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**Please respond to the Portsmouth office**

May 28, 2013

**Via Electronic and Overnight Mail**

Jane Murray, Secretary  
New Hampshire Site Evaluation Committee  
New Hampshire Department of Environmental  
Services  
29 Hazen Drive  
Concord, NH 03301

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

Dear Ms. Murray:

Enclosed please find an original and 17 copies of *Hearing Memorandum of the Towns of New Ipswich and Temple, New Hampshire*.

A complete copy of the foregoing has been provided by electronic mail to all persons on the Committee's official service list in this proceeding. Please do not hesitate to contact me if you have any questions.

Very truly yours,

  
Justin C. Richardson  
jrichardson@uptonhatfield.com

JCR/sem

Enclosure(s)

cc: Docket No. 2012-04 Service List

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**BEFORE THE STATE OF NEW HAMPSHIRE**

**SITE EVALUATION COMMITTEE**

***Timbertop Wind I, LLC Petition for Jurisdiction***

**Docket No. 2012-04**

**HEARING MEMORANDUM OF THE TOWNS OF  
NEW IPSWICH AND TEMPLE, NEW HAMPSHIRE**

**I. INTRODUCTION**

RSA 162-H recognizes that siting of energy facilities is important because it “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.” RSA 162-H:1. As a result, the Legislature required that energy facilities obtain a certificate from the Site Evaluation Committee that is “conclusive on all questions of siting, land use, air and water quality” and thereby exempt from local land use control regulations. RSA 162-H:16, II; *Public Service Company of New Hampshire v. Hampton*, 120 N.H. 68, 71 (1980).

However, not all projects are important enough to warrant review by the Committee. The Legislature excluded projects below 30 MW from the definition of energy facility, RSA 162-H:2, VII, because they contribute so little to the purposes and findings set forth in RSA 162-H:1. Projects below 30 MW remain subject to local land use control regulations, unless the Committee finds that the project “requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1”. RSA 162-H:2, VII & XII (emphasis added).

The goal of RSA 162-H is not to disregard local zoning. In fact, RSA 162-H:16, IV (b) requires the Committee to give “due consideration” to the views of municipal planning and land

use officials. The goal of RSA 162-H is to provide a mechanism for review of projects that are critical to the public welfare, the growth of industry, or required to assure an adequate and reliable supply of energy. The focus is therefore not on the municipal ordinance, but on whether the project requires a certificate due to its importance to the public welfare.

The record and the evidence in this case do not demonstrate that Timbertop Wind 1, LLC's project requires a certificate due to any of the findings or purposes set forth in RSA 162-H:1. It is a project that would, if constructed, likely provide some benefit to its investors, but there is no evidence or reason to believe that Timbertop Wind 1, LLC's project is so important to the purposes and findings set forth in RSA 162-H:1 so as to require a certificate. A mere showing of difficult permitting challenges is not enough. All wind projects involve many challenges, and Timbertop Wind 1, LLC's project is no exception due to its proximity to residential areas, historic sites, recreational areas and significant natural resource areas such as the Wapack Range, one of the most significant raptor migration areas in northeastern North America. However, these questions are comprehensively addressed in the LWES Ordinances adopted by New Ipswich and Temple. There is no reason to circumvent the standards adopted by those communities to protect the public welfare and the environment for a project that provides little benefit to the State's economy, its industry or adequacy of its energy supply. The Committee should therefore deny Timbertop Wind 1, LLC's *Petition for Jurisdiction*.

## **II. TIMBERTOP WIND 1, LLC'S BURDEN OF PROOF**

Under the Committee's rules, *Site 202.19 Burden and Standard of Proof*, "[t]he party asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence." Timbertop Wind 1, LLC Petition for Jurisdiction "asks that the Site Evaluation Committee find that its proposed renewable energy facility requires a certificate,

consistent with the purposes and findings of RSA 162-H:1, as permitted under RSA 162-H:2, XII.” It therefore has the burden of proving that its project requires a certificate “consistent with the legislative findings and purposes set forth in RSA 162-H:1.” RSA 162-H:2, VII & XII.

The Committee recently considered its jurisdiction over wind energy projects that are smaller than 30 MW in its August 10, 2011, Jurisdictional Order in response to the *Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy LLC*. In that case, the Committee explained the statutory criteria as follows:

The Committee may assert jurisdiction over a renewable energy facility consisting of electric generating station equipment and associated facilities with a nameplate capacity of 30 megawatts or less but at least 5 megawatts if it finds that taking jurisdiction over the proposed facility is consistent with the legislative findings and purposes set forth in RSA 162-H:1. *See*, RSA 162-H:2, XII; *see also*, *Jurisdictional Order, Community Energy, Inc. and Lempster Wind, LLC*, Docket No. 2006-001 (issued Sept. 23, 2006). The legislative findings and purposes outlined in RSA 162-H:1 are:

1. [T]o maintain a balance between the environment and the need for new energy facilities in New Hampshire;
2. [T]hat undue delay in the construction of needed facilities be avoided; and
3. [T]hat full and timely consideration of environmental consequences be provided;
4. [T]hat all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans;
5. [T]hat the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion;
6. [T]o assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles.

RSA 162-H:1. The Committee's determination on the issue of jurisdiction is governed by the foregoing declaration of purpose.<sup>1</sup>

The Committee's Jurisdictional Order in Antrim Wind lists the *findings* contained in RSA 162-H:1. However, the sixth finding identified by the Committee in Antrim Wind differs slightly from statutory language in RSA 162-H:1 which states: "all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles." (emphasis added). In other words, the sixth finding describes the object to be accomplished by the prior five, which is "to assure that the state has an adequate and reliable supply of energy". This finding is relevant to this case as there is no evidence, nor reason to believe, that Timbertop Wind 1, LLC's project will meaningfully contribute to (or is required to assure) an adequate and reliable supply of energy.

In addition, the Antrim Wind Jurisdictional Order does not include the statement of *purpose* in RSA 162-H:1 which precedes the six *findings*, and recognizes that 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." RSA 162-H:1. RSA 162-H:2 requires that the Committee consider both the findings and purposes set forth in RSA 162-H:1. Timbertop Wind 1, LLC therefore has the burden to show that a certificate is required for its project due to its "impact upon the welfare of the population, the location and growth of industry, [or] the overall economic growth of the state".

The Towns bring this to the Committee's attention because it is clear that Timbertop Wind 1, LLC, misunderstands its burden of proof. The question is not whether New Ipswich and

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<sup>1</sup> Jurisdictional Order, Pages 21-22 (August 10, 2011), NHSEC Docket No. 2011-02.

Temple have adopted a standard that is too strict (or not strict enough), but whether Timbertop Wind 1, LLC's proposed facility is one that requires a certificate in light of the findings and purposes set forth in RSA 162-H:1. The purposes in RSA 162-H:1 call upon the Committee to consider whether Timbertop Wind 1, LLC's project requires a certificate due to its "impact" on public welfare, the location and growth of industry, and the economy. The six findings in RSA 162-H:1 are on one hand specific, but on the other share a common objective: "all to assure that the state has an adequate and reliable supply of energy" in conformance with sound environmental principles. RSA 162-H:1.

It is difficult to believe that a small 15 MW wind energy project in New Ipswich and Temple is so important as to require a certificate in order to maintain the welfare of the population, the growth of industry or the economy, to assure an adequate and reliable supply of energy. It is not. As a result, Timbertop Wind 1, LLC can hardly be blamed for building its entire case upon an argument that the standards adopted by the Towns differ or are more stringent than those applied by the Committee. However, in making this argument, Timbertop Wind 1, LLC effectively asks the Committee to disregard the law and apply "stringency" or "Committee precedent" standard that compares Town ordinances to the Committee's prior decisions. Such a standard is not contained in RSA 162-H:1, and under the law, Timbertop Wind 1, LLC's burden is to show that its project requires a certificate "consistent with the findings and purposes set forth in RSA 162-H:1".

The evidence does not support the conclusion that Timbertop Wind 1, LLC's project requires a certificate. It is simply an ordinary 15 MW wind project that will produce, on average, approximately 5 MW of energy. Its *Petition for Jurisdiction* should therefore be denied.

### III. TIMBERTOP WIND 1, LLC's PROJECT

On December 21, 2012, Timbertop Wind 1, LLC's Petition stated that its project "as currently configured would comprise five 3-MW Siemens SWT turbines, two turbines planned to be located in New Ipswich and three turbines in Temple" for a total of 15 MW.<sup>2</sup> However, on April 25, 2013 it informed the Committee that "Siemens has notified Timbertop that the 3-MW Siemens SWT turbines may not be available as previously contemplated."<sup>3</sup> Timbertop has previously indicated it would use "up to 20 wind turbines" of 1.5 MW each,<sup>4</sup> seven 2.3 MW turbines,<sup>5</sup> or the five noted in its Petition. As of this date, Timbertop Wind 1, LLC's turbines are entirely unknown.

The location of its turbines and access roads are also uncertain. Its February 14, 2013 Supplemental Information contains a *Proposed Site Plan Concept*, dated February 13, 2013, that states that "access roads and turbine locations are subject to change based on determinations from ongoing site investigations".<sup>6</sup> In fact, Timbertop Wind 1, LLC has changed the design and location of its project dramatically, even as it received approvals from the Town of New Ipswich. According to its Petition, Timbertop Wind 1, LLC originally contemplated "the Binney Hill area in the southwestern portion of New Ipswich" and the "New Ipswich Planning Board approved a met tower for Binney Hill in March, 2009."<sup>7</sup> Its "focus later shifted to Kidder Mountain and the

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<sup>2</sup> Petition, Page 1.

<sup>3</sup> Cover Letter to SEC Secretary Jane Murray, dated April 25, 2013.

<sup>4</sup> February 14, 2013, Timbertop Wind 1, LLC Supplemental Filing, *DRAFT Spring, Summer, and Fall 2011 Avian and Bat Survey Report* (December 2011), Page 26 of the PDF.

<sup>5</sup> February 14, 2013, Timbertop Wind 1, LLC Supplemental Filing, *PSNH Impact Study Report for Customer Generation Distribution Protection and Control Aspects Only Timbertop Wind - SESD #262*, Pages 111 to 115 of the PDF.

<sup>6</sup> Timbertop Wind, Supplemental Filing dated February 14, 2013, Page 174 of the PDF, *Proposed Site Plan Concept*, Note 2.

<sup>7</sup> Petition, Page 3.

northwestern portion of New Ipswich and southwestern portion of Temple due in part to the proximity to an existing transmission line.”<sup>8</sup> Again, the New Ipswich Planning Board approved a met tower for Kidder Mountain in August, 2011.<sup>9</sup> On November 16, 2011, the New Ipswich Planning Board completed a “design review”<sup>10</sup> of a Timbertop Wind 1, LLC’s project showing 7 turbines (all located in New Ipswich).<sup>11</sup> By completing design review, the New Ipswich Planning Board grandfathered Timbertop Wind 1, LLC’s project from any changes to the Town’s Zoning Ordinance “provided that a formal application is filed with the planning board within 12 months of the end of the design review process.”<sup>12</sup> However, Timbertop Wind 1, LLC never submitted an application for its project in New Ipswich or in Temple.

In December of 2011, Timbertop Wind 1, LLC described its project as consisting of “up to 20 wind turbines” of 1.5 MW each, located on Kidder Mountain, Wildcat Mountain, Conant Hill, Binney Hill, and Emerson Hill in the Town of New Ipswich.<sup>13</sup> In its April 19, 2012 impact study report submitted to ISO-NE, Timbertop Wind 1, LLC describes its project as 16.1 MW consisting of seven 2.3 MW turbines.<sup>14</sup>

The dramatic changes in the design and location of Timbertop Wind 1, LLC’s suggest that delays to its project are not attributable to the Towns’ ordinances or the nature of municipal

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<sup>8</sup> Petition, Page 3.

<sup>9</sup> Petition, Page 3.

<sup>10</sup> See RSA 676:4, II. Design review is a conceptual review that, once noticed by the Planning Board, protects the project from subsequent changes to a Town’s land use regulations under RSA 676:12, VI.

<sup>11</sup> Petition, Page 7.

<sup>12</sup> RSA 676:12, VI.

<sup>13</sup> February 14, 2013, Timbertop Wind 1, LLC Supplemental Filing, *DRAFT Spring, Summer, and Fall 2011 Avian and Bat Survey Report* (December 2011), Page 26 of the PDF.

<sup>14</sup> February 14, 2013, Timbertop Wind 1, LLC Supplemental Filing, *PSNH Impact Study Report for Customer Generation Distribution Protection and Control Aspects Only Timbertop Wind - SESD #262*, Pages 111 to 115 of the PDF.



land use regulation. Since 2009, the Town of New Ipswich has issued timely approvals or design reviews of Timbertop Wind 1, LLC's project on three separate occasions, with no appeals.

Timbertop Wind 1, LLC had only to submit an application to the Town of New Ipswich (before November 16, 2012!) to be grandfathered under its 2010 LWES Ordinance. RSA 676:12, VI.

Unlike Antrim Wind, which was subject to multiple lawsuits over its meteorological towers, New Ipswich has reviewed or approved the project three times with no delays or appeals. To the extent that Timbertop Wind 1, LLC has experienced any delays in its project, it seems likely they are attributable to the dramatic changes in the location and design of its project.

On February 14, 2013, Timbertop Wind 1, LLC also informed the Committee that it "was not selected as a finalist in the RFP for which it had been shortlisted. Timbertop continues to respond to RFPs as they are issued and pursue negotiations with potential purchasers."<sup>15</sup> As a result, there is no clear contractual or market demand for the project's energy, capacity or RECs. This suggests that delays in its project may be due to lack of financing or interest for its project. Timbertop Wind 1, LLC's project is not like the Laidlaw Berlin BioEnergy or other projects required by an incumbent utility or by the region or the State for its economic benefits. The only beneficiaries of Timbertop Wind 1, LLC's project are its investors, and those benefits may be more attributable to taxes than to the energy it produces.

#### **IV. NEW IPSWICH AND TEMPLE, NEW HAMPSHIRE**

The Towns of New Ipswich and Temple are exceptional communities. The pictures (Exhibit 4) provide a glimpse of their outstanding historical, natural and recreational resources. Temple alone has 48 historic homes constructed in the 1700s and 19 constructed in the 1800s, in

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<sup>15</sup> Cover Letter to SEC Secretary Jane Murray, dated April 25, 2013.

a rural setting largely untouched by the industrial revolution.<sup>16</sup> New Ipswich values its “[t]raditional New England scenes characterized by farmlands and woodlands; hills and mountain ridges; rivers, ponds and streams; and traditional New England buildings”.<sup>17</sup> Many of these scenic and historic resources are located in close proximity to Timbertop Wind 1, LLC’s project. *See e.g.* Kieley & Lowry, Page 13 (noting an “abundance of historical resources in the Towns of Temple and New Ipswich which are in close proximity to their proposed site.”).

New Ipswich and Temple are also home to outstanding natural and recreational resources that are located close to Timbertop Wind 1, LLC’s project. These include the Wapack Trail, Miller State Park and N.H. Audubon’s Pack Monadnock Raptor Migration Observatory,<sup>18</sup> one of the most significant raptor migration areas in the northeast. These resources are important not only to the citizens of New Ipswich and Temple, but to the entire state and the entire region’s environment and economy.<sup>19</sup> The Monadnock region had over 100,000 visitors to state parks alone during a six month period in 2012.<sup>20</sup> This does not include tourists visiting the Wapack Trail, the Wapack National Wildlife Refuge, and other areas such as the cross-country ski center in New Ipswich near the base of Kidder Mountain.<sup>21</sup> The towns of New Ipswich and Temple have sought to promote “businesses related to tourism and outdoor recreation” as part of their Master Plans and Zoning Ordinances.<sup>22</sup>

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<sup>16</sup> Testimony of John Kieley and Rose Lowry, Pages 7-14.

<sup>17</sup> Testimony of Edward Dekker and Elizabeth Freeman, Page 10.

<sup>18</sup> The Observatory is accessed from Temple and located on the Peterborough Town Line. *See* Exhibits 1-3 & 24.

<sup>19</sup> Kieley & Lowry, Page 18 (“Protection of these resources is a high priority not only to maintain the Town’s rural character, but to maintain its economic value for tourism.”); Page 21 (DRED park use data “show that local parks and trails are important to the regional economy.”).

<sup>20</sup> Kieley & Lowry, Page 21.

<sup>21</sup> Kieley & Lowry, Pages 18-20; Dekker & Freeman, Page 19.

<sup>22</sup> Dekker & Freeman, Page 19, Footnote 29; Kieley & Lowry, Page 18, *supra*.

Exhibits 1-3 show residential lots and their proximity to Timbertop Wind 1, LLC's turbines based on its February 13, 2013, *Proposed Site Plan Concept*.<sup>23</sup> While Timbertop Wind 1, LLC has not determined its tower locations, the following numbers of residential lots are located near Timbertop Wind 1, LLC's project in the Towns of New Ipswich, Sharon and Temple based on Exhibit 3:

**TABLE 1: Proximity of Residential Lots to Timbertop Wind 1, LLC Turbines**

<b>Turbine Distance</b>	<b>Temple</b>	<b>New Ipswich</b>	<b>Sharon</b>	<b>Total</b>	<b>% of GT</b>
<0.5 mile non-part	29	15	0	<b>44</b>	<b>1.3%</b>
0.5-1.0 mile	59	47	15	<b>121</b>	<b>3.6%</b>
< 1.0 mile	88	62	15	<b>165</b>	<b>4.9%</b>
1.0-2.0 mile	148	475	63	<b>686</b>	<b>20.5%</b>
< 2.0 mile	236	537	78	<b>851</b>	<b>25.5%</b>
Total Lots by Town	737	2338	266	<b>3341</b>	<b>100%</b>

The number of residential properties in proximity to the proposed wind towers appears to be significantly greater than in other projects reviewed by the Committee. A total of 851 lots, are located within two miles of Timbertop Wind 1, LLC's turbines. This is twenty-five (25%) percent of the total number of lots in the Towns of New Ipswich, Sharon and Temple. Nearly five percent (4.9%) are located within one mile. By comparison, Exhibit 14 (Page 165) shows the Groton Wind Project which (despite its larger size) appears to have far fewer residences located within a half mile of the project.

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<sup>23</sup> Timbertop Wind, Supplemental Filing dated February 14, 2013, Page 174 of the PDF.

New Ipswich and Temple both value renewable energy and made Large Wind Energy Systems (LWES) an allowed use, provided that the LWES did not have adverse effects on the community. However, the geography of New Ipswich and Temple, and the proximity of the wind resource to significant historic, natural, and recreational resources, and residential areas, played an important role in the LWES Ordinances adopted by New Ipswich and Temple. As explained below, the Towns of New Ipswich and Temple carefully considered this and other information and adopted LWES Ordinances that permit wind energy facilities to be constructed, provided that those facilities do not have unreasonably adverse impacts on public welfare. The nature of the communities and the proximity of the wind resource to significant residential areas, historic, natural and recreational resources, require a greater level of protection than the Committee has applied to other projects in more remote areas.

## **V. MUNICIPAL LAND USE REGULATION & RSA 162-H**

A municipal zoning ordinance governs the “location and use of buildings, structures and land used for business, industrial, residential, or other purposes.” RSA 674:16, I (d). It can establish districts and regulate the use of “land within each district”, RSA 674:20, or, it can regulate all land in the Town as a single district.<sup>24</sup> A zoning ordinance can permit the use of land energy facilities subject to certain criteria, as New Ipswich and Temple have done, or, it can prohibit them entirely. *Cf. Tonnesen v. Gilmanton*, 156 N.H. 813 (2008) (aircraft landings). Some uses of land, such as agricultural uses, RSA 674:32-a-c, or timber harvesting operations, RSA 674:1, VI, are protected by laws which limit the authority of towns to adopt Zoning Ordinances. However, there is no right to construct or locate an energy facility in a community. Above 30 MW, an applicant must meet the criteria in RSA 162-H:16, IV. Below RSA 162-H’s

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<sup>24</sup> *Plainfield v. Hood*, 108 N.H. 502 (1968).

30 MW threshold, a municipal zoning ordinance may entirely prohibit an energy facility when it is inconsistent with the standards adopted to protect the welfare of the community.

Of course, New Ipswich and Temple both elected to make an LWES is an allowed use. This means that an LWES may be constructed as a matter of right, provided that the project complies with the criteria in the ordinances and it obtains site plan approval under RSA 674:43, I. During site plan review, both the Towns have the power to employ technical, engineering and environmental consultants when needed for the review of an LWES project, such as for the “costs of special investigation ... and other matters which may be required by particular applications” RSA 674:44, V & RSA 676:4, I (g).

In limited circumstances, RSA 162-H:2, VII (g) allows an applicant to petition to override municipal land use controls for “facility or equipment” which “the committee determines requires a certificate, consistent with the findings and purposes of RSA 162-H:1” (emphasis added). In the case of a renewable “generating station equipment and associated facilities” the Legislature established a minimum threshold of “at least 5 megawatts”. RSA 162-H:2, XII. As a result, it is Timbertop Wind 1, LLC’s burden to show that its project is so important to the “findings and purposes set forth in RSA 162-H:1” that its 15 MW proposed project requires a certificate. RSA 162-H:2, VII (g) & XII.

## **VI. NEW IPSWICH AND TEMPLE’S LWES ORDINANCES PROVIDE A FRAMEWORK TO RESOLVE ALL ISSUES IN AN INTEGRATED AND TIMELY MANNER**

RSA 162-H:2, VII & XII directs the Committee to consider whether Timbertop Wind 1, LLC’s project requires a certificate consistent with the findings and purposes of RSA 162-H:1. In the absence of evidence that a project is important for reasons such as the location and growth of industry, or the need to maintain an adequate and reliable supply of energy, it is not necessary

to consider the Town's Ordinances at all. However, even if there were some evidence that Timbertop Wind 1, LLC's project was important to the purposes and findings set forth in RSA 162-H:1, the LWES Ordinances adopted by New Ipswich and Temple provide an adequate framework to review of Timbertop Wind 1, LLC's project.

**A. New Ipswich and Temple's LWES Ordinances Provide for an Integrated Review**

The New Ipswich and Temple LWES Ordinances are intended to resolve all aspects of construction and operation of an LWES in an integrated manner.<sup>25</sup> In their testimony, New Ipswich and Temple describe how their LWES Ordinances meet this goal.<sup>26</sup> Their Planning Boards include members who are scientists, lawyers, engineers, developers and executives with significant managerial and technical experience, including experience in the energy industry. Both communities developed their LWES Ordinances after reviewing scientific literature and reports from other communities and relied on the advice from separate noise and other consultants. It is clear that the Boards have the necessary qualifications, resources and legal authority to review the project in an integrated manner, including the authority to retain independent technical experts to help resolve technical questions. *See* RSA 674:44, V; RSA 676:4, I (g); RSA 676:5, IV (zoning board of adjustment).

It is clear that in some areas, such as noise, the standards contained in the New Ipswich and Temple LWES Ordinances differ from the standards applied by the Committee to other projects in Lempster, Groton, Dixville Notch, Brookfield, and Antrim, New Hampshire. However, even the standards applied by the Committee have varied based on the evidence and projects before it. The Committee has also modified the standards it applies as new scientific

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<sup>25</sup> Dekker & Freeman, Page 12.

<sup>26</sup> Dekker & Freeman, Pages 12-23 & 29-30; Kieley & Lowry, Pages 24-27.

and technical information has become available, just as New Ipswich revised its 2010 LWES Ordinance when it became aware of potential adverse effects of wind turbines in quiet rural areas. The fact that this Committee has permitted projects in one community using a particular standard is not a legal guarantee that the Committee would do so again. In fact, an agency cannot (as Timbertop suggests) rule on a case by case basis and then treat its precedent as law.<sup>27</sup>

In that sense, RSA 162-H presents a difficult challenge for both an applicant and the community or individuals it impacts because it provides little guidance or certainty as to the standard to be applied to any project.<sup>28</sup> While RSA 162-H:16, IV requires that an applicant demonstrate that its project: (b) “will not unduly interfere with the orderly development”; and (c) “will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety” (emphasis added) – it provides no guidance on how these determinations are to be made in particular cases. As a result, an applicant must first demonstrate the standard to be applied to its project to determine whether or not its project is “unreasonable”; it then must demonstrate that its project meets that standard.

In contrast, the LWES Ordinances adopted by New Ipswich and Temple provide much clearer goals or standards to determine whether or not a project is entitled to site plan approval. For example, both Ordinances contain the following standards:

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<sup>27</sup> See e.g. *Appeal of Nolan*, 134 N.H. 723 (1991); *Appeal of Monsieur Henri Wines*, 128 N.H. 191, 194 (1986) (“We have long held that “[a]n agency may not add to, change, or modify [statutory law] by regulation or through case-by-case adjudication.” *In re Jack O’Lantern, Inc.*, 118 N.H. 445, 448 (1978). [...] Rulemaking authority is granted to allow administrative agencies to effectuate their statutory purposes by “fill[ing] in [the] details,” and “[i]ndeed, a legislative enactment that gives a board greater discretion than that needed to ‘fill in details’ is invalid.” *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567, 568 (1978). The legislature may not delegate the “power to make the law”; it may only confer “authority or discretion as to its execution, to be exercised under and in pursuance of the law.” *State v. Normand*, 76 N.H. 541, 546 (1913).”

<sup>28</sup> Cf. *Petition from the NH House STE Committee*, SEC Docket No. 2013-01; cf. SB 99 (pending as of 5/22/2013) (directing OEP to develop standards to assist applicants and the public).

- **Wildlife.** The project must: (1) comply with the Avian Power Line Interaction Standards; (2) Avoid creation of artificial habitats for raptors or raptor prey; (3) Not operate in winds under 10 mph to protect bats; and (4) Curtail operation to protect raptors and migratory birds during periods of significant migration.
- **Noise.** Both ordinances require that sound levels produced by the LWES shall not exceed 33 dBA (Leq 10 minute) on a Non-Participating Landowner's property. The parameters used to develop a noise prediction model are the same for both towns.
- **Historical Resources.** Temple requires a Historical, Cultural, Archeological protection plan, and the Temple Planning Board may require specific setbacks of LWES structures or roadways from significant sites and/or other actions, which protect or restore items of historic significance. New Ipswich requires the applicant to include a Historical, Cultural, Archeological, Resource Map as part of the site plan submission.
- **Visual Impacts.** Both towns use the same factors to assess visual impact using *A Visual Impact Assessment Process for Wind Energy Projects*, by Vissering, Sinclair, and Margolis (May 2011).
- **Setbacks.** The Temple ordinance requires a setback from adjacent property lines of non-participating owners of at least 2,000 feet. The New Ipswich ordinance does not require a specific setback. The applicant must demonstrate that turbine setbacks are sufficient to protect people, domestic and farm animals, public and private property, and utilities from Debris Hazard. Ice throw or ice shedding from the LWES shall not cross the Project Boundary. In both cases, it is expected that the 33 dBA noise standard will require



sufficient setbacks “to meet the goals of either Town’s setback requirements from non-participating land owners.”<sup>29</sup>

These are just examples of how the New Ipswich and Temple Zoning Ordinance resolve all environmental and technical issues in an integrated fashion.

**B. New Ipswich and Temple’s LWES Ordinances Maintain a Balance between the Environment and the Need for New Energy Facilities.**

New Ipswich and Temple both value renewable energy and made LWES an allowed use,<sup>30</sup> provided that it did not have unreasonable adverse effects on the community. By making an LWES an allowed use, the Towns promoted the need for new energy facilities. Of course, there are significant questions to be resolved concerning the impact of any LWES project and Timbertop Wind 1, LLC is likely to be no exception due to its proximity to residential areas and significant historic, natural and recreational resources. However, the New Ipswich and Temple LWES Ordinances establish an excellent framework to resolve these and any other questions in an integrated and timely manner.

In order to maintain a balance, the LWES Ordinances provide standards to protect the environment in all important areas. New Ipswich and Temple believed that an LWES could be constructed in compliance with their ordinances.<sup>31</sup> However, to the extent that Timbertop Wind 1, LLC argues that the LWES Ordinances are unreasonably strict, it has the option to seek consent from a landowner, or, to seek a variance from the terms of the ordinance under RSA

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<sup>29</sup> Dekker & Freeman, Page 27.

<sup>30</sup> See e.g. Kieley & Lowry, Pages 6 & 26 (Temple supports “the development of renewable energy” and it is “one of the first communities in the State to adopt an energy committee” which “has been called a model for the State”.); Dekker & Freeman, Page 7, 9 & 23 (New Ipswich “believed that wind farms are an important land use, and decided to write a zoning amendment making Large Wind Energy Systems (LWES) an allowed use in town.”).

<sup>31</sup> Dekker & Freeman, Pages 23-24; Kieley & Lowry, Page 26.

674:33. As New Ipswich and Temple explained in their Testimony, Timbertop Wind 1, LLC would likely be entitled to variance upon showing that a provision of the Ordinance resulted in an “unnecessary hardship”– i.e. a hardship that is “undue” or “unreasonable” – and that the project did not result in unreasonable adverse impacts on nearby properties or the environment.

An application for a variance would effectively mirror the criteria considered by the Committee under RSA 162-H:16, IV (b) & (c), i.e. whether a proposed facility will “not unduly interfere with orderly development of the region” or will “not have an unreasonable adverse effect” on the environment. Under RSA 674:33, the Zoning Board of Adjustment would consider whether to allow a project to exceed the standards set by the Ordinance provided that a variance will not “injure the private or public rights of others” or “violate the ordinance's basic zoning objectives”. *Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 559 (N.H. 2011). For example, if Timbertop Wind 1, LLC demonstrated to the Zoning Board of Adjustment that a greater noise level would not have an adverse impact on residential properties, it seems clear that the Board would be required to grant a variance from the 33 dbA standard.<sup>32</sup>

**C. New Ipswich and Temple’s LWES Ordinances will not Result in Undue Delay in the Construction of Needed Facilities.**

There is no reason to believe that review by the New Ipswich and Temple Planning Boards would result in undue delay. The Town of New Ipswich timely approved two meteorological towers and completed a design review without any delays or appeals. Both Towns have agreed to conduct joint hearings, as required by RSA 674:53, that would create a single administrative record and combined hearings “throughout the application process.” RSA 674:53, VI (a). The joint hearing would also be subject to time frames that require that an

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<sup>32</sup> Dekker & Freeman, Pages 25-26.

application be reviewed for completeness in 30 days, and that a determination on the merits be made within 65 days, subject to a 90 day extension. *See* RSA 676:4, I (c).

In the unlikely event that a Town failed to comply with the time frames specified by statute, Timbertop Wind 1, LLC is authorized to petition for “an order approving the application if the court determines that the proposal complies with existing ... zoning or other ordinances.” RSA 676:4, I (c)(2). If the court determines that the delays were “not justified, the court may order the municipality to pay the applicant's reasonable costs, including attorney's fees, incurred in securing such order.” *Id.*

Both the New Ipswich and Temple LWES Ordinances specify in detail the information to be included in a complete application. The focus of the review is not on an-open ended question of whether the project is reasonable, but on whether the application demonstrates that the project complies with the ordinances. This approach is, by its very nature, relatively straightforward compared to RSA 162-H which requires that an applicant demonstrate that its project will not “unduly interfere” or have “unreasonably adverse effects” under RSA 162-H:16, IV, without clear criteria or standards to make these determinations.

**VII. A CERTIFICATE IS NOT REQUIRED ALL TO ASSURE THAT THE STATE HAS AN ADEQUATE AND RELIABLE SUPPLY OF ENERGY IN CONFORMANCE WITH SOUND ENVIRONMENTAL PRINCIPLES.**

The record contains no information to suggest that Timbertop Wind 1, LLC’s project is a “needed facility” or that review by the Committee is required to assure “an adequate and reliable supply of energy” within the meaning of RSA 162-H:1. In fact, there is substantial reason to believe that Timbertop Wind 1, LLC’s project does not require review by the Committee under RSA 162-H:1 for these purposes.

## A. Energy

In terms of energy, New Hampshire already has an adequate and reliable supply of energy. As explained by Lisa Linowes: “New Hampshire represents approximately 9% of the total energy demand in New England but has 13% of its generation capacity. New Hampshire has long been an exporter of electricity. This coupled with reduced demand growth since 2008 for the entire region has clearly lowered the need to build new capacity.”<sup>33</sup> Publications by ISO New England confirm that New Hampshire has a “total capacity of existing generating plants located in New Hampshire [of] approximately 4,100 MW.”<sup>34</sup> By comparison, actual peak demand in 2012 was 2,293 MW.<sup>35</sup> New Hampshire has almost double the capacity and exports its energy to the rest of New England.

It is true that market conditions can arise, for example, when cold temperatures lead to a shortage of natural gas which effects the price of electricity. However, there is no information to suggest that Timbertop Wind 1, LLC’s project is required to address such a need, if it even exists. As the Committee is aware, wind turbines typically do not exceed a capacity factor of 30%, because they are dependent on wind conditions that are unreliable. Thus, a 15 MW project produces, on average, less than 5 MW of energy, that may or may not coincide with the demand for energy. This means that Timbertop Wind 1, LLC 15 MW project will provide less than 0.218% of *New Hampshire’s* peak energy demand in 2012.<sup>36</sup> Like many wind energy projects, its peak hours of operation may rarely coincide with peak demand for energy. In terms

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<sup>33</sup> Linowes, Page 5.

<sup>34</sup> ISO New England, New Hampshire 2012-13 State Profile, Exhibit 27, Page 272.

<sup>35</sup> ISO New England, New Hampshire 2012-13 State Profile, Exhibit 27, Page 272.

<sup>36</sup> ISO New England, New Hampshire 2012-13 State Profile, Exhibit 27, Page 272.

of reliability, Timbertop Wind 1, LLC's project may be very much like a friend that only offers help when it is least needed. There is no evidence in the record to suggest otherwise.

Even if Timbertop Wind 1, LLC's project contributed to some extent to an adequate and reliable supply of energy, there is no reason to believe that its project represents an important or favorable alternative to others in the market. According to ISO New England, in 2013 "approximately 260 MW of proposals in New Hampshire were active in the queue. This represents 5% of the proposals in New England."<sup>37</sup> Obviously, not all of the proposals in the queue will be developed. However, many of these alternatives could provide greater or more reliable energy with reduced environmental or other greater benefits to the public welfare. There is simply no evidence to suggest that Timbertop Wind 1, LLC's project is favorable to other projects that may come forward or required to provide an "adequate and reliable supply of energy" under RSA 162-H:1.

## **B. Renewable Energy Certificates.**

RSA 162-H:1 makes no reference to the need for Renewable Energy Certificates (RECs) or RSA 362-F. Under New Hampshire law, RSA 162-H:1 is to be interpreted according to the "plain and ordinary meaning to the words used." *Appeal of Town of Rindge*, 158 N.H. 21, 24 (2008) citing *Appeal of Bethlehem*, 154 N.H. 314, 319 (2006). An agency must interpret the statute "as written and [cannot] ... add words that the legislature did not include." *Id.* Furthermore, the Committee should not "look beyond the language of the statute to determine legislative intent if the language is clear and unambiguous." *Rindge, supra, quoting Carignan v. N.H. Int'l Speedway*, 151 N.H. 409, 419 (2004). Nor should the Committee "snatch ambiguity

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<sup>37</sup> SO New England, New Hampshire 2012-13 State Profile, Exhibit 27, Page 273.

from the jaws of clarity” by looking for ambiguity outside the statute where none exists. *Appeal of Alpha Directions, Inc.*, 152 N.H. 477, 483 (2005).

The omission of any reference to RECs in RSA 162-H:1 means that, as a matter of law, RECs are not a factor to be considered by the Committee when determining whether or not a project such as Timbertop Wind 1, LLC requires a certificate. New Hampshire adopted its RPS program on May 11, 2007,<sup>38</sup> and, on July 17, 2007, it added definitions for renewable energy facility and time frames to RSA 162-H.<sup>39</sup> The Legislature could have added the need for additional RECs as a factor but declined to do so. The absence of any reference to RPS requirements in RSA 162-H:1 is conclusive of statutory intent.

There are significant reasons why this Committee should not read those requirements into the statute. First, RPS requirements “are an abstract creation under State laws in New Hampshire, Massachusetts, Maine, Rhode Island and Connecticut to provide incentives for renewable generation. However, RECs are not ‘needed’ in the sense used in RSA 162-H:1.”<sup>40</sup> If a utility or a state does not produce sufficient Class I RECs, the lights will not go out and the growth of industry, public welfare and the other criteria under RSA 162-H:1 will not be affected.

Second, the demand for RECs is subject to regulatory and market forces that make the market unpredictable. New Hampshire has only a very small role to play in the overall REC market. “Events such as the changes to the definitions of eligible Class I facilities in other states, changes to the ACP, and availability of renewable resources in New York or other markets that can bid into the New England can quickly change the market conditions in New Hampshire.”<sup>41</sup>

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<sup>38</sup> See Laws of 2007, Chapter 364, adopted May 11, 2007.

<sup>39</sup> See Laws of 2007, Chapter 26, adopted on July 17, 2007.

<sup>40</sup> Linowes, Page 4.

<sup>41</sup> Linowes, Pages 4-5.

Furthermore, “[d]emand for RPS can also be reduced by the New Hampshire Public Utilities Commission which has the authority to delay implementation of RPS requirements under RSA 362-H:4, V. In fact, the Commission recently delayed implementation of the thermal Class I requirement in Order No. 25,484.”<sup>42</sup> As a result, unlike the adequacy and reliability of the state’s energy supply, a shortage of RECs can be created or eliminated by the stroke of a pen, or in ways that are difficult to predict.

Third, the Alternative Compliance Payment (ACP) to the State’s Renewable Energy Fund under RSA 362-F:10, II, represents an alternative means to meet the State’s renewable energy goals if shortages occur in New Hampshire due to demand in other states. The ACP is an adequate statutory remedy to address any shortage in the market.

Timbertop Wind 1, LLC has presented no evidence indicating that New Hampshire needs additional Class I facilities and, as discussed in the Testimony of Lisa Linowes, “the state of New Hampshire already has sufficient existing in-state resources to meet the state's 2025 compliance for Class I RECs”.<sup>43</sup> According to the most recent survey by the Commission, “[t]he downward trend in Class I REC prices indicates that there is a large regional supply of RECs relative to the demand for RECs, which suggests that NH electric service providers would not have difficulty purchasing RECs in the market and meeting their RPS obligations at reasonable costs to ratepayers.”<sup>44</sup> Timbertop Wind 1, LLC has been unable to find a purchaser for any RECs that it would produce. As a result there is no legal or factual basis to conclude, that a certificate is required to meet the Class I RPS requirements.

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<sup>42</sup> Linowes, Page 4.

<sup>43</sup> Linowes, Page 6.

<sup>44</sup> NH PUC, 2011 Renewable Energy Portfolio Standard Review, Exhibit 26, Page 227.

**C. Pre-Emption of New Ipswich and Temple’s Zoning Ordinances to Promote the RPS Policies of Other States Violates the New Hampshire Constitution.**

To the extent that Timbertop Wind 1, LLC argues that it will serve a need to meet the Class I RPS policies of other states, such a proposal cannot form the basis for setting aside the protection of local laws that New Hampshire affords its citizens. Part I, Article 3 of the New Hampshire Constitution provides that: “When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, *without such an equivalent, the surrender is void.*” (emphasis added); *see also, State v. Brosseau*, 124 N.H. 184, 196 (1983) (“If the individual receives an equivalent for the right of control he has parted with, the surrender of that right is valid; if he receives no equivalent, the surrender is void, and the supreme power [of the State] as it respects him is an usurper.”) (Douglas & Batchelder concurring).

New Hampshire has more than met its Class I RPS obligations. While a project greater than 30 MW is presumed to be important to the welfare of the population so as to require a certificate, Timbertop Wind 1, LLC’s project is well below this threshold. Under Part I, Article 3 of the New Hampshire Constitution, the RPS policies of Rhode Island, Connecticut or Massachusetts, however laudable they may be, cannot serve as a basis to surrender the natural rights of the citizens of New Ipswich and Temple to self-government and the protections afforded by their zoning ordinances.

Furthermore, under Part I, Article 12 of the New Hampshire Constitution, “the inhabitants of this state [are not] controllable by any other laws than those to which they, or their representative body, have given their consent.” While the citizens of New Hampshire have consented to New Hampshire’s RPS policies and to Legislature’s determination that facilities



larger than 30 MW require a certificate, neither RSA 162-H nor the New Hampshire Constitution allows New Ipswich or Temple's Zoning Ordinances to be set aside to satisfy the policies established by the laws of another state. Jurisdiction over its project can only be provided as specified by RSA 162-H:1 which does not allow the needs of the RPS requirements to be considered.

## **VII. CONCLUSION: TIMBERTOP WIND 1, LLC HAS FAILED TO DEMONSTRATE THAT ITS PROJECT REQUIRES A CERTIFICATE**

Timbertop Wind 1, LLC has failed to meet its burden of proof. The record contains no information to establish that Timbertop Wind 1, LLC's project requires a certificate consistent with the *purposes* of RSA 162-H:1, *i.e.* due to 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." RSA 162-H:1. Its project is no different from any other renewable energy project that is well below the 30 MW threshold, below which the Legislature has recognized that renewable energy facilities do not contribute significantly to the welfare of the population or the state's industry or economy. There will be few jobs created by Timbertop Wind 1, LLC's project. It will provide little benefit to the growth of the State's economy or its industry.

Similarly, there is no information to suggest that a certificate is required consistent with the *findings* in RSA 162-H:1, namely:

- To "maintain a balance between the environment and the need for new energy facilities in New Hampshire";
- To avoid "undue delay in the construction of needed facilities"; to provide "full and timely consideration of environmental consequences";

- “[T]o provide full and complete disclosure to the public of [its] plans”;
- To “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”;
- “[A]ll to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles”.

RSA 162-H:1 (emphasis added). The evidence in support of its petition is entirely lacking.

The Towns of New Ipswich and Temple believe that an appropriately sited and designed wind energy project could be constructed that complies with their carefully crafted LWES ordinances, while protecting the rural and historic characteristics of their communities, and their important environmental and recreational resources. Of course, Timbertop Wind 1, LLC may disagree. However, this is a business decision to be made by Timbertop Wind 1, LLC, based on its balancing of the costs to construct a facility that complies with the New Ipswich and Temple Zoning Ordinances against the revenues it expects to derive from the sale of energy, capacity and Class I RECs to other states.

RSA 162-H does not allow Timbertop Wind 1, LLC to set aside the standards adopted by local communities to protect the welfare of their populations, and their historic, environmental, and recreational resources, simply to make renewable energy more profitable to investors, or to yield higher returns on investment. Rather, Timbertop Wind 1, LLC must demonstrate that its project requires a certificate in light of the findings and purposes set forth in RSA 162-H:1.

Timbertop Wind 1, LLC has not, and cannot, show that its project requires a certificate for those purposes. Its *Petition for Jurisdiction* should therefore be denied.

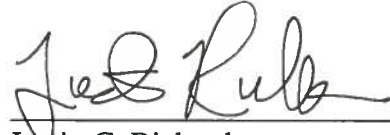
Respectfully submitted,

**TOWNS OF NEW IPSWICH  
AND TEMPLE,**

By their Counsel,

**UPTON & HATFIELD, LLP**

Dated: May 28, 2013



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was this day forwarded to the Committee's official service list in this proceeding.



Justin C. Richardson