got multiple entities, with differing standards and  
17 differing obligations. And, I'm just curious in your  
18 thoughts on that. That it seems -- well, it seems, even  
19 if each individual municipality would be well-equipped to  
20 handle a case, when you have two of them, it seems  
21 difficult to make it efficient.

22 MR. RICHARDSON: I think the answer to  
23 that is, you know, in the fact that how this case started,  
24 it began as a project in one town, the Applicant,

1 Timbertop, expanded that project, because they wanted to  
2 have, you know, more towers in place, you know, go beyond  
3 and find a better location. But each, you know,  
4 particular piece of the project is almost on a stand-alone  
5 basis. I mean, you look at how the ordinance is applied.  
6 The town is going to look at "well, what is the noise  
7 generated from the Project?" And, you know, "how does it  
8 affect the sound levels at particular properties?" And,  
9 each town will be looking at the locations of the towers  
10 within their town.

11 So, I think that, you know, this is  
12 different from a electric transmission line or a natural  
13 gas pipeline, where you absolutely have to have a  
14 connection between the two. You can't, you know, be  
15 zigzagging up and down municipal boundaries. I think here  
16 we have only a limited need to connect the electrical  
17 facilities, you know, between the various towers,  
18 ultimately, the transmission facility. I'm not sure how  
19 that works. But I think that each tower is basically, you  
20 know, meeting setback criteria that are specific to the  
21 town it's located in. And, I don't see a particular  
22 problem there.

23 VICE CHAIRMAN IGNATIUS: Mr. Roth, you  
24 had said that, if this Project were to be given

1 jurisdiction by the Site Evaluation Committee, everybody  
2 would be here and we'd have every project you could think  
3 of of any size coming before us. And, I wonder, I mean,  
4 we just, a month ago, had a proceeding for Jericho  
5 Mountain Wind facility saying "Please, don't take  
6 jurisdiction. We'd rather do it on our own." And, the  
7 Site Evaluation Committee agreed with that. The UNH  
8 Project was small, and they said "you don't need us, do  
9 you?" And, the Site Evaluation Committee agreed that we  
10 didn't have to take jurisdiction. So, what are you basing  
11 the thought that "every project suddenly will become an  
12 SEC project"?

13 MR. ROTH: What I've seen in cases  
14 involving wind, in particular, it seems, that there is a  
15 somewhat reactionary, and I don't mean that in any sort of  
16 bloated sense, but a response by developers that they  
17 don't want to undergo sort of stresses and complexities of  
18 municipal business. And, if they find a town that's  
19 perfectly compatible and friendly, for example, Lempster  
20 or Berlin, with Jericho Mountain, then they're happy to  
21 stay local. But, as soon as they run into any friction,  
22 they come here. And, that's -- I think that's where my  
23 concern about this being sort of the  
24 planning-board-of-last-resort for the State of New

1 Hampshire arises. That they sort of test the waters where  
2 the project is going to be, and, if they don't get you  
3 flower petals and ticker tape parade, then they get  
4 nervous and they come here.

5 VICE CHAIRMAN IGNATIUS: And, are you  
6 equating a multi-jurisdictional project and the challenges  
7 that that brings with a developer who didn't get the  
8 flower petals and ticker tape parade? I mean, it seems  
9 like it's really dismissing what I think are more serious  
10 issues than that.

11 MR. ROTH: Well, I think the point about  
12 the "multi-jurisdictional project" is an interesting one,  
13 because, you know, there's nothing in the statute, *per se*,  
14 that says a project that's multi-jurisdictional is to be  
15 sort of "favored" by the Site Evaluation Committee. And,  
16 instead what it says is, can the technical, economic, and  
17 environmental issues be handled in an integrated fashion?  
18 So, the question is, you look at the integration, you  
19 know, how is the integration going to be done? And, if  
20 you have, as I think Attorney Richardson pointed out, you  
21 know, absolute obstacles at the town boundary that create  
22 an impossibility or an exclusive -- an exclusionary  
23 effect, then the multi-jurisdictional integration factor  
24 probably carries more weight.

1 But, if you look at the integration in a  
2 situation like this, where the towns have a means of going  
3 about holding joint hearings and, you know, it may be a  
4 little bit clumsy, but it's not a prohibition or a bar to  
5 a successful presentation and a successful project, if the  
6 project is meant to be successful. So, the integration is  
7 one factor. But, I think even Attorney Getz admitted,  
8 that it's not the only factor, and you have to look at it  
9 in the context of the whole deal. And, in this case, I  
10 think the integration is provided in the way the towns can  
11 approach it.

12 VICE CHAIRMAN IGNATIUS: One other  
13 question. You had said that there had been no allegation  
14 of any exclusionary effect of the municipal ordinances at  
15 issue in here.

16 MR. ROTH: Yes.

17 VICE CHAIRMAN IGNATIUS: Well, let me  
18 just ask you, isn't that not entirely accurate? That  
19 there are allegations that the noise levels are, in their  
20 view, and not that you have to agree with it, but, in  
21 their view, an allegation that they're so strict that they  
22 are effectively a ban on development?

23 MR. ROTH: I guess I didn't read that in  
24 here. And, I was looking again at the Petition, in

1 particular. And, what they talk about are "unwarranted  
2 standards", and that seems to me as, you know, are we  
3 going to have a hearing here about whether 55 is warranted  
4 versus 33? I didn't read in their materials a statement  
5 that says "our Project is expected to produce, you know,  
6 54, and, therefore, these standards become an obstacle."  
7 And, in addition, you know -- so, that's on Page 14, they  
8 say "unwarranted standards". So, they're not -- they're  
9 saying the standard isn't somehow supported by law, and I  
10 have a point about that. And, then, you know, on Page 15,  
11 they talk about the noise limit as "improperly shifting  
12 the balance", but, again, they don't say that "we can't  
13 meet that standard." And, then, when they talk about the  
14 "setback", they said, on Page 16, "the New Ipswich setback  
15 standard causes concern", but it doesn't say "we can't  
16 meet that setback standard."

17 I don't think there's any information in  
18 the materials about the expected noise levels of this  
19 Project in these communities. And, so, I think it's  
20 hypothetical, it's a hypothetical sense that these  
21 standards are too strict. And, there's, I think, a  
22 complaint that they're not consistent with what the SEC  
23 has done before, even though, frankly, the SEC doesn't  
24 have a standard for noise. And, I disagree with the idea

1       that, because the small wind ordinance has a 55 decibel  
2       standard, that, therefore, everybody should have one. I  
3       think there's reasons why, you know, and we could spend  
4       time briefing and analyzing those small wind statutes and  
5       its origins, but I think there are reasons why it was done  
6       that way. And, you know, some of those reasons may be  
7       historical. You know, I came before this Committee with a  
8       gas compressor station a few years ago, and, you know, 55  
9       was the standard put out by FERC. And, you know, we  
10      discovered, I think, in the Antrim case, that the noise  
11      levels and the understanding of how they work and what  
12      they ought to be set at is an evolving thing. So, you  
13      know, maybe 55 is wrong, but, for a small project, and the  
14      Legislature's desire to encourage small projects in  
15      communities, and so that somebody can set up a wind  
16      turbine in their farmyard, and not have to worry about the  
17      neighbors blocking it, I think that that's an appropriate  
18      thing to have. And, it doesn't necessarily mean that the  
19      standard here ought to be exactly that. And, I don't  
20      think this Committee has actually ever said "The standard  
21      must be 55."

22                   VICE CHAIRMAN IGNATIUS: One final  
23      clarification question. Mr. Richardson, you had cited a  
24      statute, and you gave two different or I heard two



1 different numbers, but it may be me. It was the procedure  
2 for joint review, and you cited "674:53", and then later I  
3 thought you said "674:43"?

4 MR. RICHARDSON: I'm sorry. The correct  
5 statute is "674:53".

6 VICE CHAIRMAN IGNATIUS: Thank you.

7 MR. RICHARDSON: Which is entitled "Land  
8 Affected by Municipal Boundaries". And, then, 674:33,  
9 just to make things confusing, is the variance criteria  
10 that are applied by zoning boards of adjustment.

11 VICE CHAIRMAN IGNATIUS: And, then, Mr.  
12 Getz cited "674:63" for small wind systems. So,  
13 there's --

14 MR. RICHARDSON: That's right.

15 VICE CHAIRMAN IGNATIUS: The conspiracy  
16 people would have a theory here of what's going on, but --

17 MR. RICHARDSON: They come in sets of  
18 ten, I guess. There's a library statute as well, and it  
19 was amended in every year ending with three as well, I  
20 noticed recently.

21 VICE CHAIRMAN IGNATIUS: All right.  
22 Thank you. That's all I have.

23 CHAIRMAN BURACK: Thank you. Director  
24 Stewart.

1 DIR. STEWART: Having sat on most of  
2 these proceedings, I'm trying to distinguish one from the  
3 other. And, I think Attorney Getz has pretty well  
4 described the history in Lempster, and I have a couple of  
5 questions. Lempster, we had -- it was the first one to  
6 come through. It was 24 megawatts, under the 30 threshold  
7 for definitively EFSEC taking. Lempster and Washington  
8 had no ordinances, really had no clue as to how to handle  
9 these; nor did EFSEC at the time, because this was our  
10 first. So, we took this project under the certification  
11 process, in the context of sort of cutting our teeth and  
12 figuring out what to do with these projects. Then comes  
13 Antrim sometime later, and the Selectmen and the Applicant  
14 wanted us to take the project, and there was an ordinance  
15 under development. And, so, EFSEC decided to take that  
16 project on, even though it was under 30, ultimately, it  
17 went over 30, and that decision really didn't matter  
18 anymore. And, now, we have Timbertop, where we have  
19 ordinances in place, the towns want to keep the Project;  
20 the Applicant wants us to take it. I guess this leads me  
21 to the question of the ordinances and, you know,  
22 stringency, as to, if -- does a municipality have the  
23 ability to have a more stringent ordinance than the  
24 history of the EFSEC decisions? And, when are those

1 unreasonable? And, ultimately, looking at the various  
2 statutes, but RSA 674:63, with regard to wind energy  
3 systems, if the ordinance doesn't comply with this  
4 section, when is it EFSEC's obligation to referee between  
5 the statute and the ordinance? And, when does that kind  
6 of flow through the municipal process to the courts for a  
7 decision? So, that's my first question.

8 I guess I'll ask my second, and then let  
9 Attorney Getz handle it, and then the others can jump in.  
10 The second is, how does an energy facility, across two  
11 towns, differentiate from any other development, such as,  
12 you know, if a -- if a major shopping mall were to come  
13 in, and it were intermunicipal or some major development,  
14 why is this different than a proposal such as that?

15 And, in all these cases, state and  
16 federal permitting would be applicable anyway. So, I'll  
17 put those two questions out, for Attorney Getz first, and  
18 then the others.

19 MR. GETZ: Okay. Thank you,  
20 Mr. Stewart. So, beginning with the ordinances and the  
21 history through the Antrim and, well, in the Clean Power  
22 and Lempster case. You know, I look at the Committee's  
23 decision in the Antrim jurisdictional order, at Page 25,  
24 and they decided to take jurisdiction, and it said "we

1 cannot find that such an ordinance will eventually come to  
2 fruition or that it will adequately safeguard the purpose  
3 and findings of 162-H:1." And, our position is, what's  
4 here, ordinances did come to fruition, but they don't  
5 adequately safeguard the purpose of the statute. And,  
6 that's a factual case that we have to make to you to why  
7 these ordinances don't adequately safeguard the purpose  
8 and findings. And, again, to use the word "stringent", I  
9 think it probably is permissible for a town to do  
10 something somewhat more stringent than what the SEC has  
11 found to be an appropriate standard of any type, whether  
12 it's noise or something else.

13 But I think what the Committee should be  
14 looking to is, how does whatever this ordinance is, and in  
15 this particular case we have actual ordinances to show  
16 you, and why we think they have gone too far, and the --  
17 and we compare them to the precedent and we compare them  
18 to what the Legislature has determined with respect to  
19 small systems. So, that's our evidence as to why.

20 I don't think there's any clear line in  
21 the statute or in case law or in the rules that says when  
22 a little more stringent becomes "too stringent". So, I  
23 think that's a case we have to make to you and we hope to  
24 prove to you. And, that's why we've cited to precedent,

1 we've cited to state law. And that, when we get to an  
2 adjudicatory proceeding, we would like to put on an expert  
3 witness that can help make that case.

4 The other issue, I think that addresses  
5 most of what you raise on the first question, the second  
6 question "why is a wind project any different that goes in  
7 two towns any different from a mall that crosses two  
8 lines?" Well, it's difference is because of RSA 162-H:1.  
9 162-H:1 provides for integrated review. The Supreme Court  
10 says, in a case from 1980, that, you know, about the  
11 statutory scheme envisions all interests be considered,  
12 all regulatory agencies combined, for the twin purposes of  
13 avoiding undue delay and resolving all issues in an  
14 integrated fashion. Which I think that then gets back to  
15 an observation by Chairman Ignatius is that this is what  
16 the Committee was designed to do, was to look at projects  
17 in an integrated way. It is said, though, you don't  
18 automatically get into the game if you're under  
19 30 megawatts, but, if you can make a case why you should  
20 be here, then you can, and that's why we have to make the  
21 case.

22 CHAIRMAN BURACK: Thank you. Before we  
23 go further, just need to check with our court reporter, do  
24 you need a break?

1 MR. PATNAUDE: Soon.

2 CHAIRMAN BURACK: Soon? Okay. We'll  
3 take responses to these questions for Attorneys Richardson  
4 and Roth, and then we may take a break here.

5 MR. RICHARDSON: Thank you, Mr.  
6 Chairman. I think the first question then Commissioner  
7 Stewart raised was, you know, why -- "how does the small  
8 wind energy statute have a bearing on this?" And, that  
9 statute is cut off at 100 kilowatts. So, these turbines  
10 are, obviously, much larger than 100 kilowatts, so that  
11 the standard that's in that statute I don't think comes  
12 into play. And, you know, if you think about a  
13 55 megawatt -- "megawatt" -- 55 decibel sound level coming  
14 from a small wind energy system, it's probably, you know,  
15 I don't know if that standard is reasonable or not.  
16 Certainly, the evidence that was submitted to the Towns of  
17 Antrim and New Ipswich, you know, based on the reports  
18 that are in your file here, said that, you know, you get  
19 widespread complaints at 55 decibels. But a small wind  
20 energy system is unlikely to be up at 450 feet for a  
21 turbine or tower size. This is a large wind energy  
22 system, it's a very different creature. And, there are  
23 reasons for looking at different sound levels and  
24 different criteria. Because, once you're up at that size,

1     you know, you're affecting a much larger area. And, your  
2     sound, I mean, I'm not a sound expert, and I don't want to  
3     go outside of what my realm is as an attorney, but I think  
4     you're looking at a different animal.

5                     And, I think, you know, these boards are  
6     -- they have a lot of qualified individuals on them. I  
7     mean, there's an MIT graduate in New Ipswich, there's a --  
8     I was just given a list here, there's an electrical  
9     engineer, someone with a Ph.D in Pathology, a Ph.D in  
10    Economics. So, while they, you know, they kind of do it  
11    on their own without a regular town planner, I think these  
12    people are capable of making fairly sophisticated  
13    determinations. There -- if you want to attribute a  
14    fault, which I think essentially the Applicant has done,  
15    is that they were given two opinions. One, and these are  
16    both in the original Petition, there's a letter dated  
17    October 12th, 2011, with a proposal for a wind noise  
18    ordinance level that was submitted by the town's  
19    consultant, and then there was another that the Applicant  
20    provided as to what they thought a reasonable standard  
21    was, and they had to pick. They're not sound ordinance  
22    experts. And, faced with advice on one side as to what  
23    the standard should be, they chose the 33 decibel level.  
24    You know, whether or not they chose right or wrongly is

1 ultimately a question of law that can be presented to the  
2 Zoning Board of Adjustment, and they can make that  
3 determination based on the record. But, as of right now,  
4 when this ordinance was adopted, there were really only  
5 two standards, one was more stringent than the other.  
6 And, these planning board members, you know, fulfilling  
7 their requirements to protect the public and the general  
8 welfare of their communities, chose the more stringent of  
9 the two. And, I think they're allowed to do that. But  
10 the law provides for a release mechanism, as it were, if  
11 they do it wrong or if they go too far. And, that's all  
12 that really has been alleged here.

13 CHAIRMAN BURACK: Attorney Richardson,  
14 if I may, just for the purposes of clarity of the record,  
15 can you just tell us where in the documents we will find  
16 the two specific pages or documents that you were  
17 referring to a moment ago?

18 MR. RICHARDSON: Sure. And, I confess  
19 I'm only at a difficulty, because I don't have a Bates  
20 numbered page or document from the original Application.  
21 But I'm looking at the Petition for Jurisdiction --

22 CHAIRMAN BURACK: Dated December 21,  
23 2012?

24 MR. RICHARDSON: That is correct. And,



1 then, there is a letter, the first one that I see is dated  
2 "October 12th, 2011", and, unfortunately, --

3 CHAIRMAN BURACK: And, where does that  
4 appear? Within which attachment does that appear?

5 MR. RICHARDSON: It's in the middle of  
6 about the 300-page filing. There's no numbering, so I  
7 can't --

8 CHAIRMAN BURACK: Do you not see some  
9 blue pages in your piece that identified an attachment  
10 number? I see Attachment 2 is "Ordinances", is it within  
11 that section?

12 MR. ROTH: Or is it in the "Planning  
13 Boards Minutes" section?

14 MR. RICHARDSON: It's within the -- it's  
15 mixed in with the Planning Board records.

16 CHAIRMAN BURACK: Which would be  
17 Attachment 5.

18 MR. RICHARDSON: Okay, Attachment 5.  
19 And, then, if you flip a couple pages beyond that, you'll  
20 see that there is the Town's noise consultant's materials  
21 that were presented to, I believe in this case, New  
22 Ipswich. And, then, there was a response that's  
23 approximately 20 pages later, and the Town's consultant  
24 again explained to the Boards why they felt that the

1 ordinance that had been proposed was the reasonable  
2 standard.

3 Again, it ultimately comes down to right  
4 or wrong. There is an opportunity --

5 (Court reporter interruption.)

6 MR. RICHARDSON: Rightly or wrongly,  
7 there's an opportunity before the Zoning Board of  
8 Adjustment for the Applicant to make their case as to what  
9 the standard should be.

10 CHAIRMAN BURACK: Thank you very much.  
11 Director Stewart, I see your hand here. I'm trying to --  
12 I'm trying also to respect the fact that we're running  
13 long here on our court reporter.

14 DIR. STEWART: Okay.

15 CHAIRMAN BURACK: So, if I may, I'd like  
16 to give Mr. Roth a chance to answer your question, and  
17 then I think we may -- we'll figure out how we're going to  
18 recess here for a while.

19 MR. ROTH: Thank you. Just very  
20 quickly. The first question, "whether, you know, the SEC  
21 and how do you referee the stringency?" I think everybody  
22 here would agree that it's sort of a question of  
23 reasonableness. And, then, sort of where I think we  
24 disagree may be "what's the standard for "too stringent"?"

1 And, my suggestion is, is that the standard for "too  
2 stringent" ought to be something like what causes the  
3 question of preemption between state programs and local  
4 programs. And, that is, "is the local standard so  
5 stringent that it becomes prohibitive or exclusionary?"  
6 And, that's supported by the case law cited in the  
7 pleading that I filed.

8 And, in this case, there's been no  
9 allegation that these stricter standards offered by the  
10 Towns are exclusionary either to this Project or to any  
11 other. And, therefore, the Petition itself isn't  
12 sufficient to get to this issue, and ought to be denied  
13 for that reason.

14 Then, the question about the  
15 cross-boundary development I thought was an interesting  
16 one, and I thought Attorney Getz's answer that "it's  
17 because of 162-H:1" was also interesting. But 162-H:1  
18 presupposes that there is a need for the energy being  
19 proposed. And, that's another fact, another issue that's  
20 not adequately addressed or even alleged in the Petition  
21 before you today.

22 CHAIRMAN BURACK: Okay. Thank you. Was  
23 there a solution?

24 DIR. STEWART: A simple question?

1 CHAIRMAN BURACK: Please proceed. We'll  
2 see if it ends up being a simple answer, won't we?

3 DIR. STEWART: I have to. I mean, he's  
4 also my boss. The question I have that I would like a  
5 simple answer to is, where is -- where does the appeal go,  
6 I'm not an attorney, where does the appeal go of a local  
7 decision in this matter?

8 MR. RICHARDSON: I can answer that, with  
9 leave of the Chair?

10 CHAIRMAN BURACK: Please do.

11 MR. RICHARDSON: A appeal from a zoning  
12 board of adjustment is to the Superior Court, and that's  
13 following a motion for rehearing, similar to what happens  
14 here, and it's under 677, I believe it's 4. And, then, an  
15 appeal from the planning board is directly to Superior  
16 Court, in the county in which it's located, in both cases.  
17 And, that's under 677:15. And, they're both certified  
18 record appeals, if you go through RSA 677.

19 DIR. STEWART: Thank you.

20 CHAIRMAN BURACK: Thank you. We're just  
21 going to go off the -- just going off the record here for  
22 a moment.

23 MR. ROTH: Mr. Chairman, just for  
24 clarity sake. Is there a subsequent appeal to the New

1 Hampshire Supreme Court?

2 MR. RICHARDSON: From the Superior  
3 Court, to the Supreme Court, yes.

4 CHAIRMAN BURACK: Thank you. Just going  
5 to go off the record here for a moment.

6 (Brief off-the-record discussion ensued  
7 among Committee members and Committee  
8 Counsel.)

9 CHAIRMAN BURACK: Okay. This proceeding  
10 is not one that I think we're going to be able to wrap up  
11 probably in the next few minutes is my best guess here.  
12 So, although I should just ask Committee members, how many  
13 other members have questions that they would like to be  
14 able to ask? One, two, three, four, possibly more, our  
15 attorney has well. Clearly, we're not going to be able to  
16 wrap this up before we take a break.

17 So, let us take a break for lunch.  
18 We're going to ask everybody to be back here, if they  
19 possibly can, by, and I'm looking at the clock on the back  
20 wall here, which is maybe a little bit slow, 12:09, why  
21 don't we all plan to be back here by five minutes of 1:00,  
22 with a goal of recommencing at 1:00. So that we can do  
23 our best to wrap up this proceeding on the Timbertop  
24 matter, and then I do want to be able to turn to the

1 Groton matter today as well. And, I apologize to those  
2 who were here just for the Groton matter, that you had to  
3 sit here for this length of time. We clearly misjudged  
4 how long this first proceeding might take.

5 In any event, we will -- we'll resume  
6 here at 1:00, and we will stand adjourned until that time.

7 **(Whereupon a lunch recess was taken at**  
8 **12:10 p.m., and the hearing resumed at**  
9 **1:04 p.m.)**

10 CHAIRMAN BURACK: Good afternoon,  
11 everyone. Thank you for being back here very promptly.  
12 It's remarkably just after 1:00, and we are going to  
13 resume this proceeding of the Site Evaluation Committee  
14 involving the, I'll use the shorthand, the Timbertop Wind  
15 Project proposed for the towns of Temple and New Ipswich.

16 When we took our lunch break, it was  
17 with the understanding that we would come back for further  
18 questions of counsel from members of the Committee. I'm  
19 going to encourage Committee members to not repeat  
20 questions that have already been asked and, likewise,  
21 encourage counsel to keep their responses to the point, to  
22 the questions that are raised.

23 So, who has additional questions here?  
24 Director Normandeau, do you --

1 DIR. NORMANDEAU: Yeah, I just had --

2 CHAIRMAN BURACK: Please.

3 DIR. NORMANDEAU: Attorney Getz, just a  
4 quick question. You've alluded a couple times to a set of  
5 zoning ordinances from 2010. Something changed between  
6 2010 and 2012 is what it sounds like.

7 MR. GETZ: That's correct. And we've  
8 laid this out somewhat in the petition for jurisdiction.  
9 But there were a set of large wind energy system zoning  
10 ordinances that were approved in 2010. Timbertop was  
11 prepared to proceed under those, and they were changed in  
12 2012. And at the same time, in 2012, Temple adopted large  
13 wind energy ordinances that were very similar to the New  
14 Ipswich ordinances.

15 DIR. NORMANDEAU: Just to quickly follow  
16 up.

17 CHAIRMAN BURACK: Please.

18 DIR. NORMANDEAU: Do you or your client  
19 perceive that was done in response to the applications  
20 that they were going to bring forward?

21 MR. GETZ: I'm not really sure that I  
22 can give an opinion on why it was done. There's a large  
23 record that we attached which shows what happened at the  
24 planning board, in the minutes, of how things transpired.

1 DIR. NORMANDEAU: Thank you.

2 CHAIRMAN BURACK: Thank you very much.

3 Commissioner Scott.

4 CMSR. SCOTT: Good afternoon. Attorney  
5 Richardson or maybe one of the town representatives, I  
6 just wanted to get clarification on your assertion  
7 regarding the towns' ordinances. Is it your assertion  
8 that without a variance, that it's possible to put a wind  
9 farm in those two towns?

10 MR. RICHARDSON: I believe that it is,  
11 but I really wasn't involved in the studies. And Ms.  
12 Freeman here was involved. So with your, leave, or with  
13 the Committee's leave, I could have her respond to that  
14 directly.

15 CMSR. SCOTT: Please do.

16 MS. FREEMAN: So the question was, did  
17 we believe it was possible without a variance?

18 CMSR. SCOTT: Yes.

19 MS. FREEMAN: The answer is yes. We had  
20 seen some studies, sound projection models, and we believe  
21 that with a properly designed facility it would be  
22 possible.

23 CMSR. SCOTT: Thank you very much.  
24 That's helpful.



1                   And Attorney Getz, you may not know  
2                   this, but when do you expect the full project details will  
3                   be public, assuming you move forward?

4                   MR. GETZ: Well, the full project  
5                   details -- I mean, there's a lot of details we've already  
6                   put forward. There's more work that needs to be done to  
7                   finalize. So if it's more a question of like when would  
8                   the Applicant be in a position to file an application,  
9                   we're thinking, you know, the last -- well, by Labor Day,  
10                  certainly. I'm assuming this is going to take some time  
11                  to finish this process. But certainly by Labor Day would  
12                  be our goal, though, that -- you know, I can't commit to a  
13                  hard and fast date on that.

14                  CMSR. SCOTT: Understood. Just wanted  
15                  to get a rough time frame of expectations.

16                  Also in your original filing, the  
17                  December 21st filing, Attachment 6, you have different  
18                  news articles following, I think, the development of the  
19                  wind ordinances in the towns and some discussions  
20                  regarding a potential for the wind project in the towns.  
21                  I was curious. What was the intent of including those as  
22                  attachments?

23                  MR. GETZ: Just to show that the project  
24                  was well known, that the Applicant had been making its

1 presence known in the town and that it was trying to make  
2 available to the public the fact that it was developing a  
3 project and what it might look like in terms of size,  
4 location, et cetera. There's no other, you know, purpose  
5 other than that. There was obviously no -- we take no  
6 position that this is all that was published. It was just  
7 some articles that we thought might give some other  
8 insight into what was going on with the adoption of the  
9 ordinances.

10 CMSR. SCOTT: Thank you.

11 And following up on my question to the  
12 towns, is it -- again, just to clarify. Is it the  
13 Petitioner's assertion that, given the existing  
14 ordinances, that a wind farm could not be built that met  
15 those criteria?

16 MR. GETZ: Yes. And I think we've  
17 talked a lot today about sound. But there's more going on  
18 here. And I think if you look at Pages 14 to 15 of the  
19 petition for jurisdiction and -- and again, there's two  
20 things going on here: One is, I think, focusing on the  
21 characteristics again of the project and whether the  
22 project could or could not do what's impossible to achieve  
23 is not the appropriate focus. What's the appropriate  
24 focus is, are the ordinances reasonable? Are they

1 consistent with the understanding of R.S.A. 162-H:1?  
2 That's the test. And it is not a test of showing  
3 hardship, as Mr. Roth would pose it. And if you look at  
4 that, there's talk -- if you look, the sound level's lower  
5 on Page 14. Also, there's discussion of setbacks.  
6 There's also a discussion that the findings in the  
7 ordinance provide that the large wind energy system will  
8 not have a significant adverse impact on wildlife, will  
9 have no adverse impact on bird or bat species, will not  
10 adversely affect the quantity or quality of ground and  
11 surface waters. These are entirely different tests than  
12 the tests in 162-H:16 which require "no unreasonable  
13 adverse effect." So it's put the -- and then there's also  
14 the requirement with respect to the FAA, which are  
15 requiring, my understanding is, a technology that's not  
16 currently accepted by the FAA. So you have a whole set of  
17 requirements that are more stringent, considerably more  
18 stringent than what we'd expect to come out based on the  
19 precedent and the findings required under the Site  
20 Evaluation Committee.

21 So when you look at those two, the  
22 ordinances and what the Committee would do in comparison,  
23 our view is that the ordinances don't maintain the  
24 appropriate balance, and then also the other issues about

1 undue delay, et cetera.

2 CMSR. SCOTT: Thank you.

3 MR. ROTH: Mr. Chairman, if I can  
4 respond to that momentarily?

5 CHAIRMAN BURACK: Please do.

6 MR. ROTH: I guess I heard Attorney Getz  
7 say that the project could not comply with these more  
8 stringent requirements, but I don't see anywhere in this  
9 application or this petition where it says that, and so I  
10 just want to make that clear. Pages 14, 15 and 16 don't  
11 say that anywhere.

12 MR. GETZ: And they are not required to  
13 because that is not a requirement for showing  
14 jurisdiction. We do not need to allege facts about the  
15 project. We need to allege whether the ordinances and  
16 whether the towns' jurisdiction is consistent with  
17 162-H:1. That's all that we're required to allege, and  
18 we've done that.

19 CHAIRMAN BURACK: Thank you. We're  
20 going to keep going around here. Commissioner Harrington.

21 CMSR. HARRINGTON: Yeah, I'd like to  
22 have basically each of the three parties comment on this.  
23 We've had a lot of talk about ordinances and undue delays,  
24 whether they're overly restrictive or not. But I'm really

1 have trouble getting that far along. I read 162-H:1, and  
2 it's pretty clear that the word shows up here, and the key  
3 word I don't think we've talked enough about today is the  
4 word "need." It says, if the Legislature finds it's in  
5 the public interest to maintain a balance between the  
6 environment and the need for new energy facilities, undue  
7 delay in the construction of needed facilities... later on  
8 it talks about ensure that the state has an adequate and  
9 reliable supply of energy in conformance with sound  
10 environmental principles.

11 So I'm reading this as the first step is  
12 to show that the facility is needed; then, if it is, then  
13 we can move on to the next steps, which would be whether  
14 the ordinance is overly restrictive or meets the intent of  
15 162-H. But until we show it's a needed energy facility,  
16 you never get that far.

17 So I guess I'd ask for each of the three  
18 groups to comment on that, because I have not seen  
19 anything in the filings that show that this is -- there's  
20 a need for this energy facility in New Hampshire, and that  
21 without it, there wouldn't be an adequate and reliable  
22 supply of energy in conformance with sound environmental  
23 principles.

24 MR. GETZ: And I think the analysis

1 starts with when you read the Declaration of Purpose and  
2 why -- and that deals with why there is a Site Evaluation  
3 Committee. The premise -- and it's under what the  
4 legislature recognizes, that it recognizes selections of  
5 sites, et cetera, will have significant impact on the  
6 population, the environment and the state. The  
7 legislature finds it's in the public interest to maintain  
8 a balance between the environment and the need for new  
9 energy facilities. And that's why we've created a Site  
10 Evaluation Committee that will look at these issues and  
11 keep a balance. So it's going to look at -- so that's why  
12 you have this new body back in 19 -- well, it was before  
13 1991 -- that would look at all these issues in an  
14 integrated fashion. But it's the premise underlying why  
15 you have this body, is you're balancing the environment  
16 and the need for energy. But that has nothing to do with  
17 now, what the findings are for a certificate. The  
18 Committee, after restructuring -- or the legislature,  
19 after restructuring, repealed the need to -- the  
20 requirement to show need. So need is not a finding that  
21 you have to show for a certificate. This language is  
22 preparatory background language of why you have a  
23 committee, the types of things it's trying to balance.

24 And I read, when you say in 162-H:2 --

1 H:2, XII, the SEC is going to determine what kind of --  
2 when a project needs a certificate, it looks at where  
3 jurisdiction should lie. Should it lie -- for something  
4 under 30 megawatts, should it lie at the local level, or  
5 should it come to the SEC? It comes to the SEC when the  
6 Committee determines that, at the local level, the  
7 balancing is not going to occur; undue delay might occur.  
8 So that's what you're looking at.

9           The question of demonstrating need for  
10 the facility is not a requirement to get jurisdiction, and  
11 it's -- so, you know, perhaps when the legislature  
12 repealed the requirement under 162-H:16 about need for  
13 facility, maybe it could have gone in and struck the  
14 reference to "need" here. But I don't think that's  
15 dispositive, because it's still all about why you created  
16 the SEC, not why a project should be subject to the  
17 jurisdiction of the SEC. Because if you followed that  
18 line of thinking, I guess somebody could come in and say,  
19 with an application for something greater than 30  
20 megawatts, that you should be looking at the issue of  
21 need, or there should be an exception, and it should be  
22 taken out of your jurisdiction because -- it just seems to  
23 me to be a large, circular argument, that now you're not  
24 consistent with the Declaration of Purpose section

1 anymore.

2                   So this is a Declaration of Purpose.  
3 It's not a substantive requirement on the facility.

4                   CMSR. HARRINGTON: Thank you.

5                   MR. RICHARDSON: Commissioner  
6 Harrington, your question is precisely on point. And I  
7 think the answer to it is not that you have to look at the  
8 ordinances. You don't really have to look at the  
9 ordinances at all. Because when you look at what the  
10 legislature has said when it put the definition for  
11 "renewable energy facility" in 162-H:2, XII, it says  
12 "'Renewable energy facility' shall also include electric  
13 generating station equipment and associated facilities of  
14 30 megawatts or less nameplate capacity, but at least 5  
15 megawatts, which the Committee determines requires a  
16 certificate," and then says "consistent with the findings  
17 and purposes..."

18                   So what the legislature has told this  
19 Committee to look at is not the ordinances, but what is  
20 the facility. And you are exactly on point, in the sense  
21 that you reached, I think, the correct determination that  
22 you don't have to even consider the municipal zoning  
23 ordinance if this is not a facility that the state needs.  
24 At 30 megawatts, there is a presumption that the welfare



1 of the state, the economy, jobs, all of those things, the  
2 need to consider environmental principles, requires this  
3 Committee to consider the entire project. There's an  
4 exemption process under 4. So I don't think we ever get  
5 in the situation that Attorney Getz described, where we're  
6 exempting it on one hand and letting it go on another,  
7 with or without considering the need.

8 When the legislature created the  
9 renewable certificate -- the "renewable energy"  
10 definition, they told this Committee to look at what is in  
11 1. The word "need" is right there three times, and in the  
12 final provision, as you noted, "all to assure the state  
13 has an adequate and reliable supply." In other words,  
14 every single purpose listed in 1 is really for one  
15 purpose, and that's to determine whether or not this  
16 facility requires a certificate to accomplish all of those  
17 purposes. And I don't think we can reach the conclusion,  
18 based on this record, that this is a needed facility.

19 CHAIRMAN BURACK: Thank you. Attorney  
20 Roth.

21 MR. ROTH: Thank you. I would point out  
22 a couple things in the petition that you might want to  
23 think about in addressing this issue. The first is  
24 there's a reference to the project being short-listed for

1 a PPA. And I know this isn't in the record, but I have  
2 heard, anyway, and perhaps the Applicant can address this,  
3 that that PPA is with an out-of-state utility, so that, in  
4 essence, we'd be constructing a project in New Hampshire  
5 to sell electricity out of state.

6 The petition itself also refers to  
7 this -- to the balance. And if you look at the  
8 conclusion, you know, on Page 20, "Finally, the SEC may  
9 draw logical inferences from the minutes of meetings of  
10 the planning boards that support a conclusion that SEC  
11 jurisdiction is necessary to maintain the balance required  
12 by... 162-H:1." So, even the Applicant relies upon the  
13 balance. And the balance isn't just all of the process on  
14 one side and nothing else on the other. The other side of  
15 the scale is the need for electricity.

16 Without this, if you reduce this  
17 language in the Purposes and Intent side, and to being  
18 mere declaration and not at all substantive, there's  
19 really no purpose left. We don't have jurisdiction over  
20 these projects just for the sake of jurisdiction. There  
21 has to be some reason for this, and in particular, with  
22 smaller projects, where the presumption of jurisdiction  
23 does not exist and there is a derogation of local rights,  
24 local control over their own procedures and land use

1 planning.

2 The point about the 30-megawatt  
3 presumption of jurisdiction and the fact that Section 16  
4 was taken out by the legislature, I think that that right  
5 there is the explanation for it. It's not -- it wasn't an  
6 attempt to sort of take out all consideration of this. It  
7 was probably, if you look at it logically, a legislative  
8 decision to say we have a presumption of the need for  
9 these projects when it's over 30 megawatts. We don't need  
10 to have a special finding for it under Section 16. Thank  
11 you.

12 CHAIRMAN BURACK: Thank you.  
13 Commissioner Harrington, did you have any other questions?

14 CMSR. HARRINGTON: No, that's all I had  
15 at this time.

16 CHAIRMAN BURACK: Great. Thank you.  
17 Continuing around here. Any other questions here?  
18 Director Hatfield, did you have some questions?

19 DIR. HATFIELD: No, thank you.

20 CHAIRMAN BURACK: You're all set? Okay.  
21 Any other questions from any other  
22 members of the Committee at this time?

23 Attorney Iacopino, do you have any  
24 questions you'd like to pose at this time?

1 MR. IACOPINO: Mr. Getz, when you  
2 referenced R.S.A. 162-H previously having referenced  
3 "need," are you talking about Section IV -- Section IV of  
4 Section 16 of the statute, which used to require, prior to  
5 its amendment in 2009, that operation is consistent with  
6 the state energy policy established in R.S.A. 378:37?  
7 Because I believe that's what was eliminated from the  
8 statute in 2009.

9 MR. GETZ: Well, there's a reference in  
10 162-H:16, V, that was repealed, that spoke to, in the case  
11 of bulk power supply facilities, the Commission shall  
12 issue or deny with respect to the present and future need  
13 for electricity. I think referring to V.

14 MR. IACOPINO: So that was the  
15 procedural requirement that, once the Site Evaluation  
16 Committee ruled on a bulk power supply application, that  
17 the Public Utilities Commission then determined that there  
18 was a need, a present and future need.

19 MR. GETZ: Yes.

20 MR. IACOPINO: Okay. That applied to  
21 bulk power facilities; correct?

22 MR. GETZ: Yes, under the old definition  
23 before they were amended.

24 MR. IACOPINO: All right. Mr.

1 Richardson, during your argument you made reference to,  
2 and in your pleadings you make reference, that the  
3 Committee need not find that this is a contested case; or  
4 even if it finds it is a contested case, it does not  
5 require an adjudicative hearing. Do I understand your  
6 argument correctly?

7 MR. RICHARDSON: It's not that the  
8 Committee need not, it's that it's defined -- a "contested  
9 case" is defined as one which is "required by law to be  
10 determined after notice... for a hearing," and there's no  
11 provision in 162-H that so requires.

12 MR. IACOPINO: But you recognize that  
13 R.S.A. 541-A:31, II, does state that the Committee may  
14 hold an adjudicative hearing in any matter under its  
15 jurisdiction; is that correct?

16 MR. RICHARDSON: I recognize that that  
17 authority is there. And that is why in my opening  
18 statement we asked that the Committee not engage in that,  
19 because we'd really like to see a decision today based on  
20 the record, without having to engage in a battle of  
21 experts over whether or not this zoning ordinance is  
22 reasonable when a variance hasn't even been applied for.

23 MR. IACOPINO: And in your -- but you  
24 would agree, also, then, that the Committee does have

1 jurisdiction to determine whether or not it should  
2 exercise its jurisdiction in this case; correct?

3 MR. RICHARDSON: That's right. And  
4 that's the appeal of the Conservation Law Foundation. And  
5 this is a valid petitioner.

6 There's no doubt about this Committee's  
7 authority to hear the case and to meet the desires to  
8 require a hearing, but it's not required to do so by law.

9 MR. ROTH: Mike, forgive me. If I might  
10 just throw perhaps a slight wrench in that. There is, I  
11 think -- the Committee should at least be asking itself  
12 whether indeed it does have the jurisdiction to determine  
13 its own jurisdiction under the standard in R.S.A. 162-H:2,  
14 XII. One could argue -- and I'm not making this  
15 argument -- but one could argue that the use of the term  
16 "requires," in terms of the Committee determining its own  
17 jurisdiction, is an impermissible delegation of  
18 legislative authority because of its generality and the  
19 lack of a specific background or guiding principles for  
20 it. I understand that the reference to 162-H:1, Needs and  
21 Purposes, is one thing, but typically in cases where  
22 there's a valid legislative delegation, where there's  
23 administrative and regulatory standards, not where the  
24 body gets to determine its own jurisdiction. Just food

1 for thought.

2 MR. IACOPINO: Okay. Well, let me take  
3 you down the "food for thought" road then. If you -- I  
4 take it you join on the motion to dismiss.

5 MR. ROTH: I join in the motion to  
6 dismiss in its general principles that there shouldn't be  
7 jurisdiction here. And I suppose the way to dispose of it  
8 is through a motion to dismiss.

9 MR. IACOPINO: Well, there are several  
10 different -- the Findings and Purposes set forth in 162-H,  
11 I, obviously there's several of them. Do you agree with  
12 that?

13 MR. ROTH: Yes, indeed.

14 MR. IACOPINO: And is it your position  
15 that those all must be pled and proved, or is pleading and  
16 proving, any one of them, sufficient?

17 MR. ROTH: Well, I think the way this  
18 Committee has applied the jurisdictional test in the past,  
19 in the Antrim case and in the Laflamme and Jones case,  
20 there's an analysis of all of the major criteria. And I  
21 think it's an open question: Is one enough, or is it some  
22 quantum? And if there's some quantum of it, what is it?  
23 And I think that's one of the weaknesses of this whole  
24 exercise, is that the Committee really doesn't have much

1 to go by in that respect.

2 MR. IACOPINO: Mr. Richardson, do the  
3 towns take the position that one or all are required?

4 MR. RICHARDSON: I think the Committee  
5 is required to consider all of the purposes and then make  
6 its finding based on how it weighs the evidence before it.

7 But where I do take exception is with  
8 what Attorney Getz suggested, that the statute directs the  
9 Committee to look at the ordinances. That's where we  
10 disagree.

11 MR. IACOPINO: So the towns' position,  
12 then, is if they did prove any one -- let's say it was  
13 undue delay. Or let's make it easy. Let's say it was --  
14 their argument was these towns always do everything in  
15 secret, so the public will never know what's going on;  
16 that's why we need the Site Evaluation Committee. Let's  
17 say they prove that, and that was the only one of the  
18 purposes. Then, under your position, the Site Evaluation  
19 Committee should exercise its jurisdiction; correct?

20 MR. RICHARDSON: That's for the  
21 Committee to ultimately decide, how they balance all of  
22 them. And I can't offer an opinion on that because it's  
23 really uniquely the Committee's role. But they could, in  
24 theory, do that. But I think that, you know, that would



1 be an unusual circumstance that isn't present here.

2 MR. IACOPINO: Mr. Getz, same question  
3 to you. When considering the purposes set forth in R.S.A.  
4 162-H:1, is it sufficient for the Committee to find  
5 that there -- or actually, for the Chair of the Committee,  
6 because he rules on motions -- to find that there is a --  
7 that one of those criteria might apply, or does he have to  
8 find that all of them apply?

9 MR. GETZ: One criteria is sufficient,  
10 whether it's under the standards, the four standards set  
11 out in Laflamme and Jones, or it was broken down a little  
12 further into six in Antrim. But I think only one thing  
13 would need to be proved in order for the Committee to take  
14 jurisdiction.

15 MR. IACOPINO: So in the same example  
16 that I gave to Mr. Richardson, if the Committee were to  
17 find only that you had proved that there would not be full  
18 and complete disclosure to the public of the plans if you  
19 went with the local consideration, that would be enough  
20 for the Committee to say, Well, we're going to assert  
21 jurisdiction on the basis of that one factor.

22 MR. GETZ: Yes, and with the same  
23 proviso about -- similar to what Mr. Richardson said.  
24 He's talking about the project. I'm talking about the

1 ordinances and the town's capability.

2 MR. IACOPINO: Let me follow up with you  
3 on one question. Essentially in the motion to dismiss,  
4 what I hear them saying is that you haven't pled enough  
5 facts for the Committee to go forward. And can you just  
6 tell us, if you can encapsulate it in one or two  
7 sentences, how you have pled enough facts for the  
8 Committee to move forward?

9 MR. GETZ: I think there's enough facts  
10 pled in the introduction to the petition for jurisdiction  
11 from December 21st.

12 The SEC review is necessary, and that's  
13 the approach taken in Antrim, under the circumstances,  
14 because there's going to be a proceeding in two towns  
15 which would lead to undue delay. And we've heard talk  
16 about if we went at the town level, we'd have to ask for  
17 variances, and then if we -- and if we didn't get  
18 variances, we might have to go to superior court and then  
19 go to the Supreme Court -- so, proceeding at the town  
20 level would lead to undue delay.

21 And the second independent basis is that  
22 the town ordinances, for the variety of issues I talked to  
23 earlier -- about sounds, setbacks, standards with respect  
24 to environmental issues and the FAA requirements -- do not

1 maintain the balance that is required for the trier of  
2 fact to maintain in looking at a facility.

3 MR. RICHARDSON: Mr. Iacopino?

4 MR. IACOPINO: Yes, sir.

5 MR. RICHARDSON: If I may just respond  
6 briefly and note that the standard isn't on "delay" under  
7 that purpose. It's "undue delay in needed facilities."  
8 So I think you have to read it as a whole.

9 MR. ROTH: And I would also just point  
10 out that the words "undue delay" do not appear anywhere in  
11 this petition.

12 MR. IACOPINO: I have no further  
13 questions.

14 CHAIRMAN BURACK: Thank you. Again,  
15 although we did not specifically notice this as providing  
16 an opportunity for public comment, just first by show of  
17 hands, I want to know, are there any members of the public  
18 here today who are not directly represented by counsel  
19 here today -- understanding, of course, Counsel for the  
20 Public does, in general terms; his duty is to represent  
21 the public -- but are there members of the public who  
22 would like to be able to make a very brief statement here  
23 today?

24 (No verbal response)

1 CHAIRMAN BURACK: I do not see any.  
2 Okay. Very good. Thank you.

3 I first want to thank all the parties  
4 and their counsel for their very thoughtful and  
5 comprehensive handling of these issues. As I think we've  
6 heard from counsel, from our counsel, and as I expressed  
7 earlier, it is my responsibility and authority as  
8 presiding officer to rule on motions pending before the  
9 Committee pursuant to New Hampshire Court of  
10 Administrative Rules Site 202.14, which effectively  
11 requires the presiding officer shall rule upon a motion  
12 after full consideration of all objections and other  
13 relevant factors.

14 And I want to turn to this motion to  
15 deny or dismiss and what's requested here. The towns are  
16 requesting that we dismiss or deny the petition without a  
17 hearing. The towns claim that the petition for  
18 jurisdiction does not state sufficient faults or arguments  
19 to require a hearing. And we've heard that. I've  
20 listened closely to that argument.

21 After consideration of the filing of all  
22 the parties, I find that the pleadings submitted by the  
23 Petitioner do state a sufficient factual and legal basis  
24 upon which to commence a contested case in this matter. I

1 find that whether the petition for jurisdiction is styled  
2 as a "petition" or whether we style it as a "request for  
3 declaratory ruling" under Site 203.01, the petition has  
4 set forth sufficient facts upon which the Committee can,  
5 in fact, proceed. And in so doing, I do note that there  
6 is no specific rule governing the contents of a petition  
7 for jurisdiction, and likewise, there is no rule that  
8 permits the dismissal of a petition for failure to state a  
9 claim.

10 Additionally, the motion to dismiss  
11 seems to require more information than would normally be  
12 required in the context of a motion to dismiss under  
13 Federal Rules of Civil Procedure 12(b)(6). I recognize  
14 that that would only be understandable to the attorneys  
15 who are here in the room, but I wanted to share that  
16 nonetheless.

17 The issue before the Committee is  
18 whether asserting jurisdiction is consistent with the  
19 purposes of R.S.A. 162-H:1. And I find that the petition  
20 and supplemental documents filed by the Petitioner, when  
21 considered in the light most favorable to the Petitioner,  
22 do state a claim and provide the Committee with a  
23 sufficient basis to proceed to adjudicative hearing in  
24 this contested case, specifically on the question of

1 whether the Committee will ultimately assert its  
2 jurisdiction over this matter.

3 I also note, and we heard questioning on  
4 this a brief time ago, that R.S.A. 541-A:31, II, states  
5 that "an agency may commence an adjudicative proceeding at  
6 any time with respect to a matter within the agency's  
7 jurisdiction."

8 I would also note that R.S.A. 162-H:2  
9 clearly authorizes the Committee to determine whether it  
10 will exercise its discretionary jurisdiction.

11 Therefore, the motion to dismiss or deny  
12 without a hearing is denied, and we will issue a written  
13 order to this effect as soon as we can hereafter.

14 My request is that the parties should be  
15 prepared to meet, along with Attorney Iacopino, next week  
16 and put together a procedural schedule that addresses all  
17 of the necessary discovery, technical sessions, as well as  
18 a rough time frame for the hearing. Obviously, we will  
19 need to schedule the adjudicative proceeding at a time  
20 when the Committee is available. And if the parties  
21 cannot agree on a procedural schedule, I will simply issue  
22 one with Attorney Iacopino's assistance. But I would hope  
23 we can proceed in this manner.

24 I will note that this manner of

1 proceeding is very consistent with the way the Committee  
2 has in the past addressed other questions regarding  
3 whether or not we should or should not assert  
4 jurisdiction. To my knowledge, as a general matter, we  
5 have held additional hearings in order to be able to  
6 gather additional fact and information upon which we can  
7 ultimately make a determination. So that's how we're  
8 going to proceed in this matter. And I will ask Attorney  
9 Iacopino if there's anything else he can think of that we  
10 need to address at this time.

11 MR. IACOPINO: No.

12 CHAIRMAN BURACK: Counsel Richardson.

13 MR. RICHARDSON: If I may make one  
14 clarification. On our motion to dismiss or deny, to the  
15 extent it's a dismissal, I agree with you it's a motion,  
16 and the presiding officer has the authority to dispose of  
17 those. But our motion to deny is actually a request for a  
18 ruling on the merits, which the Committee itself could  
19 make on its own, regardless of the ruling on a motion.  
20 And so I would ask that, if possible, and with due regard  
21 to your role as Chair, if you could ask the Committee if  
22 they wanted to make such a ruling at this time.

23 MR. ROTH: Mr. Chairman, I would support  
24 that approach, and the reason for it is I don't see that

1       there is a great deal of factual matter in the underlying  
2       dispute. It seems to me we have a record here that has  
3       been developed by very capable counsel for the purposes of  
4       obtaining jurisdiction. Mr. Getz has said that everything  
5       he needs to have to establish jurisdiction is right there  
6       in the petition. And I think it is appropriate, rather  
7       than to put especially these two small towns through a  
8       prolonged jurisdictional evidentiary proceeding to produce  
9       evidence of what, I don't know, that at least the  
10      Committee have an opportunity to decide whether to  
11      deliberate on the merits of the petition as submitted and  
12      having heard all the arguments of counsel.

13                   CHAIRMAN BURACK: Attorney Getz, do you  
14      have any thoughts on that question?

15                   MR. GETZ: Well, two things: One is I'm  
16      not really sure that I understand Mr. Richardson's  
17      request. He acknowledges that you have the authority to  
18      deny the motion to dismiss. And you've denied that  
19      motion, that a claim has been fairly stated and we can  
20      move on to the case. And I think you've also concluded  
21      that to move on to the adjudicative proceeding is the way  
22      to go. A motion to deny jurisdiction substantively at  
23      this point, I think, is premature because that's something  
24      that's going to have to be developed.



1                   And I think that Mr. Roth  
2       mischaracterizes what I said in the petition for  
3       jurisdiction. In the process of addressing procedures in  
4       the petition, I think I've made reference to the fact that  
5       the discrete decision of whether to assert jurisdiction  
6       can be made substantially on the papers, and that if  
7       there's a way to enter the documents and other facts in by  
8       stipulation, it would really narrow what needed to be  
9       debated. But I think we would like the opportunity to  
10      present an expert witness to address the issues about the  
11      ordinance, which it's been alleged we failed to do at the  
12      beginning, which we've said all along we don't need to do.  
13      But I think we want to be able to make our case. So I  
14      would ask that you deny the motion to deny jurisdiction.

15                   CHAIRMAN BURACK: Thank you, Attorney  
16      Richardson and Attorneys Roth and Getz, as well. Again, I  
17      have ruled on the motion to dismiss and denying it.

18                   At this time, I think it is fair to say  
19      that at the point that we have additional information  
20      available to the Committee, based upon the process that I  
21      requested here, the Committee at that time would be in a  
22      position then to make a decision as to whether or not to  
23      deny the request that we assert jurisdiction. But I don't  
24      feel that at this time the Committee has the necessary

1 information to be able to make that final determination.

2 Commissioner Ignatius.

3 VICE CHAIRMAN IGNATIUS: Mr. Chairman,  
4 I'm a little concerned about where we're heading in terms  
5 of this next phase. If we -- Mr. Getz has said he wants  
6 to call an expert witness. I don't know if that's a sound  
7 expert, a development expert. I don't know what it would  
8 be. But we've got to find some way to really stay focused  
9 on what the jurisdictional question -- the questions  
10 needed to determine jurisdiction and not morph into a  
11 proceeding on the merits of the project. I don't think  
12 that serves anyone well, because it will either go forward  
13 on the local level or go forward with us on the merits.  
14 We don't need to -- I would hate to spend days in a battle  
15 of experts over, say, sound standards and decibel levels,  
16 which we know from other proceedings can literally take  
17 days in very complex matters. If it's -- it seems  
18 premature to me to get into all of that.

19 So I'm not sure what the factual areas  
20 are that we're looking to develop before taking up the  
21 jurisdictional issue. There may be some. I'm not opposed  
22 to some fact-finding, if that's necessary, and a  
23 stipulation of facts, if that would help to streamline it.  
24 But I really am concerned that the jurisdictional hearing

1 will become a mini hearing on the merits of the project,  
2 and that is just duplicative. It will end up costing time  
3 and money for the towns, the Applicant, the SEC, everyone.  
4 And so I don't have a solution to it, but I just -- I'm  
5 concerned, and maybe some care in developing whatever the  
6 schedule is and some scoping of what the jurisdictional  
7 hearing will entail might help to limit that a bit.

8 CHAIRMAN BURACK: Thank you.

9 MR. IACOPINO: If I can? Vice Chairman  
10 Ignatius, I think that's something that hopefully in my  
11 conference with the parties we can scope out the  
12 appropriate issues, what the factual issues in dispute  
13 will be, and make that all part of the procedural order,  
14 so that it can also be effectively enforced during the  
15 course of the adjudicative hearing.

16 VICE CHAIRMAN IGNATIUS: Thank you.

17 MR. GETZ: Mr. Chairman, if I can?

18 CHAIRMAN BURACK: Going to hear first  
19 from Commissioner Harrington.

20 CMSR. HARRINGTON: I would just like to  
21 say I agree with what Chairman Ignatius just stated. I'm  
22 not quite sure where we're heading with this about the  
23 factual basis that has to be developed. I mean, the law  
24 is pretty clear. In cases where it's between 30 and 5

1 megawatts, the Committee determines if it requires a  
2 certificate consistent with the Findings and Purposes set  
3 forth in R.S.A. 162-H:1, which is basically a half a page.  
4 Bringing on expert witnesses -- I think we've already  
5 discussed this -- I'm not sure what we're going to  
6 accomplish in the next phase. We have the criteria here.  
7 It's consistent with 162-H:1. We can all read this. I'm  
8 not sure what we're going to bring on, what facts or  
9 experts are going to come in and read this differently,  
10 unless it's going to be protracted legal arguments as to  
11 what these words really mean.

12 CHAIRMAN BURACK: Director Hatfield.

13 DIR. HATFIELD: Thank you. I also agree  
14 with the concerns that have been raised by Chairman  
15 Ignatius, and I don't see our role as judging the specific  
16 merits of a local ordinance. I would think our charge is  
17 to consider the process that would occur at the local  
18 level and whether that is consistent with the purpose of  
19 162-H. And I also am concerned about the amount of time  
20 it could take to get into factual disputes and testimony,  
21 and I'm not sure how that would aid us in our  
22 consideration of jurisdiction. Thank you.

23 CHAIRMAN BURACK: Thank you. Are there  
24 other members of the Committee who would like to speak to

1 this?

2 DIR. MUZZEY: I would just like to  
3 second what was just said, that I also have concerns about  
4 the scope of where we're going and the resources that will  
5 be required to do that. And I just wanted to agree with  
6 what folks just said.

7 CHAIRMAN BURACK: Thank you. Are there  
8 others who like to speak to this?

9 Attorney Getz, did you have something  
10 further you'd like to share?

11 MR. GETZ: If I could try to address  
12 what type of expert witness testimony might be entailed.  
13 I certainly agree that we don't want to get into specifics  
14 of the project or trying to, you know, get into a -- and I  
15 don't think it's required, and I don't think it's  
16 relevant -- a debate about what would be the sound levels  
17 that might be emitted from Timbertop. And I think this  
18 goes to Mr. Roth's posing of a test of when is stringent  
19 too stringent, that it may be something that Timbertop  
20 would want to pursue, to bring in a witness to say that,  
21 you know, the sound level, for instance, in the ordinance  
22 is too stringent; that the expert testimony -- that it's  
23 not reasonable to expect that a developer could develop a  
24 project under those particular ordinances. That's the one

1 factual issue that occurs to me. Some of the other issues  
2 in the ordinances we may be able to address without an  
3 expert witness. But that is one that may -- I think is  
4 best suited to expert testimony.

5 MR. ROTH: If I may?

6 CHAIRMAN BURACK: Attorney Roth.

7 MR. ROTH: It seems to me that having  
8 the parties sit together with Attorney Iacopino to try to  
9 figure out what to do in the absence of an understanding  
10 about what the standard is we're trying to achieve is  
11 perhaps not a good idea. And without some guidance from  
12 the Committee in the form of a ruling in terms of what  
13 we're trying to get to, trying to prove facts to get to  
14 someplace that we don't know where that is, is going to be  
15 really difficult.

16 And one thing that comes to mind -- and  
17 I don't know how this works exactly -- is in the Antrim  
18 case we had a discussion about whether jurisdiction could  
19 be applied by the Site Evaluation Committee to approve a  
20 subdivision that the Applicant in that case said it needed  
21 in order to build its project. And the first step was a  
22 submission by the parties of memorandum of law about that  
23 issue, and then there was some consideration and a ruling  
24 about that. And then there was a subsequent order where

1 we had another hearing where we went through the local  
2 regulations to determine which of them survived the  
3 pre-emption analysis. Now, I'm not saying that's going to  
4 go exactly like that. But it seems to me some sort of a  
5 ruling from the Committee, you know, what is left, if  
6 anything -- and that is perhaps a decision that first  
7 needs to be made, if there's anything left. For example:  
8 If you accept our theory that this gateway issue of need  
9 for energy has not been satisfied in this petition, it  
10 seems to me that that's a pretty important issue. And if  
11 you say that you don't need to get to all that other stuff  
12 if there's no showing of a need for the energy, then, you  
13 know, game over. On the other hand, if that is an answer  
14 to that, maybe we don't need to talk about need for energy  
15 in terms of an evidentiary proceeding. But right now, if  
16 we just say, okay, we're going to go ahead and have an  
17 evidentiary hearing on all the jurisdictional issues, we  
18 could very well see experts on the need for energy; we  
19 could see experts on sound. As Commissioner Ignatius  
20 said, we could have a mini hearing on the merits over  
21 this. So there needs to be some way to refine this,  
22 titrate it down, so to speak, so we have something more  
23 manageable and understandable to work with.

24 CHAIRMAN BURACK: Attorney Richardson.

1                   MR. RICHARDSON: Mr. Chairman, if I may  
2     echo Attorney Roth's comments. And the other thing that  
3     I'd like to point out is that this doesn't have to be an  
4     all or nothing affair. The Committee has a range of  
5     options before it, and one might be, because we don't  
6     really have a factual record, because there hasn't been a  
7     variance -- there really hasn't been a project before the  
8     boards -- this Committee could deny jurisdiction as a  
9     final matter and say, that's it, we made our  
10    determination. It could also deny jurisdiction without  
11    prejudice, to reapply if certain conditions were met, such  
12    as the Applicant actually requesting a variance and the  
13    town being able to develop a record as to how its sound  
14    ordinances would apply to the project. And if we were to  
15    then reach a point where, you know, we were at  
16    loggerheads, and the Applicant felt this couldn't be  
17    complied with, if the Committee granted them leave to do  
18    that, they could come back at that point, and this  
19    Committee could make a determination with the factual  
20    record.

21                   Right now, I mean, as Attorney Roth has  
22    suggested, I mean, I'm looking at potentially having to  
23    defend, with expert testimony about setback provisions,  
24    sound, you know, the flicker issues, the noise issues, all



1 of the issues that this project might involve in order to  
2 prove that an ordinance is not unreasonable for a project  
3 that hasn't really been applied for yet, only to then have  
4 to recommence a new proceeding, to then have this  
5 Committee determine, if it did determine there was  
6 jurisdiction, whether that project was in fact reasonable.  
7 So we end up with, I think, twice the headache for one  
8 project that's still below the jurisdictional threshold.

9 So I'd like to offer that as an avenue  
10 by which this Committee could make a ruling today that  
11 wouldn't completely foreclose jurisdiction at a later  
12 date, but would really allow the project and the factual  
13 record to be developed.

14 MR. GETZ: Mr. Chairman.

15 CHAIRMAN BURACK: Go ahead, Attorney  
16 Getz.

17 MR. GETZ: I understand that by denying  
18 the motion to dismiss, it effectively accepted Timbertop's  
19 theory of the case of what needs to be alleged in order to  
20 move forward. I understand, with respect to the argument  
21 that there should not be an adjudicative hearing, you  
22 decided that we should -- made by Mr. Richardson -- you've  
23 determined that we should move forward with an  
24 adjudicative proceeding and suggested that we get together

1 to talk about process. I think the burden is now on  
2 Timbertop to make the record, and hopefully we can agree  
3 to procedural steps to get that record before you.

4 Timbertop -- you know, the town is not  
5 the only one concerned about expense. Timbertop is  
6 concerned about expense and wants to put on the best case  
7 that it can. If it doesn't put on a good case, you're  
8 going to deny jurisdiction. If we don't include things  
9 that you think we should have, you're going to deny  
10 jurisdiction. Mr. Roth and Mr. Richardson will be able to  
11 make the arguments that we failed to do something or  
12 failed to prove something. And so I think we are in a  
13 position that we should be able to put forward the case  
14 that we think is required under the statute. We don't  
15 think it requires all of the factual issues that would  
16 happen as part of a certificate. We do not anticipate  
17 making all those kinds of arguments that you're going to  
18 have to determine the facts. We're going to focus on what  
19 is problematic about the ordinances and why they don't --  
20 and why they're not consistent with 162-H:1.

21 CHAIRMAN BURACK: I thank the attorneys  
22 for sharing their thoughts with us. I'm going to stand by  
23 my decision here and will ask the parties to work with  
24 Attorney Iacopino to narrow the scope as much as we

1 possibly and reasonably can to what absolutely has to be  
2 considered here, so that we have sufficient information  
3 upon which we can make a decision here as to whether we're  
4 going to assert our jurisdiction.

5 CMSR. HARRINGTON: Mr. Chairman,  
6 question just on process? So they will get -- the parties  
7 will get together and come back with a narrow scope that  
8 comes back, and then we have an adjudicative hearing based  
9 on that scope?

10 CHAIRMAN BURACK: That's correct. We'll  
11 have what I hope will be a relatively brief adjudicative  
12 hearing, and then we will be in a position to make a  
13 determination as to whether or not to grant or deny  
14 jurisdiction.

15 CMSR. HARRINGTON: What if the Committee  
16 members don't agree with the scope that comes out by those  
17 people? How do we work on changing the scope of making it  
18 smaller or making it bigger, redirecting it?

19 CHAIRMAN BURACK: I'm going to ask  
20 Attorney Iacopino. That's a fair question. I'm going to  
21 ask Attorney Iacopino to share with the Committee what the  
22 scope is. And perhaps, Attorney Iacopino, you can  
23 describe how we've typically handled these processes  
24 historically.

1 MR. IACOPINO: Historically, we've  
2 handled them exactly the way you've outlined for this one.  
3 In every single jurisdictional proceeding, there's been a  
4 hearing like this, maybe not quite as long, where we sort  
5 of sorted out what the issues involved are, and then the  
6 matter is then put over for a prehearing conference and an  
7 adjudicative proceeding. That's what happened in  
8 Lempster. That's what happened with Antrim. That's what  
9 happened in the Laflamme case with Clean Power. It also  
10 happened recently with Jericho Mountain, which was the  
11 flip side of this case. That's where we had a petition  
12 asking us to issue a ruling that we would not assert  
13 jurisdiction. And in every case -- well, I'm sorry. We  
14 didn't have an adjudicative proceeding in that case  
15 because there was no objection to it by the only other  
16 party involved, which was the City of Berlin. But had  
17 there been an objection by the City of Berlin, that's  
18 likely what would have happened in that case as well.

19 The R.S.A. 541-A, as well as 162-H, both  
20 -- well, one requires due process to all the parties and  
21 the other assumes that due process is going to be provided  
22 to all the parties.

23 But as far as the scoping, my goal would  
24 be to sit down with all of the parties and basically make

1 a list of issues that they believe this record needs  
2 additional facts on; how they're going to prove that;  
3 discuss whatever discovery matters that there might be  
4 between them, which hopefully the Committee will not be  
5 involved with; then come up with a time frame that  
6 involves, hopefully, as the Chair said, a relatively short  
7 adjudicative proceeding that is also consistent with the  
8 schedules of the folks on the Committee. That's the way  
9 that we would -- that I would envision this proceeding.  
10 And I will do my very best to make the issues as narrow  
11 and as complete as possible for the Committee's  
12 deliberations.

13 CHAIRMAN BURACK: Attorney Iacopino,  
14 thanks very much.

15 There being nothing further, I'm going  
16 to adjourn this proceeding. I'm sorry. Attorney  
17 Richardson.

18 MR. RICHARDSON: If I may, I didn't want  
19 my silence to be construed as agreement that the scope of  
20 issues would be limited, because I have two towns with two  
21 different ordinances that -- well, they have minor  
22 differences between them. I should clarify. But I've got  
23 to basically defend the reasonableness of the entire  
24 ordinances for both towns, and I'm very worried that I

1 don't see how I can, even on the sound issue alone, you  
2 know, keep it, you know, separated from the issue on the  
3 merits. And I thought I understood as we went around the  
4 room that there might be a willingness among the Committee  
5 members to rule on the merits at this time. And I  
6 believe, and I don't mean to belittle the Chair's  
7 authority, but I believe the Committee has the authority  
8 to make such a ruling, having heard the information that's  
9 been presented at this point.

10 CHAIRMAN BURACK: Attorney Richardson, I  
11 appreciate that very much. Under the rules -- that is,  
12 202.14 -- the duty and the authority to rule on motions  
13 does fall to the presiding officer. And I recognize that  
14 the ruling I've made may not be one that everyone is  
15 comfortable with at this moment. It's the duty, however,  
16 that I have. And I've listened very carefully, spent a  
17 lot of time looking at the record here, and I feel that,  
18 on balance, this is the necessary step for us to take  
19 before the Committee can make a fully informed decision  
20 here. There are issues raised here that are novel, to my  
21 knowledge have not been directly raised in any other  
22 proceedings in the past that have been before us, at least  
23 since I've sat on the SEC. And I think out of fairness to  
24 all the parties and to the process and to the statutes,

1       that we need to -- as I say, we need to develop additional  
2       information here so that we're making a really very  
3       well-informed decision before we make a final decision.  
4       And I don't enter into this decision lightly. I recognize  
5       the burden that it places upon all the parties. But I  
6       also feel that this is the right way for us to proceed.

7                       So, thank you. There being nothing  
8       further, we're going to adjourn this proceeding. We'll  
9       take a break until 2:15 and then commence with the matter  
10      involving Groton Wind. Thank you.

11                      **(Whereupon the public meeting was**  
12                      **concluded at 2:05 p.m.)**