

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

June 3, 2013 - 10:33 a.m.

N.H. Public Utilities Commission
20 South Fruit Street Suite 110
Concord, New Hampshire

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

PRESENT:

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

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

Acting Cmsr. Philip Bryce
Dir. Harry Stewart
Acting Director Craig Wright
Cmsr. Robert R. Scott
Cmsr. Michael D. Harrington
Director Glenn Normandeau
Dir. Meredith Hatfield
Kathryn Bailey, Dir./Telecom
(Designated as PUC Engineer)

SITE EVALUATION COMMITTEE:

N.H. Dept. of Environmental
Services

N.H. Public Utilities
Commission

DRED & Div. of Parks & Rec.
DES - Water Division
DES - Air Resources Division
N.H. Public Utilities Comm.
N.H. Public Utilities Comm.
N.H. Fish & Game Dept.
Office of Energy & Planning
N.H. Public Utilities Comm.

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

COURT REPORTER: Steven E. Patnaude, LCR No. 52

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APPEARANCES:

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

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P R O C E E D I N G

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

And, at this point, I would like to ask the members of the Committee who are present at this meeting to introduce themselves, starting to my far left.

DIR. NORMANDEAU: Glenn Normandeau, Director of New Hampshire Fish & Game.

CHAIRMAN BURACK: My far right, I'm sorry.

DIR. NORMANDEAU: Your other left.

CHAIRMAN BURACK: Yes. My other left.
Thank you.

DIR. STEWART: Harry Stewart, Director

1 of the Water Division, Department of Environmental
2 Services.

3 MS. BAILEY: Kate Bailey, designated
4 engineer for the Public Utilities Commission.

5 CMSR. SCOTT: Bob Scott, Public
6 Utilities Commission.

7 VICE CHAIRMAN IGNATIUS: Amy Ignatius,
8 Chairman of the New Hampshire Public Utilities Commission.

9 CMSR. HARRINGTON: Mike Harrington, PUC.

10 DIR. HATFIELD: Meredith Hatfield,
11 Director of the Office of Energy & Planning.

12 DIR. WRIGHT: Craig Wright, acting
13 Director for the Air Resources Division, Department of
14 Environmental Services.

15 CHAIRMAN BURACK: I will note that we do
16 have the necessary quorum to conduct our business. It is
17 also possible that one additional member may be joining us
18 in a short while.

19 But, at this point, I'd like to turn
20 things -- well, I'd first like to introduce Michael
21 Iacopino, who serves as legal counsel to the Committee in
22 this proceeding.

23 MR. IACOPINO: Good morning.

24 CHAIRMAN BURACK: And, now, I'd like to

1 turn things to Chairman Ignatius of the Public Utilities
2 Commission to formally designate the engineer from the PUC
3 for this proceeding.

4 VICE CHAIRMAN IGNATIUS: Thank you,
5 Chairman Burack. There is one piece of business just for
6 the PUC members alone. By statute, we are required, when
7 the full Site Evaluation Committee meets, to have a
8 engineer designated from the PUC to serve with us. And,
9 so, I would move that we designate Kathryn Bailey, who is
10 the Director of our Telecom Division and an engineer, to
11 participate in this proceeding.

12 CMSR. HARRINGTON: I'll second the
13 motion.

14 VICE CHAIRMAN IGNATIUS: All right.
15 And, so, a vote just among the three PUC Commissioners.
16 All in favor, please signify by saying "aye"?

17 (Multiple PUC Commissioners indicating
18 "aye".)

19 VICE CHAIRMAN IGNATIUS: Opposed?

20 (No verbal response)

21 VICE CHAIRMAN IGNATIUS: All right.
22 Then, we have a designee, Kathryn Bailey. Thank you very
23 much.

24 CHAIRMAN BURACK: Thank you,

1 Commissioner Ignatius. The agenda for today's public
2 meeting includes one matter. In Docket Number 2012-04, we
3 will consider the Petition for Jurisdiction filed by
4 Timbertop Wind I, LLC. And, I'll provide some background
5 here.

6 On December 21, 2012, Timbertop I Wind
7 -- Timbertop Wind I, LLC, filed a Petition for
8 Jurisdiction requesting the Committee to assert its
9 jurisdiction over the siting, construction, and operation
10 of a wind energy facility it plans to construct and
11 operate on Kidder Mountain, in the towns of Temple and New
12 Ipswich, Hillsborough County, New Hampshire. The
13 facility, as currently configured, will consist of five
14 Siemens SWT wind turbines, with two of them being
15 constructed and operated in New Ipswich and three of them
16 being constructed and operated in Temple. Each turbine
17 will have a nameplate capacity of 3 megawatts, for a total
18 nameplate capacity of the facility of 15 megawatts. The
19 Petitioner proposes to interconnect the facility to the
20 Public Service Company of New Hampshire Distribution
21 Circuit Number 3235. Ultimately, the Petition asserts
22 that the facility will have a nameplate capacity of more
23 than 5 megawatts, but less than 30 megawatts, and requests
24 that the Committee exercise jurisdiction over the siting,

1 construction, and operation of this facility pursuant to
2 RSA 162-H, Section 2, XII.

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

16 On February 19, 2013, a public hearing
17 was held regarding the Petition. At the hearing, the
18 motion by the Towns to intervene was granted. The Towns'
19 motion to dismiss the Petition was orally denied. The
20 parties were directed to meet with counsel to develop a
21 proposed procedural schedule. On April 19, 2013, a motion
22 to dismiss the Petition filed by the Towns was denied in
23 writing. A motion for reconsideration of the oral
24 decision to deny the motion was likewise denied.

1 On April 25, 2013, the Petitioner filed
2 a motion for deliberations and procedural schedule. The
3 motion was assented to by the Towns and Counsel for the
4 Public. On May 8, 2013, the motion for deliberation and
5 procedural schedule was granted. In accordance with the
6 order granting the motion for deliberations and procedural
7 schedule, the adjudicative proceeding was scheduled for
8 today and shall be conducted on the written record as
9 supplied by the parties. In addition, the Committee has
10 received written public comment, and I would note
11 including a comment received as recently as this morning,
12 which, pursuant to our rules, will also be considered by
13 the Committee.

14 The written record supplied by the
15 parties consists of all documents and exhibits filed by
16 the parties to date, including the documents and exhibits
17 submitted by the Towns on May 13, 2013. The parties have
18 agreed that live witness testimony is unnecessary. In
19 addition, the parties have filed briefs or legal memoranda
20 in support of their respective positions.

21 At today's hearing, we will take public
22 comment, and we'll then hear the factual and legal
23 arguments from the parties. If the Committee sees fit, we
24 will then deliberate and determine whether the Petition

1 for Jurisdiction should be granted or denied.

2 Notice of this hearing was issued by the
3 Committee on May 16, 2013. The notice was posted on the
4 Committee's website and at the Department of Environmental
5 Services and at the Public Utilities Commission. In
6 addition, the notice was distributed to the service list
7 in this docket.

8 The Committee's authority to undertake
9 these proceedings is RSA 162-H, Section 2, XII, and RSA
10 162-H, Section 4, II, and New Hampshire Code of
11 Administrative Rules, Site 202.01.

12 Again, we will begin by taking public
13 comment. There are sign-in sheets at the back of the
14 room. Any members of the public who wish to speak at this
15 hearing should sign one of the sheets. When your name is
16 called, you should stand and approach the podium and make
17 your remarks. Please understand that the Committee has a
18 substantial record already in this matter, and while we
19 welcome the public comments and viewpoints, we would ask
20 that they be made as briefly as possible, not be
21 repetitious, and that they address the factual and legal
22 bases on which the Committee must decide this matter. I
23 intend to limit public comments from the floor to three
24 minutes per speaker.

1 Once we have heard the public comments,
2 we will then hear oral arguments from the parties. We
3 will hear first from the Petitioner, Timbertop Wind I,
4 LLC. Unless the Towns and Counsel for the Public agree
5 otherwise, we will then hear from the Towns, followed by
6 Counsel for the Public. The Petitioner, having the burden
7 of proof, will be allowed a brief rebuttal argument.

8 And, we will now move to the public
9 comment portion of this proceeding. As I indicated
10 previously, I will call names from the sign-in sheets.
11 When your name is called, please stand and approach the
12 podium to make your remarks. Please keep your remarks to
13 three minutes or less. And, again, please try not to
14 repeat the same comments or remarks made by others.

15 Yes. Before we turn to that, we will go
16 ahead now, though, and take appearances, starting with
17 counsel for the Petitioner. Go ahead, please.

18 MR. GETZ: Good morning, Mr. Chairman,
19 members of the Committee. My name is Tom Getz. I'm an
20 attorney with the law firm of Devine, Millimet & Branch,
21 and here this morning on behalf of Timbertop Wind. And,
22 with me is their parent company Pioneer Green Energy's
23 Vice President, Adam Cohen.

24 CHAIRMAN BURACK: Thank you very much.

1 Counsel for the Public.

2 MR. ROTH: Good morning, Mr. Chairman,
3 members of the Committee. I'm Peter Roth, Counsel for the
4 Public.

5 CHAIRMAN BURACK: Thank you.

6 MR. RICHARDSON: Good morning, Mr.
7 Chairman, members of the Committee as well. Justin
8 Richardson, with the firm of Upton & Hatfield, here on
9 behalf of the Towns of New Ipswich and Temple. During the
10 public comment, I believe a representative from each town
11 will introduce the individuals who are here. And, I'll
12 not deliberate that, but you will hear it momentarily.
13 Thank you.

14 CHAIRMAN BURACK: Thank you very much.
15 I would also like to note for the record that we have been
16 joined by Phil Bryce, who is the Director of the Division
17 of Parks with the Department of Resources and Economic
18 Development. So, he is also sitting on this proceeding.

19 With that, going to turn things -- turn
20 now to the public statements. And, I see seven
21 individuals on this list who have asked to be able to
22 address us. And, we will just work from the top of the
23 list down. And, we'll start with Mr. Ted O'Brien, of
24 Sharon, New Hampshire. Mr. O'Brien. Again, please step

1 forward and state your name for the record. And, please
2 speak clearly, so that our stenographer can take down all
3 that you have to say.

4 MR. O'BRIEN: My name is Ted O'Brien,
5 that's O apostrophe B-r-i-e-n. And, I'm a citizen of
6 Sharon, which is a tiny town between New Ipswich and
7 Temple. I'm here to urge the Commission to allow the
8 Towns' regulations and ordinances to govern this matter
9 going forward. Town meeting, from the founding of the
10 country, has been the workshop of democracy. These Towns
11 have fashioned ordinances and regulations designed to
12 reflect the decisions of the people who live in the town.
13 As the late Congresswoman Barbara Jordan said, "Here the
14 People rule."

15 These ordinances, the regulations, the
16 jurisdiction that New Ipswich and Temple are asking for
17 are based on their study of the issue over time, and a
18 careful consideration of all the impacts that such
19 construction might have. When you're looking at something
20 that's 40 stories tall, 130-foot blades, 7 tons, then the
21 people most impacted, through their elected
22 representatives and appointed boards, should have the most
23 to say about what goes forward and what does not.

24 And, finally, if I may, those who seek

1 to bypass these decided standards, of those who seek to do
2 this, how many live on or near these wind farms? Thank
3 you very much.

4 CHAIRMAN BURACK: Thank you very much,
5 Mr. O'Brien. We will now hear from Mitch Call, of Sharon.

6 MR. CALL: Good morning, Mr. Chairman.
7 Actually, I'm speaking -- I have two constituents to speak
8 to, and I hope the timekeeper will keep that in mind. I'm
9 speaking first as the Chair of the Planning Board of the
10 Town of Sharon. The Sharon Selectmen has forwarded a
11 letter dated April 16, 2013 to this Committee voicing
12 their support for the Towns of Temple and New Ipswich, and
13 regarding their desire to apply their land use regulations
14 and procedures to the Timbertop energy project. And, they
15 strong -- they asked me that I strongly reaffirm that
16 position.

17 As was mentioned, at our town meeting
18 last March, more than two-thirds of our citizens voted in
19 favor of a Large Wind Energy System regulations and
20 enabling ordinance that very closely resemble the
21 ordinances of Temple and New Ipswich, and confirms our
22 belief that well-informed and involved local citizens will
23 have a clear and concise understanding of the many impacts
24 of a project of this type, and are therefore best able to

1 monitor and regulate this project.

2 I have a copy of my comments here to be
3 passed around.

4 MR. IACOPINO: If you can just give
5 those to the stenographer, to the court reporter, just put
6 them on his table there.

7 MR. CALL: Secondly, I'll be speaking as
8 President of the Friends of the Wapack, Incorporated,
9 before this Committee. The Wapack Trail is a 22-mile
10 ridge trail that runs from the Wapack National Wildlife
11 Refuge, in Greenfield, New Hampshire, to Mount Watatic, in
12 Ashburnham, Mass, and is celebrating its 90th anniversary
13 this year, and is considered the oldest intra-state hiking
14 trail in New England. It was blazed by Marion Buck Davis
15 and Frank Robbins, and opened in 1923. Marion coined the
16 term "Wapack", from "Wa" of Mount Watatic and "pack" from
17 North Pack Monadnock, which are the southern and northern
18 terminuses of the trail. Today, the entire ridgelines of
19 the trail are considered the "Wapack Range". This trail
20 is renowned for its pastoral and scenic beauty, a little
21 patch of wilderness within 50 miles of Boston. And, as
22 popular as it is, most people are amazed at the peace and
23 solitude it offers, with only a rare intrusion of
24 civilization.

1 More of the story of the trail can be
2 found in an article and editorial in the Monadnock Ledger
3 of May 30th, 2103 -- '13, excuse me. You'll note it
4 actually is front page, and above the fold.

5 The trail is maintained by the Friends
6 of the Wapack, an entirely volunteer organization with
7 over 850 names on our membership list. The Board of
8 Directors, elected annually, recently generated a position
9 statement on wind towers, which includes the following:
10 "For many hikers, a major purpose of using the trail is to
11 get away from civilization, so encroaching poles and roads
12 are not desirable." And, "It is the purpose of the
13 Friends of the Wapack to maintain and protect the Wapack
14 Trail and certain side trails for future generations, and
15 we will leave the larger generation" -- "discussions
16 involving positive and negative impacts of wind energy to
17 others."

18 Having said that, it is our considered
19 opinion that our deep and informed concerns about the
20 impact on the Wapack Trail would best be served by local
21 citizenry, who can well understand the importance of the
22 maintenance of the trail for its scenic, environmental,
23 wildlife habitat and historic significance. The Friends
24 are concerned for the wildlife that exists in the open

1 spaces around the trail and the many species of birds and
2 bats that use the Lead Line of the Wapack Range as a
3 guideway in their annual migrations both north and south.
4 It happens to be the only lead line in New England.

5 These are significant and fragile. And,
6 as is stated in the motto of the Friends of the Wapack,
7 "Once it's gone, it's gone forever." The local boards
8 know and understand these qualities and will work to
9 protect these -- excuse me -- priceless resources to the
10 greatest extent possible. Please let them do their job.
11 Thank you.

12 CHAIRMAN BURACK: Thank you very much,
13 Mr. Call.

14 MR. CALL: Our comments.

15 (Mr. Call handing documents to Atty.
16 Iacopino.)

17 MR. IACOPINO: Thank you.

18 CHAIRMAN BURACK: Thank you. We will
19 now hear from Mr. Edward Dekker of New Ipswich.

20 MR. DEKKER: Thank you, Mr. Chairman.
21 I'd like to thank you and the Committee for your
22 consideration. I am the Chair of the Planning Board in
23 New Ipswich. I wanted to take just a moment to put a face
24 on my written testimony, and introduce my fellow members

1 of New Ipswich's town government who attended today.
2 First, Liz Freeman. Liz is the Co-Chair of the Planning
3 Board; Joanne Meshna is our Land Use Manager; and Tim
4 Jones is a member of our Planning Board.

5 MR. JONES: Good morning.

6 MR. DEKKER: I thank you very much for
7 your time.

8 CHAIRMAN BURACK: Thank you very much,
9 Mr. Dekker, and thank you all for being here today. We'll
10 now here from John, I hope I'm pronouncing this correctly,
11 John Kieley of Temple, New Hampshire.

12 MR. KIELEY: Thank you. I'm John
13 Kieley. I'm the Chairman of the Selectboard in the Town
14 of Temple and the ex officio member of the Planning Board.
15 As Ed did, I'd like to introduce our group that's here
16 today. Starting with Rose Lowry, who is the Chairman of
17 our Planning Board; Ken Sullivan, who's a member of our
18 Planning Board; Cam Lockwood, another member of our
19 Planning Board; and Gail Cromwell, who is a member of our
20 Selectboard. I'd also like to thank this board for
21 considering our motion to dismiss this Petition. Thank
22 you.

23 CHAIRMAN BURACK: Thank you very much,
24 Mr. Kieley. And, again, thank you all for being here

1 today. I believe it's Dave Repak --

2 MR. REPAK: Yes, sir.

3 CHAIRMAN BURACK: -- of Temple. I'm not
4 sure if I read that correctly or not, sir.

5 MR. REPAK: That's right. That's
6 correct. Good morning, Mr. Chairman and members of the
7 Committee. My name is Dave Repak. And, I represent the
8 Temple Historical Society. And, my function there is the
9 overseer of the Temple Glassworks. And, I'm concerned
10 about the historic sites in this location where the towers
11 would be located. The Glassworks is just a few, maybe
12 100 yards from Old Todd Road, which is the oldest road in
13 Temple, built in 1738, and went from New Ipswich to
14 Peterborough. There's still a couple cellar holes on that
15 road that are very close to the Glassworks. The Maynard
16 Inn is a very well-defined cellar hole. It's maybe
17 100 yards from the Glassworks south. And, Todd -- the
18 cellar hole for Todd, who was the first resident on that
19 road, is very close as well. There's an intersection
20 between Todd Road and Brown Road there where these towers
21 are very close to.

22 The Glassworks site is -- I think I
23 mentioned I'm an overseer of the Glassworks site, so I'm
24 trying to protect it, is on the National Register of

1 Historic Places and also on the State Register. And, in
2 reviewing the ordinance that the Town of Temple has come
3 up with, I feel confident that these sites would be
4 protected if they followed those ordinance rules. Thank
5 you very much.

6 CHAIRMAN BURACK: Thank you very much,
7 Mr. Repak. We'll now hear from George Stolz of Temple.

8 MR. STOLZ: Good morning, Mr. Chairman,
9 ladies and gentlemen. I am a private citizen of Temple,
10 New Hampshire. I am also a Professional Engineer, and
11 I've built many renewable energy sites around the country,
12 specifically wind farms, solar farms, and small peaker
13 units.

14 What I find unconscionable in this is
15 that the corporation, Timbertop, has decided that, since
16 they don't care for the regulations of the towns involved,
17 that they have come to the SEC to try and bypass that. I
18 also find, for the amount of energy that's going to be
19 produced by this wind farm, which is in the amount of
20 about 15 megawatts, that the amount of energy produced and
21 sent to the grid is far less than the -- far less than the
22 measures that are being done around the rest of the
23 country, with the upgrading of the energy system in Maine,
24 New Hampshire, Connecticut, and Massachusetts. And, I

1 think that the Committee should uphold the Towns'
2 regulations on this point, and allow the Town governments
3 and the people who elected the officials in the Town to
4 decide what's best for their town, and not some outside
5 corporation that most likely will sell this project, as
6 have all the other renewable energy farms I've worked on,
7 to an outside source within the first two years, which
8 breaks the process of "what happens when the farm is no
9 longer viable in 25 years?" Who pays for the costs of
10 removing the scars that have been on the land, the haul
11 roads, the cables, the towers, *etcetera*?

12 So, I beg you to consider that as you
13 make your decision. Thank you.

14 CHAIRMAN BURACK: Thank you very much,
15 Mr. Stolz. And, our last speaker here is, again, I
16 believe it's Chris Pradler.

17 MR. PRADLER: Good morning. My name is
18 Chris Pradler. Our family owns about 500 acres where the
19 wind farm is being planned. We would like to see the wind
20 farm go forward. We support the renewable energy. We
21 feel that, if it was handled by this Committee, that it
22 would move forward in a smoother direction than it would
23 be to be separated and having to go through two different
24 boards at the same time. So, thank you.

1 CHAIRMAN BURACK: Thank you very much,
2 Mr. Pradler. Are there any other members of the public
3 here today who would like to be able to address the
4 Committee?

5 (No verbal response)

6 CHAIRMAN BURACK: Very good. Thank you.
7 I will just, for the Committee's benefit, I received by
8 e-mail this morning a public comment letter dated May
9 30th, addressed to Jane Murray, the Secretary of the
10 Committee, from a C. Mackensen, does not give a town of
11 residence, but I will simply circulate this letter for
12 others to look at, in the event you have not already seen
13 it yourselves.

14 All right. We have now completed the
15 public comment phase of today's proceeding, and would like
16 to turn to arguments by the parties. Starting with
17 argument by the Petitioner. And, I believe the
18 understanding is that each party will take up to 20
19 minutes.

20 MR. GETZ: Good morning, Mr. Chairman,
21 members of the Committee. As I indicated before, my name
22 is Tom Getz. And, I am an attorney with Devine, Millimet
23 & Branch, on behalf of Timbertop Wind this morning.

24 As part of Timbertop's December 21, 2012

1 Petition for Jurisdiction, its February 15, 2013 response
2 to the Towns, it's May 28, 2013 brief, and at the
3 February 19, 2013 hearing in this proceeding, the Company
4 has set forth the facts and the law supporting Site
5 Evaluation Committee jurisdiction over its project. And,
6 I thank you for the opportunity to briefly set forth
7 Timbertop's case this morning before you conduct your
8 deliberations.

9 I will begin with the governing statute.

10 CHAIRMAN BURACK: Attorney Getz, I'm
11 sorry to interrupt here. I should have said something
12 earlier. In the interest of efficiency in our conduct of
13 this proceeding, I'm going to suggest that members of the
14 Committee, if you have questions for any of the counsel,
15 that we hold our questions, write them down and hold them
16 until we've heard oral argument from all the parties. If
17 that's agreeable? If somebody has a matter that they feel
18 it must be addressed at that very moment, please raise
19 your hand, get my attention, and we can try to deal with
20 things then. But I think this will probably work best for
21 everybody, if we can give all the parties a chance to make
22 their arguments first.

23 So, again, I apologize for interrupting,
24 but I wanted to -- I wanted to get that on the table

1 before anybody else interrupted you.

2 MR. GETZ: Thank you. I appreciate
3 that.

4 CHAIRMAN BURACK: Please proceed.

5 MR. GETZ: Well, turning to the
6 governing statute, 162-H:2, XII, states in pertinent part
7 that a "renewable energy facility shall include electric
8 generating station equipment of 30 megawatts or
9 less...which the Committee determines requires a
10 certificate, consistent with the findings and purposes set
11 forth in RSA 162-H:1." The statute places on the
12 Committee the duty of determining whether a facility
13 requires a certificate. It does not place a burden on the
14 Petitioner of demonstrating that its facility is required,
15 as the Towns and Counsel for the Public argue.
16 Timbertop's burden is a different one. It's burden is to
17 demonstrate why it requires a certificate. That is, why
18 the SEC should exercise jurisdiction.

19 Now, as for guidance for the Committee
20 in making its determination, the statute directs the
21 Committee to the findings and purposes of RSA 162-H:1.
22 That provision has three parts. And, I think it's helpful
23 as a start to examine the structure of the Purpose
24 section. First, "The Legislature recognizes". So, in

1 that first sentence, the Legislature recognized
2 essentially that the selection of sites for energy
3 facilities was important. It then goes on to the second
4 part of the provision. Here it says "Accordingly, the
5 Legislature finds", and it lays out the findings that all
6 of us have set forth in the briefs and in the different
7 arguments that have been provided to you. Among those are
8 "maintain a balance between the environment and the need
9 for new energy facilities", "avoiding undue delay", and
10 "resolving issues in a integrated fashion". And, that
11 section returns to the notion of balance, when it says
12 "all to assure that the state has an adequate and reliable
13 supply of energy in conformance with sound environmental
14 principles". Lastly, this section says "The Legislature,
15 therefore, hereby establishes a procedure for review,
16 approval, monitoring...and the planning, siting,
17 construction, and the operation of energy facilities."

18 This section, 162-H:1, tells us what the
19 Legislature was intending to do when it created the Site
20 Evaluation Committee. It does not establish independent,
21 substantive requirements as the Towns and Counsel for the
22 Public suggest. The Purpose section contains nonbinding
23 preparatory language that expresses the Legislature's
24 desire in establishing the Site Evaluation Committee.

1 162-H:1 does not provide that Timbertop must show that its
2 facility is needed. What it does is explain why the
3 Legislature created this Committee.

4 The rest of the chapter sets forth the
5 duties and obligations of the SEC in effectuating the
6 purpose. It lays out the composition of the Committee, it
7 talks to the processes, and, most important, in 162-H:16,
8 it sets forth the standards that you would employ in
9 approving a certificate.

10 Now, as to the issue of need,
11 Timbertop's interpretation that a showing of need is not
12 required is confirmed by the Legislature's express repeal
13 in 2009 of the requirement that Public Utilities -- that
14 the Public Utilities Commission find, in the case of bulk
15 power supply facilities, that construction of a particular
16 facility is required to meet the present and future need
17 for electricity. That requirement no longer exists. The
18 Towns and Counsel for the Public's focus on the need for
19 the Timbertop project is therefore misplaced.

20 The proper focus in determining whether
21 Timbertop requires a certificate is on the Towns, and
22 whether their procedure for review, of Timbertop or any
23 other facility, is consistent with the findings set forth
24 in 162-H:1. As Timbertop has expressed throughout this

1 proceeding, review by the Towns does not maintain a
2 balance between the environment and the need for new
3 energy facilities; it does not avoid undue delay in
4 construction of needed facilities; and it does not resolve
5 all environmental, economic and technical issues in an
6 integrated fashion.

7 If Timbertop can show that any one of
8 these propositions is the case, then Timbertop requires a
9 certificate. In other words, SEC jurisdiction is
10 necessary. And, the Committee itself put this test well
11 in its conclusion on Page 28 of the Antrim jurisdictional
12 order. Where it said "adequate protection of the
13 objectives and purposes of RSA 162-H:1 requires the
14 Committee to assert jurisdiction over the project." The
15 focus was on the towns and the procedure, not on the
16 Antrim project.

17 Now, I'll take these three issues in
18 reverse order. With respect to "resolving all issues in
19 an integrated fashion", the Towns' review is deficient in
20 two regards. First, and most obvious, the facility would
21 be subject to the jurisdiction of two towns, with two
22 ordinances. The Towns contend that integration is
23 achieved by joint review. Joint review, however, is
24 simply a procedural device. It resolves nothing. Even

1 with a joint review, the two Towns, even on issues where
2 their ordinances are the same, could make different
3 decisions, which would be subject to separate appeals.

4 Second, the Towns' reviews do not
5 incorporate the reviews of state agencies, as the SEC
6 does. As the Supreme Court stated in the *Public Service*
7 *Company of New Hampshire versus Town of Hampton* case, with
8 respect to the predecessor to this Committee, the
9 statutory scheme under 162-H envisions that all interests
10 be considered and all regulatory agencies combine for the
11 twin purposes of avoiding undue delay and resolving all
12 issues in an integrated fashion. Because the Towns are
13 not in a position to resolve all issues in an integrated
14 fashion, Timbertop requires a certificate.

15 With respect to the twin's purpose of
16 "avoiding undue delay", the Towns' review is deficient on
17 several grounds. First, at the front end of the process,
18 the Town ordinances will require variances. A process
19 that contemplates variances on its face builds in delay
20 that is undue. Second, at the back end of the process,
21 review by the town introduces additional layers of review
22 by the Superior Court and the Supreme Court. And, third,
23 the SEC, as noted in the Antrim case, provides a clear
24 path intended by the Legislature to avoid undue delay.

1 Finally, with respect to "maintaining
2 the proper balance between the environment and the need
3 for new energy facilities", the Towns went too far.
4 Timbertop's brief identifies five areas where the Towns'
5 ordinances do not maintain the proper balance. They are
6 height restrictions, setback restrictions, sound
7 restrictions, environmental impacts, and visual impacts.
8 Some of these provisions are objective and some are
9 subjective; all are out of balance when compared to other
10 statutes and/or decisions of this Committee.

11 First, with respect to visual impact.
12 RSA 162-H:16, IV, provides that the Committee must find
13 that a facility "will have not have an unreasonable
14 adverse effect on aesthetics." The Towns' ordinances,
15 however, provide that a facility not cause "adverse visual
16 impacts". The Committee's decisions in this area,
17 beginning with Lempster, recognized that there could be
18 visual impacts from wind turbines that were not
19 unreasonably adverse. The Towns' standard, by eliminating
20 the word "unreasonable", changes the balance established
21 by the Legislature. The Towns also go too far in this
22 area by requiring automatic lighting obstruction systems
23 that exceed FAA requirements.

24 Second, with respect to environmental

1 impacts, RSA 162-H:16 provides that the Committee must
2 find that a facility "will not have an unreasonable
3 adverse effect on...the natural environment". Again, the
4 Towns disturb the balance intended by the Legislature by
5 adopting more restrictive standards; namely, no
6 significant adverse impact on wildlife, no adverse impact
7 on bat or bird species, and no adverse effect on ground
8 and surface waters.

9 Third, with respect to sound
10 restrictions, the Towns employ a standard of 33 dBA, with
11 a 5 dBA design margin, anywhere, any time, on a
12 non-participating landowner's property. This standard is
13 much lower than the 55 decibels limit set by the
14 Legislature for small wind energy systems, and lower than
15 the requirements imposed by this Committee after hearing
16 from expert witnesses subject to cross-examination.

17 Fourth, with respect to setback
18 restrictions, the Towns have taken different approaches,
19 and such is the case also with respect to height
20 restrictions. These issues are described in detail in the
21 brief, I won't go further into those. But just to note
22 that, in both cases, is the balance altered from what was
23 intended by the Legislature, and they also, because there
24 are different restrictions in the two towns, will lead to

1 undue delay.

2 Finally, and I will not restate here,
3 but, as I noted on previous occasions, that there are
4 sufficient facts that have been put forth for the
5 Committee to render a decision.

6 So, in conclusion, when an energy
7 facility is to be constructed in multiple towns, there are
8 inherent procedural problems in terms of comprehensive
9 review, and the twin purposes of "avoiding undue delay"
10 and "resolving issues in an integrated fashion" that the
11 SEC was created to address are not present. The Towns'
12 ordinances also have shifted the balance against new
13 energy facilities. As a result, the SEC jurisdiction is
14 required to right the balance, and it is also required in
15 order to avoid undue delay and resolve all issues in an
16 integrated fashion.

17 That completes my remarks. And, as I
18 understand it, questions will follow all of the
19 presentations?

20 CHAIRMAN BURACK: That's correct,
21 Attorney Getz. Thank you.

22 MR. GETZ: Thank you, Mr. Chairman,
23 members of the Committee.

24 CHAIRMAN BURACK: Thank you very much.

1 Okay. I believe we will next hear argument from the
2 Towns, unless you all have discussed --

3 MR. ROTH: Mr. Chairman, yes. We
4 actually did confer before the hearing, and decided that I
5 would go first.

6 CHAIRMAN BURACK: Very well. Please
7 proceed, Attorney Roth.

8 MR. ROTH: Thank you. And, good morning
9 again, everybody. I'm going to be very brief this
10 morning, and I'm not going to repeat all the arguments
11 made in the memorandum of law and the brief that I
12 prepared and filed last week. But I did have a few things
13 to say.

14 First, with respect to my role. My role
15 here is a little bit different than the Petitioner and a
16 little bit different than the Towns. And, so, I take the
17 -- my role is essentially to look at the findings and
18 purposes of the statute on a regular basis with every
19 case, and make sure that there's a balance that's been met
20 between the need for the energy facility and the energy
21 and the impacts that that facility would cause when it was
22 constructed or in the process of construction. So, my
23 role is, I guess, somewhere in the middle. You know, I
24 get kicked from both sides from time to time. And, I

1 think back to a question that was asked of me during the
2 Antrim discussion by Attorney Iacopino. And, that was
3 something along the lines of "aren't there going to be
4 cases when you want to have jurisdiction imposed on a
5 facility even without an application?" Because I was
6 making the argument "There is no application, we don't
7 know enough about this facility. Why should we do this?"
8 You know, "we should defer until they come forward with
9 something a little more concrete." And, Mr. Iacopino
10 asked me, "so, you know, aren't there going to be cases
11 where they don't do an application? You couldn't get them
12 to do an application if you put a gun to their head."
13 And, I have to concede that that's correct. And, so, I
14 started thinking "what is the purpose of jurisdiction when
15 it's not essentially mandatory?" And, the purpose of
16 jurisdiction when it's not mandatory, that is, any project
17 over 30 megawatts, is you have to give the opportunity of
18 the Committee to look at projects where there's going to
19 be a big impact, and that would be not reviewed by a state
20 agency, or the project is of really big importance. And,
21 I think that's consistent with the findings and purposes.

22 And, I take issue with something that
23 the Petitioner argues, and that is you only need to find
24 one of the findings and Petition -- findings and purposes

1 applies. I think you need to look at them all. And, I
2 think this Committee has consistently looked at them all
3 to make a decision. You know, do all of these factors
4 sort of create a weight of sorts that says you should take
5 jurisdiction.

6 The need for energy is just one element
7 of that analysis. It's part of the balance that we have
8 to make. I don't think, you know, Counsel for the Public,
9 in its -- in my memorandum, is arguing "need for energy is
10 everything", it's all over with that. I can simply say
11 that, in the balance, you have to evaluate "Is there a
12 need for this energy? Is it so important that we can't
13 allow a town to get in the way of it?" And, I think the
14 answer is essentially avoided by the Petitioner's approach
15 to it. They essentially write out of the statute the
16 "need" analysis. They say it's "precatory" and
17 "nonbinding language". And, I find that to be as kind of
18 an unusual and almost shocking thing to say in the context
19 of this particular exercise. Is it all "nonbinding" and
20 "precatory"? No, of course not. The statute, RSA
21 162-H:2, XII, says "jurisdiction is going to be had when
22 it's consistent with the findings and purposes". It
23 doesn't say one of them, it says all of them. So, the
24 Petitioner is trying to essentially snatch ambiguity from

1 the jaws of clarity in the statute. And, the statute very
2 clearly says you have to consider whether there's a need.
3 And, I think that makes sense consistent with the purposes
4 and findings, and the plain language of the statute.

5 The Petitioner also goes on to describe
6 how, "Well, in the Groton case, Counsel for the Public
7 argued this, that, you know, the need for energy was the
8 issue." And, I think that's a little bit unfair in terms
9 of characterizing what I did there. And, what I said, and
10 this is the same thing I'm saying here, that is, when you
11 consider the environmental impacts of a project, you have
12 to balance that with the need and the amount of
13 electricity that you're getting from it. So, if you have
14 a lot of electricity, maybe you can tolerate more impact.
15 If you have a little bit of electricity, maybe you can
16 only tolerate a little bit of impacts in order to keep the
17 scales even. So, this Groton -- you know, the Groton
18 analysis and the reference to 162-H:16 is a bit of apples
19 and oranges, I think. Because the 162-H:16 certification
20 requirement deals with, you know, the end product. And,
21 you -- when you have a case where it's over 30 megawatts,
22 you have a presumption of need. So, you don't have to
23 think about it. But I think it's clear enough from the
24 statutory language in 162-H:2, XII, and 162-H:1, that you

1 have to consider the question of need when you're doing an
2 analysis of whether jurisdiction is going to lie. And, I
3 think that, you know, it may be a dispositive in this
4 case. But, I think, if we go back to the overall question
5 that I started with, and this is where I'm going to
6 finish, is this -- is there a big impact or is there big
7 importance to this project? I think, from the record, we
8 don't see big importance for this project. It's a little
9 bit difficult to tell whether there's a big impact. But,
10 I think, as I set out in my brief, there's not a lot of
11 evidence that there's going to be a big impact.

12 So, on that basis, I think the need for
13 jurisdiction, in this particular case, is absent. And, I
14 think, at this point, because of that, the Committee
15 should deny the Petition. Thank you.

16 CHAIRMAN BURACK: Thank you very much,
17 Attorney Roth. Attorney Richardson.

18 MR. RICHARDSON: Good morning again.
19 And, thank you for your time today and your consideration
20 of this matter. RSA 162-H starts with, basically, the
21 statement that energy facilities are really important,
22 they're important to the entire State of New Hampshire,
23 but not all of them. The standard is that those above 30
24 megawatts are so important that review is required by this

1 Committee, and those below it is not. The burden is then
2 on Timbertop Wind to show why its project is so much like
3 those bigger ones. And, when you read, and this really
4 struck me, when I read Timbertop's memorandum, there was a
5 statement to the effect that "the focus is on the Towns'
6 ordinance." And, ironically, if you read ours, you'll see
7 a statement that says "the focus is on the project." And,
8 I talk with Rob Upton in my office sometimes. And,
9 whenever I ask him a legal question, the first thing he
10 says to me is "Well, what does the statute say?" And, I
11 think that's what we have to look to here, because
12 statutes are to be interpreted by their plain and ordinary
13 meaning, unless they're ambiguous. I mean, that is just
14 black letter law. When you read every single statutory
15 record -- interpretation case from the Supreme Court, from
16 agencies, we always look to the language first. And,
17 162-H:2 refers to "a renewable energy facility shall also
18 include", in other words, there is the larger than
19 30 megawatts, but then there's this other thing, the
20 "smaller than". And, the focus is on whether the
21 generating statement [station?] and equipment and
22 associated facilities", it then goes on to say "which the
23 Committee determines requires a certificate."

24 So, the Legislature has asked you to

1 look at the project. We must understand that the
2 Legislature knows how to enact laws that say
3 "municipalities can't regulate things." A perfect example
4 is agriculture. When you read RSA 674, the zoning laws,
5 it says that "unless specifically prohibited, a
6 municipality cannot use its zoning ordinance to regulate
7 agriculture." The same thing with forestry. There are
8 plenty of laws on the books where the Legislature says
9 "municipalities, you simply can't go and regulate these
10 fields." This is not one of them. Below 30 megawatts,
11 municipalities are entitled to regulate energy facilities,
12 in the same sense that they would any other industrial or
13 commercial project through their zoning, consistent with
14 their master plans.

15 So, how then do we determine whether
16 this project is one that is so important that it requires
17 review by the Committee? And, "requires" is a significant
18 word. To me, the word "requires" suggests almost like an
19 absolute. In itself it suggests need. I mean, it's not a
20 word where maybe it should, maybe it shouldn't, or it's
21 not simply for the convenience. And, a lot of the
22 arguments I think you've heard from the Applicant suggests
23 that really what's happening here is is it would be better
24 if they didn't have to comply with the Towns' ordinance,

1 because it would cost less money or it would be easier to
2 design a project, perhaps build a bigger one.

3 But the Legislature didn't ask you to
4 consider those criteria. What they said was, you have to
5 find that this project requires a certificate. If you
6 don't make that finding, in other words, if you don't find
7 something that were to -- if you don't find jurisdiction,
8 something really bad would happen to the findings and
9 purposes that are in 162-H. And, we just don't see that
10 here.

11 The other thing that's important, and I
12 think that has been missed or I don't want to be
13 overlooked, is that it is both the findings and the
14 purposes. And, that's significant, because the
15 Legislature could have just said "purposes", and then you
16 could throw everything into the mix. But, when you look
17 at what 162-H is, there's actually two components to it.
18 And, the first, Attorney Getz, in his presentation, kind
19 of skipped over it. And, that is he started with "The
20 Legislature recognizes that the selection of sites for
21 energy facilities", but then he jumps straight to the next
22 sentence, which is the findings. But what the Legislature
23 actually said is is that "the selection of sites...will
24 have a significant impact upon the welfare of the

1 population, the location and growth of industry, the
2 overall economic growth of the state, and the environment
3 of the state, and the use of natural resources."

4 Now, it's Timbertop Wind's burden of
5 proof. I can't go out and prove a real absence of this,
6 although I think, in the "need" area, there isn't any
7 evidence, and you probably couldn't find any, that would
8 show that a 15-megawatt facility, which is probably going
9 to operate at a 30 percent capacity factor or less, that's
10 5 megawatts, I don't think that you could find that that's
11 necessary for the welfare of the population or necessary
12 for the growth of industry. You know, this isn't like the
13 City of Berlin, where you might have a mill that's closing
14 down, and, you know, it's absolutely essential that we get
15 something in there, because otherwise people are not going
16 to have jobs, you know, the economy is going to suffer.
17 This is simply a project that, in the Applicant's view, it
18 would be better to proceed under the standards that the
19 Committee has applied than under the standards the Towns
20 have applied. And, that brings me back to, well, if
21 that's what the Legislature meant, let's prohibit towns
22 from imposing standards that are too stringent. Why
23 didn't they write a law that said that? I mean, they
24 clearly know how to. They have done it in numerous other

1 circumstances.

2 The findings, when you go to the next
3 sentence in 162-H, it says "Accordingly, the Legislature
4 finds that it is in the public interest to maintain a
5 balance between the environment and the need for new
6 energy". And, that's why I refer to, in our memorandum
7 and today, those are the findings, when the Legislature
8 says "the purposes and the findings", when you look at 1,
9 you see the word "finds" there. And, I think that it's
10 pretty clear that there are two things. Those are
11 findings right there, the other stuff is the purposes.

12 And, you know, it's interesting, because
13 162-H -- or, the Towns, excuse me, it's not that they
14 haven't failed to protect the environment. In fact, I
15 think the Applicant would probably argue that they do it
16 too well. So, in terms of balancing the protection of the
17 environment, I think it's clear the Towns have done their
18 job. So, that the question then shifts to, "well, where
19 is the need for new energy facilities?" And, that's not
20 our burden to prove, and I don't think you can prove it in
21 this case, because this project is simply too small to be
22 important for the public welfare. Thirty megawatts is the
23 presumption above which the need is presumed to be there.
24 And, below that, it's up to the Applicant to do the job or

1 the Petitioner, in this case, to show why that's the case.
2 And, there simply isn't any evidence to demonstrate that.

3 "Need" is referred to three times in the
4 statute. So, I think it's clear that the Legislature
5 wants this Committee to consider it. And, the fact that
6 "need" was removed from the criteria for approving a
7 project under 162-H:16 is entirely irrelevant, because
8 what the Legislature said is is "well, you're above
9 30 megawatts, of course, it's needed." I mean, when you
10 have big projects, that involves a significant impact on
11 the economy, it's significant enough to impact the supply
12 of energy, such that we're going to give this project to
13 the Committee to review. Below that, it's up to the
14 Applicant to show that, or the Petitioner. And, the
15 criteria are there. I mean, three times we see "need for
16 new energy facilities", "undue delay in the construction
17 of needed facilities", and, then, the final, which is, I
18 think, the most interesting, the last criteria, the fifth
19 one or the sixth one, if you look at the Antrim decision,
20 it says "all to assure that the state has an adequate and
21 reliable supply of energy". Now, "adequate" means
22 "sufficient", there's enough it. "Reliable" means, in
23 terms of, and the PUC Commissioners will know this, in
24 terms of electric reliability, in other words, will the

1 grid be stable, will there be sufficient VAR support,
2 ability to follow load. Those are all types of things
3 that a petitioner could bring forward and say "hey, look,
4 this project is extremely important for reliability of the
5 electric grid." And, there's just no evidence that that's
6 the case in this project.

7 Now, I hope this Committee understands
8 that there's some irony in Timbertop's arguments. They
9 argue, and I believe you just heard Timbertop state, that
10 "need is nonbinding" or that "the purposes in RSA 162-H
11 are nonbinding." But they're asking you to treat the need
12 to balance the environmental protections or the standards
13 as if it's an absolute mandate. They're all in 162-H:1.
14 And, I think they all have to be considered according to
15 the plain meaning of the statute. You can't have parts of
16 the statute be completely ignored, while treating the
17 other ones as a statutory mandate.

18 There's another thing that we cite in
19 our brief, and I want to bring to the Committee's
20 attention, because I think it's very important. The
21 Committee's precedent is binding upon every project -- or,
22 excuse me, the precedent, the decisions made by the
23 Committee are binding on that project, because this
24 Committee, under 162-H:16, is required to consider the

1 evidence that comes before it. But that precedent is not
2 law. There's a case we cite in our brief, it's *Appeal of*
3 *Nolan*, 134 NH 723. And, then, citing another case that's
4 troubling to pronounce, *Appeal of Monsieur Henri Wines*,
5 and that's 128 NH 191. And, the Court says that "The
6 Legislature may not delegate the power to make law. It
7 may only confer the authority or discretion as to the
8 execution to be exercised in -- under and in pursuant of
9 the law."

10 Now, this agency obviously has the
11 authority to adopt rules, and could make rules for what
12 has to be in the application, how they meet particular
13 standards. But it doesn't have the authority, as
14 *Timbertop Wind* suggests, to make its precedent simply a
15 statewide standard above which municipalities cannot
16 regulate. It didn't set a cap. And, had they intended to
17 do that, they would have had to put something in the
18 statute, which they know how to do. They can say "do not
19 regulate timber", "do not regulate forestry". There are a
20 number of other subjects that municipalities simply cannot
21 regulate. But, in this case, it's *Timbertop Wind*'s burden
22 to show why their project is so important, so critical,
23 that it has to come below the -- come before this
24 Committee. Because, at 30 megawatts, it's presumed to be

1 important; below 30 megawatts, it's not. And, if we were
2 to simply say that "the ordinance is too stringent,
3 therefore, we're going to take jurisdiction", what does
4 that mean for the State of New Hampshire? The Towns of
5 Temple and New Ipswich have gone through incredible
6 research to develop an ordinance that allows energy
7 facilities to be constructed. Is this Committee going to
8 send a message that, "if you do it too well, if you
9 protect the environment, we're going to take jurisdiction
10 away from you"? Of course, if they don't do it well
11 enough, then we're going to create the opposite problem,
12 where projects will say "Let's go in front of the
13 ordinance. We'll design a project below 30 megawatts."
14 And, then, the standards that are supposed to be
15 protecting the environmental quality, they're not going to
16 be protected. Because, you know, if a municipality
17 approaches the line, jurisdiction gets taken away. So, if
18 they have to stand far off from it, they're not going to
19 be able to do their job, they're not going to be able to
20 protect the welfare of the public and land use in
21 different communities. And, what you'd end up with is,
22 ironically, abutters in town saying "Oh, wait a minute.
23 There is a really significant impact on the environment
24 here. It's not addressed in the zoning ordinance. So, we

1 want to opt in." And, that's a real problem, from my
2 perspective, because I don't think we want to punish towns
3 for protecting the environment, particularly where they
4 make the use an allowed use.

5 And, so, you know, it just comes back to
6 the statute. Where does RSA 162-H say that the law or
7 this Committee is supposed to review ordinances and
8 determine whether or not it's too stringent? It's a very
9 simple law to write, and the Legislature clearly did not
10 do that.

11 I think, ultimately, what this project
12 comes down to is a business decision to be made by
13 Timbertop Wind. They're not here for any other reason
14 that they want to build a project, and they want to do it
15 as profitably as they can. Nobody blames them for that.
16 But the benefits from this wind energy project, they don't
17 inure to the public, they don't inure to the electric
18 grid. There's no evidence to support that. What we have
19 is a tax code that may or may not be extended, that
20 provides tremendous tax benefits to the investors to build
21 a project. But that's not one of the criteria that allows
22 this Committee to assert jurisdiction, nor is the
23 stringency of the Towns' ordinances.

24 Every petition, every project has to be

1 reviewed on its own merits. And, I am sure that there
2 have been projects that have come before this Committee in
3 which people, maybe abutters, maybe the towns have said,
4 you know, "you've gone too far" or "you haven't gone far
5 enough." The Town of Temple and New Ipswich is no
6 different. Like this Committee, they had to choose a
7 standard that applied. But the question is, in this case,
8 "whether or not the purposes and findings of 162-H:1
9 require that there be a certificate?" And, there simply
10 isn't any evidence on that point.

11 My outline was based on whether or not
12 -- I was assuming there would be questions. And, I plan
13 to address things like whether or not RPS should be
14 considered, those are all in our brief. I'll defer to
15 those. But, unless members want me to do it now, I could
16 put that forward.

17 CHAIRMAN BURACK: That's fine. We'll
18 take it as the submittal within the brief itself.

19 MR. RICHARDSON: Thank you.

20 CHAIRMAN BURACK: Thank you, Attorney
21 Richardson. Attorney Getz, we'll provide you an
22 opportunity, if you'd like a brief rebuttal. And, then, I
23 think we're going to have questions from the Committee.

24 MR. ROTH: Mr. Chairman?

1 CHAIRMAN BURACK: Yes.

2 MR. ROTH: Before he does that, I'm
3 sorry to interrupt you, Tom, but there is one very minor
4 technical point that I wanted to cover with the Committee
5 about a missing figure from my brief.

6 CHAIRMAN BURACK: Please proceed. I did
7 notice that.

8 MR. ROTH: On Page 6, and in Footnote
9 16, there was a fraction. And, I was very clever with
10 word processing, you know, the Word for Windows program,
11 they had this really neat thing where you could have a
12 fraction, a mathematical fraction shown. And, when I
13 converted it to pdf, it left it out. The fraction is
14 1/1000th. And, that goes in, one, two, three -- fourth
15 line on Page 6, and the Footnote 16. Thank you.

16 CHAIRMAN BURACK: Attorney Getz, please
17 proceed. Please proceed.

18 MR. GETZ: Thank you, Mr. Chairman. The
19 decision before you is whether to step in.
20 Unsurprisingly, the Towns urge you not to step in. And,
21 chief among their arguments is that "Timbertop is an
22 ordinary project that is not needed." They take this
23 interpretation of the statute that "Timbertop must show
24 that it is so important that you must exercise

1 jurisdiction." Well, that analysis, that approach, you've
2 already dealt with that in the Antrim case. In the Antrim
3 case, the focus was on "was there adequate protection, in
4 terms of maintaining the purposes and findings of the
5 statute?" So, their arguments are beside the point.

6 Their arguments are also flawed, when
7 they are structured both by Counsel for the Public and the
8 Towns suggests that above 30 megawatts its need is
9 presumed or you don't have to show need. Well, that
10 ignores the historic structure of 162-H:16, which required
11 a specific finding by the Public Utilities Commission of
12 the need for the project. Subsequent to restructuring,
13 and subsequent to the repeal of the finding requirement,
14 there is no longer a requirement to demonstrate need.
15 What the Legislature has done is, in a deregulated
16 environment, says that projects who, in this environment,
17 want to get approval, go to the SEC if you're above
18 30 megawatts, and they will deal with, essentially, the
19 environmental issues. And, that's how, you know, this
20 bill originally was described at the Legislature by -- in
21 1971 as an environmental bill.

22 So, and there's also, I think, if you
23 take their arguments to their logical extreme, that any
24 facility under 30 megawatts would have to show that it is

1 needed. Given the size of the electric marketplace, how
2 could any project of 15, 20 megawatts show that it is so
3 important to all of the purposes of the statute that it
4 would be needed? It's beside the point. The focus is on
5 the Towns, the Towns' ordinances that they maintain a
6 balance, the Towns' procedures. Are they integrated and
7 do they lead to undue delay?

8 I also want to point out to this
9 generalized balancing argument that Counsel for the Public
10 makes. The Committee has essentially addressed that issue
11 as well. In the Groton case, there was an argument that,
12 in addition to going through the findings, that the
13 Committee should do a generalized balancing test. There
14 the Committee said that "the balancing argument mistakenly
15 conflates the general language of the Declaration of
16 Purpose with the specific findings under 162-H:16." Now,
17 that was in the context of an application, this is in the
18 context of a petition for jurisdiction, but the principle
19 is the same. What you should be looking at is, "Do the
20 findings, are they satisfied by town jurisdiction?" If
21 they're not satisfied by town jurisdiction, then the SEC
22 should take jurisdiction. And, that's the position that
23 we hope you will agree with. Thank you.

24 CHAIRMAN BURACK: Thank you very much,

1 Attorney Getz. I would like now to turn to members of the
2 Committee, if they have questions for any of the attorneys
3 here. And, we will start with Commissioner Scott.

4 CMSR. SCOTT: Thank you. Good morning.
5 I'll start with Attorney Getz. I just wanted to re-cover
6 some of the ground your testimony talks to. Is it your
7 position that a town cannot adopt more stringent standards
8 for siting than the state?

9 MR. GETZ: No. Our position is that
10 it's a factual determination for this Committee to
11 determine whether those ordinances maintain the balance
12 intended by the Legislature. It's potentially the case
13 that they would be -- that a town, in the abstract, could
14 pass that test. The Towns, in this case, do not pass that
15 test. And, therefore, jurisdiction should go to the
16 Committee.

17 CMSR. SCOTT: Okay. And, help me flesh
18 out a little bit the balance requirement. So, 162-H
19 clearly requires a balance if a project would be over
20 30 megawatts, that seems fairly clear. It seems
21 discretionary, some of the language between 5 and
22 30 megawatts.

23 MR. GETZ: Well, I would quibble in this
24 regard. It's not discretionary that is unfettered. What

1 is required is an exercise of judgment, based on the facts
2 and based on the guidance provided in the findings
3 section, and directing you towards "is the balance
4 maintained?" And, looking at what has this town or any
5 other town done in creating its ordinances, and have they
6 maintained the balance, have they provided the adequate
7 protection, as the language was in Antrim.

8 CMSR. SCOTT: And, perhaps, and
9 hopefully this is on the same theme, at least in my mind
10 it is, I'll pick at the ordinance regarding the sounds.
11 Are you aware of any projects, well, anywhere, that
12 currently meet that sound requirement for wind?

13 MR. GETZ: I am not.

14 CMSR. SCOTT: Okay. So, is it your
15 position that, effectively, this, again, I'm picking on
16 one subset, I understand, but that the Towns' ordinances
17 are a *de facto* ban on wind projects?

18 MR. GETZ: Again, that's not the test.
19 The test is whether they maintain the balance. The
20 benchmark for determining whether they have maintained the
21 balance is to look at state law. If you look at the
22 standard that was set for small wind energy systems now
23 that, you know, do not apply directly to this, but it sets
24 a benchmark, it suggests what the Legislature thought, and

1 you look at what this Committee has done in other cases,
2 their standard is much lower than those standards. And,
3 we conclude that they don't maintain the appropriate
4 balance. It's not an issue of whether it could or
5 couldn't be met, and I think this is this argument about
6 where I think both the Towns and Counsel for the Public
7 equate exclusionary zoning, and that Timbertop should be
8 showing why it can't do something. That's not relevant.
9 What's relevant is what has it done and how -- what has
10 the Towns done and how does that, what they have done,
11 compare to some independent benchmarks.

12 CMSR. SCOTT: And, you mentioned
13 "precedent", or at least what the Committee has done in
14 the past. Is it not correct that past SEC jurisdictional
15 cases where they have taken jurisdiction for projects
16 below 30 megawatts, in those cases the towns have actually
17 petitioned and asked for the SEC to take jurisdiction?

18 MR. GETZ: I think that's the case.

19 CMSR. SCOTT: Thank you. And,
20 Mr. Chair, I have some questions for others, but not Mr.
21 Getz now.

22 CHAIRMAN BURACK: Why don't you -- why
23 don't you go ahead and proceed with your questions. Then,
24 we'll just work our way around to anybody who would like

1 to ask questions.

2 CMSR. SCOTT: Okay. Thank you. And,
3 now I'll ask the Town, I don't know if Mr. Richardson is
4 the best one or whoever you think. I'm going to retread a
5 little bit of the same ground I just did.

6 As the Towns were developing their
7 projects, and again I'll, for simplicity, I'll pick on the
8 wind -- the sound requirements, are they aware of any
9 projects that currently exist that meet these sound
10 requirements?

11 MR. RICHARDSON: Certainly, they
12 believed that it was possible to build a project like
13 that. And, if you look at, in the materials, if you have
14 them in front, I'm happy to give you my copy, if you need
15 it, there's a exhibit on Page 165, it's Exhibit 14. And,
16 what that shows is a -- and this was provided actually by
17 Timbertop Wind to the New Ipswich Planning Board, when
18 they were designing their ordinance. And, it showed a --
19 I forget, I believe the Groton Wind Project was 50
20 megawatts. And, what it showed was, you'll see various
21 bars for different sound levels. And, by the time you get
22 to the area around the Rumney Depot, they are outside --
23 or, excuse me, they're outside a 35 megawatt sound level,
24 but then there's also a dark blue line, which is the 30

1 megawatt sound level. And, based on this, the Towns
2 believed that a much smaller project, obviously, the
3 amount of land that's involved in New Ipswich and Temple
4 is not as great, this is a 15-megawatt facility, not a 50
5 one. They thought that 33 megawatts [dBA?] could be met.

6 But, you know, the more important, I
7 think, consideration in all of this, too, is is how
8 different their communities are from the other ones where
9 wind energy facilities are sited. Because even this
10 Committee, when it reviews a project, has to find that the
11 impacts are not unreasonably adverse. And, so, they were
12 looking at projects where the residences are much closer
13 to the actual turbine locations. And, so, that's another
14 reason, I think, that motivated them to be concerned, and
15 their experts ultimately advised New Ipswich, and then
16 Temple had its own expert, that the 33 dBA standard would
17 be sufficient to ensure that there were not widespread
18 complaints. The standard, under the EPA methodology, was
19 sporadic complaints. So, their goal was to find a level
20 at which there would be some -- some complaints
21 sporadically might occur, but not that they would reach a
22 widespread level.

23 CMSR. SCOTT: Thank you. And, earlier
24 you mentioned "33 megawatts", I took that to mean "33

1 decibels"?

2 MR. RICHARDSON: It's so easy, but I
3 have the terms jump around. Yes, you're correct, "33
4 dBA".

5 CMSR. SCOTT: On a slightly different
6 tack, there is some testimony regarding RSA 674, the small
7 wind energy systems, which is 674:62 and 366, I believe.

8 MR. RICHARDSON: Uh-huh.

9 CMSR. SCOTT: Does either of the Towns
10 have any regulation along those lines for small wind
11 energy systems?

12 MR. RICHARDSON: They actually both have
13 small wind energy system ordinances. And, they may be
14 included in Timbertop's original filing. The zoning
15 ordinances are there. And, I'm going to flip to -- well,
16 the pages aren't numbered, but Attachment 2 are the
17 ordinances. You see the New Ipswich Ordinance from 2010,
18 and then from 2012, about 20 pages later. Yes, they do.
19 And, we'd be happy to provide those, if it were important,
20 and if they're not already in the record.

21 MR. IACOPINO: Just for clarity, you're
22 referring to the Petition for Jurisdiction?

23 MR. RICHARDSON: That's correct. And, I
24 didn't, because their ordinances were already part of the

1 record, I felt this Committee doesn't want to get drowned
2 in too much paper. So, --

3 MR. ROTH: If I can be of assistance, I
4 think, if you have this binder, it's about a quarter of an
5 inch in, and it's marked -- I think one of the Towns, it
6 starts at Page 63 of -- that's numbered at the bottom of
7 their -- of the Town's document.

8 MR. IACOPINO: If you're looking at it
9 electronically on the pdf, it's Page 32 of the pdf. Well,
10 actually, that's where the ordinances start.

11 CMSR. SCOTT: Thank you. I found it.

12 MR. RICHARDSON: Yes. Okay. And, there
13 are important reasons why the -- and that's, I believe,
14 explained in Ms. Freeman and Mr. Dekker's testimony for
15 New Ipswich. A 100 kW facility, that's the limit for a
16 small wind energy facility under RSA 674:63. No one's
17 going to put one of those on a 300-foot tower. The
18 turbines themselves are much, much smaller in size,
19 there's less energy involved. They don't produce the same
20 sound levels. And, so, -- and, because they're down at a
21 lower level, you don't see the potential for noise to
22 migrate. It's different atmospheric conditions, I
23 believe. So, there's a number of different reasons why
24 it's not -- well, first of all, it's not legally

1 applicable, and also why, from a physical construction
2 standpoint, why a small wind energy system, even at the
3 same power level at the property line would not have the
4 same impacts on the community.

5 CMSR. SCOTT: Well, help me tease that
6 out a little bit, if you would. If I'm living next door
7 to a small turbine, and it's at 55 dBA as the state law
8 sets as a minimum -- a maximum -- a minimum, how is that
9 different? I'm going to be still hearing that. Whether
10 my neighbors hear it may be irrelevant to me, but I'll
11 still hear that. So, what's the balance there?

12 MR. RICHARDSON: Well, unfortunately, if
13 you were the abutter in that case, I -- you know, it may
14 be that you're not very well protected by that standard.
15 But it's less likely that someone a half a mile down the
16 road would also be impacted by it, because it's a
17 different type of facility. So, you know, for better or
18 for worst, the Legislature has given greater leniency to
19 small wind energy systems, but the cutoff is 100 kW.

20 CMSR. SCOTT: Thank you. That's all I
21 have.

22 CHAIRMAN BURACK: Thank you very much,
23 Commissioner Scott. Commissioner Harrington.

24 CMSR. HARRINGTON: Yes. Good morning.

1 A few questions. I guess this would go to both
2 Mr. Richardson and Mr. Roth. I just wondered if you care
3 to comment on the statute 674:17, I(j). Let's see if I've
4 got that right. Yes. And, it says -- this is the
5 "Purposes of Zoning Ordinances". And, it says "To
6 encourage the installation and use of solar, wind, and
7 other renewable energy systems". Does the Town ordinance
8 do that?

9 MR. RICHARDSON: Yes. In fact, both
10 ordinances make this an allowed use, and as a way to
11 promote this. In other words, once a project came before
12 the Committee -- excuse me, before the Town Planning
13 Boards, the issue of "is a wind project allowed or not
14 allowed in the Town of New Ipswich and in the Town of
15 Temple?" It would not be a consideration. And, in fact,
16 when you were to -- if they were to need a variance, you'd
17 actually look at the spirit of the ordinance as one of the
18 criteria. And, because they made wind energy an allowed
19 use, large wind energy, that's certainly what the purpose
20 of that ordinance is, is to actually promote systems,
21 provided that they don't have an unreasonable impact on
22 the surrounding properties.

23 CMSR. HARRINGTON: And, you feel as
24 though that 35 decibels is a fair standard for sound?

1 MR. RICHARDSON: 33 dBA was what they
2 were advised, using the EPA methodology, would result in a
3 measurement of sporadic complaints within the community.
4 Understand as well, though, that, and as explained in
5 their testimony, these ordinances were written with a
6 couple of different safety valves. The first was that a
7 project developer could obtain the consent of the abutting
8 property owners, and they would effectively become like
9 participating landowners. And, so, the noise measurement
10 standard would be measured out at the next property. And,
11 some of the properties are fairly significant up on the
12 mountains.

13 The other aspect of this is is that, you
14 know, the science has changed. I mean, ten years ago I
15 don't think anyone understood or expected that wind energy
16 was going to be developed in New Hampshire. As the
17 technology has improved, you know, you've seen better
18 turbine designs that make less noise. And, so, that's
19 another factor, is is that it may be that a modification
20 to a project could come forward. But, ultimately, the
21 ordinances were written such that, if an applicant were
22 able to demonstrate "this project will not, based on the
23 evidence, will not cause adverse impacts on the
24 communities, under -- by meeting, say, a 35 or a 36", I

1 mean, if you look at Page 165, what you've seen in Groton,
2 you know, you see that there's tremendous variability in
3 the lines of how the noise carries and how they predict it
4 in their sound models. It may be that they could develop
5 a project that would allow -- basically be built, but not
6 have an adverse impact at some other level. But that's
7 really a question to be -- or, an argument to be made in
8 another case.

9 CMSR. HARRINGTON: And, ordinances,
10 there must be wind ordinances in many towns across the
11 United States. Are there any that impose this? Or, if
12 there aren't, what do they use?

13 MR. RICHARDSON: I could get that
14 information to you. We believe that Wisconsin had adopted
15 a similar noise ordinance. Was it 33? Okay, it may have
16 been recommended. You know, one of the things that I
17 think is important, too, is is that the information that's
18 been available on noise impacts has changed tremendously.
19 And, as, you know, the WHO guidelines, as this Committee
20 knows, has been revised, this Committee has revised its
21 standards as it's considered new projects. And, that was
22 -- I think that that was an important consideration as
23 well, is, you know, "could this project be built?" But,
24 also, "what is the sound level that is needed to protect

1 the public in this case?"

2 CMSR. HARRINGTON: Okay. And, Mr. Roth,
3 would you like to comment on that same law, that "To
4 encourage the installation and use of solar, wind and
5 other renewable energy systems". Do you feel the
6 ordinances, as written, do that?

7 MR. ROTH: I would, very briefly. I
8 think 674:17 comes out of a specific legislative mandate,
9 and I recall reading the legislative history of this
10 particular law when we were having a discussion during
11 Antrim over a subdivision. And, there was a specific
12 legislative mandate to encourage people to develop small
13 wind. There is no such statute encouraging people to
14 develop utility-size scale wind on their property. RSA
15 162-H doesn't purport to do that. It's not an
16 encouragement statute, it's simply a regulation of how you
17 go about doing it. Whereas, I think there was a specific
18 legislative intent in 674 to encourage and promote its
19 use.

20 CMSR. HARRINGTON: So, you --

21 MR. ROTH: I'd also point out that I
22 think --

23 CMSR. HARRINGTON: Excuse me, but just
24 so we're clear on what we're saying here, it doesn't say

1 anything in the law about "small solar" or "small wind".
2 It says "To encourage the installation and use of solar,
3 wind, and other renewable energy systems".

4 MR. ROTH: Right. But the legislative
5 history of that deals with small wind. And, the
6 ordinances that have come out, and this is not my area,
7 unfortunately, the ordinances that have come out all deal
8 with small projects like that. And, I think what's, you
9 know, I think to bear in mind is that this particular
10 statute, 674, this is sort of the strawman technique that
11 the Petitioner is using. It's largely irrelevant, because
12 the Legislature has told you not to go and look at 674:17.
13 The Legislature has told you to go and look at 162-H:1 for
14 your intents and purposes. So, what the Legislature may
15 say about something -- about wind, and whether it's small
16 or not, in 674, is not within sort of your jurisdiction to
17 look to, because the Legislature, in 162-H:2, XII, is very
18 specific about where you go look for the findings and
19 purposes.

20 CMSR. HARRINGTON: Okay. So, you're
21 saying then that, regardless of the content of the zoning
22 ordinances, this Committee should not be reviewing those,
23 they should have no bearing on our decision?

24 MR. ROTH: Well, that's actually a very

1 good question, because, in a sense, it actually -- it's
2 going to depend on the need for the facility, because I
3 think a town could lawfully ban them altogether. So, even
4 if they said "Thou shalt not build a wind farm that makes
5 more than five decibels of noise", creating an impossible
6 barrier, if there was a need for the facility, and there
7 was an unreasonable barrier to entry, then, I think
8 jurisdiction would lie. But, unless they show a need for
9 the facility, the fact that there is a barrier to entry,
10 that's just too bad. You know, that's the way the cookie
11 crumbles. The developer is going to have to go somewhere
12 else.

13 CMSR. HARRINGTON: Okay. And, Mr. Getz,
14 I had a question for you as well. You were discussing the
15 fact that part of the statute was repealed, having to do
16 with the PUC finding a need for an energy facility. And,
17 that, in effect, was a result of the restructuring of the
18 electric markets in New Hampshire, correct?

19 MR. GETZ: Yes, ultimately.

20 CMSR. HARRINGTON: So, because the PUC
21 no longer had jurisdiction over new generation facilities?

22 MR. GETZ: Well, I think it's little
23 more than that. Is once -- well, once there was
24 restructuring, then there was no need, once it became

1 clear that there was not a monopoly in the generation
2 sector, and that the PUC wouldn't have to be looking at
3 PSNH's decisions and whether their projects were needed,
4 then the Legislature stepped back and said "the SEC
5 statutes aren't going to include a review of need for a
6 facility any longer." So, I think it's mostly "yes" to
7 your question.

8 CMSR. HARRINGTON: Okay. But that
9 section is -- was repealed from what the Committee should
10 find, if indeed they do issue a certificate. And, what
11 we're dealing with today is whether the Committee should
12 take jurisdiction. And, I'm having really trouble with
13 the argument that "need doesn't have any argument anyplace
14 whatsoever", when it says, you know, that "consistent with
15 the finding and purposes set forth in RSA 162-H:1", where
16 the word, you know, "need" and "a balance" and "need"
17 shows up a number of times. Could you comment on that?

18 MR. GETZ: Yes. And, this gets back to
19 that issue of "What is a "purpose" section all about?
20 What does it do?" And, what the Legislature has done here
21 is explain why it's created a site evaluation committee.
22 It created a site evaluation committee because it
23 determined that there was a need to balance new
24 facilities, new energy facilities, and siting of energy

1 facilities with environmental issues. So, that's
2 basically setting "the direction" of why you have a site
3 evaluation committee. It gives you the background. It
4 doesn't create an independent substantive obligation on
5 Timbertop to show that it is needed. A certificate is
6 required, and this, again, goes back to what this
7 Committee decided in Antrim, is when there -- it's
8 necessary for the Site Evaluation Committee to step in,
9 because, at the town level, it can't meet the findings.
10 It can't maintain it, it either can't, because there's
11 multiple jurisdictions, or it hasn't, because it's imposed
12 too restrictive ordinances that it's necessary for the SEC
13 to step in. So, that's why SEC jurisdiction is required,
14 so that the review, which is what was established by the
15 SEC, this review procedure is done properly. The
16 specifics of any project are really irrelevant to that
17 decision.

18 CMSR. HARRINGTON: So, are you saying
19 then that this Committee should be reviewing the specifics
20 of various zoning ordinances, and making a decision on
21 whether their impact is sufficient enough so that we take
22 -- we basically supercede the ordinance?

23 MR. GETZ: Yes. And, that's exactly
24 what the Committee said in Antrim.

1 CMSR. HARRINGTON: Okay. And, this
2 would be for Mr. Richardson. There was some discussion by
3 Mr. Getz about, if you had to show need for something
4 under 30 megawatts, it would be virtually impossible to
5 do. So, is it your contention that, if you have to show
6 need, meaning there is a need for the electric power
7 coming out of whatever the project is, and how would you
8 do that for something that was 10 or 15 megawatts?

9 MR. RICHARDSON: Well, I think there are
10 some types of facilities, such as those that are needed
11 for, you know, load-following VAR support, you could be in
12 an area where, you know, like what do they call it, the
13 LMPs, you know, the -- like, for example, northeastern
14 Massachusetts is one example, and there may be areas like
15 that in New Hampshire, where there's a shortage of supply
16 of energy. So, you know, whatever you can get is going to
17 help tremendously. I don't think that there's anything
18 analogous to that.

19 Another way, you know, obviously, this
20 is an example that's larger than -- well, I'll give you an
21 example. I believe that Concord Steam has proposed a
22 wood-fired plant that provides some type of cogeneration,
23 where they're providing a steam distribution network.
24 And, you know, it could be a project like that.

1 Obviously, that got approved by the City of Concord's
2 Planning Board. So, they didn't need to come before the
3 city -- I mean, before the Committee, but that would be
4 great example of, you know, where you've got some of the
5 purposes, such as the welfare of the public, or, in the
6 case of, you know, an area where there's a deficiency in
7 supply of energy, where you would find that the need
8 tipped in favor of finding jurisdiction. I don't doubt
9 that it's difficult. And, I think that's why the
10 Legislature said "below 30 megawatts, you know, you're
11 just cut off." But what they did say is is that, "if you
12 are able to make that showing, you can come back in."

13 And, I realize, as Attorney Getz just
14 pointed out, that that showing was made in Antrim. But, I
15 mean, Antrim is incredibly different from what we're
16 considering today. We have two towns that are both
17 willing to support this project. We've heard from Sharon
18 today, all three communities have basically adopted the
19 same standard. They're willing to work on this project.

20 In Antrim, you had a community that
21 could not adopt an ordinance. They -- I believe the
22 selectmen in that case testified that, if an ordinance was
23 adopted by the Planning Board or recommended, the
24 Committee would probably -- or, the Town would probably

1 vote it down. Because, if it was too stringent, it wasn't
2 going to pass. So, you were effectively left with a
3 project where there would be no standards whatsoever.

4 Now, turning back to that time, I mean,
5 was need shown specifically? I don't know. I'm not sure
6 that it was raised. I know the issue was raised by
7 Counsel for the Public that an application was required,
8 and this Committee ruled against that. But I don't think
9 the need issue was specifically challenged, and,
10 obviously, I was sitting on the opposite side of the table
11 in that case.

12 The other problem with using Antrim is,
13 as I recall, it was deadlocked. I mean, this Committee
14 deliberated for two hours, and it was a tie vote. And,
15 that one member of the Committee changed that Committee
16 member's vote in order to break the tie to allow Antrim
17 Wind to come forward. So, it was -- even in a case where
18 just the met towers had resulted in three lawsuits, it was
19 a very close call.

20 In this case, we have all of the
21 communities adopting similar standards, working together,
22 willing to conduct joint reviews. So, I think that the
23 focus is really not on "do they adequately protect the
24 environment?" But "are we balancing the need?" And,

1 there's just no evidence of it.

2 CMSR. HARRINGTON: Well, just to get
3 back to the issue that I asked, which was the proving need
4 for something of a small size, there are no conditions
5 that exist like that in New Hampshire, where we have a
6 desperate shortage of electricity, such that installing a
7 megawatt or something or 5 megawatts or 8 megawatts
8 someplace would resolve the issue.

9 MR. RICHARDSON: Uh-huh.

10 CMSR. HARRINGTON: So, I guess what I'm
11 hearing is that, in absence of these conditions which
12 aren't present in the state, it's almost impossible to
13 show that something is needed if it's on that small scale
14 of the 10 to 15 megawatts?

15 MR. RICHARDSON: You know, unless it was
16 like a cogen situation, or unless the energy markets were
17 to change. I mean, as you know, I mean, we built Seabrook
18 20 years ago or longer, and that really did shift the
19 balance. But maybe, at some day in the future, as load
20 growth increases, I mean, we're in a period of low demand,
21 we could reach that point. It's really up to the
22 applicants or the petitioner to make that showing. And,
23 you know, it's hard for me to speculate about, you know,
24 things that are -- I don't want to go too far afield and

1 suggest things that just don't exist under the current
2 market.

3 CMSR. HARRINGTON: Okay. And, one final
4 question then. Since you're fairly familiar with the
5 zoning ordinances from the Towns, do you feel that the
6 ordinances as they exist today meet the intent and purpose
7 of 162-H:1, in that, if the Committee didn't take
8 jurisdiction, that adequate review and protection would be
9 provided through those ordinances?

10 MR. RICHARDSON: I think so. Because
11 it's clear that the Towns went out to find a ordinance
12 that protected the environment, while making wind energy
13 an allowed use. There's not been any showing that this
14 project is needed. So, I mean, you know, should we build
15 this project, and then not build another one that might be
16 located in a more remote area? Or, could the need be met
17 in other ways? Those are all, I think, fair questions.
18 And, I don't think that coming before the Committee is a
19 guarantee of a certificate.

20 So, it's really -- it may be very
21 difficult to meet these standards. We don't -- we don't
22 deny that. But the Towns have looked at their ordinances,
23 looked at their communities, and decided what is an
24 appropriate use. They could have prohibited wind energy

1 entirely, but they didn't, because they felt it was
2 important to promote, as long as it didn't have adverse
3 impacts.

4 CMSR. HARRINGTON: Thank you. And, just
5 one final question for Mr. Getz, just the subject that was
6 just brought up. Do you feel that a town has the ability
7 in New Hampshire to just ban wind projects outright, if
8 they wanted to?

9 MR. GETZ: I don't know, as a legal
10 matter, if that's true. But, if they -- I would think, in
11 a situation like that, where there was a ban, then,
12 obviously, the developer would come here to the Site
13 Evaluation Committee and argue that the ordinances -- the
14 ban is inconsistent with the purposes and findings of the
15 statute and ask the Committee to take jurisdiction.

16 CMSR. HARRINGTON: Okay. Thank you.

17 MR. ROTH: Mr. Harrington, if I could
18 respond to the question you asked of Mr. Richardson.

19 CMSR. HARRINGTON: Sure.

20 MR. ROTH: Just very briefly. About
21 "how could they ever show need?" And, I would just look
22 back at the statute and its origins, and suggest that the
23 Legislature had to deal with sort of an "all seasons" kind
24 of approach. And, probably they wrote the statute during

1 a time when there was a sense of urgency about needing
2 more generation, and seeing everybody lining up saying
3 "No, no, no, not here, not here, not here." And, so, I
4 think, as Mr. Richardson suggests, there could be a time
5 again when we do need more electrical generation
6 constructed in New Hampshire. And, you know, I think the
7 evidence right now is that that's not the case at the
8 moment.

9 CMSR. HARRINGTON: All right. Thank
10 you. That's all I had, Mr. Chairman.

11 CHAIRMAN BURACK: Thank you. Director
12 Hatfield.

13 DIR. HATFIELD: Thank you. Mr. Getz, if
14 you look at Public Counsel's memorandum of law, on Page
15 13, the last sentence in the final paragraph says "The
16 mere possibility that the Timbertop project might not be
17 able to meet the Towns' criteria, is not in and of itself
18 a reason to assume that the Towns' process will create
19 undue delay." Can you speak to that assertion?

20 MR. GETZ: Well, I think, again, it's
21 mixing apples and oranges. "Undue delay" comes out of the
22 procedures that the town has and uses, including variances
23 -- or, ordinances are going to require variances. At
24 bottom, there is no way to show that the Towns' criteria

1 might be a barrier to entry, because there's only
2 speculation to compare to on either side. And, again, it
3 conflates the standards, with a barrier to entry,
4 exclusionary zoning. The proper focus is on the Towns'
5 ordinances, in terms of maintaining a balance, and the
6 fact -- and there's two towns with two ordinances in terms
7 of contributing to undue delay and not resolving issues in
8 an integrated fashion. So, I -- and, I think that a lot
9 of -- it's been obvious the theories of the case are
10 entirely different, and I think that their framing of the
11 issues is the incorrect one.

12 DIR. HATFIELD: So, you're asking the
13 Committee to find that applying the ordinances does not
14 strike the right balance and would result in undue delay
15 before the ordinances have been applied?

16 MR. GETZ: I think that's fair, yes. To
17 say that the ordinances, in five separate respects, do not
18 maintain the balance. The procedures, again,
19 independently, will lead to undue delay, and the
20 procedures, because there's two towns, do not resolve
21 issues in an integrated fashion.

22 DIR. HATFIELD: Thank you. Mr.
23 Richardson, the Section 1 of 162-H, I'm looking at the
24 Counsel for the Public's memo of law, because he sets

1 forth the findings and purposes in that section on Page 2.
2 And, Section 6 -- Subsection 6 of Section 1 is the section
3 that talks about "issues being resolved in an integrated
4 fashion". Do you see that?

5 MR. RICHARDSON: Yes.

6 DIR. HATFIELD: Can you speak to how you
7 would see all of the state processes that would presumably
8 need to take place happening in an integrated fashion with
9 the Towns' processes?

10 MR. RICHARDSON: Certainly. It wouldn't
11 be that different from, you know, like a major subdivision
12 or something like that, that also requires terrain
13 alteration or also requires, you know, various other
14 wetlands permits. You know, there are minimum standards
15 that the state can establish, which the towns can exceed.
16 I don't think that there's -- the other aspect of this
17 statute, I believe, and I can't remember the precise
18 precision -- provision, but I believe that during
19 Committee review, if an agency denies a project over the
20 matter that's within its jurisdiction, I don't believe the
21 Committee is allowed to actually issue a certificate and
22 override that denial. So, a wind project that was before
23 the planning board would face some of those same
24 challenges before the Committee, that they would need to

1 get every state agency approval.

2 In terms of an "integrated manner", you
3 know, the site plan review process would obviously have to
4 comply with the Town's ordinance, and they would be
5 looking at effectively a lot of the same issues that were
6 occurring at the different levels. And, it's often up to
7 the applicant to share that information or not share it,
8 based on the timing of a project. I mean, I sit on a
9 planning board myself. And, I have seen some applicants
10 come in and say "well, the state's already issued a
11 stormwater permit, so you don't need to focus on that very
12 much." And, by the same token, sometimes they argue that
13 issue will be decided later. It ultimately just comes
14 down to the town to apply its ordinance, and the state to
15 set a minimum standard. If the municipal ordinance allows
16 it, they can exceed the state standard.

17 DIR. HATFIELD: Thank you. If the
18 Committee does take jurisdiction, it's required to give
19 due consideration to local requirements, is that right?
20 Is that your understanding?

21 MR. RICHARDSON: Actually, the "views of
22 municipal officials" is I believe what it says.

23 DIR. HATFIELD: Do you not -- it seems
24 as though you don't believe that that is sufficient to

1 allow the Towns to participate in this Committee's
2 processes?

3 MR. RICHARDSON: It would be very
4 challenging, because, and I don't want to understate this,
5 because it's tremendous. The local planning boards have
6 the authority under RSA 676:4, to require the applicant to
7 pay for studies, to make sure that the project, you know,
8 for example, engineering reviews, those types of things,
9 to make sure the project complies with their ordinances.
10 If this project goes before the Committee, all of those
11 expenses are effectively out-of-pocket. And, then, we're
12 looking at a project where the only standard in the law is
13 is that the environmental impacts be not unreasonably
14 adverse, I believe is what 16, IV(c) says, or that it
15 would not unduly interfere with the orderly development of
16 the region. And, the problem is is that it would be up to
17 the municipalities to then prove that the standards that
18 they're recommending in their ordinances and that they
19 adopted are the correct ones, and then to prove whether or
20 not the project met those standards. And, that's, you
21 know, suddenly we're now looking at, if the Committee --
22 if the Towns want to comment on "Jeez, does this project
23 have adverse impacts on avian resources, on noise?" I
24 mean, effectively, we have a trial first on what the noise

1 standard should be, and then whether or not it meets it.
2 And, I don't believe that the municipalities can afford to
3 do that without using their own statutory mechanism, which
4 allows them to retain their consultants to provide
5 recommendations to the Board. You know, effectively, you
6 know, the most you would possibly see would be something
7 like we've submitted in our testimony, where they have
8 provided the reports that they considered in adopting
9 their ordinances, and they have basically gone as far as
10 they could go. It's a very expensive proposition for a
11 municipality to participate in the hearing process before
12 the Committee. I think Antrim was ten days. You know, I
13 expect, if I told them my hourly rate, well, they know my
14 hourly rate, and I said I was going to represent them in
15 ten days of hearings before the Committee, they would turn
16 to me and say "we can't afford that."

17 So, I think that it's very difficult to
18 articulate those views. And, as the project changes, I
19 mean, often a project comes in in one way, there's a
20 metamorphosis that occurs, as supplemental information
21 comes in, as testimony comes in. It's a burden not only
22 on the municipality, but also the Committee. And, I think
23 that it's fair to ask, under 162-H:1, "why are we doing
24 that?" Are we taking away even resources from Committee

1 members, because you all have other important tasks to
2 accomplish. Why are we doing that for a project that's
3 below 30 megawatts?

4 DIR. HATFIELD: Mr. Richardson, do you
5 have a copy of Mr. Getz's brief?

6 MR. RICHARDSON: Yes.

7 DIR. HATFIELD: On the bottom of
8 Page 20, and going over onto Page 21, he refers to having
9 to go through a review in two towns as being
10 "duplicative", "unnecessary", and he says that it "leaves
11 open the possibility of conflicting results." Can you
12 just speak to that concern?

13 MR. RICHARDSON: Certainly. The joint
14 review process is at the option of the applicant. So, the
15 Applicant has the authority, where a project's in two
16 towns, to require that it be done. It's not -- the towns
17 have said that they're willing to do that, but it's not
18 really their choice. They have to, if it's requested.
19 The joint hearings are then based upon the same
20 administrative records. The hearings are the same.
21 Effectively, the timeframes are going to be the same,
22 because, once both projects are complete and all the
23 information is there, they're required to follow the
24 timeframes under 676:4, which require a project to be

1 basically reviewed within 60 days, they get a
2 determination, subject to an extension of up to 90 days on
3 the request of the planning boards, if they require
4 additional time. Excuse me, I believe it's 65 and 90
5 days.

6 So, what then happens is the
7 determinations are made based upon the same record. And,
8 so, I mean I think it would be -- it would create a real
9 -- well, it would be surprising to me, if reviewing the
10 same project, on the same evidence, applying essentially
11 the same standards, there are minor differences, that they
12 would reach different conclusions. And, if they did,
13 appeals from a zoning board of adjustment or from a
14 planning board, those are record appeals. You're not
15 allowed to kind of have a new trial or to submit new
16 evidence, except upon petition of the court for leave to
17 do so. And, that's in 677:15 talks about appeals of
18 planning board decisions. Earlier, the statute has
19 sections governing variances. But the court's going to be
20 looking at, you know, you would see one community saying
21 "Well, you know, you've met the 33 dBA standard." Why
22 wouldn't it apply in another? I mean, you're looking at
23 the same experts, the same testimony. So, I think it's
24 very much analogous to a hearing in front of a large

1 board, where there may be a variety of different concerns
2 from different aspects, but they're reviewing the same
3 project.

4 DIR. HATFIELD: But you did just
5 acknowledge that some of the standards are different in
6 the ordinances, is that correct?

7 MR. RICHARDSON: Yes. For example,
8 Temple provides a -- I believe an absolute setback of
9 2,000 feet; whereas the New Ipswich setback is it has to
10 be sufficient for purposes like safety, etcetera. And,
11 so, it's a somewhat more flexible standard. But, if the
12 project, you know, met 2,000 feet, I think they would
13 probably comply with it under all circumstances. And,
14 they also have, in their testimony, explained that it's
15 really the noise ordinance more than anything else that's
16 going to drive the setbacks. But, you know, that while
17 there are differences, I don't think that there are --
18 they're not of such a nature that you'd find a community
19 saying "you can build it on one side, but not build it on
20 the other." I mean, even where there are differences,
21 they're relatively minor. We're looking at the same
22 sources of information. And, I think they would be likely
23 to reach the same conclusions. The real question is, is
24 "what is the project going to look like and how are they

1 going to do that?"

2 DIR. HATFIELD: Thank you, Mr. Chairman.

3 CHAIRMAN BURACK: Thank you very much,
4 Director Hatfield. I'm looking at the clock now, and it's
5 about 12:25, almost 12:30. I just want to go off the
6 record for a moment so I can speak with the stenographer
7 here.

8 (Brief off-the-record discussion
9 ensued.)

10 CHAIRMAN BURACK: Just by a quick show
11 of hands, I just want to get a sense from the Committee
12 members, how many additional Committee members have
13 questions that they would like to be able to ask or,
14 again, depending on what other questions are asked, think
15 they may want to ask some questions?

16 (Show of hands.)

17 CHAIRMAN BURACK: One, two, three, four,
18 five. I know Attorney Iacopino has questions as well. I
19 think, in light of that, we're going to need to take a
20 break here. And, the question really is how quickly we
21 could take that break and then reassemble. I'm just going
22 to take this off the record, I don't think we need to
23 record all of this here.

24 (Brief off-the-record discussion

1 ensued.)

2 CHAIRMAN BURACK: So, again, just coming
3 back on the record. We're going to take a break now until
4 1:15 for lunch, and we will reconvene at that time for
5 additional questions, and then deliberations presumably by
6 the Committee. Thank you. So, we stand adjourned until
7 1:15.

8 (Whereupon a lunch recess was taken at
9 12:28 p.m. and the hearing reconvened at
10 1:21 p.m.)

11 CHAIRMAN BURACK: Okay. We're going to
12 resume our proceedings here in the Petition of Timbertop
13 Wind I, LLC, in Docket Number 2012-04. And, we are going
14 to continue with questions for counsel from members of the
15 Committee. And, I'm going to start to my far left, then I
16 think we'll just more or less work our way around the
17 table here. And, so, we'll start with Director Bryce.

18 DIR. BRYCE: Thank you, Mr. Chairman.
19 Let's see. A question for Mr. Richardson. Have there
20 been any legal challenges to the current ordinances in
21 either town?

22 MR. RICHARDSON: No.

23 DIR. BRYCE: Okay. As a follow-up, if I
24 may? I'd really be interested in more -- a little bit

1 more details, if you can provide them, on the process, but
2 particularly how the Towns are going to reconcile any
3 differences between the ordinances in the Towns.

4 MR. RICHARDSON: Sure. Some of that is
5 in Mr. Dekker and Ms. Freeman's testimony, but they will
6 -- where there are conflicts, it's not typically like a
7 conflict where it says, you know, one says "it shall be
8 450" and the other shall be, you know, says "350". So,
9 you have a specific requirement where, you know, you can
10 only meet it one way. For example, on the tower height,
11 Temple is 450 feet, and then New Ipswich has a standard
12 that requires that the applicant demonstrate that the
13 tower height, you know, is appropriate, doesn't cause
14 unreasonable, you know, view impacts, that type of thing.
15 And, so, you know, effectively, you know, what I would
16 anticipate, in the Applicant's shoes, if I were in them,
17 would be arguing that, you know, we went with the maximum
18 allowed in Temple, and then the modeling to show that,
19 from an aesthetics standpoint, there were not unreasonable
20 impacts, you know, that they met the intent of the New
21 Ipswich ordinance. And, the same thing would be true for
22 setbacks and other areas where there were some minor
23 differences between the two ordinances.

24 I believe, if you look at RSA -- we

1 don't cite this in our brief or in the testimony, I
2 believe, but if you look at RSA 674:53, there are, and I'm
3 looking at Roman Numeral Section V(b), it talks about "A
4 planning board may waive or vary its regulations with
5 respect to access or interior roads in order to provide
6 better harmony with the regulations of an adjoining
7 municipality, whenever strict compliance would be
8 unreasonable in light of the overall design of the
9 proposal." Now, this is obviously written with
10 subdivisions in mind. But I expect that the ordinances,
11 and, you know, both towns have indicated their willingness
12 to do this, is is they're really going to work together to
13 try to make a project work, as long as it's meaning the
14 common goals that are in the ordinances.

15 I mean, the differences, I don't really
16 see as fundamental or as roadblocks to getting a project
17 through. I think both communities are supportive of large
18 wind, as long as it doesn't have an adverse effect on the
19 communities.

20 DIR. BRYCE: So, do you envision,
21 though, where there are specific standards, does the
22 Planning Board have the flexibility to waive those or
23 would it have to go to the zoning board?

24 MR. RICHARDSON: If a standard is

1 contained within the site plan regulations, typically, in
2 Temple, I believe, has a significant amount that's in its
3 site plan regulations; New Ipswich is, I believe, less.
4 But a planning board can waive its site plan requirements.
5 Only the zoning board of adjustment can waive a zoning
6 ordinance through the variance process, unless there is
7 something akin to a conditional use permit, which there
8 really isn't here. So that, you know, the ordinances
9 basically set the standards to be met. In some areas, you
10 know, it's up to the applicants to show how they meet
11 those standards.

12 DIR. BRYCE: Okay. Thank you. A
13 question for Mr. Getz. Can you envision a circumstance
14 where a project that was between more than one town
15 wouldn't come to this Committee, if there are slightly
16 different ordinances? It seems like the arguments you
17 make indicate that, really, if you have a situation where
18 a project is in more than one town, that it's going to be
19 a hardship or it's going to not be consistent with, you
20 know, 162-H, unless it actually does come to us.

21 MR. GETZ: I've given that question a
22 lot of thought since the February 19 hearing, when I think
23 Chairman Ignatius asked a similar question. And, in the
24 abstract, it seemed to me that there could be a case.

1 And, the more I look at the facts of this case, it's hard
2 for me to imagine facts on the parts of -- with respect to
3 "undue delay" and "resolving all issues in an integrated
4 fashion", it's hard for me to imagine a case where towns
5 would not be found to be inconsistent with the purposes
6 and the findings. You may be able to -- the towns may
7 have been able to put their ordinances in a way that
8 weren't problematic, which is not the case here. But, on
9 the procedure side, I think it's a -- I think it would be
10 the exception and not the rule, where for two towns to be
11 able to show that they, you know, that there was -- that
12 they were avoiding undue delay or resolving issues in an
13 integrated fashion.

14 DIR. BRYCE: Okay. Thank you.

15 CHAIRMAN BURACK: You all set?

16 DIR. BRYCE: Yes. Thank you.

17 CHAIRMAN BURACK: Director Wright.

18 DIR. WRIGHT: Thank you, Mr. Chairman.

19 Mr. Richardson, just -- I'm sure it's in the documentation
20 somewhere, and I've heard you mention "five differences
21 between the two Towns' ordinances", and I've heard height
22 and setbacks. What are the other three differences
23 between the two ordinances?

24 MR. RICHARDSON: That's in Ms. Freeman

1 and Mr. Dekker's testimony. And, if you look at Page 26,
2 there's a question "How do the ordinances of the two Towns
3 compare?" And, she walks through them. Both use the same
4 definitions. Now, you're asking where they're different.
5 So, that's going to be at the end, a few pages further
6 down. And, you know, the only significant differences are
7 not five. I think Attorney Getz has, he's indicated
8 there's "five".

9 The Temple ordinance designates the
10 maximum height of 450 feet, and then it designates a
11 specific setback of 2,000 feet. Which is, you know,
12 obviously, important for ice throw, it probably has a lot
13 of benefits on noise and those types of things. I don't
14 see any of the other ones as really material.

15 DIR. WRIGHT: Just one follow-up
16 question, actually, Attorney Getz. I think Attorney
17 Richardson described those differences as "minor" in
18 nature. How does your applicant -- how does your client
19 feel about that?

20 MR. GETZ: Two different ways of looking
21 at that, and our client does not view it the same way.
22 First of all, with respect to a developer, the
23 differences, with respect to heights and setbacks, are
24 fundamental in how you put together a project, where you

1 locate your turbines. So, those are very important. And,
2 then, there's the -- so, there's the approach from project
3 development and then there's the approach legally. That,
4 to the extent there's differences, it increases the
5 likelihood of different decisions, which increases the
6 likelihood of, you know, more delay and appeals and
7 different results.

8 DIR. WRIGHT: Thank you.

9 CHAIRMAN BURACK: Further questions?

10 DIR. WRIGHT: No.

11 CHAIRMAN BURACK: Chairman Ignatius.

12 VICE CHAIRMAN IGNATIUS: Thank you. Mr.
13 Getz, in your submission you referenced an analysis of
14 what the 33 dBA standard effectively meant, because of the
15 five dB design, I forget the term, it was "design
16 something", that brought it down to 28 dBA. Can you walk
17 me through that please?

18 MR. GETZ: Yes. And, this is from the
19 letter of Mr. O'Neal to -- well, actually, to Pioneer
20 Green Energy analyzing the New Ipswich ordinances, and
21 then which was provided to the -- provided to the New
22 Ipswich Planning Board. And, the point that Mr. O'Neal
23 was making was that, on its face, the ordinance speaks to
24 a "33 dBA standard", but it also, as you go further into

1 Section 5, with respect to noise level limits and
2 measurement, there's a Subsection (d)(6) that says "add a
3 plus five dB design margin to the predicted noise levels."
4 And, my understanding, from Mr. O'Neal and from my client,
5 is that what this effectively does is create a 28 dBA
6 standard.

7 VICE CHAIRMAN IGNATIUS: So, it's not
8 taking 33 and adding five to make it 38. It's taking 33
9 and effectively subtracting five, assuming that the first
10 five is this adder, and then you only have 28 more that
11 you can -- the project could add to the sound levels?

12 MR. GETZ: That's the way I understand
13 it, and that's the way it appears from Mr. O'Neal's
14 letter.

15 VICE CHAIRMAN IGNATIUS: And, do you
16 know if the Town -- if the Towns would agree with that
17 interpretation? Have you had any response from the Towns
18 that that's exactly the way it should be calculated or is
19 not the way it should be calculated?

20 MR. GETZ: I know that the Towns'
21 consultants responded to Mr. O'Neal's letter. But I don't
22 think they particularly addressed that issue. And, what
23 the Towns -- whether the Towns agree or not, I don't know.

24 VICE CHAIRMAN IGNATIUS: All right.

1 Then, I'll ask Mr. Richard that in a moment -- Richardson
2 that in a moment. You then, in your brief, said, based on
3 that calculation, it appeared that there would be a 4-mile
4 strip that would be -- could not have a residence within
5 that, a 4-mile zone of each turbine, in order to meet that
6 standard. How did you develop that?

7 MR. GETZ: Again, that goes back to Mr.
8 O'Neal's letter, which was submitted, you know, originally
9 with the New Ipswich notes of Planning Board meetings, and
10 that's his calculation on required setbacks to meet
11 ordinances. If -- I can direct you to where it is in the
12 record, but it's Mr. O'Neal's calculation of a 4-mile --
13 it's basically a 2-mile radius, so, a 4-mile diameter or
14 circumference.

15 VICE CHAIRMAN IGNATIUS: Well, I -- no,
16 I understand where it is in the record. What I'm
17 wondering is, how do you get to those calculations? I
18 mean, I was looking at the Exhibit 14 from the Town, which
19 was something that was in the Groton record, that was a
20 sound analysis moving out from the turbines. And, each
21 locality will be different, obviously, based on what the
22 turbines are and what the topography is. But, just
23 looking at that, it didn't look to me that you had a
24 2-mile -- a 2-mile radius from each turbine to reach that

1 28 level. Is that what you would --

2 MR. GETZ: Well, the way I understand
3 his calculation is, you know, since the utility scale wind
4 turbines have a sound power level, you know, at the base
5 of 106 to 109 dBA, to get to the point where you're down
6 to 33 dBA minus five dBA, it would be a -- it's more than
7 two miles to meet the ordinance. And, then, you -- and,
8 that's a radius, so, you double the two to a four, for
9 what he's indicating as the buffer zone.

10 VICE CHAIRMAN IGNATIUS: Thank you. One
11 of the concerns that I have, when I look at the argument
12 you've made, is that, as you said just a moment ago, it
13 would be hard to imagine a project that spanned two
14 municipalities being able to -- why that -- I want to say
15 it the other way around, that, if you had a project that
16 spanned two municipalities, it would be hard to imagine it
17 being appropriate to stay within the municipal processes,
18 and better to have it before the SEC, that it would meet
19 the standards, as you see it, under the SEC. It seems to
20 me there's a potential there that a developer might
21 choose, after all, where you site these is your choice,
22 where you place a turbine. And, that you might choose to
23 cross into another municipality, place one turbine over
24 the line into another area, and then be able to argue that

1 you really shouldn't be under both ordinances. And that,
2 to me, doesn't seem like a very fair result, if the real
3 intent of the Legislature was to allow for smaller
4 projects to be dealt with on a local level, unless these
5 particular standards are met under the discretionary power
6 of the SEC. Do you have a response to that?

7 MR. GETZ: Well, I'd say two things.
8 Looking at the law and looking at the Supreme Court's
9 interpretation of what the 162-H was supposed to be about,
10 is for a comprehensive review, twin purposes of "avoiding
11 undue delay" and "resolving all issues in an integrated
12 fashion". So, it was intended to be directed to these
13 types of situations where there are multiple circumstances
14 where there could be a problem. So, the SEC was intended
15 as a remedy for that situation.

16 What you're raising is the issue of game
17 playing, which, you know, arguably could go on right now,
18 if somebody decides they want to make -- build a
19 28-megawatt wind project and be under SEC jurisdiction, I
20 guess they have that opportunity. If they want to build a
21 32-megawatt project and be outside of town jurisdictions,
22 they have the opportunity to do that. And, I think, you
23 know, effectively, you saw that play out with Antrim.
24 That it was -- at first, it was under 30 megawatts, and

1 then later it was above 30 megawatts. But, you know, this
2 project started out in the southern part of the town, on
3 Binney Mountain, and then, you know, the developers are
4 making decisions based on what's the best wind source.
5 So, my client moved to the other side of town, and it just
6 so happens that's on a ridge that crosses both towns.

7 So, I think, you know, I think you have
8 to assume good faith, that people are going to try and
9 build their projects which -- in the way that makes the
10 most sense. Whether somebody would try to make sure they
11 went into a second town in order to improve their chances
12 of SEC jurisdiction, they also could be trying to make
13 sure that they can put up enough turbines to do the same
14 thing.

15 VICE CHAIRMAN IGNATIUS: Throughout this
16 you've said that, "because there's two municipalities and
17 two processes, even if they're joint proceedings, that it
18 will result in undue delay." And, so, what's the
19 assumption that you make that leads you from the fact of
20 two municipalities having their own processes and own
21 determinations that concludes with the undue delay, not a
22 potential for it, but that it will be -- it will result in
23 undue delay?

24 MR. GETZ: Well, in this case, it's hard

1 to segregate out some of these issues, because there's
2 overlap. Part of the undue delay here is that the
3 ordinances are written in a way that's going to require
4 variances, and even, you know, the Towns admit that. So,
5 the fact that you've got to go through that level creates
6 the undue delay. The fact that there's two towns, who are
7 going to issue separate decisions, I mean, it is possible
8 that they could end up with the same decisions, but then
9 their decisions have more levels of appeal than they do
10 for a -- if you go through the Site Evaluation Committee.
11 And, I go back to the language of the Committee in the
12 Antrim case, which points out that you've got, you know, a
13 set eight-month review process, you've got, you know, one
14 -- only one body that makes a decision that can be subject
15 to rehearing and appeal. So, I think the structure of the
16 two-town approach is conducive to undue delay and has some
17 extra built-in steps that are certainly going to make it
18 longer than an SEC review.

19 VICE CHAIRMAN IGNATIUS: But you saw the
20 numbers that Mr. Roth put in his brief of what the actual
21 time period has been for renewable projects. We have a
22 deadline, but we often find ourselves not meeting it, that
23 the materials are just not all there, there's a consent on
24 the part of the developer, and it's nothing to be proud

1 of, but they have gone a full year, in some cases more
2 than a year, in review. So, from that perspective, the
3 local standards are faster, the deadlines are faster than
4 they are for the SEC, aren't they?

5 MR. GETZ: Well, perhaps the theoretical
6 standards. But, when you look at towns who have -- that
7 meet once or twice a month, depending on what board it is,
8 whether it's planning board or ZBA, and given the
9 complexity of these cases, my expectation would be that
10 they're going to be well outside the nominal time periods,
11 just as you say that the SEC -- many of the SEC cases have
12 exceeded the nominal time periods.

13 VICE CHAIRMAN IGNATIUS: If the
14 ordinance had been -- ordinances had been written to
15 include the qualifiers "undue adverse impact" or
16 "unreasonable effect", would you be less troubled by
17 proceeding under the local ordinances?

18 MR. GETZ: Well, that would have cured
19 two problems out of five on the ordinances. It's still --
20 I think it's still very problematic -- well, actually, the
21 visual has two subsets to it, the environmental has three
22 subsets to it. So, that's five. And, then, there's, you
23 know, three other, eight. So, it would resolve, you know,
24 half of the problem, I guess, but we'd still have a

1 problem on the sound restrictions and on the way that the
2 heights and the setbacks have been determined.

3 VICE CHAIRMAN IGNATIUS: And, you heard
4 Mr. Richardson say, "well, on the heights and setbacks,
5 they're different requirements, but they're not in
6 conflict mandating -- one mandating one number and one
7 mandating another. One sets a maximum and one has a more
8 subjective analysis of what's appropriate." Why can't --
9 why are those problematic for you?

10 MR. GETZ: They are potentially
11 compatible. But, when you look at the setback restriction
12 for Temple, for instance, where it has the 2,000-foot
13 setback requirement, I think in and of itself that does
14 not maintain the proper balance. When you look at what
15 the benchmark set by 674:63, III, for small wind energy
16 systems, requiring setbacks -- prohibiting setbacks
17 greater than 150 percent of the system height, and when
18 you look at what this Committee has decided with respect
19 to setbacks, their setback is unreasonable in comparison,
20 it does not maintain the proper balance. That's a
21 different issue of whether they may, through a proceeding,
22 come up to the same answer.

23 VICE CHAIRMAN IGNATIUS: But it's not
24 the right balance because it's a number you think is too

1 strict? I'm not following --

2 MR. GETZ: Yes.

3 VICE CHAIRMAN IGNATIUS: And, why is
4 that a question of balance?

5 MR. GETZ: Because when -- the way I
6 read the statute, it says, under the definition, you look
7 to the guidance of the purposes and findings. One of the
8 findings is "maintain a balance between the environment
9 and the need for new energy facilities". The Legislature
10 has set forth some standards with small facilities that
11 has a balance based on a legislative finding. The
12 Committee, in interpreting and applying the statute, has
13 come to certain conclusions based on adjudicative
14 proceedings. Now, these Towns have created ordinances
15 that are far more restrictive than these other benchmarks.
16 And, that's the only way, I think, in how you make your
17 decision here, is how do they -- have they maintained a
18 balance? Balance compared to what?

19 And, that's why we've asked you to take
20 a look at state statute 162-H, the small wind energy
21 system statute, and your own decisions, and that gives you
22 the benchmark to decide whether they have gone too far.
23 And, I think that follows up on Mr. Scott's question,
24 Commissioner Scott's question of, you know, "how do I

1 know?" And, I think it's a judgment of fact, based on
2 comparing their ordinances to these other expressions of
3 what a reasonable balanced approach is to whatever the
4 issue is.

5 VICE CHAIRMAN IGNATIUS: I guess I have
6 a hard time concluding that the proper balance has to be
7 one that mirrors what the Site Evaluation Committee has
8 already done in other cases. I just don't see it. It
9 seems to me "balance" is you need to balance something
10 against something else, but I hadn't thought it was
11 balancing the ordinance against the Site Evaluation
12 Committee's findings. I mean, I thought we were balancing
13 the impact of the project, the environmental impacts of
14 the project against other benefits of the project?

15 MR. GETZ: No. The Commission, I don't
16 know if you're talking about the Site Evaluation Committee
17 or the Towns or the decision on jurisdiction, but there is
18 no -- as in the Groton case expressed, there is no general
19 balancing that the Committee undertakes in looking at a
20 project. The balancing that the Legislature was talking
21 about is this is why we created the SEC. There's a place
22 to go to that's going to maintain a balance. And, then,
23 when they're conducting their review, and that's what you
24 do is you make these judgments in adjudicative cases. In

1 a decision whether to take jurisdiction, then the
2 Committee looks -- uses as guidance on whether to take
3 jurisdiction is how are the Towns' procedures and
4 ordinances matching up to the findings. And, that's --
5 and, if you look at the language in the Antrim case, I
6 think that's where, you know, is the best expression of
7 the analysis. And, what it's looking at is, you know, are
8 the ordinances going to be consistent with the legislative
9 findings and purposes, and is there going to be adequate
10 protection of the objectives and purposes? And, then, to
11 make the comparison to know whether these ordinances are
12 out of balance, you look at other decisions that the
13 Legislature has made or that you have made. That's your
14 benchmark.

15 VICE CHAIRMAN IGNATIUS: Well, that's --
16 I mean, I get with you up until that very last conclusion,
17 and then to say that "the balance must necessarily be
18 something that mirrors what's been done by the SEC" is
19 where I just don't follow the logic.

20 MR. GETZ: Well, that it necessarily
21 follows? I think where it necessarily follows is the fact
22 that the Towns have adopted different standards in terms
23 of "adverse" versus "unreasonably adverse". I think that
24 follows clearly.

1 I think what this Committee's decided on
2 sound levels, for instance, I think is instructive, and is
3 a fair benchmark for you to make a decision from. Now,
4 some of this gets back to this issue of that I think there
5 was some discussion at the February 19th hearing, what are
6 these Petition for Jurisdiction proceedings supposed to be
7 like? And, I think there was a -- there was a reluctance
8 for a full-blown adjudicative hearing bringing in
9 witnesses on every single one of these issues, including
10 sound. So, certainly, my client has no interest in
11 turning this into, you know, another extra year on this in
12 adjudicating expert witnesses. But what we do have are
13 these reference points that are in state law, state
14 decisions, SEC decisions, that then you can use to help
15 you make your fact-based determination of whether the
16 Towns went too far.

17 VICE CHAIRMAN IGNATIUS: All right. I'm
18 going to pick on Mr. Richardson for a while now. The
19 discussion of the possibility of joint hearings and the
20 possibility of leading to different results, you told us a
21 lot about how the two Towns have agreed to work together
22 and come up with a unified procedural schedule, and,
23 because they will be hearing the same evidence, it
24 shouldn't be a problem. But, I mean, we hear, as a panel,

1 we hear the same evidence, and we end up with split
2 decisions all the time. You noted we were in a dead heat
3 in the Antrim jurisdictional case, and that was hearing
4 the same evidence, with the same governing statute. So,
5 how do you -- how do you assure us that two
6 municipalities, even with joint hearings, won't end up
7 with a split decision?

8 MR. RICHARDSON: I don't want to go so
9 far as to assure you that it will never happen. All that
10 they have done is that they have made an effort to draw up
11 basically very similar, as close to the same ordinances as
12 they could. And, they're required by law to have those
13 joint hearings, which is a single record, they're applying
14 the same standards. And, I think that it's, you know,
15 it's so -- it's just speculation whether or not they will
16 reach the same result. And, I don't -- or, a different
17 result, I should say.

18 I really think that, you know, on the
19 key areas, you know, "does this meet the noise
20 requirement?" "Does it meet setback height?" It's not
21 going to be that complicated to make those demonstrations.
22 And, I don't think that there's that much that's really
23 subject or open to significant debate.

24 VICE CHAIRMAN IGNATIUS: And, what about

1 the -- you mentioned that you've heard before about how
2 these hearings do go on, they're fairly complex, and
3 municipal governance doesn't involve people being in the
4 same -- you know, they have all got their other jobs
5 during the day, so that you don't have the ability, as we
6 do here, to just sit in proceedings from 9:00 until 6:00
7 at night, hearing evidence, and days and days of
8 deliberations. How realistic is it when you say that the
9 two municipalities can take this on and keep to those
10 tight timeframes?

11 MR. RICHARDSON: I think that it is very
12 realistic. And, the reason is that the ordinances set
13 forth exactly what has to be in the application, what are
14 the standards, what are the criteria. And, so, the goals
15 or objectives to be met by the project are clear from the
16 outset. And, then, unlike a review by the Committee,
17 where you have to decide "well, does this project have an
18 unreasonable adverse effect?" Which how does it -- what
19 does that mean? How do you measure it? Under the Town
20 ordinances, you're either going to meet the standard
21 that's in the ordinance or you're going to have to get
22 some type of a variance. And, the variance actually can
23 be done before the, you know, the real detailed work in a
24 site plan gets done. I don't know if any of you have

1 planning board experience, but, typically, you know, a
2 variance application, you know, you can only have very
3 preliminary site work design, the applicant can make a
4 decision about whether they can work within the limits of
5 the variance or not. So, it's not as extensive from an
6 engineering standpoint.

7 But the point is is though that, once
8 the criteria are set in the ordinance, you don't have to
9 have a trial about, you know, "what is reasonable or
10 unreasonable?" The experts will review the project and
11 say either it meets the standards that have been set or it
12 doesn't.

13 And, it's also important, I mean, we
14 slip into, because it's shorter, the words "undue delay",
15 but that's not what the Legislature said. It's "undue
16 delay in the construction of needed facilities" or "undue
17 delay in needed facilities". And, I think that's key, is
18 is that we don't think that there's going to be any delay.
19 And, our biggest question is "why is this a needed
20 facility?" How is this facility different from any other
21 one that's below 30 megawatts?

22 VICE CHAIRMAN IGNATIUS: In your view,
23 on the -- at least on the setbacks and the height, and is
24 it sound levels also, I guess, is that it's an absolute,

1 you either meet it or you don't, and you don't have to
2 evaluate whether there's an adverse impact -- an undue
3 adverse impact. Simply, it's a mathematical question,
4 "are you within the threshold or not?" How about the
5 things such as visual impacts, that is very much more
6 subjective? Is it your view that it is an absolute
7 standard, as Mr. Getz said, if it's just adverse to any
8 degree, it's impermissible, not that it's unreasonably
9 adverse?

10 MR. RICHARDSON: Well, it's -- I don't
11 have the ordinance in front of me right now, but I don't
12 believe that they use the word "adverse", and I heard Mr.
13 Getz refer to that momentarily. And, that was in a
14 section analogizing what a ZBA would do to what the
15 Committee does through, you know, is it unreasonably
16 adverse before this Committee, versus the ZBA, which would
17 decide whether or not there was conflict in the spirit.
18 So, the ordinances use the identical standard for
19 measuring aesthetic impact. And, I forget the name of the
20 author of the study, but it's in the variance -- I mean,
21 excuse me, in the ordinances. And, I believe it's the
22 same criteria that this Committee actually used in the
23 Antrim case. So, --

24 VICE CHAIRMAN IGNATIUS: Is it Jean

1 Vissering, --

2 MR. RICHARDSON: Yes. Correct.

3 VICE CHAIRMAN IGNATIUS: -- who has been
4 a witness in some of our cases?

5 MR. RICHARDSON: Right. And, there's a
6 publication that she's made, which I've not read in
7 detail. So, I don't want to suggest that I understand it,
8 because I really don't. But, ironically, the Towns
9 required the same study be used to evaluate this as the
10 Committee used in Antrim. So, it's hard for me to reach
11 the conclusion that, I mean, at least by the -- you know,
12 are we doing the same thing as the Committee approach?
13 You know, we're following that.

14 Did that answer your question or did I
15 wonder off it?

16 VICE CHAIRMAN IGNATIUS: Well, I think
17 there's still this question of whether things are blanket
18 adverse as opposed to unreasonably adverse effect on
19 environment and other matters that I haven't heard you
20 say isn't --

21 MR. RICHARDSON: But I think --

22 VICE CHAIRMAN IGNATIUS: -- is not the
23 language in the statute. I mean, is there an opportunity
24 for, is there even a mechanism in municipal planning

1 standards to be able to, by agreement, have a municipality
2 say "we will treat this as an unreasonably adverse
3 impact", even if the language adopted doesn't use that
4 phrase, to impose that. That it isn't just an absolute
5 one -- you know, one bit over the line makes it an
6 unacceptable project and must be rejected?

7 MR. RICHARDSON: Right. And, the real
8 question is is, first of all, whether or not, under
9 674:33, whether or not the project -- or, the ordinance,
10 excuse me, results in unnecessary hardship on the
11 applicant? And, so, the Applicant has to show "jeez, this
12 zoning ordinance is going to impair my ability to develop
13 a wind project, which, by the way, is an allowed use under
14 your ordinance." The question then becomes, "is the
15 project consistent with the spirit of the ordinance?" In
16 other words, if we're dealing with noise, you know, are we
17 being protective of the population? And, assuming the
18 applicant can make the showing, "yes, you know, if we do
19 this at 35, you know, there's not really going to be any
20 adverse impacts." People are going to not complain,
21 they're not going to be hurt. It's not going to affect
22 their property.

23 I mean, those are the same things that
24 we expect the Committee would want to look at, that the

1 ZBA would be required to examine under the ordinance. If
2 the ZBA makes that determination, whether it's 35 or 37 or
3 something else, then that becomes the very departure that
4 I think you were discussing. It doesn't have to be
5 absolutely technical compliance in every case. And, in
6 fact, if you looked at planning board decisions -- or,
7 excuse me, zoning board decisions, you'd find that far
8 more often the cry is is that the ZBAs don't hold the
9 applicant's feet to the fire as much as they should.

10 VICE CHAIRMAN IGNATIUS: And, in the
11 case of New Ipswich in particular, those kinds of more
12 flexible response to the evidence would have to be through
13 a ZBA process; whereas, in Temple, more of it would be in
14 the site plan regulations and could be done by the
15 Planning Board?

16 MR. RICHARDSON: That's correct. I
17 mean, but, you know, what's in the Temple site plan
18 regulations is often things like submission requirements.
19 In both Towns, really, the bulk of the standards are in
20 the zoning ordinances. So, I think you really -- I don't
21 want to suggest that the Planning Board would just be
22 waiving the major requirements for the facility. It's
23 really, you know, this is ultimately about the noise
24 ordinance.

1 The Town -- New Ipswich approved two met
2 towers without any appeals. They went through the design
3 review for site plan of the project. I believe it had
4 seven turbines that were located in New Ipswich, there
5 were none in Temple at the time. And, it was, you know,
6 there were no appeals from any of that process. We're
7 only here because of the 33-decibel standard. And, the
8 reason why I bring that to your attention is that it's not
9 that the delays or the joint review or I think anything
10 like that is really the problem. Timbertop's, the thrust
11 of its argument, you know, while it tries to fit within
12 the language in 162-H:1, it's really just that the Towns
13 have gone too stringent.

14 If that's the case, I think we have to
15 look back at 162-H:1, and say "we're to maintain a balance
16 between the environment and the need." And, so, I think,
17 you know, it's clear, Temple and New Ipswich have
18 protected the environment, maybe they have done it too
19 much. But the thing that has to be considered by this
20 Committee, before it pulls the project away from the
21 Towns, is "Why is this project important?" "Why is it
22 required for the Committee to take jurisdiction?" And, I
23 think, if the Legislature had wanted to say "let's just
24 preempt towns that go too far", I mean, the word

1 "municipality" really isn't in 162-H:1. I don't think
2 they went there.

3 And, I apologize if I've gone off into a
4 different question, but that's how I see your question
5 fitting into the overall scheme of the statute.

6 VICE CHAIRMAN IGNATIUS: On the question
7 of need, you had said before that, for the projects that
8 were 30 megawatts and higher, it's just presumed that
9 there's a need for them. And, I don't know of any source
10 you cited for how you got to that conclusion.

11 MR. RICHARDSON: Well, we know that
12 162-H:1 is adopted pursuant to the public welfare, you
13 know, all of the purposes and the findings. And, that
14 above that amount, the applicant doesn't have to show
15 that. And, in fact, it's really, when you look at what
16 happened in deregulation and with, first, the bulk power
17 supply findings being removed, and then the "consistency
18 with the state energy policy" being removed. Above
19 30 megawatts, the need is there, and we're just going to
20 let the market decide. I mean, that's effectively what
21 the Legislature has said, is is that, once you're above
22 30 megawatts, if you've got somebody who's willing to
23 finance your project, you only have to show that there is
24 not undue adverse -- I'm sorry, I get the criterion

1 confused, unreasonable adverse effects or undue impact on
2 the orderly development of the region. And that, in
3 itself, almost requires the Committee to evaluate the
4 need. I mean, are we essentially building, you know, a
5 project that affects huge resources, huge environmental
6 impacts for just a tiny amount of energy. So, I think
7 there's still a vestige of that. But, ultimately, what
8 the amendments to 16 say is that the Committee just
9 presumes that need exists, if it's above 30 megawatts. If
10 it's below, that's not the case.

11 VICE CHAIRMAN IGNATIUS: And, that's the
12 final point where I don't follow it. I think we can both
13 agree that the -- for the larger projects, there is no
14 requirement or showing need, because the Legislature
15 repealed that. And, you conclude that's because they are
16 presuming that there's a need.

17 MR. RICHARDSON: Right.

18 VICE CHAIRMAN IGNATIUS: And, I'm not
19 seeing that.

20 MR. RICHARDSON: So, it starts off with
21 "The Legislature recognizes that the siting of energy
22 facilities...has a significant impact on", you know, "the
23 general welfare of the population", etcetera. You then
24 get to 162-H:2, and it says that "above 30 megawatts",

1 that's what an energy facility is. That's the thing. I'm
2 not trying to make a technical, you know, argument about
3 there is a rebuttable presumption or something like that.
4 I'm saying, what the Legislature has said is that, above
5 30 megawatts, these things are so important that we want
6 the Committee to review them. Below 30 megawatts, the
7 Committee can review them, if it determines it's required
8 to do so, consistent with what's in H:1. And, that's all
9 that I mean by saying "it's presumed". It's not anything
10 more than that. It's just where the Legislature drew the
11 cut-off. And, then, I think, you know, above that
12 cut-off, obviously, everything in 162-H comes into play,
13 is important; below that, I think it's up to the Applicant
14 to show why those same considerations apply.

15 VICE CHAIRMAN IGNATIUS: All right. I
16 guess that's it for me. Thank you very much. I
17 appreciate everyone's attention.

18 CHAIRMAN BURACK: Thank you. Yes. Why
19 don't I keep going around and we'll come back to you.
20 Director Bailey.

21 MS. BAILEY: Thank you. Mr. Richardson,
22 do you think that the Town is anyway legally obligated to
23 balance the interests and the need for facilities with the
24 environmental impacts?

1 MR. RICHARDSON: I believe that they
2 are. In the sense that their Master Plan recognizes the
3 value of renewable energy. Temple had one of the first
4 energy committees in the state, and they, you know, they
5 wrote a small wind energy ordinance. They also adopted
6 the large wind energy ordinance to make those facilities a
7 permitted use.

8 I don't feel that they have, if your
9 question is is "do they have an obligation to disregard
10 their ordinance and approve a project, notwithstanding the
11 standards in it?" They clearly cannot do that.

12 MS. BAILEY: So, do they have any
13 obligation to consider what we would consider,
14 unreasonable impact on public health?

15 MR. RICHARDSON: I think that they have.
16 And, when you, you know, look at the various reports, you
17 know, particularly about noise impacts, that was one thing
18 that they considered. There's all sorts of information
19 that was before them on avian impacts. I think they have
20 really gone, and when you go through their testimony kind
21 of bullet by bullet, I think they covered all of the major
22 issues that the Committee would consider. I'm not sure
23 what public health impacts there would be that are not
24 contemplated in their ordinance. If you're aware, I'd be

1 happy to --

2 MS. BAILEY: Well, do you think that
3 sound levels that are "high enough to generate sporadic
4 complaints" is the same as "an unreasonable impact on
5 public health" as a result of sound?

6 MR. RICHARDSON: I think that, yes.
7 And, when you look at what they had, and I'm looking at
8 Exhibit 8, which is on Page 65 of the testimony. And,
9 what -- this is really what the Towns base their studies
10 on. And, I'm looking at the last paragraph on the bottom.
11 You see here "Pederson & Wayne (2004) research found that
12 when wind turbine noise levels reached 35 dBA, six percent
13 of the population was highly annoyed, and this rapidly
14 increased to 25 percent at 40 dBA." And, then, -- and,
15 so, in a sense, what I'm trying to get at is is that the
16 33 dBA standard adopted by the Towns was an effort to
17 reach that determination of "where are the adverse impacts
18 on the community?" It's not expressly written in terms of
19 "is there a public health threat?" It's more written in
20 the sense of "is there a general threat to the nature of
21 the community, the proximity of residences?"

22 And, it's fairly significant. I believe
23 there's 165 -- before I misquote what the memorandum says,
24 where is it? There's a table in their memorandum that

1 counts up the lots that are within distances of a half
2 mile to one mile. And, so that the number of residential
3 lots that are close to this project is fairly -- is fairly
4 large.

5 VICE CHAIRMAN IGNATIUS: Can I clarify
6 one thing? I'm sorry to interrupt, Ms. Bailey. Can I
7 just ask, because I think I heard a different answer? I
8 heard something different in your response from what you
9 said earlier. And, I just want to be sure. Maybe I just
10 got it wrong, whether the words got switched around.

11 I thought you said earlier this morning
12 that "the Towns adopted 33, because that was the level
13 that would generate sporadic complaints". And, I took
14 that to mean "you were willing to live with sporadic
15 complaints." But, above sporadic complaints, and I'm not
16 sure quite what that means, but above that would be an
17 unacceptable level. And, I think Ms. Bailey's question
18 was "does a project that generates sporadic complaints
19 constitute "unreasonable impact"?" And, you said "yes, it
20 would." And, that seemed to contradict what you had said
21 before. So, I want to just give you a chance to explain
22 what you meant and help me know what the right answer is.

23 MR. RICHARDSON: So, the Pederson & Wayne
24 document that I referred to said that, at 35 dBA, there

1 were widespread complaints reported; 33 dBA is sporadic.
2 If I worded that inartfully, what that was meant to
3 reflect was is that, above that 33 dBA, the impacts were
4 reaching the levels that the Towns considered to be
5 unreasonable.

6 VICE CHAIRMAN IGNATIUS: Thank you.

7 MS. BAILEY: And, do you know when the
8 Towns were looking at the Pederson study, did they also
9 look at the World Health Organization's analysis of what
10 constituted an adverse impact to public health?

11 MR. RICHARDSON: It's not in the record,
12 but Ms. Freeman was nodding "yes". I don't know -- I
13 don't know that we cited that. There was a real issue
14 with not wanting to give you too many reports and too much
15 paper. So, we tried to boil it down to a few of them.
16 But that was obviously something they would have
17 considered.

18 MS. BAILEY: And, I think that the World
19 Health Organization's findings are a little bit higher
20 than 33 dBA.

21 MR. RICHARDSON: It's 40, correct?

22 MS. BAILEY: Yes.

23 MR. RICHARDSON: Yes.

24 MS. BAILEY: At night.

1 MR. RICHARDSON: Uh-huh. But, you know,
2 I think that it's important, and you look at how the EPA
3 methodology is derived, it's based upon also consideration
4 of what the ambient sound levels are. And, you know, I
5 think that we, obviously, don't have the data to show
6 this, but this is a very quiet, rural area, and you might
7 be experiencing noise levels, I mean, there's no
8 industrial sources of noise, no major transportation
9 routes, you might be looking at background levels that are
10 in the low 20s.

11 MS. BAILEY: Uh-huh. You keep referring
12 to the "EPA", and I don't think the EPA has enumerated
13 standards. What exactly are you referring to when you
14 cite the "EPA"?

15 MR. RICHARDSON: The EPA produced a
16 document for modeling what the impacts of noise levels are
17 on a community. And, it was based upon an urban
18 community, but they included a table that's in the
19 testimony that you have, it's one of the exhibits, and it
20 basically explains how you apply the EPA model to reach
21 that determination of what -- what the impacts would be.

22 And, you know, I look around the table
23 here, but, in 1998, when this Committee approved the
24 Newington energy project, that was based on a noise

1 standard that was actually, if you look at the Stantec
2 [sic] report, was based upon the community noise standard
3 used by the EPA. So, it's kind of beyond the memory of,
4 you know, those who are on this Board now, but it's
5 actually been used by this Committee to evaluate a
6 project. I was the Public Counsel in that case, and
7 that's why I know this, because he was my expert in that
8 case.

9 MR. IACOPINO: If I could just
10 interrupt? You're referring to the document from the EPA
11 from 1977, usually referred to as the "Levels document",
12 correct?

13 MR. RICHARDSON: That's correct. And, I
14 believe it's also discussed in the 2004, I mean, more
15 recent papers have affirmed that that is an acceptable
16 methodology for evaluating community impacts.

17 MR. IACOPINO: But the EPA hasn't opined
18 since 1977. I mean, other people have reviewed the Levels
19 document.

20 MR. RICHARDSON: I don't know the
21 answer. I mean, the EPA is a big organization, so, it's
22 hard to say.

23 MS. BAILEY: What do you make of the
24 sentence, I think it's the last sentence in 162-H:1, that

1 says "The Legislature, therefore, hereby establishes a
2 procedure for the review, approval, monitoring, and
3 enforcement of compliance in the planning, siting,
4 construction, and operation of energy facilities"?

5 MR. RICHARDSON: I think that means
6 exactly what it says. There's a procedure for review.
7 And, I think, you know, one of the interesting things that
8 I take from that is is it's not a substance. They didn't
9 say "a standard for the design and construction", they
10 didn't say the -- how to measure the environmental
11 impacts, except to say that this Committee determines
12 whether or not they're not unreasonably adverse, or
13 whether they have undue impact on the orderly development
14 of the region. So, effectively, it leaves the question of
15 "how should the impacts be measured?" wide open. And, I
16 think that is why the House Science and Technology
17 Committee was before you recently, was to say, you know,
18 "please give us some guidance, because right now, you
19 know, neither abutters, towns, nor applicants really have
20 a sense for what the design goal is."

21 MS. BAILEY: And, the Towns are or are
22 not guided by what is in 106-H -- I'm sorry, 162-H?

23 MR. RICHARDSON: I don't believe that
24 they are. And, I think the law, if you read the case, and

1 I quoted it during the opening statement, so, I won't
2 repeat it here. But what the Committee does is it applies
3 the evidence and facts to the standard in 16 in each case.
4 But there's no authority or reason to believe that the
5 Committee -- those precedents are intended to be binding.
6 I mean, a wind turbine project that's 99 megawatts in
7 Dixville Notch, you know, that you can't use a model for
8 that to evaluate, you know, a project that's in a much
9 more densely settled area in New Ipswich and Temple, the
10 topography is different. I don't think that, first of
11 all, the law allows, and I'm not sure that the facts would
12 apply the same standards in each case.

13 MS. BAILEY: Well, the standard is
14 whether there's unreasonable adverse impacts. And, so,
15 the findings may be different, but what you look at is the
16 same, isn't it?

17 MR. RICHARDSON: Well, I guess, you
18 know, what applicants typically do, and I'm sure abutters
19 and towns, you know, will also weigh in on, is is how do
20 you determine whether or not something is reasonable or
21 unreasonable? And, that's a difficult challenge.
22 Because, you know, for example, I know that, in Antrim,
23 though I wasn't in the room during any of the
24 deliberations, but I know there was some debate about, you

1 know, "do we use the average of the noise requirements or
2 do we just consider, you know, the L10s or L90s, those
3 types of things?" I mean, you could actually have a trial
4 in front of this Board about "how do you make that
5 determination?" Whereas, in the zoning ordinances, it's
6 basically set forth in the ordinance. And, the ordinance
7 is, you know, the standard by which it's measured, unless
8 there is a variance that's required and issued.

9 MS. BAILEY: And, isn't that an argument
10 why this Committee maybe should be the body that hears
11 that evidence?

12 MR. RICHARDSON: Uh-huh.

13 MS. BAILEY: Because there's a lot of
14 collective experience from other cases, as compared to two
15 towns, who are looking at this information for the first
16 time, and may or may not be able to strike the balance
17 that the Legislature was looking for?

18 MR. RICHARDSON: Absolutely, yes. But
19 what the law requires the Committee to consider is to not
20 just measure the strictness of zoning ordinances in the
21 abstract, but to maintain a balance between the
22 environment and the need for new energy facilities. I
23 don't think there's any doubt that the Towns have
24 protected the environment. The question is is, "is there

1 something about the need for new energy facilities or the
2 need for this project that suggests that jurisdiction is
3 required for that?" And, I just don't -- I mean, we are
4 -- I'm making an argument against, you know, what a need
5 might be, but there's been no showing of what the need
6 actually is. And, I think that's fatal to the Petition.
7 I think they have to show you why this project or why
8 another project is needed. And, it almost gets into an
9 alternatives analysis, in my view. Because, you know,
10 it's not enough to say that RPS exists. In fact, "RPS"
11 isn't mentioned in 162-H:1. I won't go into that, because
12 that's not really your question. But could the need for
13 new energy facilities be met by a gas-fired plant? Could
14 it be better met -- I mean, with less impact? Could it be
15 better met by a, you know, a REC-eligible wood-fired
16 generating station? There's 260 megawatts of projects in
17 New Hampshire that are in the queue. What is it about
18 this project that requires jurisdiction? Or, do we have
19 to let them all in?

20 I mean, that's really what this case
21 should be about is is "why is Timbertop Wind's project
22 important in order to maintain the state's balance of need
23 for energy and impact to the environment?" Clearly, this
24 has impacts to the environment. I mean, we included the

1 avian migration. I mean, 8,700 broad-winged hawks passed
2 over this ridge in a single day. Timbertop's avian study
3 shows that 38 percent of them are going to be below blade
4 height. The Town has, obviously, been concerned about
5 that. They have developed standards for that. What is it
6 on the other side of the equation, the need, that says
7 that this Committee should take review?

8 MS. BAILEY: And, Mr. Getz, I think your
9 argument is that this Committee would balance the need
10 with all of those other things?

11 MR. GETZ: No. My argument is that the
12 Towns have shifted the existing balance against Timbertop,
13 and anyone else who wants to develop within their
14 communities, by putting in ordinances that are out of step
15 with the benchmarks of state law, which -- and including
16 decisions of this, of this Committee. So, that's -- so,
17 by their actions, in shifting the balance, they have not
18 maintained a balance between the need for new facilities
19 and the environment. And, what we're asking is to come to
20 the SEC where that balance will be maintained. Because
21 the alternative is, if they're not -- if they have gone
22 too far on -- to maintain a balance, and, you know,
23 putting aside the integrated review, --

24 MS. BAILEY: Right.

1 MR. GETZ: -- then the alternative is to
2 come to the Committee. And, then, the Committee will --
3 then, the Committee will make its decisions, which, you
4 know, they're always balancing things and balancing the
5 evidence and balancing the testimony and making their
6 decision. But I think -- but it's by definition, by
7 creation of this body, and I think you're absolutely right
8 in focusing on that last sentence, by creating a
9 procedure, the Legislature created a body that, by
10 definition, the SEC maintains the balance between the need
11 for facilities and the environment, and they just apply
12 that in each case.

13 MS. BAILEY: And, so, if a petitioner
14 asks, we have to take it.

15 MR. GETZ: The petitioner has to make a
16 case. You know, for instance, in the Antrim case, when
17 there was only one jurisdiction, it's harder to make the
18 arguments perhaps about "undue delay" or "resolving things
19 in an integrated fashion", which are amplified in this
20 case. But, if you had a single jurisdiction, and the --
21 and that jurisdiction had not gone too far, and had not
22 shifted the balance against new energy facilities, then
23 that would be the type of case where you may decline
24 jurisdiction. And, especially like in the Berlin case,

1 where there was a lot of progress made, and there was, you
2 know, agreement between the Applicant and the Town. There
3 were some other individuals that were seeking SEC
4 jurisdiction in that case, I believe.

5 MS. BAILEY: Okay. Thank you.

6 CHAIRMAN BURACK: No further questions,
7 you're all set?

8 MS. BAILEY: Yes.

9 CHAIRMAN BURACK: Director Stewart, do
10 you have any questions? No? Director Normandeau, any
11 questions?

12 DIR. NORMANDEAU: I think I'll pass.

13 CHAIRMAN BURACK: Okay. Do you have a
14 follow-up as well?

15 CMSR. HARRINGTON: Yes.

16 CHAIRMAN BURACK: Commissioner
17 Harrington, then Commissioner Scott, and then Attorney
18 Ignatius -- or, Attorney Iacopino and I may have some
19 final questions here.

20 CMSR. HARRINGTON: For Mr. Richardson,
21 just so we get a feel for this, how long and how much
22 money have the Towns spent on developing these ordinances?

23 MR. RICHARDSON: I don't know. Do you
24 want me to ask my clients?

1 CMSR. HARRINGTON: Sure. Just, you
2 know, a ballpark figure. You don't have to have an exact
3 number.

4 (Atty. Richardson conferring with the
5 Towns' representatives.)

6 MR. GETZ: Mr. Chairman?

7 CHAIRMAN BURACK: Yes, Mr. Getz.

8 MR. GETZ: If I could just ask that the
9 answer include the 2010 ordinances as well, and not just
10 the 2012 ordinances?

11 CHAIRMAN BURACK: Well, we'll see what
12 Attorney Richardson has to share with us, and then we'll
13 ask about those. I know there is some information, some
14 statements made in the pleadings about the time spent, I
15 believe in the testimony of -- yes, the testimony of
16 Dekker and Freeman, I believe that there is some reference
17 to the time spent in preparing the ordinances. I don't
18 recall if the testimony of Kieley and Lowry did the same
19 or not.

20 We want to hear what you have to say,
21 obviously, Attorney Richardson. But, while you were
22 conferring, Attorney Getz asked the question as to whether
23 you could also tell us how much time was spent also
24 preparing the 2010 noise ordinances. So, I don't know

1 what you have for us, maybe it's just on the most recent
2 ordinances?

3 MR. RICHARDSON: It was, I mean, the
4 amount of money was not significant on the ordinance. I
5 mean, we're looking at somewhere around \$5,000, maybe
6 more, on outside consultants who would have attended the
7 Planning Board's hearing.

8 In terms of the number of months
9 researching the more recent ordinances, seven months to
10 upwards of over a year. I mean, I think, is it 2,000
11 hours of volunteers?

12 UNIDENTIFIED SPEAKER: Thousands.

13 UNIDENTIFIED SPEAKER: Thousands.

14 MR. RICHARDSON: Yes. So, they -- I
15 mean, they would form committees, you know, to look at
16 particular issues, and then those, you know, working
17 groups would come back and report on them, is what I
18 assume.

19 CMSR. HARRINGTON: All right. That's
20 satisfactory. That's all I was looking for, is to just
21 get a range of that. Thank you.

22 For Mr. Getz, I had a question, the
23 concept here of this being in multiple towns and having
24 multiple jurisdictions was one of the justifications for

1 this Committee taking jurisdiction on it. Do you know of
2 any other type of activity or type of industrial
3 development where there is a law in place where the state
4 can supersede local zoning ordinances because someone
5 wants to make a shopping plaza or whatever, a factory, and
6 it happens to be in two towns?

7 MR. GETZ: Not that -- I'm not familiar
8 with that. All I'm familiar with is energy facilities.

9 CMSR. HARRINGTON: Okay. And, your
10 question on 162-H:1, you've referred many, many times to
11 the balance that needs to be maintained. And, when I read
12 this, the only place I really see "balance" is at the
13 beginning, or in the middle of the paragraph it says
14 "Accordingly, the legislature finds that it is in the
15 public interest to maintain a balance between the
16 environment and the need for new energy facilities." So,
17 is that the "balance" you're talking about?

18 MR. GETZ: Yes. And that what I'm
19 saying there is, that's why the SEC was created. One of
20 the reasons it was created was to have a body that would
21 maintain that balance through its decisions.

22 CMSR. HARRINGTON: Okay. But the
23 balance it's talking about is between the environment and
24 the need for new energy facilities, and you say there's no

1 necessary -- it's not necessary to show any need for this
2 energy facility?

3 MR. GETZ: That's correct. That the
4 "purpose" section does not create any independent,
5 substantive requirement. It's not required for an
6 application, to file an application. It's not required to
7 get a certificate. All that the H:2 says is "when you're
8 figuring out whether to step in, keep these things in
9 mind." And, when you're looking at "what" -- "does the
10 Town have the capability of meeting these obligations?"
11 And, one of those obligations is maintaining a balance,
12 and I often insert, you know, the word "a proper balance",
13 between the environment and the need for new facilities.
14 And, that's where I get to, you know, pointing out that
15 they shifted the balance against facilities.

16 CMSR. HARRINGTON: So, you're saying
17 that we need to maintain a balance between the environment
18 and the need for new facilities, but there's no need to
19 show that there's any need for new facilities?

20 MR. GETZ: Correct.

21 CMSR. HARRINGTON: All right. I don't
22 quite follow that, but I don't think we need to push it
23 any further.

24 This -- I go back to Mr. Richardson on

1 this. In -- get the right section here -- 162-H:4, IV,
2 sub (a), states, this is the section that describes, for
3 energy facilities, that the SEC does have primary
4 jurisdiction of, basically to say something over
5 30 megawatts, and these are times when they don't have to
6 take that jurisdiction or they can basically waive it.
7 And, what it says "Existing state or federal statutes,
8 state or federal agency rules or municipal ordinances
9 provide adequate protection of the objectives of RSA
10 162-H:1." Do you think the municipal ordinances in
11 question here meet that requirement?

12 MR. RICHARDSON: I think that they do.
13 Because, you know, we're looking at protecting all of the
14 environmental impacts, and we're not looking at a project
15 that is so critical to the state's infrastructure, or its
16 energy or its economy, the public welfare, that requires
17 that those standards be set aside.

18 CMSR. HARRINGTON: Okay. And, going
19 further down onto (d) in the same section, it says that
20 "All environmental impacts or effects are adequately
21 regulated by other state" -- "other federal, state or
22 local statutes, rules or ordinances." The same question,
23 do the ordinances here meet that criteria?

24 MR. RICHARDSON: I think across the

1 board they do. I mean, historic, avian, noise, public
2 safety. I think everything has been addressed.

3 CMSR. HARRINGTON: Okay. And, Mr. Getz,
4 without -- I'm not going to repeat the questions over
5 again, but I'd just say the same questions to you please.

6 MR. GETZ: Well, I was having --
7 unfortunately, trying to follow you.

8 CMSR. HARRINGTON: Okay.

9 MR. GETZ: We're in 162-H:4, IV.

10 CMSR. HARRINGTON: Four.

11 MR. GETZ: Which is the --

12 CMSR. HARRINGTON: Sub (a).

13 MR. GETZ: Which is the basis for when a
14 Committee may exempt an otherwise jurisdictional facility.
15 So, with (a), "existing state, federal or municipal
16 ordinances provide adequate protection"?

17 CMSR. HARRINGTON: Yes.

18 MR. GETZ: No. They don't provide
19 adequate protection, because they don't maintain the
20 balance that is required of them.

21 CMSR. HARRINGTON: And, what about (d)?

22 MR. GETZ: With respect to "all
23 environmental impacts are adequately regulated", I don't
24 know the answer to that. I do know that the approach at

1 the town level doesn't resolve all the issues in an
2 integrated fashion. But I do know that, if this project
3 were before the SEC, then all of those issues would be
4 addressed in an integrated fashion.

5 CMSR. HARRINGTON: Okay, thank you.
6 That's all I have.

7 CHAIRMAN BURACK: Commissioner Scott.

8 CMSR. SCOTT: Thank you. Attorney
9 Richardson, there's been a lot of discussion about the
10 ordinances, and I think you made the point to the effect
11 that, in some ways, the ordinances are easier, because you
12 have some set criteria, unlike some of the SEC rules. But
13 it also seems very clear that the way the ordinances are
14 constructed, in order for a wind project to actually
15 happen, at least the potential applicant seems to the feel
16 that they would definitely need a variance in order to
17 move ahead on a project.

18 With that, I wanted to ask you a little
19 bit about that process. What criteria do the ZBAs use for
20 a variance?

21 MR. RICHARDSON: Sure. It's in
22 Ms. Freeman's testimony, or I could read the statute to
23 you. But it's RSA 674:33. And, I understand as well that
24 there have been some changes to it, and the ZBA standards

1 have actually been lessened from actually what's in the
2 testimony, although that occurred before their testimony
3 in this. If you look at the --

4 (Court reporter interruption.)

5 MR. RICHARDSON: Yes. *Brandt*
6 *Development versus Somersworth*, they talk about how these
7 standards have changed some. And, there's -- the first
8 one is "the variance will not be contrary to the public
9 interest", and I'm looking at RSA 674:33(b)(1)
10 [674:33,I(b)(1)?]; then (b)(2) is "The spirit of the
11 ordinance is observed"; (b)(3) is that "Substantial
12 justice is done"; (b)(4) is "The values of surrounding
13 properties are not diminished"; and then (b)(5) is that
14 "Literal enforcement of the provisions of ordinance would
15 result in an unnecessary hardship."

16 Now, if you then read further down,
17 there is another twist to this, and this is the piece that
18 wasn't included in the testimony, only because I'm not --
19 I wasn't sure it was needed to go into the level of detail
20 about the variance criteria. But it's, you know, when you
21 look at this, I mean, you're looking at whether the
22 proposed use is a reasonable one, it's a breakdown of
23 what's in the "hardship" criteria. And, effectively, you
24 know, what the Legislature is saying is is that, you know,

1 it's no longer a test of "a hardship is denied unless you
2 can show that there's no other reasonable use of the
3 property." Now, an applicant only has to show that their
4 underlying use is reasonable, kind of consistent with the
5 other criteria.

6 CMSR. SCOTT: Thank you. And,
7 elaborating on that I think is helpful, too. But, I
8 guess, would you agree then, the ordinance itself is
9 fairly self-explanatory, but, once you get into
10 determining a variance, it becomes a lot more subjective?

11 MR. RICHARDSON: Well, it is, only
12 because you then have to figure out "what is the rationale
13 behind the ordinance?" And, that was one of the reasons
14 why I think there was reference in Timbertop's memorandum
15 about there being "irreconcilable differences between the
16 Temple testimony and the New Ipswich testimony". One was
17 looking actually, though, in the context of the overall
18 ordinance; the other was looking at the noise criteria.
19 Which is why one said "adverse impacts to abutting or
20 properties in the neighborhood"; the other said, you know,
21 "to the environmental qualities" and that type of thing.
22 So, it was really just a question of the context in which
23 the variance was being evaluated. But that's, I mean,
24 that's what this is, is it's intended to provide a relief

1 valve to prevent an ordinance from, you know, denying a
2 project, when there's no good reason for it.

3 CMSR. SCOTT: Okay. And, I think, when
4 you were being questioned by Ms. Bailey, you perhaps, and
5 maybe I got the timing wrong, but you had started to
6 characterize the experience of the ZBAs with variances.
7 Can you elaborate on that? Have they been granting them?
8 Have never granted one?

9 MR. RICHARDSON: I don't know. And,
10 part of the reason why I don't know is is that we've been
11 very careful, because ZBA members are like this Committee,
12 they're kind of judicial officials, and so they can't
13 communicate. And, I was worried that, if, you know, we
14 brought ZBA members in to explain their testimony, you
15 know, which would typically be the chairman, the chair,
16 then that individual would have to recuse themselves
17 potentially from hearing the variance, and we've
18 effectively lost the leadership on the boards.

19 CMSR. SCOTT: Well, I'm not asking for
20 that. But, clearly, there's some history of the ZBA in
21 granting variances, correct?

22 MR. RICHARDSON: Yes.

23 CMSR. SCOTT: For the two towns, and do
24 they sometimes grant it? Sometimes not? Always grant?

1 Never grant?

2 (Atty. Richardson conferring with the
3 Towns' representatives.)

4 MR. RICHARDSON: Yeah, it goes both
5 ways.

6 CMSR. SCOTT: Thank you. And, Attorney
7 Getz, there's been, obviously, a lot of discussion over
8 "undue delay". To the extent we're discussing timing, I
9 was curious, if we to take jurisdiction, when would we
10 expect to see a perfected application that would come
11 before us?

12 MR. GETZ: Before the end of year the
13 Company could put an application together. You know, what
14 has happened is, they have had to put a lot of development
15 efforts on hold to see what's -- what kind of decision is
16 going to be made. And, then, we'll have to, you know, get
17 back to putting an application together, which is a
18 significant undertaking.

19 CMSR. SCOTT: And, if we were not to
20 take jurisdiction, what would be the timeframe to go
21 before the Towns?

22 MR. GETZ: There's no intention to go
23 before the Towns under these ordinances. Timbertop cannot
24 develop its project under these ordinances.

1 CMSR. SCOTT: Even with potential for a
2 variance?

3 MR. GETZ: If you got half a dozen
4 variances that were approved, I mean, there's just too
5 much that's unknown. There are some things that, if there
6 were, you know, that are objective, like the sound
7 ordinance, and despite the fact that it's been indicated
8 "this is all about the sound ordinance" or "ultimately
9 about the sound ordinance", that's just one piece of it.
10 How do you go and get a variance to a ordinance that says
11 "no adverse" -- you know, that "the LWES will not
12 adversely" -- or, "will not cause adverse visual impacts"?
13 If they were to -- if we could get a variance that said
14 they're going to apply the standard under 162-H, that
15 there be "no unreasonable adverse visual impact". So, I
16 think it's a virtual impossibility for Timbertop to
17 proceed with the Towns.

18 CMSR. SCOTT: Okay. Thank you.

19 CHAIRMAN BURACK: Attorney Iacopino.

20 MR. IACOPINO: Thank you. Mr. Getz, at
21 the beginning of your --

22 (Court reporter interruption.)

23 MR. IACOPINO: I'm sorry. Mr. Getz, at
24 the beginning of your argument, I thought I heard you say

1 that "it's not your client's burden of proof here today".
2 And, I don't know if I actually caught the reason why you
3 make that statement. If you could just explain that in
4 greater detail please.

5 MR. GETZ: I believe my statement was,
6 "it's not my client's burden to prove that this project is
7 needed." It's my client's burden to prove that a
8 certificate is required, and which we take very different
9 views.

10 MR. IACOPINO: So, you're limiting that
11 statement to "you don't need to prove the need"?

12 MR. GETZ: Correct.

13 MR. IACOPINO: Okay. Mr. Richardson,
14 with respect to need, you seem to indicate that the word
15 "need" only means "quantitative need". And, do you
16 recognize that there might be other types of need for
17 energy in the State of New Hampshire, other than just
18 meeting a certain amount of megawatts of power being
19 produced?

20 MR. RICHARDSON: I'm not sure I
21 understand by what you mean by "quantitative need". And,
22 there's two different places where it talks about "need
23 for energy". And, I think that's really -- and, then, in
24 the sixth finding in the Antrim decision, it talked about

1 "adequate and reliable". And, I think, you know, it does
2 come down to, you know, not just the numbers that are
3 running, I mean, there's available capacity, there's
4 ability to follow load. It's -- you know, so, from an
5 energy standpoint, you know, it is about the numbers,
6 although it's not just absolute. I mean, you could have a
7 need -- you could have sufficient capacity, but then you
8 could not be able to have peaking requirements, you know,
9 where you have instantaneous demand at high levels. So, I
10 think it is a complex question.

11 MR. IACOPINO: Let me change it a little
12 bit then.

13 MR. RICHARDSON: Sure.

14 MR. IACOPINO: You've spent a
15 considerable amount of time putting in expert testimony
16 regarding that RPS doesn't play a role here, that there
17 is, you know, that we shouldn't be considering the need to
18 fulfill the RPS requirements. I guess my question to you
19 is, isn't part of the need for energy in this -- in this
20 state the need for clean, renewable energy, as opposed to
21 dirtier types of energy that might cause air pollution and
22 other environmental issues?

23 MR. RICHARDSON: Certainly, that goes to
24 balancing the need for energy and the protection of the

1 environment. But, you know, there's no evidence in this
2 case that it's required for that. I mean, Timbertop has
3 effectively ignored making that showing.

4 MR. IACOPINO: I understand that. But
5 point is is that, do you recognize that "need" does not
6 necessarily mean "a certain number of megawatts of
7 electricity"?

8 MR. RICHARDSON: Well, I don't think
9 that's the way the statute is written. And, when you look
10 at what the order in which RPS was enacted in May 19th, I
11 believe it was 2007, and then it was on July 23rd that the
12 "renewable" definitions were added. So that the
13 Legislature, obviously, had just passed RPS, they could
14 have put it in to 162-H, but they didn't. And, the RPS
15 Program itself has the ability for the Commission to
16 adjust the amounts, delay implementation of the Class I,
17 there are different requirements. And, then, a utility
18 could, in theory at least, avoid its requirements entirely
19 and just pay the compliance penalty.

20 MR. IACOPINO: Do you recognize that at
21 that time that the statute was amended that, in fact, the
22 Legislature passed a more streamlined and quicker decision
23 tree schedule for renewable energy facilities?

24 MR. RICHARDSON: Above 30 megawatts.

1 And, then, below 30 megawatts, it basically directed the
2 Committee to evaluate the project under 162-H:1, to
3 determine whether it comes in.

4 MR. IACOPINO: And, do you recognize
5 that H:1 refers to all -- all different types of energy
6 facilities, not just electric generating facilities?

7 MR. RICHARDSON: Well, I do. But I
8 can't get around the fact that they did not put in
9 something about the renewable or RPS requirements. I
10 mean, obviously, fuel diversity is important. And, that's
11 one way in which I suppose you could, you know, it still
12 comes down to the numbers, but you could make a
13 qualitative need type decision. The problem is is where
14 is the information to show that in this case? And, in
15 fact, you know, when you look at the way wind energy
16 facilities operate, and there's a study, and we didn't go
17 into this, because it just didn't appear to be an issue in
18 the case, but wind energy doesn't peak during periods of
19 peak demand. So, you know, when you look at what its
20 contribution is, you may still have to run gas units and
21 maintain gas units in order to follow load and meet peak
22 demand. So, it's -- I think it's a hard sell. I don't
23 see it in this case. Although, it could, in theory,
24 happen in a different case.

1 MR. IACOPINO: Do you recognize that in
2 a number of statutes the Legislature has specifically
3 identified a need for renewable energy sources?

4 MR. RICHARDSON: Yes. I mean, 362-F is
5 it right there, I don't think you have to look far beyond
6 that. But the criteria about whether or not we set aside,
7 you know, standards to protect the public health or public
8 welfare is significant. And, it would really, I mean,
9 most of you grew up in New Hampshire, I'm sure. And, it's
10 just shocking to me that a need for Class I RECs in
11 Connecticut or Massachusetts could form the basis for
12 setting aside land use protections in New Hampshire towns.
13 And, it's not really about discriminating against those
14 outside, you know, communities or those outside needs,
15 they're clearly all important. But that doesn't mean that
16 we should give up who we are and how communities define
17 themselves. And, I think that, you know, when you look at
18 the constitutional provisions that we have cited, you
19 know, when New Hampshire has laws that are intended to
20 protect the welfare of the public, you know, we give up
21 some of our rights in order to ensure the protection of
22 others. But, if we give up New Hampshire's zoning, simply
23 so that people can meet RPS requirements in other states,
24 we don't have any political accountability to those

1 states, we don't know are those states doing what they
2 could do? Are they, you know, defining their programs in
3 particular ways, such as Massachusetts, you know,
4 eliminating the wood requirements? Are they not letting
5 in wind from New York? Are they not letting in renewables
6 from Hydro-Quebec? All of those issues are, I think, are
7 out there. And, the markets can change. You know,
8 someone can change a definition and the whole structure
9 changes. And, that's why I really don't feel that the RPS
10 Program fits within 162-H:1.

11 MR. IACOPINO: Mr. Getz, Mr. Richardson
12 makes the point that you're not arguing that there is a
13 need, other than quantitative, or that the definition of
14 "need" in RSA 162-H:1 involves anything other than
15 quantitative need. And, I think your argument really
16 doesn't include that. Is there a reason why you're not
17 taking that position?

18 MR. GETZ: Well, I don't think that
19 that's the appropriate inquiry about "need". But, if you
20 look at Page 10 of the Timbertop brief, we do say that
21 "Assuming for the sake of argument that the reference to
22 need in 162-H:1 has any bearing on a petition for
23 jurisdiction, that reference is more properly interpreted
24 as a general statement of the state's desire and need for

1 new resources of renewable energy." And, I think that
2 goes to your pointing to and the conversation about RSA
3 362-F. And, we point to the Committee's decisions in
4 Clean Power Development, where the SEC recognized that the
5 State of New Hampshire maintains a need for new energy --
6 for new clean and renewable energy sources, and, most
7 recently, in the Antrim Wind case, where the SEC noted "it
8 was cognizant of the need for new clean and renewable
9 energy sources." And, it closes that paragraph by
10 pointing out that "These recognitions apply to Timbertop
11 as well." Timbertop will be a wind facility subject to
12 and eligible for renewable energy credits and will meet
13 the goals of 362-F.

14 So, I don't agree with respect to the
15 interpretation of what need is required. But, if you
16 don't agree with me about how to read the statute with
17 respect to "need", then, I think there is a second way of
18 looking at this argument, and it's consistent with what
19 the Committee's done in Clean Power and Antrim and other
20 cases, talking more generally about the need for new clean
21 and renewable energy sources.

22 MR. IACOPINO: Thank you. I have
23 another question for you. You indicate in your papers
24 that all you have to do is meet a single one of the

1 findings, in order for the Committee to determine that it
2 is required, consistent with the findings, to assert
3 jurisdiction. Where do you get the fact that you only
4 need to address one? In other words, if I understand your
5 argument, you could just come in here and say "Look, undue
6 delay is our only complaint. There would be too much
7 delay in going through a variance process and an appeal to
8 the Superior Court maybe." Let's say that was your only
9 argument for jurisdiction. I understand your argument to
10 be that's all you need. And, then, if you can establish
11 that before the Committee, then, the Committee is required
12 to determine to assert jurisdiction.

13 MR. GETZ: Yes. And, --

14 MR. IACOPINO: And, I guess I'm looking
15 for your legal argument for why it's only one, and why not
16 all?

17 MR. GETZ: As I read the statute
18 162-H:1, it lays out standards, and it has an "and". So,
19 the -- that to maintain -- it's in the public interest to
20 do all of these things, and, if you're not doing all of
21 these things, if the Town's not maintaining the balance,
22 is not avoiding undue delay, is not integrating, if you
23 fail to do any one of those things, you're deficient under
24 the statute.

1 MR. IACOPINO: The language used in the
2 statute is "consistent with". Can you tell me how you --
3 how you and your client define that terminology
4 "consistent with"?

5 MR. GETZ: The language in 162-H:2 --

6 MR. IACOPINO: H:2, XII, you know, the
7 definitional section, which is also the determination
8 statute for the Committee.

9 MR. GETZ: I look at that provision that
10 says "a facility shall include generating equipment which
11 the Committee determines requires a certificate." In
12 determining whether it requires a certificate, the
13 guidance given to the Committee is that it look to
14 consistency with the findings and purposes set forth in 1.
15 And, in looking through that list, then you have to meet
16 -- you have to meet all the elements of the list, is the
17 way I interpret it.

18 MR. IACOPINO: Okay. Mr. Richardson --
19 or, actually, let me go to Mr. Roth, because he's been
20 quite for a long time. How do you interpret that? How do
21 you interpret it? Is it a need an applicant only satisfy
22 one of those findings or need an applicant satisfy all of
23 the findings? Or, is it some gestalt type of approach?

24 MR. ROTH: Mr. Iacopino, when I was

1 giving my remarks at the beginning, the word "gestalt"
2 passed my mind, and I thought "no, no, no, I think I'll
3 stick with "weight". And, I think what it is is, in many
4 of these kinds of statutes where there's a variety of
5 factors to be considered, typically, the way you go about
6 it is by some weight of the factors. So, because not all
7 factors weigh equally in any given case. For example, you
8 know, the "need" issue, could be a very slight need. But
9 there could be -- which in and of itself wouldn't carry
10 the day. But, if there were a great environmental impact
11 of the facility, then, the Committee could step in and
12 take jurisdiction, because that was an important thing to
13 protect. So, I think that it's a quantum of the various
14 factors that need to be considered as a whole.

15 MR. IACOPINO: And, Mr. Richardson,
16 what's the Towns' position with respect to that?

17 MR. RICHARDSON: My reading of the
18 statute is similar to Mr. Roth's. I differ in one
19 respect. The statute, 162-H:2, says it has to be
20 "consistent with the findings and purposes". They could
21 have just said "consistent with the purposes". After all,
22 162-H is, I think, called or captioned "Declaration of
23 Purpose". So, what is this other thing called "the
24 findings"? And, those are the six elements that are

1 referred to in Antrim. The part before that is the public
2 welfare, location and growth of industry, economic
3 development, I believe are the factors. And, so, I think
4 you've got to have at least, you know, some balancing in
5 favor on the first part, and then some balancing among the
6 findings. You've got to have, I don't want to say "one of
7 each", but there's got to be something on each side of
8 that of the statute.

9 And, you know, like Peter said, I mean,
10 you know, it's really up to this Committee to decide what
11 weight they give to each piece of it. I think it's the
12 Committee's duty to consider all of them. Which ones you
13 find are the most important, that's within your
14 discretion.

15 MR. IACOPINO: Mr. Getz, I do have a
16 couple of questions for you about some of your arguments.
17 One being your -- you sort of use the Small Wind Energy
18 System portion of the planning statute, RSA 674, I believe
19 it is, to make an argument that that sort of sets a sort
20 of policy of the state with respect to at least noise, and
21 I forget what the other factor was that a town is
22 prohibited from limiting with a small wind energy. Do you
23 recognize that there could be a number of different
24 reasons why the state and the Legislature might

1 differentiate between a small wind energy system and a
2 large scale energy system -- wind energy -- wind energy
3 system? Sorry.

4 MR. GETZ: There may be, I don't know.
5 And, what I would -- the other, setbacks. And, what I was
6 pointing to, though, is -- to that statute, is it's a
7 legislative benchmark, where the Legislature has addressed
8 some of these issues, where -- and it gives the SEC
9 something instructive to look at in making its judgment.

10 MR. IACOPINO: Well, Mr. Richardson gave
11 an example earlier of a reason why there might be a
12 difference, that being that, you know, obviously, most
13 small wind energy systems that are under 100 kilovolts
14 aren't going to be as tall, and, therefore, probably are
15 not going to project the sound as far. And, does any of
16 that indicate to you that they're really -- you're really
17 talking apples and oranges here when you compare the two
18 statutes?

19 MR. GETZ: No. Especially with setbacks
20 and sounds, unless you are going to interpret the
21 Legislature to have decided, under the Small Wind Energy
22 System statute that, "since it's a smaller transmitter of
23 sound, it's not going to bother the whole town, go ahead
24 and bother just the immediate neighbors." I don't think

1 that's what the Legislature was doing. It was looking at
2 "what's a reasonable level, a decibel level below which it
3 didn't want the towns to set standards?" And, I think
4 that applies, if you're a neighbor, whether it's a large
5 wind energy system or a small wind energy system, what
6 you're going to care about is the decibel level, not the
7 size of the turbine that's emitting the sound.

8 MR. IACOPINO: The other question I had
9 about your argument is you argue that there are
10 differences between the Site Evaluation Committee statute
11 and the ordinances in Temple and in New Ipswich. That, in
12 some instances, the Towns' ordinances use the term "an
13 adverse impact", as opposed to "an unreasonable adverse
14 impact". And, I know you went into this a little bit with
15 Vice Chairman Ignatius. But I guess I'm just trying to
16 understand exactly why you think that the two are
17 "irreconcilable"?

18 MR. GETZ: Well, the use of the word
19 "irreconcilable" is something I used with respect to some
20 -- in a different issue in my analysis. What I would say
21 is that there's a very significant difference between a
22 standard that says "no unreasonable adverse effect" and a
23 standard that says "no adverse effect". And, I think,
24 obviously, it can play out, and I described it earlier in

1 the context of visual impact, and going back to the
2 Lempster case, where the Committee recognized that there
3 were impacts, but it concluded those impacts were not
4 unreasonably adverse.

5 An "adverse impact" standard on whatever
6 the issue is can be extremely restrictive. It doesn't,
7 you know, it doesn't tell you that there's a -- that
8 there's a range, use your judgment about, that you should
9 use a reasonableness standard. Where, under 162-H:16,
10 it's telling you that there are going to be some effects,
11 but use a reasonableness standard in determining whether
12 they're reasonable or unreasonable.

13 MR. IACOPINO: Mr. Richardson, best
14 guess that you can give us, if the Applicant were to file
15 for -- were to file today with the Towns for review of
16 their plan -- well, actually, let me back up. In these
17 two towns, does the applicant first have to go to the ZBA
18 and get a variance before it could apply to the Planning
19 Board?

20 MR. RICHARDSON: There's no law on that.
21 It's entirely within the discretion of the applicant, the
22 order in which they pursue those.

23 MR. IACOPINO: It's in the discretion of
24 the applicant?

1 MR. RICHARDSON: Yes. That's right.

2 MR. IACOPINO: Okay. So, if they filed
3 with the Planning Board, would the Board then say "oh, no,
4 we're going to hold up our timeframes, while you go and
5 see if the ZBA will give you a variance for whatever --
6 whatever they need a variance for"?

7 MR. RICHARDSON: There's a statute that
8 prohibits them from finding a project incomplete, based on
9 the failure to get a variance or failure to have state
10 approvals. And, I believe it's in 676:4, which is the
11 statute governing planning board procedures. So, they
12 can't say "You're incomplete." Their only remedy is to
13 review the project within the statutory timeframes and
14 then potentially deny it.

15 What that suggests to me, though, is
16 that they don't always do that. There is some discretion
17 to say "well, we'll leave that issue open." Many boards
18 do that.

19 MR. IACOPINO: Can they permit it with a
20 condition?

21 MR. RICHARDSON: Absolutely.
22 Absolutely. In other words, they can approve the project,
23 or they can deny it, but what they can't do is hold the
24 project up by saying "It's incomplete, because you don't

1 have your variance." So, typically, you know, if a
2 project doesn't meet the zoning ordinance, you say "We
3 condition it upon the issuance of a variance from this
4 section." You put that note on the plan, the plan would,
5 you know, get recorded or something like that, everyone
6 would know that that restriction was imposed.

7 From a practical standpoint, variances
8 almost always come first, because you only need a broad
9 conceptual design, and, you know, you get right on the
10 issue where you know "is this project a "go" or a "no
11 go"?" And, so, you get the variances, and then it just
12 follows the statutory timeframes. I believe it's 30 days
13 for a completeness determination, all subject to, you
14 know, potential agreements with the applicant. But, then,
15 it's 65 days to review the project, subject to a 90-day
16 extension, with the caveat that the statute says that, if
17 the planning board, you know, doesn't follow those
18 deadlines, the applicant has the authority to get a
19 *mandamus* order to recover costs, you know, against the
20 town, and attorneys' fees. So, they're --

21 MR. IACOPINO: Let's say the applicant
22 did all of that, and your committees, the Zoning Board
23 granted a variance and the Planning Board approved the
24 application. What is the total timeframe that, assuming

1 that they were granted at every step, --

2 MR. RICHARDSON: Uh-huh.

3 MR. IACOPINO: -- what's the total
4 timeframe you would anticipate to occur?

5 MR. RICHARDSON: If the applicant's
6 complete, and there's no variances, I'm just going to
7 assume that the 90-day extension is needed. So, we're
8 looking at 150 days.

9 MR. IACOPINO: Plus the Zoning Board of
10 Adjustment timeframe?

11 MR. RICHARDSON: Oh, plus the -- the ZBA
12 timeframe is they have to render a decision within 30 days
13 of the hearing. So, that's not a lot of time. But, I
14 mean, I've seen projects where there's several hearings.
15 I don't doubt that this would be one in which the ZBA
16 would exercise a statutory authority to have a consultant
17 advise it. I mean, these noise standard issues are going
18 to come before them, and they're going to need a record,
19 they're going to have the submission by the applicant's --

20 MR. IACOPINO: And, what's the outside
21 limit on the ZBA, if there is one?

22 MR. RICHARDSON: The statute basically
23 says that the board has to hear from the applicant, it has
24 to hear from abutters. So, it's whenever the case is

1 submitted. I mean, it's a little bit like this Committee,
2 in the sense that there's no cap on the number of days of
3 hearings that you're required to hold. I'm sure you wish
4 that there was. But, you know, I can't give you a number
5 on that.

6 MR. IACOPINO: But, theoretically, then,
7 if it was 30 days to get the variance, and 90 plus 60 --
8 65 plus 90 to get through the Planning Board process,
9 you're talking about 180 -- 155 days, plus 30, so, 185
10 days?

11 MR. RICHARDSON: Yes.

12 MR. IACOPINO: If everything were to go,
13 you know, perfect for the applicant.

14 MR. RICHARDSON: And, I thought, you
15 know, Peter's table was great in that regard. I didn't
16 have the benefit of knowing the days from your process,
17 but I suspected that, you know, it was longer.

18 MR. IACOPINO: Let me ask you a couple
19 other questions. Say everything doesn't go perfect. Do
20 you have any idea on what the average appeal from the
21 denial of a variance takes in the Superior Court?

22 MR. RICHARDSON: They're record appeals.

23 MR. IACOPINO: I understand. But do you
24 know how long they take?

1 MR. RICHARDSON: Yes. You know, and I
2 actually asked this question of Bart Mayer in my office,
3 and a few other people who do these things regularly.
4 And, you know, you get an order as soon as you file the --
5 as soon as you file the petition saying, you know,
6 "produce the certified record". And, then, the first
7 order in the case by the court, the order of notice has
8 the date of the hearing in it.

9 It's my experience that typically it's
10 six months. Now, this is not a typical project. But, you
11 know, I will bet you dollars to donuts that it's, you
12 know, under ten months, under a year for certain. Because
13 the Court's going to say "Look, there's conflicting
14 evidence on both sides. Did the ZBA make an error of
15 judgment in reviewing the evidence or error of the law?"

16 MR. IACOPINO: Is a ZBA appeal to the
17 Superior Court one of those appeals that is supposed to
18 take priority on the Superior Court docket?

19 MR. RICHARDSON: Yes. And, an appeal of
20 the ZBA doesn't stay the planning board project as well.
21 So, you know, you could take it that road -- that way.

22 MR. IACOPINO: And, the appeal from the
23 Planning Board, if the Planning Board were to deny the
24 project for some reason, is similar to the Superior Court?

1 MR. RICHARDSON: Yes. Yes. It's
2 677:15, certified record, only with leave of the Court can
3 you submit additional evidence.

4 MR. IACOPINO: And, is that pretty much
5 on the same time track as the ZBA appeals?

6 MR. RICHARDSON: Yes.

7 MR. IACOPINO: Okay. Finally,
8 Mr. Richardson, you indicated in your answer to, I
9 believe, Ms. Bailey's question that "really, the only
10 reason why we're here is this -- the noise restriction."
11 And, I guess I'm going to make this question to you as
12 simple as possible. Does that mean that, if we disagree,
13 not me, but if the Committee were to disagree with
14 Mr. Rand's advice to your clients with respect to the 33
15 dBA, that the Committee should vote to assert
16 jurisdiction?

17 MR. RICHARDSON: Certainly, if you found
18 that, you know, this project required a certificate. But
19 it's what the statute says, "to maintain a balance between
20 the need and the environment". And, so, you know, and I
21 don't think there's, I've said this before, I don't think
22 there's any doubt, you know, we've sought to protect the
23 environment. The real question is is, is the statute
24 directs the Committee to examine, you know, the need, why

1 is this important to both the public welfare and the
2 purposes?" And, I'm sorry, I'm going over your short, so
3 -- and then the findings. So, that's my answer.

4 MR. IACOPINO: Okay. But my question is
5 very direct. It's if the Committee disagreed with this 33
6 dBA limit, and, through its expertise, having sat on many
7 of these, determined that that's just, you know, that's
8 just really just a barrier to entry, in other words,
9 instead of simply saying "we're not going to allow
10 windmills in our town", it's an unmeetable, you know,
11 unmeetable restriction, should this Committee exercise
12 jurisdiction?

13 MR. RICHARDSON: I don't think so,
14 without the need. But let me say this, though. It's, you
15 know, I think you have to look, I mean, we're assuming
16 that it's, you know, the ordinance that is the barrier.
17 But, if this project comes before the Committee, it's
18 going to be the impacts that are protected by that
19 ordinance that are the barrier. And, as we know from
20 Antrim, I mean, coming before the Committee isn't a
21 guarantied certificate. And, I think this project would
22 face similar issues. I mean, I'm not trying to bring
23 Antrim into this, but it's just the -- those standards
24 were adopted by the communities because of the

1 significance of the resources they're trying to protect.

2 MR. IACOPINO: And, the reason I ask the
3 question is because, in Antrim, the Committee adopted a
4 noise standard that's considerably different than the one
5 that's contained in your ordinance. You understand that,
6 right?

7 MR. RICHARDSON: Yes. But it's moving
8 in that direction. I mean, I think the Committee, you
9 know, it's gone from 55 to none, Peter has talked about
10 that, to, you know, the 40-45. I don't want to talk about
11 an issue that's subject to rehearing. And, I have to be
12 mindful that my office represents that case. So, I'm
13 going to not go further than that, but --

14 MR. IACOPINO: Okay. I have no further
15 questions.

16 CHAIRMAN BURACK: Did you have something
17 further? Go ahead, Commissioner Ignatius.

18 VICE CHAIRMAN IGNATIUS: At the risk of
19 starting all this up again, I just want to ask one factual
20 question. In looking at, and this is directed to you, Mr.
21 Getz, though, I'm looking at the brief filed by
22 Mr. Richardson. On Page 10, he had a table of how far
23 residences in Temple, New Ipswich, and Sharon were from
24 turbines. And, I guess I was wondering if you had any

1 disagreement with that chart, any reason to doubt that
2 it's accurate? I'm also a little bit curious about how
3 that could be defined. Maybe you need to ask
4 Mr. Richardson, since he also says that "the turbine
5 locations haven't been defined yet". So, I realize, in
6 asking the question, I'm not sure the basis for the
7 locations. But did you, when you saw this chart, is that
8 something you've seen before? Was it, the findings in the
9 -- the information contained in the chart, did it seem
10 accurate to you?

11 MR. GETZ: Well, first of all, the
12 turbine locations are identified on a map that we
13 submitted. So, I'm assuming this is built off of that.

14 VICE CHAIRMAN IGNATIUS: All right.

15 MR. GETZ: And, whether this is accurate
16 or not, if I can just check with my --

17 (Atty. Getz conferring confer with Mr.
18 Cohen.)

19 MR. GETZ: And, my client says he really
20 doesn't know if it's accurate or not. That the only issue
21 that had occurred was whether proximity of residential
22 lots meant "occupied" versus "unoccupied". But, other
23 than that, I don't have any real viewpoint on the accuracy
24 of these numbers.

1 VICE CHAIRMAN IGNATIUS: The reason I
2 ask is that, if the residential lots were accurately
3 described, it's conceivable that a number of the sound
4 levels that the SEC has imposed would create a real issue
5 for the Applicant as well.

6 MR. GETZ: Well, I guess one point my
7 client makes is that some of these landowners are
8 participating landowners probably. That's his
9 understanding.

10 VICE CHAIRMAN IGNATIUS: Well, the chart
11 says "non-participating", but I guess we don't know all
12 the details.

13 MR. GETZ: I don't see where it says
14 "non-participating", but --

15 VICE CHAIRMAN IGNATIUS: In the "less
16 than half a mile non-part", I assume meant
17 "non-participating", the top line in the far left.

18 MR. GETZ: You know, maybe it does. But
19 I don't understand, I'm not sure that, with respect to the
20 sound, whether, for instance, the recent decision on sound
21 requirements in the Antrim case, whether that would affect
22 Timbertop. What we do know is, under the previous 2010
23 ordinance, which had a 45 dBA requirement, that Timbertop
24 was prepared to move ahead under those sound requirements.

1 It's when they went down to 33 that that -- the sound
2 issue arose.

3 VICE CHAIRMAN IGNATIUS: All right.
4 Thank you.

5 CHAIRMAN BURACK: Commissioner Scott.

6 CMSR. SCOTT: Sorry about that. Mr.
7 Getz, Attorney Getz, my other question on the ordinance
8 was, if I -- at this point, I'm, if you forgive me, I'm a
9 little bit hazy, but, at least for the sound ordinance,
10 what I recollect, there was also an opportunity to exceed
11 the ordinance if you had an easement from the property
12 owner, is that correct?

13 MR. GETZ: My understanding of the
14 ordinance is it applies to the property lines of
15 non-participating landowners. So, if there's a -- if, for
16 instance, the Timbertop owns or leases property it puts
17 the turbines on, there is an adjacent landowner who is
18 participating, then, the sound requirement wouldn't apply
19 to that neighbor. It would apply to neighbors who have no
20 relationship to the -- or agreement with the developer.

21 CMSR. SCOTT: So, it sounds like we're
22 saying the same thing. If you had an easement, you would
23 be, in your definition, a participant, it sounds like?

24 MR. GETZ: If there -- yes. If there's

1 an easement or whatever the nature of the agreement is,
2 then, it basically would mean that the sound requirement
3 wouldn't apply to that person who was, you know, that
4 landowner who essentially has waived it, I guess.

5 CMSR. SCOTT: Okay. Thank you.

6 CHAIRMAN BURACK: Director Bryce.

7 DIR. BRYCE: Sorry. The word
8 "consistent" has been bothering me. And, the longer we
9 sit here, the more it sits there and stews. So, I can't
10 help but ask this question. I'm not sure who to ask it
11 to. I might ask it of Attorney Roth. Mr. Iacopino
12 brought it up earlier. When I look at the conditions
13 under which it says, in the statute, under which a
14 certificate is issued, it says "must", so, "must find that
15 the site and facility", and then *etcetera, etcetera,*
16 *etcetera*, "of orderly development of the region". So,
17 there's a "must" there, in terms of looking at standards.
18 Here, when it talks about "jurisdiction", it says, my
19 understanding is it's talking, and correct me if I'm wrong
20 on some of this, but it talks about "consistent with",
21 which is very different than "in accordance with" or the
22 "must" word. So, I'm wondering how much -- it seems as if
23 we're -- I'm wondering where the line gets drawn between,
24 give me a sense for if I'm correct, in assuming that

1 "consistent" does give leeway, as opposed to the, you
2 know, the stricter standard as if this was coming to us.
3 I'm not sure if I'm explaining that. But the word
4 "consistent with" isn't "in accordance with" or "must
5 comply with". Am I correct in struggling with that, I
6 guess?

7 MR. ROTH: I've had the same struggle,
8 because what I'm hearing is, and whenever we go into the
9 weeds of this particular project, I get concerned. And,
10 are we getting beyond "consistent with" to a question of
11 "would this Committee approve this project or not?" I
12 think "consistent with" does mean more or less like the
13 same process and the same considerations. It doesn't
14 require identicalness in approach or identicalness in
15 result. So that, for example, all this conversation about
16 whether the SEC has, in the past, done 45, 55,
17 zero decibels, I think doesn't really inform us of much.
18 Because we don't know whether, for example, in this case,
19 the SEC, when it reviews the evidence, might say "Oh, gee,
20 33 is the right number." So, to say -- to require
21 identicality with previous decisions doesn't -- I don't
22 know which previous decision we look to. And, what does
23 that do for how does the SEC make a decision about this
24 one when all the evidence comes in? So, I think I share

1 your concern that "consistent with" doesn't mean a mandate
2 and it doesn't mean identicality. It means that there is
3 a general agreement with the way it's done, and in kind of
4 a rough way, not precise.

5 DIR. BRYCE: Thank you.

6 CHAIRMAN BURACK: Director Stewart.

7 DIR. STEWART: Maybe the last one. I'm
8 trying to understand, well, let's say, under Attorney
9 Roth's scenario, that driving that to the extreme, the
10 town establishes an ordinance with zero decibels. And,
11 there's a variance request, and the request is denied.
12 So, now, we're in Superior Court. Does the Superior Court
13 consider the validity of the technical standards when they
14 make a decision on a variance or an appeal of a variance?

15 MR. ROTH: If you're asking me, I don't
16 know the answer. And, one of the things that concern me
17 about one part of this conversation is whether, you know,
18 the concept of "adverse impact" is somehow different than
19 "unreasonable adverse impact". And, I was thinking about
20 this in the context of the Superior Court conversation.
21 And, if I'm a Superior Court judge, I think I'm going to
22 be looking to decide "is it an unreasonable adverse
23 impact?", not just an "adverse impact", because there has
24 to be something wrong with it. And, I think the

1 "unreasonable" is going to be read into it as a matter of
2 law.

3 DIR. STEWART: So, Attorney Getz and
4 Richardson, would the Superior Court consider the
5 reasonableness of the technical standard in an appeal?

6 MR. GETZ: I'm afraid I don't know the
7 answer to that question.

8 DIR. STEWART: You don't know either.

9 MR. RICHARDSON: I think that they
10 would. I was looking for the statutory provision under
11 which you would find the best cases. But, basically, what
12 the Court would look at was, you know, for example, was
13 the ordinance at odds with the master plan, and was it so
14 -- I mean, obviously, the Court retains jurisdiction over
15 anything that amounts to a constitutional violation of
16 the, you know, substantive right to use and enjoy
17 property. So, that's another way in which an ordinance,
18 you know, could be challenged from a substantive
19 standpoint. But I think it's there, although I don't
20 think it's, you know, it's simply is a -- you know, the
21 agent -- the town is entitled to some deference. Someone
22 would have to show a constitutional problem or some other
23 inconsistency with the master plan.

24 DIR. STEWART: Okay. Thank you.

1 MR. ROTH: Director Stewart, I think
2 that the Superior Court is going to look at it as a matter
3 on an appeal as whether the decision was unreasonable or
4 unlawful, the same way, you know, decisions of any
5 administrative agency are reviewed. So, it seems to me
6 that that's an opportunity for a disappointed applicant to
7 claim that a zero decibels ordinance is one that's
8 unreasonable and unlawful, because it is essentially a,
9 what's the word, you know, a disguise for a denial, you
10 know, it's a pretext.

11 MR. RICHARDSON: As Peter said that, if
12 you look at 677:15, that's where the standard is for a
13 planning board appeal. The same standard is in the ZBA
14 standard. And, it's "illegal or unreasonable".

15 DIR. STEWART: That's useful.

16 CHAIRMAN BURACK: Thank you. We are
17 nothing if not thorough in our questions here. And, I'm
18 not sure that there are any questions that, at this point,
19 I can add that will help to further our understanding of
20 the positions and the arguments that the parties have
21 made.

22 So, what I am going to suggest is that
23 we take a brief, no more than ten minute break, and, by
24 that clock on the back wall, I'd like to be back here at

1 20 minutes of 4:00 for the Committee to deliberate in this
2 matter. So, we're going to take a brief break until 20
3 minutes of 4:00, and then we will return. Thank you.

4 MR. ROTH: Thank you.

5 (Whereupon a recess was taken at 3:28
6 p.m. and the hearing reconvened at 3:42
7 p.m.)

8 CHAIRMAN BURACK: If I could ask the
9 Committee members to please take their seats, we're going
10 to resume today's proceeding and move to our deliberative
11 phase here. And, I do want to first thank counsel for all
12 the parties for their participation and their endurance
13 with us as we asked many questions. And, I also want to
14 thank the members of the public who are here for their
15 interest and their participation in this process.

16 We are going to proceed now, as I said,
17 to deliberate on this matter. And, for those who have not
18 been involved in these kind of proceedings in the past, we
19 will provide the members of the Committee an opportunity
20 to discuss this. I'm going to suggest that we might just
21 have an open discussion first of what we've heard. And,
22 it may be best to structure our discussion around looking
23 at the specific provisions of RSA 162-H:1, which is the
24 applicable statute here.

1 I think, once we've had some discussion,
2 it may then be appropriate to -- for somebody to offer a
3 motion, which presumably would be a motion either to grant
4 or to deny jurisdiction in this proceeding. It will be
5 important that, on the record, we have a full and thorough
6 discussion of our reasoning for how we might ultimately
7 decide this matter. And, then, once we have -- once we
8 have voted and decided this matter, presumably today,
9 there will be a draft of a decision prepared by Attorney
10 Iacopino for the Committee to review. And, once all
11 Committee members are satisfied with that document, it
12 will be signed and released, again, to -- effectively to
13 document the decision that we will make here today.

14 I will simply begin this discussion by
15 pointing out that I believe the way the statute is
16 structured and the requirements that we have under the
17 statute are that we must decide these matters on the facts
18 before us. That is, we make case-by-case determinations
19 here within the Site Evaluation Committee. And, as I
20 think we have discussed within the questioning process
21 today, we are not -- we are not bound by any prior
22 decisions that have been issued by the Committee in other
23 matters.

24 So, I'm going to open things up here

1 now, and it may be somebody want to start discussion. I
2 mean, again, I'm going to suggest, unless somebody has a
3 different way they would like to do this, recognizing
4 that, yes, there are certainly some different theories of
5 this case and different theories of interpretation of the
6 statute that have been suggested by the parties, that it
7 may be most helpful for us to walk through this
8 conversation, based upon the various provisions, that is
9 the purpose and findings, as they are laid out in RSA
10 162-H:1, and just take those one at a time.

11 Does that make sense to folks as a way
12 to proceed? Somebody want to suggest something different?

13 (No verbal response)

14 CHAIRMAN BURACK: Okay. So, let us
15 start in that fashion. And, I am looking at the language
16 of the statute, 162-H:1, but also working off of, because
17 I think it's the place where it may be the most complete
18 rendition of this broken down into more bite-size pieces,
19 I'm looking specifically at the memorandum of law of
20 Counsel for the Public. And, on Page 2 of that document,
21 Section 5, again, is where these items are laid out, in
22 fact, there are seven items enumerated there. And, the
23 first, again, coming back to the statute, is based upon
24 the recognition by the Legislature that "selection of

1 sites for energy facilities", and, again, I'm leaving out
2 some language here related to "high voltage transmission
3 lines", but "the selection of sites for energy facilities
4 will have a significant impact upon the welfare of the
5 population, the location and growth of industry, the
6 overall economic growth of the state, the environment of
7 the state, and the use of natural resources."

8 Anybody wish to make any comments with
9 respect to that particular provision of 162-H:1, based on
10 what they have heard today? Director Stewart.

11 DIR. STEWART: Yeah. Right off the bat,
12 in terms of the narrow purview of state permitting, it's
13 really a washout as to whether it's Site Evaluation
14 Committee or a local jurisdiction with regard to the whole
15 project. In the sense that the wetlands permitting would
16 be identical, the alteration of terrain permitting and
17 evaluation would be identical, any federal issues related
18 to wetlands would be the same. So, really, just from the
19 get-go, the state permitting, you know, outside of the
20 "energy benefit" discussion, is the same under either
21 course.

22 CHAIRMAN BURACK: Thank you. Other
23 thoughts that anybody would like to share with respect to
24 this, these provisions here at this time? I mean, I will

1 note that, certainly, counsel for the communities has made
2 the argument that we should, in fact, be looking at that
3 language and should be guided that language, in the sense
4 that, if there are projects that truly would have a
5 significant impact upon the welfare of the population or
6 location and growth of industry, overall economic growth,
7 or the environment, or use of natural resources, that that
8 would be a reason why we would want to potentially assert
9 jurisdiction. But, if those factors are not particularly
10 prominent with respect to this matter, then, arguably,
11 those would be reasons why it may not be appropriate for
12 us to assert jurisdiction. Director Hatfield.

13 DIR. HATFIELD: A question for some of
14 my colleagues, namely, Fish & Game and DRED. Would you
15 say something similar to what Director Stewart just said,
16 that the reviews that your agencies might, you know, areas
17 where you might have jurisdiction or where you might have
18 an interest in this particular project, that the reviews
19 would take place similarly under either approach?

20 DIR. NORMANDEAU: At least with Fish &
21 Game, yeah. Because normally what happens is, our folks
22 review the wetlands applications that go to DES. So,
23 there would be that. I'm not quite sure whether or not
24 that would be accurate relative to things like bird and

1 bat studies, because those are things that we tend to
2 require here. I don't know what -- where else those
3 requirements would come from, U.S. Fish & Wildlife
4 Service, possibly. But, generally, one of these
5 applicants to the SEC would be inquiring of us a year or
6 more ahead of time what we want to see in those for
7 studies prior to. And, I, frankly, don't know if we've
8 had any of those conversations with Timbertop at this
9 time.

10 CHAIRMAN BURACK: If I may, though, it
11 would be fair to say there would be nothing to prevent an
12 applicant, in this matter or any other matter, that might
13 be going to a planning board, as opposed to coming to the
14 SEC, --

15 DIR. NORMANDEAU: Right.

16 CHAIRMAN BURACK: -- to consult with the
17 Fish & Game as to "what would you need?"

18 DIR. NORMANDEAU: That's absolutely
19 correct.

20 CHAIRMAN BURACK: Thank you. Did you
21 have something further, Director Hatfield?

22 DIR. HATFIELD: I wanted to ask the same
23 question of --

24 CHAIRMAN BURACK: Oh, sure.

1 DIR. BRYCE: Yes. My understanding is
2 they would have to do, as part of the wetlands permit,
3 certainly do a part -- a check with Natural Heritage on
4 any plants. And, whether are not they're required to do a
5 full inventory of the property, no, but they would have to
6 check the current inventory.

7 DIR. HATFIELD: And, I did have a
8 follow-up.

9 CHAIRMAN BURACK: Go ahead.

10 DIR. HATFIELD: With respect to Pack
11 Monadnock and Temple Mountain and other areas, are those
12 -- those are parks or reservations or other types of lands
13 held by the state?

14 DIR. BRYCE: Yeah. Those are, Miller
15 and Temple Mountain, are both state reservations.

16 DIR. HATFIELD: So, if a project was
17 potentially going to impact them, do you have a review
18 process that you go through or would you do that through
19 the Site Evaluation Committee?

20 DIR. BRYCE: Yeah, we don't have any --
21 Parks doesn't have any regulatory jurisdiction on projects
22 like that for the recreational sites.

23 DIR. HATFIELD: Thank you.

24 CHAIRMAN BURACK: Thank you. Chairman

1 Ignatius.

2 VICE CHAIRMAN IGNATIUS: Thank you. I
3 just wanted to respond to the suggestion a moment ago from
4 you, Chairman Burack.

5 CHAIRMAN BURACK: Yes.

6 VICE CHAIRMAN IGNATIUS: That that
7 opening line of what the Legislature recognizes as
8 important, I don't disagree with in any way, but I have a
9 hard time turning that sentence into something that
10 suggests a test of whether or not we should be taking
11 jurisdiction. I just don't see it as that. In my mind,
12 it's an opening statement of important principles that
13 legislation often has. It doesn't -- it just sets the
14 stage, and then, from that, you develop the specific
15 requirements that everyone's got to live by.

16 So, you had said, "if it were a project
17 that would have a significant impact on the welfare, then
18 that might suggest a greater need for us to take
19 jurisdiction", that sort of thing. I don't -- to me, I
20 don't go there just with that opening line. I don't think
21 it creates any sort of decision tree about jurisdiction.
22 I think all of that comes later.

23 CHAIRMAN BURACK: So, if I may, you
24 don't see that as effectively a statement of purpose?

1 That is that the purpose of the statute is to make sure
2 that those issues are addressed in the context of site
3 selection?

4 VICE CHAIRMAN IGNATIUS: Oh, I do. I
5 agree with that completely. But I don't think it informs
6 whether or not the Committee should take jurisdiction in
7 -- I don't think it sets up a standard to evaluate whether
8 we should take jurisdiction in a case like this.

9 CMSR. HARRINGTON: Well, what do you
10 think does?

11 VICE CHAIRMAN IGNATIUS: I think, when
12 you get to the next provisions about when to -- when one
13 of the projects, between that 5 and 30 megawatt level of
14 what you've got to find, and, so, that's in the next
15 sentence down, I think. But that opening sentence, to me,
16 doesn't tell us "if it's significant, then we do A; if
17 it's not significant, we do B." I think it's -- I just
18 don't read it that way. I think we then look at the --

19 CMSR. HARRINGTON: Do you start with the
20 "Accordingly, the Legislature finds"?

21 VICE CHAIRMAN IGNATIUS: Correct.

22 CHAIRMAN BURACK: And, just it's
23 important that we not speak over each other. So, if we
24 can make sure that we're speaking one at a time, and if

1 you would please give me a chance to recognize you all.

2 If I may, Commissioner Ignatius, I hear
3 your argument. I'm going to respectfully suggest that, if
4 that is not then the "purpose" provision, I don't know
5 where there then is a "purpose" language in this Section
6 162-H:1 that is stated "Declaration of Purpose". Clearly,
7 there are findings that follow the word "accordingly".
8 And, I think that the language there in that first
9 sentence effectively is stating the purpose of the
10 statute. And, I do believe that, under 162-H:2, that we
11 are effectively directed to consider, that is, to make a
12 determination whether a certificate is required,
13 "consistent with the findings and purposes set forth in
14 RSA 162-H:1."

15 So, I'm -- it may be that this is a
16 matter that ultimately will not have any significance to
17 our decision. But it sounds like there may be some
18 different readings here of the statute between us on this
19 point.

20 But why don't we, unless somebody has
21 something further they want to address with respect to
22 that first sentence of 162-H:1 and its applicability here,
23 why don't we then turn to you, Chairman Ignatius, to talk
24 about, if you you'd like, that first provision there under

1 the findings sections here, --

2 VICE CHAIRMAN IGNATIUS: All right.

3 CHAIRMAN BURACK: -- relating to "public
4 interest to maintain a balance between the environment and
5 the need for new energy facilities in New Hampshire".

6 VICE CHAIRMAN IGNATIUS: Thank you. I
7 think the question of "finding the balance" is what is the
8 most difficult part that we face in all of the SEC
9 proceedings that we participate in, because there is a
10 mixture of factual determinations, and then some
11 subjective analysis that go into it as well. And, we
12 struggle with that. Any of us who have been on these
13 panels know that it's not taken lightly. So, obviously,
14 if we have a case before us, that balance is critical.
15 What we're being asked today is how to -- whether -- I
16 think the request of the Applicant is to say that "the
17 ordinances passed by the Town don't evince an adequate
18 level of balance and they're too", I guess, "absolute in
19 some of their determinations. And, therefore, in order to
20 keep a balanced review, it must come to the Site
21 Evaluation Committee." Now, I may be misinterpreting what
22 the Applicant said, but that's the best I could get from
23 it. And that, if that's the case, is it correct that we
24 are the only ones who really can find the right way to

1 balance the interests?

2 I'm not convinced that, certainly, it
3 doesn't always have to be us. I mean, I've been quite
4 strong in believing that the Legislature intended that a
5 number of projects remain on the municipal level. If they
6 didn't want that, they would have written it very
7 differently. And that, in my mind, the default for under
8 30 megawatts is it stays local, and there's got to be an
9 extremely good reason to move it outside of the
10 municipality. I think we should never do that lightly,
11 should never take it from the municipality unless there is
12 a very, very clear reason that we need to step in, and
13 that some real danger will be done to the purposes of the
14 statute or to the welfare of the state, really, if we
15 don't step in.

16 In this case, I think we have a real mix
17 of arguments that go both ways, personally, in my view.
18 There really is plenty of argument to be put on the side
19 of taking jurisdiction, there's plenty of argument to be
20 put on the side of leaving it in the hands of the
21 localities. I mean, as I read and hear the arguments on
22 the ordinances, they appear to have been worked on
23 carefully, not with a design to drive developers away. I
24 don't think there's any ill intent that I've heard

1 discussed in how those ordinances were adopted. There
2 hasn't been a great deal of contentious relationship
3 between municipal officials, one town to another, or
4 within the municipality, as we've seen in some
5 communities. It doesn't sound like there's been a very
6 contentious relationship with the developer. There isn't
7 litigation mounting up, which we've seen in some cases.
8 And, all of those things lead me to think that the
9 locality is in fairly good shape, the localities, plural,
10 to take this on with a committed, dedicated planning board
11 and ZBA and municipal structure in place.

12 The thing that, for me, personally, that
13 works against that is the fact that the sound ordinances
14 are extremely low. And, though, they may not have been
15 written with the intent to prohibit industrial wind
16 facilities in their community, it sounds as though that
17 may be the effect of the way they have set those limits.
18 And, are they so low that they result in doing damage to
19 the intent of the statute? Are they now written in a way
20 that really would work against the purposes of the
21 statute, by prohibiting, in these two towns, Sharon just
22 adopted one just almost the same. You know, if most of
23 the towns got on the bandwagon, you would have resulted in
24 a complete block of any project certainly under the 30

1 megawatt level. And, that troubles me.

2 I don't think I know yet. I want to
3 hear from my colleagues on their arguments, because I
4 truly am torn right now on what's the appropriate thing to
5 do.

6 CHAIRMAN BURACK: Commissioner Scott.

7 CMSR. SCOTT: Thank you, Chair Ignatius.
8 I do think our prior cases where we've taken jurisdiction,
9 and as I alluded to in my questioning with Attorney Getz
10 was, in other cases where we've taken jurisdiction under
11 30 megawatts, the town has literally come in and
12 effectively said "We don't have the resources to do this.
13 Please do this." And, that made this easy, in my opinion.
14 Because, clearly, if the town said "We can't do the
15 analysis", then, you know, we could go there a lot easier.

16 Here, the Towns spent a lot of time,
17 obviously, and resources, and certainly appears they have
18 taken this very seriously in developing ordinances
19 regarding this. So, I'm much more -- to me it makes it
20 much more difficult to say that "the Town doesn't have the
21 wherewithal to do this."

22 I do have to echo, you mentioned the
23 noise limit, that is really where I am still struggling,
24 is it seems exclusionary. It would seem the ordinance

1 could have the impact, basically, of not allowing any wind
2 developer period. Having said that, I would argue then
3 "why didn't they just pass an ordinance saying "there
4 shall be no wind development"?" That would seem to be a
5 lot easier. And, with that, if that was the intent, is
6 there any -- there doesn't seem to be any prohibition on a
7 municipality just saying that. And, if that were the
8 case, and if they had done that, would we still be saying
9 "No, we have to" -- "we have to take jurisdiction, because
10 they're not going to do that." So, that's an open
11 question in my mind.

12 But it does seem we have two towns that
13 have taken this seriously, or are telling us that they
14 have the wherewithal to do all this. And, that's a little
15 bit different than we've seen in the past, I think.

16 CHAIRMAN BURACK: Others who would like
17 to voice thoughts on this issue? Commissioner Harrington.

18 CMSR. HARRINGTON: Yeah. I guess I kind
19 of go along with what we just heard. We do have a
20 situation here where it's clearly different than the
21 Lempster case, where the Town came to the Committee and
22 asked us to take jurisdiction, and our other cases have
23 been like that. And, here you have a situation, if you go
24 through and sit down and look at what the Town actually

1 submitted. Basically, they did a pretty comprehensive
2 evaluation. Their noise number may be one that people
3 don't all necessarily agree with. But I think anybody who
4 sat on this Committee before dealing with wind situations
5 realizes that there is no bottom line. There's no place
6 you can look up and say "the right number is 42 decibels",
7 you know, "2,826 feet from the windmill". And, there's
8 variations all over the place. But they have appeared to
9 have done their homework. They have got jurisdiction for
10 what they have done, and they have provided a lot of
11 information here.

12 I tend to go along with what Amy said.
13 That, you know, it's a big step taking away the
14 jurisdiction from the local community. And, it normally
15 would be done with the intent that they simply don't have
16 the wherewithal to do it. I just don't see that being the
17 case here. They've -- if you've looked at the resumés, if
18 you call them that, of the various people on these boards,
19 I mean, there's Master's degrees, mechanical engineering,
20 there's lawyers, there's veterinarians, and there's people
21 with extensive experience in business. So, I think they
22 have put in what they said was thousands of hours of work
23 developing these ordinances. And, I'd be very, very
24 hesitant to transferring jurisdiction away from them. I

1 think they have got the things covered.

2 Now, having said that, doesn't mean I
3 agree with everything in their ordinance, but I don't
4 think that's the responsibility of this organization, this
5 Committee, to review ordinances of towns and make sure
6 they're perfect.

7 CHAIRMAN BURACK: Others who would like
8 to share thoughts on this point? Director Normandeau.

9 DIR. NORMANDEAU: Yeah. I'm just going
10 to sort of weigh in in the same respect. I think, in the
11 case of Antrim, when the Town came to us and asked us to
12 take it, you know, when you hear from the "Town fathers",
13 I think you need to listen to them. You know, in Berlin,
14 the City and the Applicant came and asked us not to. And,
15 you know, that was all fine. I think -- I think, again,
16 deference needs to be made.

17 I am, I guess, a little bit suspicious
18 about the generation of these ordinances and the low noise
19 limit, *etcetera, etcetera*. But, again, I'm not sure that
20 we're in the position to be the arbiter of land law. And,
21 so, my tendency would be to let the Town have the go at
22 it.

23 CHAIRMAN BURACK: Others who'd like to
24 discuss this particular point at this moment? Ms. Bailey.

1 MS. BAILEY: Thank you. I think I take
2 the other view. I agree that the Town has done a really
3 great job in trying to get their head around all of the
4 issues that we deal with pretty regularly on this
5 Committee. But 162-H:2 says we have to, when we're trying
6 to figure out whether we should require a certificate, we
7 have to -- we have to see if it's consistent with the
8 purpose of -- the purpose and findings in 162-H:1. And, I
9 think that, if a town has ordinances in place that would
10 prevent an applicant from even attempting to get a siting
11 facility in that location, then it thwarts the purposes of
12 162-H:1. So, I think that -- that not only the sound
13 ordinance, but, you know, even "adverse visual impact", I
14 mean, it's not "unreasonable adverse visual impact", it's
15 just "adverse impact". And, I think that's very
16 troubling.

17 CHAIRMAN BURACK: Thank you. I will
18 offer the observation that I think we have to understand
19 that we're looking at this process at the outset of it,
20 that is, none of us know for sure how any particular
21 proceeding is going to play out. And, so, while we might
22 look at an ordinance, which, on its face, may appear to us
23 to be more stringent than perhaps this Committee has
24 applied in prior decisions, that is not to say that, as,

1 for example, we got into it further, I think somebody made
2 this point earlier, we might not find ourselves coming to
3 a similar place to where they were. It's also very
4 possible, given the way the statute is structured, that
5 the planning board or through the zoning board process, as
6 applicable, they could come to the finding that maybe they
7 were too stringent in certain ways, and, so, they are
8 going to, for example, provide a variance, or they are
9 going to make adjustments, or certain property owners are
10 going to -- are going to agree to certain conditions that
11 would subject them to potentially the higher noise levels
12 than would otherwise be the case.

13 I think we get on a very, very slippery
14 slope, if our approach in this case is that, because the
15 Applicant tells us that, "these standards are too strict,
16 and, so, they're going to abandon the project, because
17 they think the Towns' requirements are too strict", I
18 think that would be a very inappropriate basis on which
19 for us to determine that we're going to take jurisdiction.
20 I think, if that were seriously something we were going to
21 consider, then we would necessarily, I think, have to do
22 the flip-side of the analysis, which is what the Applicant
23 has strongly argued we shouldn't do, which is to actually
24 essentially look at the size, the scale, the need, the

1 significance of the project. And, I think, if we were to
2 go down that route, I think it would be very difficult to
3 make findings that this is a project that is significant
4 enough in scale, in impact, in relevance to the overall
5 energy supply of the state, to warrant and justify the
6 engagement at the level that would be required of state
7 government.

8 I think this is -- this is truly a small
9 scale project that, under the very terms of the statute
10 itself, really are not intended to come to us, except
11 under circumstances where we find, and I have to concur
12 with the general sentiments expressed by Attorney Roth,
13 that, effectively, we have to look at all of these factors
14 together. And, merely because perhaps one of these
15 factors isn't satisfied in the minds of the Applicant,
16 therefore, we must take jurisdiction, I just can't -- I
17 can't find myself there, and I don't think this Committee
18 should find itself there in this circumstance.

19 So, I just, coming back to your point,
20 Ms. Bailey, I think we just have a different view on that,
21 in terms of how it might play out in this process. And,
22 it may be that an applicant will say "the hill is too high
23 to climb, so, I'm just not going to climb it." And, if
24 that's -- if that's the business decision they make, well,

1 so be it. But I don't think that the business decisions
2 that might be made are what should be driving our
3 decision-making process here.

4 Does anybody have anything further they
5 want to share on this point or can we move to the third
6 point of "undue delay in construction of needed
7 facilities"? Yes.

8 CMSR. HARRINGTON: Just really quickly,
9 I think you touched on it briefly there. But, I mean, you
10 have to get into this idea, as much as we try to avoid it,
11 the need for new energy facilities. Now, I realize the
12 law was changed to take out the PUC part of that. But
13 that was because, before that, the understanding was that
14 people building generation facilities were public
15 utilities. When restructuring changed that, that's why
16 the part came out. But the Legislature deliberately
17 didn't take out the word "need" as it appears multiple
18 places in the Declaration of Purpose under "the need for
19 new energy facilities". And, as I agreed, I just don't
20 see that you can say that there's a real need for this,
21 and you have to -- that's the balance that says we're
22 supposed to be maintaining.

23 And, also, with regard to the sound, as
24 well as some of the other provisions of the law, it seems

1 as if they have put in some alternate methods of
2 compliance that, to me, makes a big difference. If their
3 goal here was just to stop the wind farm, they would have
4 come out with something that would be much more definitive
5 and you couldn't get around. But, as far as the sound
6 waves, they can negotiate with the landowner, who is
7 willing to take probably some compensation and says "yeah,
8 I can put up 36 decibels, instead of 33", then, they can
9 work that out, and just on a voluntary basis, which is
10 always the preferred method of working things out. And,
11 even if that doesn't -- if that fails, there's still a
12 provision to request a variance. So, I think they have
13 put adequate flexibility in there. And, I just -- I don't
14 see the need for us to be taking jurisdiction.

15 CHAIRMAN BURACK: Thank you. Would
16 anybody -- Commissioner Scott.

17 CMSR. SCOTT: I will give a very quick
18 counterpoint to Commissioner Harrington. That, as far as
19 the need, I would argue, despite Attorney Richardson's
20 comments, that the State did -- the Legislature did pass
21 an RPS. The RPS, in my view, is intended to foster more
22 clean energy in the state and the region. And, I agree,
23 you can't tell where the electrons go. But that was the
24 signal from the Legislature, to make sure they -- that

1 they wanted to incent clean energy. So, in that capacity,
2 I would take small issue with your statement that I think
3 that does demonstrate that there's a need.

4 Having said that, I'm not sure -- again,
5 I'm not sure we need to take away jurisdiction from the
6 Town.

7 CHAIRMAN BURACK: Okay. Thank you.
8 Perhaps we can move on to this third element then in the
9 findings, which is "avoidance of undue delay in the
10 construction of needed facilities", or language I should
11 read "undue delay in the construction of needed facilities
12 be avoided" or "should be avoided". Anybody wish to share
13 any thoughts on that, based on what we've heard today?
14 Commissioner Scott.

15 CMSR. SCOTT: While I certainly
16 appreciate the project's concern over multiple
17 jurisdictional entities, if they say -- if we do not take
18 jurisdiction from the two towns. And, it's been
19 mentioned, given our track history and just the nature of
20 the SEC, I don't necessarily think the SEC is a quicker
21 route than perhaps the Towns would be. Though, I can see
22 perhaps there's some more risk for a potential applicant
23 going through the two -- more than one jurisdictions.

24 CHAIRMAN BURACK: Chairman Ignatius.

1 VICE CHAIRMAN IGNATIUS: I think it's
2 going to be an extremely challenging process if we don't
3 take jurisdiction and it remains with the municipalities
4 that no one should underestimate. That there are some
5 elements that we struggle over and spend a lot of time on
6 that wouldn't be required if there's a set ordinance that
7 defines what "setback" is and it's not a debate about
8 what's an appropriate level, and a sound level that's
9 simply defined and not trying to decide what's the right
10 level. But, even in those, there's suggestions that
11 variances and some flexibility may be present given
12 circumstances.

13 And, getting through all of the detail
14 is just enormously complex, if you're willing to really do
15 it carefully and hear everybody out, which I would imagine
16 the municipalities would agree is their duty to do.

17 And, so, if the decision ultimately is
18 that we deny jurisdiction, I would hope that the
19 municipalities come up with a plan to do this with a kind
20 of -- allow the kind of time you need to go through it,
21 and that it won't fit into the normal, you know, Tuesday
22 night once-a-month meetings, that may work for other
23 projects. It will take some extra scheduling, I imagine
24 that's within the authority of the boards to do. It just

1 takes some planning and people knowing that the
2 expectation is that it's going to be far more detailed
3 than what they're accustomed to. And, you'd hate to get
4 part way into it and have people then realize that they
5 should have planned more time. So, just a caveat, if that
6 is the ultimate determination.

7 CHAIRMAN BURACK: Thank you. Other
8 thoughts on this? And, I will simply observe that,
9 certainly, the appeal process in the courts, through the
10 Superior Court system, if necessary, could add time to the
11 process. But I would anticipate that, if there were
12 decisions that needed to be appealed, that, presumably,
13 the Superior Court would entertain consolidated appeals,
14 for example, if there were different issues in the
15 different towns, so that it could all be handled in a --
16 in the most efficient manner possible.

17 But I don't think that, overall, one can
18 necessarily say at the outset that the mere fact that
19 there may have to be variances requested and, you know, and
20 making an assumption up front that some requested
21 variances might be denied, and, therefore, there would
22 have to be appeals, that that is grounds for us to define
23 that -- for us to find that there would be undue delay
24 that could only be avoided by our taking jurisdiction. I

1 think that's just very speculative, and I just don't feel
2 comfortable making a -- basing a decision on that kind of
3 speculative finding.

4 Anybody want to share anything further
5 on this point? Director Bryce.

6 DIR. BRYCE: Yes, I would agree. But I
7 would just remind the Towns that if, depending on how this
8 goes, if they're the ones that are going to be reviewing
9 the project, that this would have -- could have
10 repercussions for other communities across the state if
11 those come forward. So, you know, as you say, there's not
12 grounds to -- there's not grounds now, but, hopefully,
13 grounds won't be created.

14 CHAIRMAN BURACK: Thank you. If there's
15 nothing further on this, let's move to the next element
16 here, which is "full and timely consideration of
17 environmental consequences be provided". And, I think
18 we've actually already heard some discussion on this from
19 Director Stewart and others, and Director Normandeau,
20 regarding the fact that, you know, the environmental
21 reviews by the state, and, presumably, federal agencies,
22 would be occurring regardless. I think we also heard
23 evidence that the scope of the -- of the ordinances in the
24 two communities are quite broad, in terms of addressing

1 environmental issues.

2 So, my sense is that that kind of full
3 and timely consideration would occur within the context of
4 a municipal review, and it would not be necessary for the
5 Site Evaluation Committee to have jurisdiction in order to
6 ensure that that kind of full and timely consideration of
7 environmental consequences would occur.

8 But I don't know if others have other
9 thoughts or heard other evidence or information on that?
10 Not seeing or hearing any thoughts -- Commissioner
11 Harrington.

12 CMSR. HARRINGTON: Yeah. Just quickly,
13 I'll just, again, go over the question I had asked Mr.
14 Richardson. I asked him "if all environmental impacts or
15 effects are adequately regulated by other state" --
16 "federal, state or local statutes, rules and ordinances?"
17 And, the answer was "yes". So, I have no reason to
18 believe he's not accurate.

19 CHAIRMAN BURACK: Anything further on
20 this point at this time?

21 (No verbal response)

22 CHAIRMAN BURACK: Okay. Let's then turn
23 to the next element here, which is "that all entities
24 planning to construct facilities in the state be required

1 to provide full and complete disclosure to the public of
2 such plans". And, I will offer here that I don't believe
3 we really heard any substantive discussion of this issue
4 here, because my recollection is that the Petitioner
5 effectively conceded, in their pleadings, that, whether it
6 was through the municipal process or before the Site
7 Evaluation Committee, that there would be full and
8 complete disclosure to the public. And, I don't know if
9 anybody heard anything different or read anything
10 different on that, on that point?

11 (No verbal response)

12 CHAIRMAN BURACK: I'm not -- I'm seeing
13 a lot of shaking heads. So, nobody came to any different
14 findings on that, on that point.

15 The next provision then or clause or
16 phrase in 162-H:1 that we might focus on is the language
17 reading "that the state", I'll insert the word "should"
18 here, "ensure that the construction and operation of
19 energy facilities is treated as a significant aspect of
20 land-use planning in which all environmental, economic,
21 and technical issues are resolved in an integrated
22 fashion." And, we heard quite a bit of argument on this
23 point. And, who would like to offer some observations
24 here? Director Hatfield.

1 DIR. HATFIELD: Thank you. I do think
2 that one of the real benefits of the Site Evaluation
3 Committee is sort of one-stop shopping, the bringing all
4 of the agencies and the issues together. So, I would hope
5 that, if we don't take jurisdiction, that the Towns not
6 only will work together, but also would really be mindful
7 of all of the permits and reviews that the project would
8 need to go through, and figure out a way to build all of
9 that into their review process. And, I think that will be
10 a challenge, as Commissioner Ignatius was saying, but I
11 certainly think that it would benefit everyone.

12 CHAIRMAN BURACK: Thank you. Other
13 thoughts or observations on this point?

14 (No verbal response)

15 CHAIRMAN BURACK: Anything further?

16 (No verbal response)

17 CHAIRMAN BURACK: Okay. I'll just offer
18 the observation that, you know, I think, by the very
19 nature of land-use planning, these kinds of issues must be
20 considered, that is the environmental factors, the
21 economic issues, to the extent that they are certainly
22 articulated within the land-use ordinances have to be
23 considered. And, certainly, the technical issues must be
24 -- must be considered and based upon a review of the

1 ordinances of these two communities.

2 Certainly, it appears, and we've
3 discussed earlier, that a significant amount of time has
4 been spent by the communities in looking at the technical
5 standards. Now, whether they might be the standards that
6 this Committee ultimately might apply to this particular
7 project, we don't know. We perhaps will never know. But
8 I don't think that that means that they're not capable of
9 ensuring that that review occurs, and that it occurs in an
10 integrated manner.

11 Anybody have anything further they want
12 to share on that? Have I prompted any further thoughts at
13 this time?

14 (No verbal response)

15 CHAIRMAN BURACK: All right. So, let's
16 then move to the last phrase in 162-H:1, which is -- or, I
17 shouldn't say the last phrase, the last phrase in that
18 sentence that lists findings here. Which reads "all to
19 assure that the state has an adequate and reliable supply
20 of energy in conformance with sound environmental
21 principles." Anybody wish to offer any thoughts on that
22 language? Commissioner Harrington.

23 CMSR. HARRINGTON: Yeah. I guess this
24 is probably maybe the more easiest one of these to

1 address, because a project of this size, 14 and a half
2 megawatts of variable power, is not going to have any
3 effect on the adequacy or reliability of the supply of
4 energy one way or the other.

5 Now, very large injections of variable
6 power can somehow have -- sometimes has problems on
7 reliability, but this simply isn't big enough to do that,
8 and it's not big enough to ensure reliability or to make
9 it less reliable. So, I think it has -- it would have no
10 effect one way or the other on it. It's another reason
11 why I think that doesn't have to really be addressed by
12 anybody, so --

13 CHAIRMAN BURACK: Others want to make
14 observations on this? I would observe that counsel for
15 the communities made a -- tried to make a substantial
16 argument out of this issue in the Towns' brief, trying to
17 suggest that, essentially, all of these other provisions,
18 in light of the word "all", effectively added up to making
19 this the culminating and perhaps most important finding of
20 all it, again, in support of his argument that, unless we
21 find there's substantial need for the project, that it
22 really wouldn't be appropriate for us to take
23 jurisdiction.

24 Now, I'm not sure that we have to make

1 any decision whatsoever with respect to whether we agree
2 or disagree with that argument, but I just wanted to point
3 out that that was the basis there in that language for
4 that argument.

5 There is then a final language -- or,
6 I'm sorry, a final sentence here in 162-H:1 that reads
7 "The Legislature, therefore, hereby establishes a
8 procedure for the review, approval, monitoring, and
9 enforcement of compliance in the planning, siting,
10 construction, and operation of energy facilities." And, I
11 just would ask whether anybody has any thoughts on that?
12 Whether that constitutes either a statement of purpose or
13 a statement of findings or something else, and whether
14 it's operative language with respect to our
15 decision-making process here?

16 (No verbal response)

17 CHAIRMAN BURACK: Any thoughts?

18 (No verbal response)

19 CHAIRMAN BURACK: I know that we did, at
20 least I believe we did hear from Attorney Richardson,
21 focusing on the fact that that sentence refers to
22 establishment of a procedure, not establishment of
23 specific substantive standards in addition to a procedure.
24 And, perhaps that -- perhaps that is a distinction that's

1 worth noting with respect to how we might proceed here.

2 Any other thoughts with respect to this
3 review of the language in 162-H:1?

4 (No verbal response)

5 CHAIRMAN BURACK: If not, does anybody
6 want to share any general thoughts or observations or
7 specific thoughts or observations before perhaps somebody
8 would want to make a motion? Commissioner Harrington.

9 CMSR. HARRINGTON: Yes. Well, you know,
10 there is some additional guidance provided in the law in
11 162-H:4, when it discusses for what are -- normally would
12 be jurisdictional projects that are over 30 megawatts,
13 where an exception can be granted by the Committee not to
14 take jurisdiction. And, so, I think that, and there's a
15 series of sections there. In Section IV(a), starts out
16 with "Existing state or federal statutes, state or federal
17 agency rules or municipal ordinances provide adequate
18 protection of the objectives of RSA 162-H:1;" and then
19 there's a few more sentences, but basically dealing with
20 the same type of stuff, down through (d), where "All
21 environmental impacts or effects are adequately regulated
22 by other state" -- "federal, state, or local statutes,
23 rules, or ordinances." If we can answer those questions
24 positively on this particular case, that would have

1 allowed us to take a larger than 30 megawatt facility and
2 say "We don't need to take jurisdiction, because it's
3 being covered by federal, state, and local statutes,
4 rules, and ordinances." And, so, clearly, if that
5 criteria was applied for something that's normally
6 jurisdictional to us, if that applies in this case, it's
7 clearly a case -- be indicative that we don't have to take
8 jurisdiction on it. And, I think that those, especially
9 section -- that question (a) and (d), we have addressed,
10 and I think that the answers to them that they -- there
11 are existing rules that provide adequate protection for
12 the objectives of RSA 162-H:1, and that all environmental
13 impacts or effects are adequately regulated by other
14 federal, state, or local statutes, rules, and ordinances.
15 So, I think that's one criteria we can use to evaluate
16 this. That should be a higher criteria than the one we
17 have to apply here, because of the size of the project.

18 CHAIRMAN BURACK: Thank you,
19 Commissioner Harrington. I'll just offer the observation
20 that, while I think it may be potentially instructive to
21 look to this language as an analogy, I do not think it
22 would be appropriate for us to base our decision upon the
23 language here in Section 162-H:4.

24 I think the parties have rightly

1 identified 162-H:2, and its reference back to 162-H:1, as
2 what is truly the governing law here. And, that's what
3 they have briefed on. And, so, I think, while I would
4 agree with you that there may be some analogies to be
5 drawn from this other language, it's a different
6 circumstance, it's a different test than what we need to
7 be applying with respect to taking jurisdiction of a
8 project under 30 megawatts.

9 I think it's fair to say that you were
10 correct in observing that 162-H:4 presumably applies only
11 to projects of 30 megawatts or greater. I suppose that
12 it's conceivable there could be a circumstance where we
13 took jurisdiction, that is the SEC took jurisdiction of a
14 smaller scale project, and then subsequently determined
15 that it was, in fact, going to exempt that requirement
16 after all. But I think that's probably a pretty unlikely
17 scenario.

18 So, again, I appreciate that it's an
19 analogy worth looking at, but I would not want to see us
20 base our decision upon this particular section of the
21 statute.

22 CMSR. HARRINGTON: If I can just respond
23 to that?

24 CHAIRMAN BURACK: Sure.

1 CMSR. HARRINGTON: What I was trying to
2 say is that this provides us guidance from the
3 Legislature. They're saying that, if you have the case of
4 a facility that's prime jurisdiction is the Site
5 Evaluation Committee, it's over 30 megawatts, that, if you
6 meet these criteria, that the Committee does not have to
7 take jurisdiction. So, presumably, the bar is a lower
8 standard for something where we don't have primary
9 jurisdiction, under 30 megawatts.

10 And, my point is, if you think we can --
11 we've met the criteria for the 30 megawatt plus project
12 not taking jurisdiction, that would surpass the criteria
13 needed to do the smaller project the same way. That's all
14 I'm trying to get across here.

15 CHAIRMAN BURACK: Understood. Thank
16 you. Okay. Other general thoughts or observations that
17 anyone would like to share or specific thoughts? Director
18 Hatfield.

19 DIR. HATFIELD: I'm not sure that this
20 is all that helpful to our decision, but I just did want
21 to say that it's definitely concerning to me the resource
22 challenge for effective municipalities to be able to
23 participate at the Site Evaluation Committee. And,
24 hopefully, that's something that we can talk about in the

1 various studies that some of us will be undertaking in the
2 near future. But it's just troubling that we don't have
3 resources, as a Committee, so that we could provide them
4 to those who really have a strong interest in
5 participating.

6 CHAIRMAN BURACK: Thank you.

7 DIR. NORMANDEAU: Chairman?

8 CHAIRMAN BURACK: Director Normandeau.

9 DIR. NORMANDEAU: Let me just note that
10 it's very concerning to me that the agencies represented
11 on this Committee don't have the resources to do it.

12 CHAIRMAN BURACK: Director Normandeau, I
13 appreciate that concern. I think it's very important to
14 recognize that, through thick and through thin, the
15 members of this Committee have always met their statutory
16 duties and obligations. It is, in fact, despite whatever
17 the financial challenges we may have in state government,
18 it is our duty to ensure that our statutory obligations
19 are fulfilled. And, I'm proud to say that in this
20 instance, and in all other instances, I believe that the
21 members of the Site Evaluation Committee have been able to
22 do exactly that. So, I don't think that that -- that
23 would be a basis for us to either grant or deny
24 jurisdiction. But I do think that there is, as reflected

1 in the statutory language itself, there is effectively a
2 threshold below which there's a very high bar that needs
3 to be reached for there to be a determination that, in
4 fact, state resources necessarily do need to be expended
5 in order to address a particular matter.

6 So, is there any further general
7 discussion or a specific discussion of provisions that
8 anybody would -- or testimony or evidence that we've
9 heard, arguments made, that anyone would like to address?

10 (No verbal response)

11 CHAIRMAN BURACK: All right. If not, is
12 there someone who would like to offer a motion, which
13 presumably would be either a motion to grant or a motion
14 to deny the Petition for Jurisdiction? Director
15 Normandeau.

16 DIR. NORMANDEAU: I'll make a motion to
17 deny petition -- deny the Petition to Take Jurisdiction.

18 CHAIRMAN BURACK: Okay. Director
19 Normandeau has made a motion to deny the Petition. Is
20 there a second to his motion?

21 CMSR. SCOTT: Second.

22 CHAIRMAN BURACK: The motion has been
23 seconded by Commissioner Scott. All right. Let's have
24 discussion then on this motion. And, so, you made the

1 motion, Director Normandeau. Do you wish to speak to it?
2 And, maybe then we can go around the horn here and see who
3 would like to offer comments.

4 DIR. NORMANDEAU: Again, and as you
5 mentioned earlier, I think it's a high bar to take it
6 away, to take jurisdiction away for a small project from
7 the local municipalities. I think the -- I think this is
8 a -- the SEC statutes are, you know, pretty powerful laws,
9 if you look at them in their ability to allow the state to
10 sort of usurp land use, which is generally kind of the
11 province of the towns.

12 But, you know, in this case, I think
13 that -- that it's being served at the town level. And,
14 you know, absent a judge somehow remanding the case to the
15 SEC, I don't know if that's a legal possibility or not,
16 I'm comfortable to let it stay where it's at at this time.

17 CHAIRMAN BURACK: Thank you. Director
18 Stewart, do you wish to speak to this motion?

19 DIR. STEWART: Sure. Again, all the
20 state and federal permits will be addressed, as they would
21 be if SEC or the local jurisdictions control. With regard
22 to Lempster and Antrim, there's been comparisons, and, as
23 Commissioner Scott indicated, that in both of those cases
24 the local governments requested that we take jurisdiction,

1 as well as the Applicant. So, I see a difference between
2 those and this one in that regard.

3 And, really, the discussion kind of
4 hinges on these ordinances of the two communities. Both
5 Lempster and Am -- Antrim, excuse me, did not have
6 ordinances at the time when we considered jurisdiction.
7 In this case, it's a question of these -- the local
8 ordinances being potentially or arguably more stringent
9 than the state. That's no different than most of our
10 environmental criteria, where the state agencies set
11 standards many times, and the local governments can go,
12 you know, marginally more stringent. And, ultimately,
13 there's a floor, as Attorney Roth indicated, that Superior
14 Court could come in and determine that there was an
15 unreasonable standard.

16 CHAIRMAN BURACK: Thank you. Anything
17 further?

18 DIR. STEWART: No.

19 CHAIRMAN BURACK: Okay. Ms. Bailey, do
20 you wish to discuss this?

21 MS. BAILEY: I think I have a broader
22 view of the charge from the Legislature than the majority.
23 But I also am struck by the arguments that it is a small
24 facility, and that it would be significant to take this

1 away from the local officials. So, I'm still thinking
2 about it.

3 CHAIRMAN BURACK: Thank you.
4 Commissioner Scott.

5 CMSR. SCOTT: I'm not sure I can add
6 anything I already have. And, I do hope, again, that the
7 ordinance -- my biggest pause has been the ordinance does
8 -- looks as if it could be exclusionary. And, I am taking
9 at face value that, as hope we should be able to, that the
10 process for a variance is just that, a fair process.

11 CHAIRMAN BURACK: Thank you. Chairman
12 Ignatius?

13 VICE CHAIRMAN IGNATIUS: Thank you. I
14 am not sure I have anything to add that hasn't already
15 been said by my colleagues. I think all of us really
16 honor the notion that the municipality should remain in
17 control of its own ordinances and the development within
18 its municipal boundaries, unless there's reasons that it
19 must be taken away. And, I don't find a basis here under
20 the statute to take that step. So, I would support the
21 motion.

22 CMSR. HARRINGTON: I think everything I
23 needed to say has been said. I'll support the motion.

24 CHAIRMAN BURACK: Thank you very much,

1 Commissioner Harrington. Turn then to Director Hatfield.

2 DIR. HATFIELD: I don't have anything
3 further to add. Thank you.

4 CHAIRMAN BURACK: Okay.

5 DIR. WRIGHT: Yeah. I wouldn't have
6 anything further to add, other than to say I would support
7 the motion also.

8 CHAIRMAN BURACK: Director Bryce.

9 DIR. BRYCE: Yes. I would just, I think
10 it was -- it's a very tough case to make, because I think
11 -- I think the Petitioner did a good job laying out
12 everything that needed to be laid out. But, for me, the
13 fact that the ordinances are there carries a lot of
14 weight. And, I think it depends on whether you intended
15 that the Legislature allowed, you know, set a standard of
16 30, and then provided for other instances, or whether or
17 not there was a really -- a real intent to take these
18 other projects. And, my feeling is that the Legislature
19 was just allowing for some -- as in some other cases.
20 But, if things were pretty much in order at the local
21 community level, we should let the communities do that.
22 So, I would, again, commend the Petitioner, but I'm going
23 to support the -- support the motion.

24 CHAIRMAN BURACK: Thank you. I,

1 likewise, will support this motion. I think this has been
2 a, obviously, a long set of deliberations here and
3 conversation and questioning with counsel for all the
4 parties. My feeling at the end of the day is that the
5 Petitioner simply has not met the burden of showing that a
6 -- that a certificate is, in fact, required in this
7 instance, looking at both the individual sections of
8 162-H:1, both in terms of purposes and findings, but also
9 in terms of, well, the weight of the arguments on those
10 various points, but also looking at all of the factors as
11 a whole, I do not see a compelling argument, a burden
12 having been met that demonstrates that, in fact, a
13 certificate is required here. So, for that reason, I will
14 also support this motion.

15 Is there anything further that anyone
16 would like to say or discuss with respect to the motion,
17 before we take a vote?

18 (No verbal response)

19 CHAIRMAN BURACK: All right. Thank you.
20 I'm going to ask Attorney Iacopino to do a roll call here.

21 MR. IACOPINO: Does anybody need the
22 motion re-read? Okay. The motion on the floor is to deny
23 the Petition for Jurisdiction. Director Normandeau?

24 DIR. NORMANDEAU: Yes.

1 MR. IACOPINO: Director Stewart?

2 DIR. STEWART: Yes.

3 MR. IACOPINO: Ms. Bailey?

4 MS. BAILEY: Yes.

5 MR. IACOPINO: Mr. Scott?

6 CMSR. SCOTT: Yes.

7 MR. IACOPINO: Commissioner Scott, I'm
8 sorry. Vice Chairman Ignatius?

9 VICE CHAIRMAN IGNATIUS: Yes.

10 MR. IACOPINO: Commissioner Harrington?

11 CMSR. HARRINGTON: Yes.

12 MR. IACOPINO: Director Hatfield?

13 DIR. HATFIELD: Yes.

14 MR. IACOPINO: Director Wright?

15 DIR. WRIGHT: Yes.

16 MR. IACOPINO: Director Bryce?

17 DIR. BRYCE: Yes.

18 MR. IACOPINO: Mr. Chairman?

19 CHAIRMAN BURACK: Yes.

20 MR. IACOPINO: The "ayes" have it.

21 CHAIRMAN BURACK: Thank you very much.

22 The motion to deny the Petition has been approved by
23 unanimous vote of the Committee. We will proceed to
24 develop a written order summarizing the decision here and

1 documenting that decision. And, we will endeavor to get
2 that finalized and released within approximately the next
3 30 days or so.

4 Before we adjourn, I simply want to take
5 a moment to thank counsel for all the parties, thank the
6 participants from the communities for their involvement in
7 this process with the Site Evaluation Committee. I want
8 to thank our stenographer, Mr. Patnaude, our counsel,
9 Attorney Iacopino. I particularly want to thank all the
10 members of the Committee for their diligent efforts in
11 reviewing all the materials for this matter, and their
12 very careful and thorough participation in the proceedings
13 here.

14 So, with that, we will stand adjourned.
15 Thank you.

16 **(Whereupon the public meeting ended at**
17 **4:45 p.m.)**