THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

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

MEMORANDUM OF LAW OF COUNSEL FOR THE PUBLIC

Counsel for The Public hereby submits this memorandum of law to the Committee with respect to the question of whether, under the particular circumstances of this case, the Committee should take jurisdiction over the Timbertop project. Because the Petitioner has not demonstrated that its project requires a certificate, consistent with the findings and purposes of RSA 162-H:1, the Committee should not assert jurisdiction in this case.

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

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

3. Under the standard followed by the Committee in *Petitions of Laflamme and Jones (In re Clean Power Development, LLC)*, N.H. Site Eval. Comm., no. 2009-03 ("*Laflamme and Jones*"), and subsequently followed in *Petition for Jurisdiction (In re*

Antrim Wind Energy, LLC), N.H. Site Eval. Comm., no. 2011-02 ("*Antrim Jurisdiction*"), jurisdiction over this project is not required.[1]

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

5. The findings and purposes of RSA 162-H:1 are:

> (i) …the selection of sites for energy facilities … will have a significant impact upon the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state, and the use of natural resources.
>
> (ii) …it is in the public interest to maintain a balance between the environment and the need for new energy facilities in New Hampshire;
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> (iii) …undue delay in the construction of needed facilities [should] be avoided…
>
> (iv) …full and timely consideration of environmental consequences be provided;
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> (v) …all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans;
>
> (vi) …the state [should] ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion,
>
> (vii) …all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles.

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

ARGUMENT

(i) Significant Impact on the State.

The Petitioner has not shown how its project would have a significant impact on the welfare of the population of the State, the location and growth of industry, or the overall economic growth of the State. The Petitioner has also not shown that the Timbertop project may have a significant impact on the environment or natural resources of the State. It is difficult to see how it could. This is a rather small power project that has not committed to supplying power to the State. It has proposed five turbines, likely to produce on average 3.6 mw.[2] The Petitioner's map shows that the bulk of the access road will follow an existing access road and add an additional 2,600 feet. [3] The Timbertop project is located only in two towns. The evidence in the record thus far renders no opinions about whether the project will have any impacts on any state or federally listed species observed at the project sites.[4] While it may have some important impacts on a local level, the Petitioner has not so far presented evidence that the project will have State-level impacts.

[2] See page 5-6 below discussing capacity factor.
[3] Petitioner's Response to Joint Petition to Intervene and Objection to Motion to Deny or Dismiss of the Boards of Selectmen for the Towns of New Ipswich and Temple, dated Feb. 14, 2013 ("Petitioner's Response"), Attachment 7.
[4] *See* Petitioner's Response, Attachment 3, *Draft Spring Summer, and Fall 2011 Avian and Bat Survey Report*, dated Dec. 2011 ("Draft Avian Report"). In previous wind power applications before the Committee of much greater size the consultants employed by the Petitioner have routinely opined that wind projects do not have an unreasonable adverse effect on avian species.

(ii) The Public Interest – Impacts vs. Assuring an Adequate and Reliable Supply.

The second finding and purpose of RSA 162-H is that the public interest requires a balance between "the environment and the need for new energy facilities…" RSA 162-H:1. Under this factor, determining jurisdiction would require balancing environmental impacts with the need for the facility. From the present perspective it is difficult if not impossible to make much of a determination of the environmental impacts of the Timbertop project. While the meager evidence suggests that those impacts will not effect State-level resources, there will no doubt be some effects. The Draft Avian Report does show that bat call sequences were counted at the sites, including significant numbers of State-listed species.[5] It also shows that with a modest number of survey days, diurnal raptors that were counted included State endangered and threatened species such as northern harrier, bald eagle, and peregrine falcons, in addition to State species of special concern such as ospreys and kestrels.[6] The project map shows the new portion of the access road bisecting a wetlands complex in the saddle between Kidder Mt. and Wildcat hill.[7] There is no visual impact study yet performed but as the Committee learned with the recent Antrim case, 500 foot tall wind turbines on low ridges such as Kidder Mt. and

[5] Draft Avian Report, 4-11.
[6] *Id*., at 35, 42 and table 4-1 (p. 29) and table 4-7 (p. 37). *See also* Evidence Offered On Behalf of the Towns of New Ipswich and Temple, New Hampshire, May 13, 2013 ("Towns' Evidence"), at tab 7, N.H. Audubon, *Pack Monadnock Raptor Migration Observatory, Final Report, Fall 2012*, at 8-20 (noting large numbers of diurnal raptors migrating through the area).
[7] Petitioner's Response, Attachment 7.

Wildcat hill could very well "appear out of scale and out of context with the region."[8] Like the turbines proposed for Antrim, these would be the tallest in the State.[9] The Towns, Thornton Wilderian New Hampshire originals, have shown that they are scenic with appealing natural and man-made historic features.[10] The ridgeline, as in Antrim, appears to be a "prominent topographical feature."[11] It would appear that the Timbertop turbines would stand in outsized proportions to the ridgelines similar to that projected for Antrim.[12] Similarly, little is known about the noise impacts of the Timbertop project. There is evidence, however, that like Antrim, New Ipswich and Temple are quiet rural communities.[13]

In sum, it appears likely that the Timbertop project will have environmental and aesthetic impacts on its setting.

Factor 2 in the analysis looks to a balance of those effects to the amount of energy produced as a function of the need for energy in the State. Jurisdiction might lie if the need were great, the energy to be produced was significant, or the impacts were great.

The Timbertop project would consist of five 3-mw wind turbines. Evidence presented by Deloitte in the Antrim case suggested that capacity factors for wind projects

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[8] Decision and Order Denying Application for Certificate of Site and Facility, dated April 25, 2013, *In re Application of Antrim Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2012-01, at 50 ("Antrim Decision").
[9] *Id*.
[10] Towns' Evidence, Tab 4, Exhibit 4; *see* Thornton Wilder, *Our Town* (1938) (depicting the fictional New Hampshire town of Grover's Corners).
[11] *Id*. *See* Antrim Decision, at 49-50.
[12] *Compare* Antrim Decision, at 49 (25-35%) *with* Petitioner's Response, Attachment 6 – "FAA Determinations" (WTG1-- height 499/elev. 1,668 = 29%; WTG2 -- 27%; WTG3 -- 30%; WTG4 -- 34%; WTG5 -- 33%; WTG6 -- 34%; WTG7 -- 34%).
[13] Petition for Jurisdiction, dated Dec. 21, 2012 ("Timbertop Petition"), Attachment 5, New Ipswich Planning Board Meeting minutes, Dec. 21, 2011, Letter of Stephen Ambrose.

in New England were at a mean of 24%.[14] If Timbertop produces a capacity factor at the mean for New England, its contribution to the power grid would be 3.6 mw. According to ISO New England, New Hampshire's generating resources total 4,100 mw.[15] This means that Timbertop would produce less than —— of New Hampshire's power, if that power were actually to stay in State. At the same time, ISO New England reports that 2012 actual peak demand in New Hampshire is for 2,293 mw, and projected peak demand for 2021 is 2,870 mw.[16] According to ISO New England, New Hampshire will see "a slowing growth rate for peak demand with a total reduction in peak demand of 65 mw from 2015 to 2021."[17] New Hampshire, it appears, will be an energy exporter for the foreseeable future.[18]

The balancing of the "need for new energy facilities in New Hampshire" in relation to the contribution of the Timbertop project against the foreseeable impacts of the Timbertop project on the environment tips decidedly the wrong way.

In the *Antrim Jurisdiction* decision and in *Laflamme and Jones*, the Committee went beyond the language of the statute to measure need by a perceived need for

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[14] Deloitte Financial Advisory Services, *Analysis of the Wind Generation Facility Proposed to be Built in Antrim, New Hampshire*, dated September 26, 2012, submitted in *Antrim* case as Exhibit PC 7, at 26. *See* RSA 541-A:33, V, (b) and (c) (official notice may be taken of record of other proceedings and generally recognized scientific facts within agency's specialized knowledge).

[15] Towns' Evidence, Tab 8 at 272; http://www.iso-ne.com/nwsiss/grid_mkts/key_facts/final_nh_profile_2012-13.pdf

[16] *Id*. The project's contribution to satisfy the demand would be —— in either case.

[17] *Id*.

[18] *Petitions of Laflamme and Jones (In re Clean Power Devel., LLC),* N.H. Site Eval. Comm., no 2009-03, Order, dated April 7, 2010 at 8.

renewable sources.[19] In attempting to understand the findings and purposes of RSA 162-H:1, the Committee must "look first to the statutory language itself … and construe the law in a manner consistent with its plain meaning."[20] "Words and phrases shall be construed according to the common and approved use of the language; technical words and phrases … as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning."[21] "To divine the intent of a statute" the Committee should "determine its meaning from its construction as a whole, not by examining isolated words and phrases."[22] When a statute is clear on its face, its meaning is not subject to modification.[23] In attempting to understand the findings and purposes of RSA 162-H:1, the Committee should "neither consider what the legislature might have said nor add words that it did not see fit to include."[24] "[T]he purpose which a court must effectuate is not that which [the legislature] should have enacted or would have. It is that which did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms."[25] The "goal is to apply statutes in light of the legislature's intent in

[19] *Petition for Jurisdiction (In re Antrim Wind Energy, LLC)*, N.H. Site Eval. Comm., no. 2011-02, Order, dated August 10, 2011, at 22-23; *Laflamme and Jones*, 8.
[20] *Town of Tilton v. State of New Hampshire*, 137 N.H. 463, 465 (1993).
[21] RSA 21:2.
[22] *Town of Tilton*, 137 N.H. at 465.
[23] *New Hampshire Dept. of Envtl. Serv. v. Marino*, 155 N.H. 709, 713 (2007).
[24] *Id*.
[25] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947).

enacting them, and in light of the policy sought to be advanced by the entire statutory scheme."[26]

There is nothing in the plain meaning of the words and phrases or by reasonable inference of the whole of the findings and purposes of chapter 162-H as expressed in RSA 162-H:1 that can lead one to a tenable construction that "need for new energy facilities in New Hampshire" also means 'except that regardless of the need for new energy facilities in New Hampshire, there will nevertheless be a need for renewable energy facilities.'

In the context of the expression "all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles", it is even more clear that the legislature referred to "supply" of energy, not the sources, as the focus of the findings and purposes. In enacting RSA 162-H, the legislature meant to ensure that when supply was needed, the environmental concerns would not be pushed aside but that in addition, the process of considering those concerns would not get in the way of meeting the needed supply. To get to a reading which includes that the state 'needs renewable energy,' requires reading words into the findings and purposes that the legislature did not see fit to add, and disregards the plain meaning of the words "needed new facilities" in the context of "all to assure … an adequate and reliable supply." There is nothing inherent in the terms that leads logically to a conclusion that the findings and purposes indicates a distinct need for renewables apart from a sufficient and reliable supply.

[26] *Id.*

In the balance, on one side of the scale are the impacts that might be expected, and on the other is the need. Ideally, the two should in some sense even out; balance. At this juncture, however, the need side of the scale is empty. The impacts side of the scale sinks with the weight of the impacts and balance is not achieved. Impacts without need is not what RSA 162-H was designed to address and thus jurisdiction as a State matter should not attach.

(iii) Avoid Undue Delay In The Construction Of Needed Facilities.

The third factor in the findings and purposes of RSA 162-H:1, is the desire to avoid "undue delay in the construction of needed facilities" by means of a State process.

The Petitioner has not met its burden to show that following the Towns' processes would result in any delay in the construction of a needed facility, much less any "undue delay."[27] The Petition goes to great lengths to describe the vicissitudes of the Towns' efforts to establish and amend their respective zoning ordinances.[28] At the outset, however, the Petition makes clear that Timbertop's requests for approvals of meteorological towers as well as design reviews were approved without any apparent undue delay, inefficiency or duplication of effort.[29] The planning boards' ordinance adoption processes or their length and complexity are not relevant here and do not evidence the likelihood of undue delay or an un-integrated process.

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[27] Timbertop's Petition claims, without much support, that "separate reviews at the town level would result in duplicative, inefficient and untimely processes." Timbertop Petition, at 1.

[28] Timbertop Petition, at 4-11, and Attachment 5 and 6 (planning board meeting minutes and news article reporting on them), The Timbertop Petition includes minutes from 65 planning board meetings held between December 2008 and March 2012.

[29] Timbertop Petition, at 3-5; *see* Towns' Evidence, tab 1 --*Testimony of Edward Dekker and Elizabeth Freeman*, at 9 ("Dekker & Freeman").

What should be of interest and importance instead, is whether the processes themselves will create "undue delay" in their implementation. After a 30-day completeness review period, the Towns are bound by law to approve or disapprove an application for a project within 60 days with the possibility of a 90-day extension.[30] During the time of application the project proponent is protected from changes in the law.[31] Thus, in a best case scenario, the local approvals could be done in 90 days, and with an extension, 180 days. Failure of the planning board to meet the time frame under the statute constitutes grounds for an appeal to the Superior Court.[32]

Obviously, it is not as simple as that. Many cases involving complex issues and interpretations of zoning regulations concerning variances may require a trip to the zoning board of adjustment.[33] The ZBA, however, is required to hold a hearing within 30 days.[34] The ZBA and the planning board can hold joint hearings to avoid the "volleyball effect."[35] The ZBA must make a written decision within 5 days of its vote deciding the appeal.[36]

As shown on *table 1* below, the consideration of energy projects takes time to be done right.[37]

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[30]RSA 676:4, I; Peter J. Loughlin, NEW HAMPSHIRE PRACTICE: LAND USE PLANNING AND ZONING § 32.03 (4th ed. 2010); Towns' Evidence, tab 2 --*Testimony of John Kieley and Rose Lowry* at 24 ("Kieley and Lowry").
[31] Loughlin, § 11.04.
[32] RSA 476:4, I(c)(2).
[33] Loughlin § 19.02.
[34] RSA 476:7, II.
[35] Loughlin, § 21.09; RSA 676:2.
[36] RSA 676:3, II.
[37] In the two cases showing less time was needed, *Berlin Station* and *Brookfield*, the Committee acted on requests for approval of ownership transfers, not complete applications.

Table 1

Project	Application	Completeness	Order	Total days
Antrim	1/31/12	3/5/12	5/16/13	472
Berlin Stn.	3/9/11	NA	7/12/11	126
Brookfield	12/3/10	NA	2/8/11	68
Groton	3/26/10	4/21/10	5/6/11	417
Laidlaw	12/16/09	1/26/10[38]	11/8/10	328
Granite R.P.	1/15/08	8/14/08	7/15/09	548
Lempster	8/28/06	10/17/06	6/28/07	305

Under the Committee's statute, it must make an order on completeness within 30 days of receipt.[39] From there it has 240 days to make a final decision, so the process should be done within 270 days.[40] Unlike the planning board process, which is limited in the extensions it may grant, the Committee can temporarily suspend deliberations and extend the process for as long as it "deems it to be in the public interest."[41] Clearly in any process like this there are many good reasons for the time to be extended, but whether it is before local land use boards or the Committee, such does not constitute "undue delay." There is nothing inherent in the local processes, however, which indicates that they will create undue delay. Without even considering the many good reasons for cases to be extended, it would be hard to say that the Towns' processes are necessarily more delay prone that that provided by the Committee.

The Petitioner argues that because the Timbertop project is in two towns and will need both Towns' approval, that this could conceivably create undue delay. It appears from the evidence, as opposed to the Petitioners' speculation, that the two-towns problem

[38] Initially rejected on Jan. 16, 2010.
[39] RSA 162-H:6-a, I - III.
[40] RSA 162-H: 6-a, VIII.
[41] RSA 162-H:6-a, IX.

can easily be resolved by petitioning for joint hearings.[42] Fortunately, many of the criteria are the same in both Towns; nevertheless, one Town's criteria cannot be imposed upon the parts of the project in the other.[43]

Finally, the Petitioner argues that the standards set forth in the ordinances for setbacks, noise, and other criteria will create undue delay because the project may require variances in order to succeed with its applications.[44] The Committee's prior rulings on permitable noise levels, bird and bat conditions, setbacks, and other criteria do not establish a regulatory baseline for this project which should preclude criteria to be applied by a Town. Each case must stand on its own and the Committee does not have any rules or guidelines establishing any black line criteria for approving a project. While it may be a good practice to be generally consistent, the Committee is in no way bound by its prior decisions with respect to project and site specific criteria. A developer's hope that the Committee might follow its previous decisions is, moreover, not necessarily a reasonable one. As each case has come along, the Committee's approach to different elements has evolved. Different projects on different sites require different approaches.

Noise is a good example. In the *Lempster* case, the Committee ordered a fairly complicated set of conditions and a maximum night-time noise levels of 45 dBA, or 5 dBA above ambient at the outside of a no-participating person's dwelling, and 55 dBA at the property line.[45] In the *Groton* case, the criteria and conditions simplified in some

[42] *See* RSA 674:53, VI(a) – (c); Loughlin, § 29.13; Kieley & Lowry, at 26-27.
[43] *See Churchill Realty Tr. v. City of Dover Zoning Board of Adjustment*, 156 N.H. 667, 671 (2008).
[44] Petitioner's Response, at 4.
[45] Decision Issuing Certificate of Site and Facility, dated June 28, 2007, *In re Application of Lempster Wind, LLC*, N.H. Site Eval. Comm., no. 2006-01, at 47-49 ("Lempster Decision")

ways and became more complicated in others because of the differences in the facts.[46] In *Granite Reliable*, there was no noise criteria imposed at all.[47] In the *Antrim* case, the Committee did not grant a certificate but in dicta, indicated that it would rely upon new 2009 World Health Organization standards and impose a new variation on the noise condition.[48] It is anyone's guess which of the four decisions provides the Petitioner some vested interest in a regulatory standard for the Timbertop project.

The variance process itself shows no inherent unfairness or delay.[49] There is in fact no way to know whether with respect to noise or any of the other issues, the project would not meet the conditions that the Towns might impose (with or without variances) or whether the Committee might, based on the evidence, adopt a more stringent standard than it previously has. At bottom, there is no way to show that the Towns' criteria might be a barrier to entry because there is only speculation to compare to on either side. The mere possibility that the Timbertop project might not be able to meet the Towns' criteria, is not in and of itself a reason to assume that the Towns' process will create undue delay.[50]

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[46] Decision Granting Certificate of Site and Facility With Conditions, dated May 6, 2011, *In re Application of Groton Wind Energy, LLC*, N.H. Site Eval. Comm., no. 2010-01, at 85-88 ("Groton Decision")

[47] Decision Granting Certificate of Site and Facility With Conditions, dated July 15, 2009, *In re Application of Granite Reliable Power, LLC*, N.H. Site Eval. Comm., no. 2008-04, ("GRP Decision")

[48] Antrim Decision, at 68 -69.

[49] Kieley & Lowry, at 25-26.

[50] *Accord Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied* 421 U.S. 978 (1975) (more stringent local environmental protection criteria for detergent phosphate is constitutional where burden on interstate commerce is slight). *See also* Hearing Transcript, Feb. 19, 2013, *In re Petition of Timbertop Wind, LLC*, N.H. Site Eval. Comm., no. 2012-04, at 53-54 (Attorney Getz acknowledging that the possibility of failure in Towns' process or expectation of success in SEC process are not grounds for jurisdiction).

There does not appear to be any basis for establishing jurisdiction over the Timbertop project on the grounds of undue delay. The Towns' approval process and the joint hearings indicate that the Timbertop project could be approved (or denied) by the Towns in the same or less time than the Committee could accomplish itself. We do not mean to suggest by this argument that in another case involving another project that undue delay by town processes could conceivably be an issue. The evidence in this case, however, shows that it likely is not going to be a problem. The more stringent criteria that these Towns might apply, and the problems that this Petitioner might encounter obtaining variances do not in and of themselves create any undue delay to the extent that the Project requires jurisdiction under RSA 162-H:2, XII.[51]

(iv) Full and Timely Consideration of Environmental Consequences.

Reading the Petitioner's papers might lead one to believe that the primary reason for discretionary jurisdiction is to provide a fast and straight-forward pathway to approval of energy projects. Yet, equally important is to consider whether the local process will adequately protect the environment. In a case where local control does not so provide, a strong argument would be made for State assertion of jurisdiction. However, it appears in this case that the Towns' ordinances provide sufficient attention to environmental concerns. They clearly do more of that than the City of Berlin ordinances that were deemed sufficient in

[51] *See Bfp v. Resolution Tr. Co.*, 511, U.S. 531, 544 (1994) (urging caution in finding preemption and only when reasons are "clear and manifest").

Laflamme and Jones.[52] The Towns' ordinances require a large wind energy system developer to include and maintain erosion control and storm water management, take appropriate steps to minimize and mitigate impacts on the natural environment, and provide post-construction environmental impact studies, among other things.[53]

It would appear that in drafting their ordinances the Towns used previous proceedings before the Committee as a model and attempted to imitate the State program. It also appears that the Towns did a fair and comprehensive job in writing these ordinances.

The level of environmental protection provided by the local processes does not provide a justification for an assertion of jurisdiction consistent with the findings and purposes of RSA 162-H:1.

(v). Full and Complete Disclosure.

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

[52] *Laflamme and Jones* at 9-10.
[53] Timbertop Petition, attachment 2, New Ipswich Zoning Ordinance (amended March 13, 2012) (pp. 49, 51-52, 54-55); Temple Zoning Ordinance (amended March 31, 2012) (pp. 36, 37-39, 41-41, 43-44).

(vi). Significant Aspect of Land Use Planning in Which All Environmental, Economic, and Technical Issues Are Resolved in an Integrated Fashion.

In light of the comprehensive scope of the applicable zoning ordinances, it appears that both Towns' processes would treat the consideration of the project as a significant aspect of land use planning in a manner substantially similar (albeit not identical) to the process employed by the Committee. As the Committee found in *Laflamme and Jones*, the Towns here, like the City of Berlin in that case, will use an "integrated review process to consider those issues of land use planning that relate to this Project."[54] Many of the considerations will be "very similar to the considerations that would be addressed by this Committee."[55] The Towns' ordinances provide for review of the project's impacts in many important ways, including, visual appearance and shadow flicker, noise, safety, and environmental impacts on wildlife and avian species, storm water and erosion control. The ordinances also provide for specific criteria on design, manufacture and construction of facilities, financial assurance, financial, technical and managerial capability, decommissioning, and enforcement of the rules. In some ways, the local regulations provide clearer standards for a project applicant than that provided by chapter 162-H. At a minimum, the local regulations in this case are more faithful to the findings and purposes of chapter 162-H than were the local regulations that the Committee found sufficient in *Laflamme and Jones*.

[54] *Laflamme and Jones*, at 9.
[55] *Id*. at 10.

The Petitioner does not argue that the local regulations do not treat the consideration of wind projects as a significant aspect of land use planning. Instead, the Petitioner complains that in essence they do too good of a job at it by "incorporating standards inconsistent with SEC precedent…"[56] The quarrel is that the regulations *may be* too protective of public health and safety and the environment.

As is clear from *Laflamme and Jones*, Committee jurisdiction is not mandated in any case where the local regulations are not identical to Committee process and result. All that is required in the jurisdictional context is that the "findings and purposes" and "the goals of the statute" can be identified in the local process, not that they be nearly identical as the Petitioner suggests.[57] The Committee has not required identical treatment, only that whatever treatment is provided by local regulation will be at least as protective of the goals of chapter 162-H as chapter 162-H is itself. While certain of the New Ipswich and Temple standards may be somewhat more stringent, the Petitioner has not alleged that it would not be possible ever to meet them, and that as a result the stringency becomes exclusionary, or that they were made in bad faith.[58] Significantly, even if the stringency of local regulation might serve to block *this* project, if it is not exclusionary in *every* case, there is no basis to conclude that the local process is

[56] Timbertop Petition, at 14.
[57] *See Laflamme and Jones*, at 7; *Antrim Jurisdiction*, at 25 (lack of local regulation makes it impossible to tell whether it would "sufficiently assure adherence to the purposes and findings" in chapter 162-H).
[58] *Accord Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied* 421 U.S. 978 (1975) (more stringent local environmental protection criteria for detergent phosphate is constitutional where burden on interstate commerce is slight); *North Country Envtl. Servs., Inc. v. Town of Bethlehem*, 150 N.H. 606, 620 (2004) (local control that is applied in good faith and without exclusionary effect should be allowed); *Antrim Jurisdiction*, Dissent from Jurisdictional Order, dated August 23, 2011 at 2 (dissenters, including then-Chairman Getz, would allow local control where no evidence of lack of good faith).

inconsistent with the findings and purposes of chapter 162-H. Neither strict uniformity of treatment nor success in every case are among the findings and purposes of chapter 162-H.

An obvious question on integration arises as a result of the two-towns scope of the project. As previously noted, however, State law provides a mechanism available to the Petitioner to integrate the processes of the Towns and the ZBA into a single manageable whole.[59]

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

(vii) All To Assure That The State Has An Adequate And Reliable Supply Of Energy In Conformance With Sound Environmental Principles.

The analysis ends where it began: balancing the need for an "adequate and reliable supply" of energy with the environmental impacts of developing the facilities that provide that supply. The Petitioner has not demonstrated that there is a need for its electrical energy in New Hampshire and the evidence appears to be to the contrary. It is relatively certain, however, that there will be some environmental impacts. However, the Towns' ordinances and processes appear sufficiently capable of addressing those impacts in this case.

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

[59] Loughlin, § 21.09; RSA 676:2 (joint ZBA and planning board hearings possible); RSA 674:53, VI(a) – (c); Loughlin, § 29.13; Kieley & Lowry, at 26-27 (joint hearings for project straddling town line can be requested by the applicant).

Respectfully submitted,

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