STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2012-04

Re: Petition for Jurisdiction of Timbertop Wind I, LLC for a Renewable Energy Facility Proposed to be Located in New Ipswich and Temple, Hillsborough County, New Hampshire

August 13, 2013

FINAL ORDER DENYING PETITION FOR JURISDICTION FILED BY TIMBERTOP WIND I, LLC

Background

On December 21, 2012, Timbertop Wind I, LLC ("Petitioner") filed a Petition for Jurisdiction ("Petition") requesting the New Hampshire Site Evaluation Committee ("Committee") to exercise its discretionary jurisdiction over the siting, construction and operation of a wind energy facility which the Petitioner intends to site, construct, and operate on Kidder Mountain in the Towns of Temple and New Ipswich, Hillsborough County, New Hampshire ("Facility"). The Petition asserts that the Facility will consist of a total of five Siemens wind turbines with each having a nameplate capacity of 3 MW for a total nameplate capacity of 15MW. The Petitioner requests the Committee to exercise its discretionary jurisdiction over the siting, construction and operation of the Facility pursuant to RSA 162-H: 2, XII.

On January 18, 2013, the Committee issued an Order and Notice of Public Meeting. The Order and Notice permitted the filing of motions to intervene on or before February 8, 2013. On January 25, 2013, the Towns of New Ipswich and Temple ("Towns") filed a Joint Petition to Intervene and requested the Committee to grant them intervenor status in this docket and to dismiss the Petition with or without prejudice. On February 5, 2013, the Towns filed a Motion to Deny or Dismiss the Petition. On February 14, 2013, the Petitioner filed a response to the Towns' Motion to Deny or Dismiss the Petition. On February 14, 2013, the Attorney General appointed Senior Assistant Attorney General Peter Roth as Counsel for the Public in this docket. On the same date, Counsel for the Public filed a response to the Petition. On February 19, 2013, the Chairman of the Committee denied the Towns' request to deny the Petition on the merits and ruled that an adjudicative hearing was required. On February 25, 2013, the Towns filed a Motion for Reconsideration requesting that the Committee reconsider the denial of the request to deny the Petition. The Petitioner objected on March 4, 2013. On March 20, 2013, Counsel for the Public filed a response to the Towns' Motion for Reconsideration stating that Counsel for the Public "takes no position on the legal question presented by the Motion for Reconsideration." On April 19, 2013, the Chairman of the Committee as presiding officer issued an order

memorializing his decision to deny the Towns' Motion to Dismiss and denying Towns' Motion for Reconsideration.

On June 3, 2013, the Committee commenced an adjudicatory proceeding and considered evidence and arguments from the parties in a deliberative session. After due consideration, the Committee unanimously voted to deny the Petition. This Order memorializes the reasons for the denial of the Petition.

Position of the Parties

A. Petitioner

The Petitioner requests the Committee to exercise its jurisdiction over the Facility. In support, the Petitioner states that the review of the Facility by the Committee will allow the Petitioner to undergo a single review process rather than two separate reviews by two different Towns. The Petitioner further asserts that the Towns are not well equipped to review the Facility because the Towns' land use ordinances are inconsistent with each other and are inconsistent with the findings and purposes set forth in RSA 162-H: 1.

The Petitioner asserts that the Town land use ordinances "impose unwarranted standards with respect to sound limits, setbacks, and certain environmental impacts." The Petitioner complains that both Town zoning ordinances impose an unreasonable noise/sound pressure level limit of 33dBA, anywhere at anytime on a non-participating landowner's property. The Petitioner also complains that both local zoning ordinances require that a Project should not have an "adverse effect" on bird or bat species, the quality or quantity of ground and surface water, and the aesthetics of the region. The Petitioner claims that the "adverse effect" standard in the zoning ordinances is substantively different from the "unreasonable adverse effect" standard used by the Committee and codified at RSA 162-H: 16, IV. The Petitioner makes a similar argument with regard to the Town zoning ordinance references to the impact on wildlife and wildlife habitat. The Petitioner also asserts that the local ordinances, requiring radar activated obstruction lighting on the turbines, impose a requirement that is not codified in RSA 162-H.

The Petitioner also alleges that inconsistencies between the two zoning ordinances require that we exercise our discretionary jurisdiction. The Petitioner asserts that the ordinances contain different height limitations (450 feet in the Town of Temple and no specific height requirement in the Town of New Ipswich) and different setback requirements (2,000 feet, or roughly 4.5 times the structure height in the Town of Temple, and a setback "sufficient to protect people, domestic and farm animals, public and private property, and utilities from Debris Hazard" in the Town of New Ipswich). The Petitioner ultimately asserts that the Committee should exercise its jurisdiction over the Facility to enable the Petitioner to avoid duplicative and allegedly inconsistent review by two Towns in a manner that is substantially different from the process and standards normally applied by the Committee.

B. Intervenors

The Towns request that the Committee deny the Petition. Specifically, the Towns assert that the Petition fails to state why the Committee's intervention is "required" to accomplish the purposes of RSA 162-H as opposed to being "merely advantageous or convenient for its own purposes." The Towns also state that the record and the evidence in this docket do not demonstrate that the Facility requires a Certificate. The Towns further assert that there is no evidence or reason to believe that the Facility is so important to the purposes and findings set forth in RSA 162-H: 1 as to require a Certificate. Ultimately, the Towns argue that the Committee's intervention is not "required" and, contrary to the Petitioner's allegations, the Town ordinances do not preclude the Petitioner from the construction and operation of the Facility. The Towns argue that the Petitioner may request variances from the local zoning ordinances and, upon approval, construct and operate the Facility without the Committee's intervention.

C. Counsel for the Public

Counsel for the Public opposes the assertion of jurisdiction by the Committee and argues that the Petition does not meet the criteria articulated in RSA 162-H: 1. Counsel for the Public, at the outset, argues that the Petitioner has not established a need for the energy to be produced by the Facility. Counsel for the Public argues that the "need for new energy facilities in New Hampshire," as expressed in RSA 162-H: 1, is a quantitative need. Because Counsel for the Public definitively rejects differential consideration of renewable energy sources, he asserts that the Petition expresses no "need for energy" in the State and, therefore, the Petition should be rejected. Counsel for the Public also claims that the Petition fails to significantly describe the environmental impacts of the Facility, thereby leaving the Committee without a sufficient basis to balance the need for energy against the environmental effects. Counsel for the Public also argues that asserting jurisdiction will not prevent undue delay because there is no need for the energy in the State. Counsel for the Public claims that local consideration of the Facility is just as open and transparent as to the Committee's process and, therefore, the Committee's jurisdiction is not necessary to ensure full and complete disclosure. Counsel for the Public asserts that the Towns have sufficiently integrated zoning and planning processes to assure that the siting is considered as a significant aspect of land use planning. Counsel for the Public argues that the relevant inquiry is whether a sufficient process exists at the local level and not whether any particular Project would succeed in permitting at the local level.

Analysis

A. Legal Standard

RSA 162-H: 1 "recognizes" that the selection of sites for energy facilities will have a "significant impact upon the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state, and the use of natural resources." RSA 162-H: 1. During deliberations in this docket, there was some discussion amongst Committee members about this recognition language and whether it was precatory

language or an additional factor that must be explicitly considered by the Committee. Whether the "recognition" language contained in RSA 162-H:1 is precatory or mandatory, it is clear that the concern of the statute is the significant impact that energy facility siting has on the public interests expressed in this section of the statute. In this case, the Committee has determined that the proposed Facility is simply not large enough and does not present enough demonstrated impact on "the welfare of the population, the location and growth of industry, the overall economic growth of the state, the environment of the state, and the use of natural resources" to warrant the exercise of jurisdiction under RSA 162-H. See, RSA 162-H: 1. Moreover, to the extent that the proposed Facility would have local impacts on the public interests recognized by the statute, the Committee finds that the local municipalities have sufficiently planned for and are equipped to address those impacts through their local land use ordinances.

In addition, we note that the legislature has determined that an energy facility with a nameplate capacity of 30 MW or more automatically has a sufficient impact on the public interests expressed in the statute to require Committee review and regulation. See, RSA 162-H: 5, I. The Facility, as proposed in this docket, is approximately 15 MW. At its present size, the Facility does not trigger the automatic jurisdiction of the Committee. This is a relatively small wind energy project. There is nothing about the size of the Facility or its impacts that suggest that the Committee's discretionary jurisdiction is needed to protect the public interests expressed in the statute.

After "recognizing" or acknowledging the significant impact that the siting of energy facilities has on the state, RSA 162-H then lists certain factors or findings that relate to the public interests expressed in the statute. The list of those findings is set forth below. The stated purpose of the findings is "all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles." RSA 162-H: 1. Therefore, in order to decide whether to assert jurisdiction over a project, the Committee must determine whether a Certificate is needed to:

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

See, RSA 162-H: 1. If the Committee finds that review is not necessary to achieve the goals of the statute, then the Committee should deny the Petition. However, if the Committee decides that the goals of the statute are best met by requiring review, then the Petition should be granted.

B. Discussion

After the adjudicative hearing in this docket, the Committee unanimously determined that the Facility, as proposed, does not require a certificate and, therefore, the Committee would not assert its discretionary jurisdictional authority. The Committee's unanimous decision is firmly based on the findings and purposes set out in RSA 162H: 1.

1. The Assertion of Discretionary Jurisdiction by the Committee Is Not Necessary To Maintain a Balance Between the Environment and the Need for New Energy Facilities

a. Impact of Town Ordinances

The Petitioner asserts that the Committee must exercise its discretionary jurisdiction in order to assure that there is a balance maintained between the environment and the need for new energy facilities. The Petitioner suggests that jurisdiction is necessary in the environmental context for five reasons. The Petitioner asserts that there are inconsistent height restrictions between the ordinances in the Towns of Temple and New Ipswich. The Petitioner points out that Temple has a 450 foot height restriction whereas New Ipswich has a height restriction which requires its land use boards to consider the height "in relation to the landscape." The Petitioner also asserts that the Towns have inconsistent setback standards. The Petitioner points out that the Town of Temple has a 2,000 foot setback requirement for a large wind energy system, while the Town of New Ipswich requires a setback "sufficient to protect" the public. The Petitioner also complains that the noise restrictions in both Towns are overly restrictive. They point out that each ordinance requires a maximum sound level at a non-participating residence of 33 dbA. The Petitioner complains that this results in an actual sound level of 28 dbA (when a comparison to ambient sound levels is considered). In addition, the Petitioner points out that a state statute prohibits land use boards from restricting sound levels to anything less than 55 dbA at the site boundary line for a small wind electrical system. See, RSA 674:63. The Petitioner further states that the Towns' lighting system requirements are unreasonable and inconsistent with the standards set forth by the Committee and the legislature. The Petitioner also asserts that environmental restrictions from the two Towns are overly restrictive. The Petitioner asserts that each of the Town ordinances has provisions that provide for:

A. No significant adverse impact on wildlife and habitat.
B. No adverse impact on avian and bat bird species.
C. No adverse effect on ground and surface water.

The Petitioner claims that these requirements are more restrictive than the requirements contained within RSA 162-H: 16 that would be applicable if the Committee were to exercise jurisdiction. Finally, with respect to environmental aspects of its proposed Facility, the Petitioner complains that the land use ordinances in the Towns prohibit "adverse" visual impacts and require an automated obstruction lighting system. The Petitioner complains that both of these requirements are more restrictive than would be required by the Committee considering an application under RSA 162-H: 16.

In response to the Petitioner's claims that jurisdiction is necessary to maintain a balance between the environment and the need for new energy sources, the Towns of New Ipswich and Temple argue, in the first instance, that the local ordinances are not too restrictive. Nonetheless, they also point out that if the Petitioner feels that the ordinances are too restrictive, there are procedures contained within the ordinances and in state statutes that would permit the Petitioner to seek to avoid the restrictive requirements. The Towns point out that the local land use ordinances recognize that abutting and nearby landowners can consent and become participating landowners, which would eliminate some of the restrictions with respect to factors such as setback and noise. Secondly, the Towns also respond that the restrictions contained within the ordinances may be addressed through obtaining a land use variance.

The Committee notes that the land use ordinances as they presently exist do contain components that may be more restrictive than the Committee has required of other wind energy facilities. However, if the ordinances turn out to be overly restrictive in contemplation of this particular Facility, there is a variance process available to the Petitioner. The variance process may permit the Petitioner to avoid those portions of the ordinances that may be too restrictive or unreasonable in the context of the Facility. Also, with respect to setbacks and noise limitations, the Petitioner can negotiate agreements with abutters and other nearby landowners that would eliminate concerns related to the amount of setback and the noise generated in areas close to the Facility. To the extent that the Petitioner claims that the ordinances in each Town are different with regard to factors such as height and setback restrictions, we note that the differences complained of are not mutually exclusive of each other and it is not impossible to satisfy both ordinances in this regard.

It should also be noted that in the absence of the exercise of jurisdiction by this Committee, the proposed Facility will still be subject to various state permits that would affect the environment. It is likely that this Facility would require a wetlands permit, an alteration of terrain permit and a water quality certificate, all from the Department of Environmental Services. In addition, there may be other state agencies with permitting jurisdiction that may affect the environmental context of the Facility. The ability to obtain such state permits is a factor that would likely be considered in determining whether the Facility meets the environmental requirements of each of the Town ordinances. The Petitioner's ability to obtain state permitting could set a standard upon which the Petitioner may base an application for a variance from the zoning ordinances. Therefore, the Petitioner's claim that jurisdiction must be asserted in order to maintain a balance between the environment and the need for new energy facilities fails.

The Petitioner claims that the local ordinances are inconsistent with the prior decisions of this Committee. In particular the Petitioner alleged such inconsistencies are evident in the noise and sound pressure level requirements contained in each of the local ordinances. The Committee, in past decisions, has set maximum sound level restrictions. However, those restrictions were based on a case-by-case analysis of individual projects. Each of the ordinances, through the variance procedure, provides a process for a remedy with respect to the absolute limits contained in the ordinances should they prove to be too restrictive. We also note that our past exercise of discretionary jurisdiction has, in each instance, been at the request of the host community. See, Jurisdictional Order, Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC, Docket No. 2011-02; Jurisdictional Order Re: Community Energy, Inc. and Lempster Wind, LLC, Docket No. 2006-01.

The Committee finds that the assertion of jurisdiction is not necessary to maintain a balance between the environment and the need for new energy facilities.

b. Consideration of the "Need for New Energy Sources"

Counsel for the Public argues that jurisdiction is not necessary to maintain a balance between the environment and the need for new energy facilities because the proposed Facility will generate such a small amount of electricity and that it will do nothing to mitigate any need that may exist. Therefore, Counsel for the Public argues that any environmental impacts of the Facility would likely outweigh the need for new energy and, therefore, the Committee should not assert jurisdiction.

At the outset, we must point out that Counsel for the Public's reading of the statute is overly restrictive with respect to his reliance on a quantitative analysis of the need for energy. Counsel for the Public claims that the need for particular types of energy facilities is not a consideration under the statute. We disagree with Counsel for the Public in this regard. RSA 162-H: 1 references "the need for new energy facilities" (emphasis added.) "New energy facilities" would include renewable energy facilities. See, RSA 162-H: 2, VII. Moreover, "the need for new energy facilities" is not merely a quantitative phrase. The word "new" modifies the term "energy facilities" and thus indicates that the legislature determined that new types of energy facilities such as renewable energy facilities must be considered by the Committee[1]. In 2007 RSA 162-H was amended to include and define the term "renewable energy facility." See, Laws, 2007, c. 364: 3 (adding and defining the term "renewable energy facility" at RSA 162-H: 2, XII.) The 2007 amendments also required the Committee to put the review of applications for renewable energy sources on a faster track. See, Laws, 2007, c. 364: 6 (adding RSA 162-H: 6-a.) The amendments to the statute support the conclusion that the legislature did not intend to limit the Committee's review of the need for new energy facilities to a quantitative analysis.

[1] The intention of the legislature to promote the development of low emission renewable energy sources is also apparent from RSA 362-F, in which the legislature specifically stated that the state needs to develop renewable energy sources. RSA 362-F: 3 also set an escalating requirement for low emission renewable energy.

However, the fact that the development of renewable energy sources is consistent with the purpose of the statute does not, in and of itself, make every proposed renewable energy project subject to the jurisdiction of the Committee. In this case, the Committee found that although the Facility could be a new and renewable source of energy, it was not sufficiently large to require consideration by the Committee.

2. The assertion of discretionary jurisdiction is not required to avoid undue delay in the construction of needed facilities

Petitioner asserts that the difference between the way the variance standard is worded in each of the Town's ordinances demonstrates markedly different standards reflecting likely irreconcilable differences and potentially causing an undue delay in the construction of the Facility. This argument ignores the fact that the standard for a variance is statutorily mandated by RSA 674:33, I (b), which authorizes a zoning Board of Adjustment to grant a variance if:

(1) The variance will not be contrary to the public interest;
(2) The spirit of the ordinance is observed;
(3) Substantial justice is done;
(4) The values of surrounding properties are not diminished; and
(5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
(ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

See, RSA 674:33, I (b). The statutory framework set forth above is binding upon both the Town of New Ipswich and the Town of Temple. The Towns must provide due process in the variance procedure. The statutory framework provided by the legislature to obtain a variance levels the playing field between the two Towns. Given the statutory framework, the Petitioner's concern about "differing mindsets" between zoning and planning officials in each of the two Towns is without merit. The Committee finds that the assertion of discretionary jurisdiction is not required to avoid undue delay in the construction of needed facilities on the basis that the Petitioner must appear before two sets of land use boards.

The Committee also notes that there is a statutory process for a joint meeting of the land use boards from each Town. This statutory feature also would avoid undue delay in consideration of the project by the Towns. Finally, although the Petitioner complains that the process "could be lengthy," there is no indication that the process of filing the appropriate application with the Town of Temple and the Town of New Ipswich and pursing the variances that may be required would, in fact, take any longer than the process before the Committee. The Committee notes that although there is an 8 month limitation on its consideration of renewable energy sources, and a 9 month limitation on consideration of traditional energy sources, that time limit can be extended if it is in the public interest. In many dockets before the Committee, that time frame has been extended due to public interest concerns. Whether the Facility is reviewed by the Committee or at the local level, it is important that the interests of the public be accommodated. In many cases, accommodation of the public interest has required additional hearings or deliberation. There is nothing inherent in the local review process that would eliminate due concern for the public interest or cause undue delay. Therefore, we decline to exercise our discretionary jurisdiction on that basis.

3. The assertion of jurisdiction over the Project is not necessary to ensure that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans.

The Petitioner does not allege that jurisdiction need be entertained in order to provide full and complete disclosure to the public. Indeed, the Petitioner agrees that the process provided by each Town would provide full and complete disclosure to the public. Therefore, we find that the assertion of our discretionary jurisdiction is not necessary to ensure that the Petitioner is required to provide full and complete disclosure to the public.

4. The assertion of jurisdiction over the Project is not necessary to assure that the construction and operation of energy facilities are treated as a significant aspect of land use planning in which all environmental, economic and technical issues are resolved in an integrated fashion.

The Petitioner strenuously argues that it is necessary for the Committee to assert jurisdiction because, in the absence of jurisdiction, it must submit to separate reviews at the municipal level. The Petitioner alleges that the Committee's well developed regulatory scheme is more likely to produce a coherent integration of the environmental, economic and technical

issues that must be resolved than if the matter were to be reviewed by each Town's individual processes. The Petitioner argues that the failure to assert jurisdiction will result in duplicative and unnecessary review by two Towns and leaves open the possibility for conflicting results. The Petitioner also points out incongruities between the ordinance in Temple and the ordinance in New Ipswich. See, Section B, above. In response to the claim of the Towns that there is a statutorily available joint review process that would include both Towns, the Petitioner complains that there could, nonetheless, be differing outcomes between the Towns. As such, the Petitioner argues that jurisdiction is necessary in order to deal with the land use issues in an integrated fashion.

The Committee does not agree with the concerns expressed by the Petitioner. As noted above, there is a statutory process for a variance. Each Town is required to follow that process. The Committee sees no reasons why, in the event of an appeal, challenges from both Town orders could not be consolidated in the Superior Court. Just as we have found that the requirements of two separate municipalities do not necessarily cause an undue delay in consideration, we also find that the concurrent applicability of two zoning ordinances and two variance procedures does not, by itself, frustrate the purpose of integrating the environmental, economic and technical issues as significant aspects of land use planning. Indeed, the Committee notes that in all land use matters unrelated to energy facility siting, the municipal boards in each Town consider these issues in an integrated fashion on a day-to-day basis.

Conclusion

Based upon the foregoing, the Committee determined that it is not necessary to exercise our discretionary jurisdiction pursuant to RSA 162-H: 2, XII with respect to the proposed Project. Therefore, the Petition for Jurisdiction is hereby **DENIED**.

Thomas S. Burack, Chairman
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