

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2012-04

Petition for Jurisdiction over a Renewable Energy Facility Proposed by Timbertop Wind I, LLC, to be Located in Temple, New Hampshire and New Ipswich, New Hampshire.

**ORDER
DENYING MOTION TO DENY OR DISMISS THE PETITION AND DENYING
MOTION FOR RECONSIDERATION FILED BY BOARDS OF SELECTMEN OF THE
TOWNS OF TEMPLE AND NEW IPSWICH**

Background

The Timbertop Wind I, LLC Project ("Facility" and/or "Project") is a proposed wind energy facility consisting of (5) Siemens SWT turbines each having a nameplate capacity of 3 MW. The Facility is proposed to be located on Kidder Mountain in the towns of Temple and New Ipswich, Hillsborough County, New Hampshire.

On December 21, 2012, Timbertop Wind I, LLC ("Petitioner") filed a Petition for Jurisdiction ("Petition") with the New Hampshire Site Evaluation Committee ("Committee") requesting the Committee to exercise jurisdiction over the siting, construction and operation of the Facility to be located in the Towns of Temple and New Ipswich, Hillsborough County, New Hampshire pursuant to RSA 162-H:2, XII. The Boards of Selectmen of the Towns of Temple and New Ipswich filed a Motion to Deny or Dismiss the Petition on February 5, 2013. The Petitioner objected in a timely manner to the Motion to Deny or Dismiss the Petition. The Towns' Motion to Deny or Dismiss the Petition was orally denied by me as a Chairman of the Committee and Presiding Officer at a meeting of the Committee held on February 19, 2013. On February 25, 2013, the Towns of Temple and New Ipswich filed a Motion for Reconsideration requesting reconsideration of the decision to deny the Motion to Dismiss or Deny the Petition. On March 4, 2013, the Petitioner filed its Objection to the Motion for Reconsideration and on March 20, 2013, Counsel for the Public filed a Response of Counsel for the Public to Motion for Reconsideration. This Order memorializes the reasons for the original denial of the Motion to Deny or Dismiss the Petition and further denies the Motion for Reconsideration.

Position of the Parties

The Petitioner proposes to site, construct, and operate a wind energy facility on Kidder Mountain in the towns of Temple and New Ipswich, Hillsborough County, New Hampshire. The Petitioner plans to site and construct a total of five wind turbines, two in New Ipswich and three in Temple. As currently configured, the Facility would consist of five (5) Siemens SWT turbines, each having a nameplate capacity of 3 MW. The total nameplate capacity for the Facility would be 15 MW. The Petitioner proposes to interconnect the Facility to the Public Service Company of New Hampshire distribution circuit #3235. The Petition asserts that the Facility will have a

nameplate capacity of more than 5 MW, but less than 30 MW and requests that the Committee exercise jurisdiction over the siting, construction and operation of the Facility pursuant to RSA 162-H:2, XII.

The Petitioner states that the assertion of jurisdiction over the Project is appropriate because the Project, as proposed, will be constructed in two towns. The assertion of jurisdiction will consolidate the review of all issues into a single proceeding. The Petitioner also asserts that the New Ipswich and Temple planning and zoning ordinances pertaining to the siting and construction of wind facilities inadequately safeguard the purposes and findings of RSA 162-H:1. Specifically, the Petitioner asserts that noise restrictions, setback conditions, wildlife provisions, and aviation conditions in each of the town ordinances are contrary to the purposes and findings of RSA 162-H:1. The Petitioner further asserts that the ordinances are not appropriate because their standards are inconsistent with the Committee's precedent. The Petitioner also claims that the local ordinances are unreasonable because they exceed statutory limitations on the regulation of small wind energy systems set forth at RSA 674: 63.

On February 5, 2013, the Towns filed a Motion to Deny or Dismiss the Petition. In their Motion to Deny or Dismiss the Petition, the Towns urged the Committee to dismiss or deny the Petition without a hearing. The Towns argue that the Petition should be dismissed or denied without hearing because the Petitioner allegedly failed to set forth sufficient facts in its Petition to warrant an adjudicative proceeding. Specifically, the Towns claim that the Petition fails to adequately address why the assertion of jurisdiction is required and is consistent with the findings and purposes of RSA 162-H: 1. The Towns also claim that the Petition should be dismissed because it violates RSA 541-A: 39, which provides for appropriate notice to municipalities of state agency action.

On February 14, 2013, Counsel for the Public filed a response to the Petition for Jurisdiction opposing the Petition and stating that the assertion of jurisdiction is not consistent with the findings and purposes set forth in RSA 162-H:1. Although Counsel for the Public did not file a formal pleading stating its position on the Motion to Dismiss or Deny the Petition, he supported the request to dismiss the Petition "in its general principles."

On February 14, 2013, the Petitioner responded to the Motion to Dismiss or Deny the Petition. In its response, the Petitioner asserts that the Petition provided appropriate notice to the Towns. The Petitioner also points out that the Towns moved to intervene and, therefore, were in fact afforded the opportunity to participate in the proceeding. The Petitioner further argues that the Petition sets forth sufficient substantive arguments to invoke the jurisdiction of the Committee. Specifically, the Petitioner argues that the Petition states that the towns ordinances impose substantive requirements that are inconsistent with Committee precedent and state law; that separate reviews by the zoning and planning boards of two towns would result in a duplicative, inefficient and untimely process; and that the ordinances in each of the Towns are inconsistent with the findings and purposes of RSA 162-H:1. In addition, the Petitioner appended a number of exhibits to its response that describe the location, nature, and impacts of the proposed Facility.

The Committee held a public meeting on February 19, 2013. At the meeting, I orally denied the Motion to Deny or Dismiss the Petition, as Presiding Officer. On February 25, 2013, the Towns filed a Motion for Reconsideration of the order denying the Motion to Deny or Dismiss the Petition. In its Motion for Reconsideration, the Towns assert that the Chairman does not have authority to rule on the Motion to Deny or Dismiss or to require the commencement of an adjudicative proceeding. On March 4, 2013, the Petitioner filed a timely Objection to the Towns' Motion for Reconsideration. The Petitioner asserts that the adjudicative proceeding was not commenced by the Chairman's order, but was commenced by issuance of the January 18, 2013 Order and Notice of Public Meeting. The Petitioner also asserts that the Administrative Procedures Act, RSA 541-A, and RSA 162-H delegates to the Chairperson the authority to commence an adjudicative proceeding. On March 20, 2013, Counsel for the Public responded to the Motion for Reconsideration. Counsel for the Public took no position with respect to legal the question presented by the Motion for Reconsideration.

Legal Analysis

A. Motion to Dismiss or Deny.

The Towns urge the Committee to grant their Motion to Dismiss or Deny the Petition and state that the Petition lacks sufficient information upon which the Committee can determine whether relief should or should not be granted. The Towns' claim is without merit.

Neither the Administrative Procedures Act nor Committee's procedural rules require specific or precise pleading in order to allow the Committee to consider the request to invoke the jurisdiction of the Committee. In order to actually assert jurisdiction over the Facility, the Committee must make a finding that a Certificate is consistent with the findings and purposes set forth in RSA 162-H. Specifically, in order to assert jurisdiction over the Facility, the Committee must determine whether a Certificate is needed to:

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

See, RSA 162-H: 1.

In this docket, the Petition requesting the Committee to exercise its jurisdiction specifically referenced a jurisdictional statute, RSA 162-H: 2, XII. The Petition further set forth the basis upon which the Petitioner seeks to invoke the jurisdiction of the Committee, *i.e.*, it states why the assertion of the Committee's jurisdiction over the Project would be consistent with the findings and purposes of RSA 162-H:1. Whether considered a Petition for Jurisdiction pursuant to N.H. CODE OF ADMINISTRATIVE RULES, Site 102.13 or a Motion for Declaratory Ruling pursuant to N.H. CODE OF ADMINISTRATIVE RULES, Site 203.01, the Petition and the supplemental information filed by the Petitioner more than adequately provides a statutory and factual basis required for consideration of jurisdictional issues by the Committee. Therefore, the Town's Motion to Dismiss or Deny seeking dismissal of the Petition for alleged failure to state a claim required for consideration of the Petitioner's request to assert jurisdiction is denied.

The Towns also request the Committee to deny the Petition without a hearing on the merits. The basis for seeking a denial without hearing is essentially the same basis upon which the Towns moved to dismiss the Petition. The Towns complain that the Petition fails to contain sufficient information. The Towns also complain that an adjudicative proceeding will be costly. However, as indicated above, there is more than sufficient information contained within the Petition for the Committee to proceed to the hearing on the merits. The fact that there will be a cost to the Towns is an irrelevant consideration. Therefore, the Motion to Dismiss or Deny seeking denial of the Petition without hearing on the merits is denied.

B. Motion for Reconsideration.

The Towns filed a Motion for Reconsideration urging the Chairman to reconsider its decision to deny the Motion to Dismiss or Deny the Petition. The Towns argue that the Chairman did not have authority to render a decision on the Motion to Dismiss or Deny the Petition and to proceed to the hearing on the merits of the Petition. The Towns' position is erroneous. The Towns, in their Motion for Reconsideration, confuse a decision on the merits of the Petition with a decision on the Motion to Dismiss or Deny the Petition. The Towns are correct in asserting that only the Committee, acting through a quorum, can rule on the merits of whether the Petition should be granted or denied. N.H. CODE OF ADMINISTRATIVE RULES, Site 202.01 (stating that the "committee . . . shall conduct an adjudicative proceeding, regarding an application or petition . . . in accordance with the administrative procedure act, RSA 541-A, and these rules"). However, the Chairman's ruling in this case denying the Motion to Dismiss or Deny the Petition was not a ruling on the merits. It is a ruling on a procedural motion and is fully authorized by the Committee's administrative rules. N.H. CODE OF ADMINISTRATIVE RULES, Site 202.11 (h) pertaining to Motions and Objection clearly states that "the presiding officer shall rule upon a motion after full consideration of all objections and other factors relevant to the motion." See, N.H. CODE OF ADMINISTRATIVE RULES, Site 202.11 (h) (emphasis added). N.H. CODE OF ADMINISTRATIVE RULES, Site 102.15 further defines the term "presiding officer" as "the individual to whom the agency has delegated the authority to preside over a proceeding, if any." See, N.H. CODE OF ADMINISTRATIVE RULES, Site 102.15. Nothing in the Administrative Procedures Act, RSA 541-A, is contrary. In fact, N.H. CODE OF ADMINISTRATIVE RULES, Site 102.15 defining the term "presiding officer" cross-references the Administrative Procedures Act, RSA 541-A:1, XIV, and provides the same definition of the term "presiding officer." The

Committee's administrative rules designate the chairman of the Committee as presiding officer. According to clear language of N.H. CODE OF ADMINISTRATIVE RULES, Site 202.11 (h) and the Administrative Procedures Act, the Chairman of the Committee is a presiding officer vested with the full authority to rule on motions, including the Motion to Dismiss or Deny. Therefore, as Chairman of the Committee, I acted within my authority when I denied the Motion to Dismiss or Deny the Petition.

The Towns further argue that the Committee Chairman does not have authority to render a decision on the Motion to Dismiss or Deny because RSA 541-A: 31 and RSA 541-A: 29 specifically identify the "agency" as a body authorized to render such a decision. The Towns' interpretation of the Administrative Procedure Act is erroneous. Under RSA 541-A: 29, the agency "shall . . . [c]ommence an adjudicative proceeding" within a reasonable time, not to exceed 120 days, after receipt of the application, petition or request. RSA 541-A: 29, II (b) (emphasis added). RSA 541-A: 31 further requires an agency to "commence an adjudicative proceeding if a matter has reached a stage at which it is considered a contested case." See, RSA 541-A: 31, I. There is no question but that this docket concerns a contested case as defined by RSA 541-A: 1, IV. See RSA 541-A: 1, IV (defining "contested case" as a "proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing."). Both RSA 541-A: 31 and RSA 541-A: 29 require the agency to "commence an adjudicative proceeding" in this docket. See, RSA 541-A: 31, I; RSA 541-A: 29, II (b). Neither RSA 541-A: 31 nor RSA 541-A: 29 gives an agency exclusive authority to render decisions on procedural motions. As stated above, such authority is delegated to the "presiding officer". See N.H. CODE OF ADMINISTRATIVE RULES, Site 102.15, 202.11 (h). As Chairman I did not render a decision on the merits of the Petition. I denied a procedural motion requesting that the Committee proceed to adjudication without the adjudicative proceeding required under RSA 541-A: 31 and RSA 541-A: 29. My decision to deny the procedural motion was within the scope of the authority specifically delegated to me as "presiding officer" by statute and administrative rules.

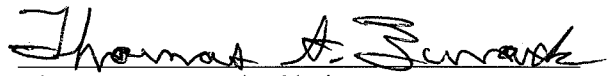
The denial of the Motion to Dismiss or Deny the Petition was not contrary to the statute authorizing the agency to render the decision on the merits of the Petition, RSA 541-A:29, II (a), because I did not address the merits of the Petition but simply denied a procedural motion. In addition, even assuming *arguendo* that RSA 541-A: 29, II (a) authorizes the agency to approve or deny procedural motions, the Towns' argument that RSA 541-A: 29, II (a) gives exclusive jurisdiction to deny their motion in this case to the Committee fails. RSA 541-A: 29, II (a) is not applicable to this case. RSA 541-A: 29, II (a) requires the agency to approve or deny the application on the basis of non-adjudicative process only if "the application by the use of these processes is not precluded by any provision of law." RSA 541-A: 29, II (a). In this docket, however, as stated above, the Committee is required to commence an adjudicative proceeding and, therefore, is precluded from the denial of the application on the basis of a non-adjudicative process. See, RSA 541-A: 31, I. For the reasons stated above, the Towns' Motion for Reconsideration is denied.

Conclusion

Based upon the foregoing, it is hereby ordered that the Towns' of Temple and New Ipswich Motion to Dismiss or Deny Petition is **DENIED**; and it is,

Further Ordered that, the Towns' of Temple and New Ipswich Motion for Reconsideration pertaining to Motion to Dismiss or Deny the Petition is **DENIED**.

SO ORDERED this 19th day of April, 2013.

A handwritten signature in black ink, reading "Thomas S. Burack". The signature is written in a cursive style with a horizontal line underneath the name.

Thomas S. Burack, Chairman
New Hampshire Site Evaluation Committee