

980 CMR: ENERGY FACILITIES SITING BOARD

980 CMR 6.00: CERTIFICATION OF ENVIRONMENTAL IMPACT AND PUBLIC NEED

Section

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6.01: General

(1) Scope. 980 CMR 6.00 shall apply to complaints to the Council from the actions of other state and local agencies. Such complaints are provided for by M.G.L. c. 164, §§ 69K through 69O and are entitled applications for Certificates of Environmental Impact and Public Need.

(2) Statutory Authority. 980 CMR 6.00 is promulgated pursuant to M.G.L. c. 164, ss. 69H, 69K-69O.

(3) Definitions. For purposes of 980 CMR 6.00 the definitions set forth in 980 CMR 1.03(3) and 6.01(3) apply, unless the context or subject matter requires a different interpretation.

Applicant means an electric, gas or oil company which is authorized pursuant to 980 CMR 6.02(4) to file an application.

Application means an application for a Certificate.

Certificate means a Certificate of Environmental Impact and Public Need.

Final decision means an action by a state or local agency which is subject to judicial review pursuant to M.G.L. c. 30A, § 14 or pursuant to any other general law or statute of the Commonwealth.

Subject Facility means the facility which is the subject of an initial petition or application.

Permit means a permit, license, approval, certificate, consent or other permission required for an applicant to construct, operate or maintain a facility.

(4) Application of 980 CMR 1.00 and 2.00. 980 CMR 1.00 and 2.00 shall apply to 980 CMR 6.00 except to the extent that 980 CMR 1.00, 980 CMR 2.00 and 980 CMR 6.00 are in conflict. In the event of a conflict, 980 CMR 1.00 shall prevail over 980 CMR 2.00 and 980 CMR 6.00 shall prevail over 980 CMR 1.00 and 2.00.

6.02: Initial Petition

(1) Basis for Petition. Any electric, gas or oil company which proposes to construct or operate a facility may petition the Council for a Certificate of Environmental Impact and Public Need with respect to such facility. Such initial petition shall assert one or more of the grounds set forth in 980 CMR 6.02(2).

No petition asserting grounds specified in 980 CMR 6.02(2)(a), 6.02(2)(c), 6.02(2)(d), 6.02(2)(e), and 6.02(2)(f) with respect to the action of a state or local agency shall be brought until a final decision has been rendered by the agency in question. No petition asserting such grounds with respect to an action of a local agency shall be brought until the petitioner has exhausted any appeal to a state agency provided by statute.

A petitioner complaining of the final decision of an agency shall prepare and provide a full record of such agency decision. Where adjudicatory proceedings have been conducted, the petitioner shall request that the agency issue findings of fact and conclusions of law and shall provide these to the council.

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(2) Grounds for Petition.

(a) The company may assert that it is prevented from building a subject facility because it cannot meet standards imposed by a state or local agency with commercially available equipment.

(b) The company may assert that it is prevented from building a subject facility because the processing or granting by a state or local agency of any permit has been unduly delayed. In determining whether undue delay has occurred, the Council may consider the amount of time normally required by the agency or similar agencies to resolve issues of similar complexity and importance, and whether the delay is due to the failure of the company to supply information to the agency necessary for processing or granting the permit. No petition shall be heard pursuant to 980 CMR 6.02(2) until at least 30 days after the company has notified the agency by certified mail that it intends to submit a petition to the Council.

(c) The company may assert that it believes there are inconsistencies among resource use permits issued by state or local agencies. In reviewing the initial petition, the Council may determine whether the belief is reasonable.

(d) The company may assert that it believes that a non-regulatory issue or condition has been raised or imposed by a state or local agency. A non-regulatory issue or condition relates to matters not within the statutory jurisdiction of the agency in question. In reviewing the initial petition, the Council may determine whether the belief of the company is reasonable.

(e) The company may assert that a state or local agency has imposed a burdensome condition or limitation on any permit which has a substantial impact on the Council's responsibilities. The Council may consider a condition or limitation to be burdensome if the resulting cost would be out of proportion to the cost of the facility or to the benefits to be gained from the condition or limitation. The denial of a permit may constitute a burdensome condition or limitation.

(f) The company may assert that a subject facility cannot be constructed due to disapproval, condition or denial by a local government. 980 CMR 6.02(2) shall not apply to lands or interests therein, excluding public ways, owned or managed by any state agency or local government. 980 CMR 6.02(2) shall not be construed to give the Council authority to override any zoning by-law in effect on the date when a notice of intention is filed as provided by 980 CMR 8.02(1).

(3) Form of Initial Petition; Notice. An initial petition shall be an initial pleading in the form required by 980 CMR 1.03(4). The petition may include such attachments as the petitioning company deems useful. The petitioning company shall be required to give notice as provided in 980 CMR 1.03(2).

(4) Action on the Initial Petition. Upon receipt of an initial petition, the Council or Chairman shall within seven days determine whether to hold a separate hearing on the grounds asserted in the petition or to accept an application pursuant to 980 CMR 6.03(1), and to defer decision on the merits of the grounds asserted in the initial petition until the hearing on the application.

A separate hearing, if held, shall be an adjudicatory proceeding and shall be subject to 980 CMR 1.00. After determining pursuant to 980 CMR 6.00 that a separate hearing on grounds should be held, the Council shall immediately schedule a hearing to be held no more than 30 days after the date notice is given pursuant to 980 CMR 6.02(3). The Council shall render a decision no more than 14 days after the conclusion of the hearing. Should the Council determine that valid grounds do not exist, its ruling shall be immediately appealable.

6.03: The Application

(1) Basis for the Application. If an initial petition filed pursuant to 980 CMR 6.02(1) is granted or if a decision on a petition is deferred as provided by 980 CMR 6.02(4), the petitioning company may file an application for a Certificate of Environmental Impact and Public Need. In any event the initial petition and application shall be given the same docket number. Each separate facility shall require a separate application. The Council may in its discretion consider applications in a single proceeding.

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When adjudicatory findings of fact in the context of a final decision made by an agency within the statutory jurisdiction of said agency are challenged by an application, review by the Council of said findings shall be limited to the record presented before the agency; provided, however, that the Council may modify the agency findings of fact or substitute its own findings therefore if the Council determines that said agency findings are:

- (a) In excess of the statutory authority or jurisdiction of the agency;
- (b) Unsupported by substantial evidence;
- (c) Arbitrary or capricious or an abuse of discretion; or
- (d) Not sufficient to permit adequate Council review of the application pursuant to the Council's obligation to insure a necessary energy supply at the lowest possible cost with a minimum impact on the environment.

Any party wishing to challenge agency findings of fact shall specify which of grounds 980 CMR 6.03(1)(a) through 6.03(1)(d), is relied upon and shall state the substance of his claim, including citations to the portions of the agency record he relies upon.

In such cases, the Council may take evidence itself or remand questions of fact to the agency for further proceedings, consistent with the time limits set forth in M.G.L. c. 164, §§ 69K through 69O.

In reviewing facts found by an agency, the Council shall give due weight to the experience, technical competence and specialized knowledge of the agency. Nothing in 980 CMR 6.03 is intended to limit the authority of the Council to decide questions of fact not raised or decided in the context of the final decision of the agency.

(2) Notice; Service. The applicant shall at least seven days prior to the date of filing an application give notice to the Council by filing a notice as set forth in 980 CMR 1.02(2), to the agency complained of by first class mail, to such persons as are entitled to notice under M.G.L. c. 164, § 69L, para. B(1) by first class mail, and by publication in two newspapers of general circulation in the vicinity of the subject facility. The notice shall state the name and address of the applicant, the date on which the application will be filed, the name, location of and a description of the subject facility, the name or names and address or addresses of the agency or agencies complained of, the relief sought, the full name, address and telephone number of the Council, and the date when the application will be filed. The notice shall further bear the following statement:

"Persons desiring additional information should contact the Siting Council at the above address or telephone number. Persons wishing to be admitted as parties in interest to proceedings on the application should present a petition to the Council no later than ()."

In place of the parentheses should be inserted the date which is 30 days after the date of filing of the application. Finally, the notice should bear the following statement:

"A copy of the application may be inspected at the offices of the Siting Council, set forth above, or at ()." In place of the parentheses should be placed the name, address, and telephone number of a repository of documents chosen pursuant to 980 CMR 2.03(4).

The applicant shall insure that both the Council and a repository of documents possess complete copies of the application before giving notice. The repository shall be within a city or town containing the subject facility or within an adjacent city or town.

Failure to give service or notice as required by 980 CMR 6.03(2), may be cured by the Council upon motion by the applicant. The Council may, as a condition of granting the motion, require the applicant to consent to such measures as are necessary and appropriate in order to insure full and adequate participation and review by the public and agencies, including but not limited to waiving the limitation upon standing set forth in 980 CMR 1.05(2)(f) and delaying or reopening a hearing without regard to the time limitations set forth in any rule or statute.

(3) Form of Application. An application for a Certificate shall contain the following information:

- (a) In the case of an electric and gas company a copy of each long-range forecast and supplement in which the subject facility or its site was proposed, or, in the case of an oil company, a copy of an approved Notice of Intention;
- (b) A copy of the most recent approved long-range forecast, and a copy of all approved supplements thereto;

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- (c) A copy of any forecast or supplement currently under consideration by the Council, but not yet approved;
- (d) One or more 1:24,000 scale United States Geologic Survey (USGS) topographical maps with transparent overlays showing the boundaries of the site and the precise location of the subject facility. Additional USGS maps shall be provided if they depict land or waters within 8,000 feet of the site.
- (e) Such other maps as may be appropriate;
- (f) A detailed description of and plans for the subject facility;
- (g) Photographs of the site and, if relevant, of the facility. (The photographs shall be accompanied by a description of the camera or cameras and lens or lenses used and by a map showing the points from which and direction in which the photographs were taken);
- (h) Aerial photographs of the site;
- (i) A copy of each study which the applicant has made of the environmental impact of the subject facility;
- (j) A statement of the reasons for the choice of the location;
- (k) A complete list of all licenses, permits and other regulatory approvals already obtained for the subject facility;
- (l) A complete list of all other licenses, permits and approvals expected to be required for the subject facility. (The applicant shall indicate whether applications have been made and, if so, their status);
- (m) A statement setting forth the applicant's need for a Certificate. (The applicant shall state which permit is sought from the Council and shall state the grounds for Council jurisdiction as set forth in 980 CMR 6.02(2). Two or more permits may be sought in one application, if valid grounds exist for each);
- (n) A copy of every decision by and study by the agency or agencies complained of concerning the subject facility;
- (o) If the subject facility is not included in a long-range forecast or supplement approved by the Council or is not the subject of an approved Notice of Intention, extensive evidence of future demand; and
- (p) Such other information as the applicant deems relevant.

(4) Affidavit. Each application for a Certificate shall be accompanied by an affidavit that notice has been given as required by 980 CMR 6.03(2).

(5) Fees. Each application shall be accompanied by payment of a fee as herein provided, but in no event less than \$5,000.

- (a) For an electric Generating Plant, the fee shall be \$.04 per rated kilowatt electric of capacity, plus \$1,000 per ancillary substation, but in no event more than \$25,000.
- (b) For an electric transmission line, the fee shall be \$.001 per rated volt of capacity per mile for that part of the line proposed for a new right of way, plus \$.0005 per rated volt per mile for that part of the line proposed for an existing right of way, plus \$1,000 per ancillary substation, but in no event more than \$25,000.
- (c) For a gas pipeline, the fee shall be \$.00003 per rated pound per square inch of pressure capacity per cubic foot of volume contained for that part of the line proposed for a new right of way, plus \$.000015 per rated pound per square inch of pressure capacity per cubic foot of volume contained for that part of the line proposed for an established right of way, but in no event more than \$25,000.
- (d) For a gas storage facility, the fee shall be \$.01 per rated million BTU's of capacity, but in no event more than \$25,000.
- (e) For a gas manufacturing plant, the fee shall be \$1.00 per rated million BTU's per day of capacity, but in no event more than \$25,000.
- (f) For an oil refinery, the fee shall be \$.25 per rated barrel per day of throughput capacity, but in no event more than \$25,000.
- (g) For an oil storage or transshipment facility, the fee shall be \$.005 per rated barrel of storage capacity, but in no event more than \$25,000.
- (h) For an oil terminal intended to handle water-borne shipments, the fee shall be \$.03 per rated barrel per day of throughput capacity, but in no event more than \$25,000.

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(i) For an oil pipeline, the fee shall be \$.10 per cubic foot of volume contained for that part of the line proposed for a new right of way, plus \$.05 per cubic foot of volume contained for that part of the line proposed for an established right of way, but in no event more than \$25,000.

If two or more permits for a single facility are sought in a single application, only one fee shall be charged. If two or more applications are filed in regard to a single facility, the fee for the second and each subsequent application shall be one-half of the fee for the first application.

(6) Amendment of Application. An application may be amended by the applicant at any time prior to the entry of a final decision on the application by the Council. The Council shall take such measures as are necessary and appropriate to insure reasonable notice to parties, participating persons, persons entitled to notice pursuant to M.G.L. c. 164, § 69L, para. B(1), state and local agencies, and the general public. The Council may take such measures as are necessary and appropriate in order to insure full and adequate participation and review by the public and agencies, including but not limited to treating the amendment as a new initial petition or a new application for purposes of standing pursuant to 980 CMR 1.05(2)(f), for purposes of notice pursuant to 980 CMR 6.03(2), for purposes of the fee requirements of 980 CMR 6.03(5), and for purposes of the time deadline set forth in 980 CMR 6.05(1).

(7) Consolidation of Issues. To the extent that adequate grounds can be asserted pursuant to 980 CMR 6.02(2) and to the extent permitted by statute or 980 CMR 6.00, companies are encouraged to consolidate issues relating to more than one permit or agency in a single application.

6.04: Conduct of Hearing

(1) The Date of the Hearing. The Council or the Chairman shall set a time and place for an adjudicatory hearing after receipt of a complete application.

(2) Informational Hearing. The Council may conduct non-adjudicatory hearings in the vicinity of a subject facility after the filing of the application and before commencement of the adjudicatory hearing.

(3) Notice of Hearing; Written Comments. Notice of the hearing shall be provided as required by 980 CMR 1.03(3).

(4) Additional Information. The Council may during the course of any hearing held pursuant to this Chapter require the submission of such additional information and exhibits as the Council deems useful.

6.05: Council Decisions

(1) Time Limit. The Council shall vote a final decision no later than six months after the date of filing of an application.

(2) Lack of Majority. If a majority of Council members participating in the votes cannot be obtained for denying the application, granting the application, or granting the application subject to terms and conditions, the application shall be considered denied. Such a denial may be treated by the applicant at its option as a denial without prejudice to its right to file another initial petition in regard to the same matter or as a final agency action entitling it to judicial review.

(3) Form of Certificate. A decision shall be in writing and shall set forth its basis in law and fact. It shall include specific findings and opinion with regard to:

(a) The need for the facility to meet the energy requirements of the applicant's market area taking into account wholesale bulk power, gas or oil sales or purchases or other cooperative arrangements with other utilities or oil companies and energy policies as adopted by the Commonwealth;

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- (b) The compatibility of the facility with considerations of environmental protection, public health and public safety;
- (c) The extent to which construction and operation of the facility will fail to conform with existing state and local laws, ordinances, bylaws, rules and regulations and reasonableness of exemption thereunder, if any consistent with the implementation of the energy policies contained in this act to provide a necessary energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost; and
- (d) The public interest, convenience and necessity requiring construction and operation of the facility.

The Council shall state the extent to which the decision is or is not based upon the above findings and opinion.

If the application is granted, the Council's decision shall constitute a Certificate of Environmental Impact and Public Need. If the application relates to more than one permit, the Council may issue a Certificate with regard to all such permits or less than all. When issued, a Certificate shall serve in lieu of the permit in question.

The Certificate may, according to its terms, authorize the applicant to construct, operate or maintain a facility. It shall be sufficient to serve in lieu of the permit required from the agency complained of. The applicant shall not be required to reapply for the permit to the agency complained of, nor may the agency complained of impose or enforce any law, ordinance, by-law, rule or regulation in conflict with the terms of the Certificate.

(4) Amendment of a Certificate. Any party to a Certificate proceeding or aggrieved person may make application for amendment of a Certificate within 30 days after the granting of the Certificate, the application shall be made in the form of a motion pursuant to 980 CMR 1.04(3).

The Council may within 30 days after the motion deny the motion or schedule a hearing on it. If a hearing is scheduled, the Council shall take such measures as are necessary to insure full and adequate notice to, participation by and review by parties, the public and agencies.

(5) Federal Pre-emption. The Council shall not issue a Certificate the effect of which would be to grant or modify a permit which, if so granted or modified by the agency appealed from would be invalid because of a conflict with applicable federal laws and regulations.

(6) National Pollutant Discharge Elimination System Permit. If an application for a Certificate involves a National Pollutant Discharge Elimination System Permit, the applicant and the Council shall, in addition to complying with 980 CMR 6.00 and 980 CMR 1.00, comply fully with all requirements of M.G.L. c. 164, § 69M.

6.06: Emergencies

(1) Definitions. For purposes of 980 CMR 6.06 "emergency" means an accident, act of God or unforeseen condition which jeopardizes the health and safety of the public.

(2) Waiver of Requirements. When an emergency exists or has occurred, the Council may grant a Certificate to a company without requiring that the subject facility have been included in an approved long-range forecast or supplement or that a Notice of Intention have been approved by the Council.

REGULATORY AUTHORITY

980 CMR 6.00: M.G.L. c. 164, §§ 69H, 69K through 69O.